HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

APPLICANT S APPELLANT

AND

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS RESPONDENT

Applicant S v Minister for Immigration and Multicultural Affairs
[2004] HCA 25
27 May 2004
P52/2003

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court made on 21 August 2002 and, in lieu thereof, order that the appeal to the Full Court of the Federal Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

M D Howard for the appellant (instructed by Minter Ellison)

J Basten QC with P R Macliver for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Applicant S v Minister for Immigration and Multicultural Affairs

Immigration – Refugees – Application for protection visa – Well-founded fear of persecution for reason of membership of particular social group – Particular social group identified as able-bodied young men from Afghanistan – Whether member of a particular social group – Whether Afghan society must perceive the particular social group – Whether well-founded fear of persecution – Whether enmity or malignity necessary to establish persecution – Whether facts reveal law of general application – Whether implementation of law of general application can amount to persecution – Whether implementation of ad hoc policy can amount to persecution.

Words and phrases: "Particular social group", "well-founded fear of persecution", "law of general application", "legitimate national objective".

Migration Act 1958 (Cth), s 36(2).

GLEESON CJ, GUMMOW AND KIRBY JJ.

Introduction

1 This appeal turns upon the provisions of the *Migration Act* 1958 (Cth) ("the Act") respecting the issue of protection visas. It is common ground that the appeal is to be determined by reference to the legislation as it stood before the commencement of the *Migration Legislation Amendment Act (No 6)* 2001 (Cth).

2 Section 36(1) of the Act provides that there is a class of visas to be known as protection visas. Section 36(2) provides that a criterion for a protection visa is that the applicant for the visa is:

> "a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol".

3 If, after considering a valid application for a protection visa, the Minister is satisfied that this criterion and any other requirements spelled out in par (a) (for example, health requirements) of s65(1) of the Act are met, the Minister is to grant the visa.

4 The expression "a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol" picks up the definition of "refugee" in Art 1A(2) of these international instruments ("the Convention"), which relevantly provides:

> "[Any person who] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

5 The issues in this appeal raise two questions respecting the construction and application of the Convention definition. First, the criteria to be applied in order to determine whether the appellant was a member of a particular social group; and, secondly, whether the appellant could be considered to have a well-founded fear of being persecuted. The second question was raised for the first time by the Minister before this Court.

6 Both questions, but particularly the first, involve consideration of what was decided in earlier decisions of this Court and the grounds for those decisions.

The cases are *Applicant A v Minister for Immigration and Ethnic Affairs*[1], *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*[2], *Minister for Immigration and Multicultural Affairs v Yusuf*[3] and *Minister for Immigration and Multicultural Affairs v Khawar*[4]. It is necessary to approach the judgments in those cases with an appreciation of the procedural setting in which they reached this Court and the actual outcomes which were achieved.

Facts and litigation

7 The appellant is a married Afghan male of Pashtun ethnicity, from Malizo village of Gizab district in Orozgan province, Afghanistan. The appellant's wife, father, mother and four brothers remain in the village. He was born in 1980, and arrived in Australia on 11 July 2000 by boat.

8 On 25 July 2000 the appellant applied for a protection visa. On 5 September 2000 the Minister's delegate refused the appellant's application. The appellant sought review of the delegate's decision by the Refugee Review Tribunal ("the Tribunal"). On 4 January 2001, the Tribunal affirmed the delegate's decision[5].

9 Both the Minister's delegate and the Tribunal accepted that the appellant's reason for leaving Afghanistan was to avoid the Taliban who were recruiting for military service. The Taliban had tried twice forcibly to recruit the appellant. On the first occasion, the appellant avoided recruitment by paying off the recruiters. On the second occasion, the appellant told the recruiters that he needed to speak to his parents. He then departed immediately from Afghanistan with the assistance of a people smuggler.

10 Although not dealing expressly with whether the appellant had a well-founded fear of persecution, the Tribunal did find that the appellant "may face serious harm" as a result of conscription (it was also accepted that the

---

1 (1997) 190 CLR 225.

2 (2000) 201 CLR 293.

3 (2001) 206 CLR 323.

4 (2002) 210 CLR 1.

5 Refugee Review Tribunal, Decision and Reasons for Decision, ref N00/35095 at 25.

appellant had a well-founded fear of harm). This issue was given considerable attention during oral argument before this Court.

11 The Tribunal accepted that many young men in Afghanistan had been recruited by the Taliban. The Taliban practised ad hoc, random, forcible recruitment of young men, where the only apparent criterion for recruitment was that the young men be able-bodied. This was borne out by both the country information accepted by the Tribunal and the fact that the appellant's brother was not recruited because he was not able-bodied. The Tribunal also noted that thousands of young men had left Afghanistan to avoid recruitment by the Taliban.

12 The Tribunal's reasons for rejecting the appellant's claim appear from the following passage [6]:

> "The nature of the recruitment process is such that there are no criteria for selection save being able-bodied and, being in the wrong place at the wrong time.
>
> By his own account he 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 paid to allow him to avoid the recruitment drive.
>
> When the second group came they took no action when he said he wanted to speak to his parents first and indicated that he may also pay them.
>
> Given the Taliban's rigid approach to compliance this action leads me to conclude they were not concerned about the Applicant who had no skills or any significant value to them apart from his youth and the fact he was able-bodied. No immediate follow-up occurred and he was not required to report to them.
>
> 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* and, in the random manner of such an ad hoc drive he was able to avoid recruitment for a second time." (emphasis added)

---

6 Refugee Review Tribunal, Decision and Reasons for Decision, ref N00/35095 at 23.

13 The key to this passage is in the final paragraph, which discloses the Tribunal's conclusion that the appellant was not targeted by reasons of any political opinion or religious beliefs (ie, he was not "listed or registered for recruitment"). On review by the Federal Court[7], Carr J (with respect, correctly) understood the reasons to indicate that the Tribunal had not considered whether the appellant was a member of a "particular social group"[8], and whether he was persecuted by reason of his membership of that group[9]. His Honour said that the facts presented the potential for such a case, and thus 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) comprised a particular social group within the meaning of the Convention[10]. Accordingly, Carr J ordered that the Tribunal's decision be set aside and the matter be remitted to it for redetermination according to law[11].

14 The Minister appealed to the Full Court of the Federal Court (Whitlam and Stone JJ; North J dissenting)[12] which allowed the appeal. Stone J, with whom Whitlam J agreed[13], concluded[14]:

> "In this case, however (unlike the position in *Khawar*), I can find no trace of any evidence before the Tribunal that would support a claim that Afghan society *perceived* young able-bodied men as comprising a separate group either as a result of the Taliban's recruitment process or for any other reason. In my view there is nothing to distinguish this case from that considered by the Full Court in [*Minister for Immigration and Multicultural Affairs v*] *Applicant Z*." (emphasis added)

---

7 *Applicant S v Minister for Immigration and Multicultural Affairs* [2001] FCA 1411.

8 [2001] FCA 1411 at [19].

9 [2001] FCA 1411 at [19].

10 [2001] FCA 1411 at [48].

11 [2001] FCA 1411 at [55].

12 *Minister for Immigration and Multicultural Affairs v Applicant S* (2002) 124 FCR 256.

13 (2002) 124 FCR 256 at 257.

14 (2002) 124 FCR 256 at 275.

15 In *Applicant Z*[15], the Full Court (Sackville, Kiefel and Hely JJ) was concerned with an Afghan applicant in a position substantially the same as that of the appellant in this case. Sackville J identified as an "insuperable obstacle" the absence of material before the Tribunal that would have justified it in finding that Afghan society, or some clearly identifiable section of it, perceived "able-bodied Afghan men" as a distinct social unit[16].

16 The appellant's primary ground of appeal in this Court is that the majority of the Full Court erred in requiring that there be evidence that Afghan society *perceived* young able-bodied men to comprise a particular social group, before the Tribunal was obliged to consider whether the appellant was a member of that group. The appellant contended that Afghan society's perceptions of whether there is a particular social group is *relevant* to the question of whether there is such a particular social group, but it is not a *requirement*. That submission should be upheld. We turn to indicate why this is so.

Perception of "particular social group"

17 The requirement that Afghan society must perceive young able-bodied men as comprising a particular social group is derived from the reasoning in an earlier unanimous decision of the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Zamora*[17]. That case concerned a protection visa applicant from Ecuador who sought protection in Australia on the basis of harassment (including both threats and physical and sexual assault) suffered by her at the hands of criminal gangs in Quito, the capital of Ecuador. The Full Court (Black CJ, Branson and Finkelstein JJ) affirmed the decision of the Tribunal denying the protection visa application. The applicant had claimed that it was a common experience for criminal gangs to attempt to recruit tourist guides to help steal from tourists. After discussing the various reasonings adopted by the members of this Court in *Applicant A*, their Honours stated[18]:

> "In our view *Applicant A*'s case is authority for the following propositions. To determine that a particular social group exists, the putative group must be shown to have the following features. First, there must be some characteristic other than persecution or the fear of

---

15 (2001) 116 FCR 36.

16 (2001) 116 FCR 36 at 40.

17 (1998) 85 FCR 458.

18 (1998) 85 FCR 458 at 464.

> persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community."

18 The second and third propositions appear to require an objective and then subjective assessment of the position of the group within the community. The third proposition is subjective in that it relies upon recognition by, or the perceptions of, the rest of the community.

19 The "third proposition" outlined by the Full Court in *Zamora*, and the subsequent holding in *Applicant Z*, reflects an understanding in the Full Court of remarks by McHugh J in his judgment in *Applicant A*. Accordingly, it is necessary to turn to that case.

Applicant A

20 The applicants in *Applicant A*, a married couple, arrived in Australia in 1993 and their child was born shortly thereafter. They claimed refugee status on the basis that, if they were returned to their country of nationality, China, they would face enforcement of the "one child policy" by sterilisation. They argued that this amounted to a fear of persecution by reason of membership of a particular social group, namely, persons desiring to be parents of more than one child.

21 The Tribunal decided that the applicants answered the Convention definition. In the Federal Court, Sackville J dismissed an application by the Minister under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)[19], but the Full Court allowed the Minister's appeal and set aside the Tribunal's decision[20]. This Court supported that outcome and, by a majority (Dawson, McHugh and Gummow JJ; Brennan CJ and Kirby J dissenting) dismissed the appeal to it. The Full Court had treated the issue respecting the "one child policy" as posing a question of law of the construction of the expression

---

19 *Minister for Immigration and Ethnic Affairs v Respondent A* (1994) 127 ALR 383.

20 *Minister for Immigration and Ethnic Affairs v Respondent A* (1995) 57 FCR 309 at 325-326.

"membership of a particlar social group" in the Convention definition[21] and this Court proceeded on the same basis.

22 A majority of this Court accepted what became the "first proposition" in *Zamora*, that a "particular social group" must be identifiable by a characteristic or attribute common to all members of the group, but that characteristic cannot be the fear of persecution itself[22]. This proposition can be split into two parts. The first part amounts to a general principle that there must be a common characteristic or attribute and the second part can be characterised as a limitation on the general principle. The limitation was explained by McHugh J as follows[23]:

> "[P]ersons who seek to fall within the definition of 'refugee' in Art 1A(2) of the Convention must demonstrate that the form of persecution that they fear is not a defining characteristic of the 'particular social group' of which they claim membership. If it were otherwise, Art 1A(2) would be rendered illogical and nonsensical. *It would mean that persons who had a well-founded fear of persecution were members of a particular social group because they feared persecution*. The only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution." (footnote omitted) (emphasis added)

The apparent circularity in the emphasised passage was further considered by Dawson J[24]:

> "There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution. A group thus defined does not have anything in common save fear of persecution, and allowing such a group to constitute a particular social group for the purposes of the Convention 'completely reverses the statutory definition of

---

21 (1995) 57 FCR 309 at 315-316.

22 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 241-243 per Dawson J, 263 per McHugh J, 285-286 per Gummow J.

23 (1997) 190 CLR 225 at 263; see also at 242 per Dawson J, 286 per Gummow J.

24 (1997) 190 CLR 225 at 242.

> Convention refugee in issue (wherein persecution must be driven by one of the enumerated grounds and not vice versa)'." (footnote omitted)

It is worth noting that the limitation later was accepted and applied by the House of Lords in *R v Immigration Appeal Tribunal; Ex parte Shah*[25].

23 In *Applicant A*, after expressing the general principle and limitation, McHugh J went on[26]:

> "Nevertheless, 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. 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 recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group."

It will be convenient later in these reasons to return to consider the example of left-handed men. McHugh J continued[27]:

> "The fact that the actions of the persecutors can serve to identify or even create 'a particular social group' **emphasises the point** that the existence of such a group depends in most, perhaps all, cases on **external perceptions of the group**. The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit. Only in the 'particular social group' category is the notion of 'membership' expressly mentioned. The use of that term in conjunction with 'particular social group' connotes persons who are defined as a distinct *social* group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. **If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group.** Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals,

---

25 [1999] 2 AC 629 at 639-640 per Lord Steyn, 656 per Lord Hope of Craighead, 662 per Lord Millett (dissenting).

26 (1997) 190 CLR 225 at 264.

27 (1997) 190 CLR 225 at 264.

> however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group." (italicised emphasis in original, bold emphasis added)

24 It was from this passage that the Full Court in *Zamora* extracted the third proposition to which reference has been made.

25 Two propositions are to be taken from McHugh J's remarks. First, in some circumstances it is possible for a particular social group to be created by the persecutory conduct such that it can no longer be said that the group is "defined" by the persecutory conduct. His Honour expressed this in a temporal sense. Secondly, given that the actions of the persecutors may identify or even create the group, what may be critical in most, and perhaps all, cases is the perception of the group by others ("external perceptions"). This is further explained by the example that *if* the group is perceived by the community in the relevant country as a particular social group, then usually, but not always, the particular social group can be taken to have been created.

26 By contrast, Brennan CJ (dissenting as to the outcome) and Dawson J appear to express a similar principle by construing the phrase "particular social group". After construing a "particular group" as a group identifiable by any characteristic common to the members of the group (ie, the general principle referred to above), Brennan CJ said[28]:

> "[A] 'social group' is a group the members of which possess some characteristic *which distinguishes them from society at large*". (emphasis added)

In the same vein, Dawson J stated[29]:

> "The word 'particular' in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, 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*." (footnote omitted) (emphasis added)

---

28 (1997) 190 CLR 225 at 234.

29 (1997) 190 CLR 225 at 241.

Kirby J made a similar point in *Applicant A* by pointing out that the text, its history and the many "groups" recognised as falling within the Convention in this and other countries denied any suggestion that there must be "an associational participation or even consciousness of such group membership"[30].

27 Putting these statements together with the second proposition stated by McHugh J, it is apparent that his Honour was adopting no different approach to the Convention definition to that adopted by Brennan CJ and Dawson J, albeit expressing it in other terms. His Honour was expanding on the requirement that the existence of a particular social group requires that the group be distinguished or set apart from society at large. One way in which this may be determined is by examining whether the society in question perceives there to be such a group. Thus, perceptions held by the community may amount to evidence that a social group is a cognisable group within the community. The general principle is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society.

Khawar

28 Another way of expressing the same principle, or the application of the same principle, is illustrated by a reading of *Khawar*[31]. The first respondent in that case, a married Pakistani woman, claimed to have suffered persecution by reason of her membership of the particular social group comprising married Pakistani women (other formulations were also offered). The persecution claimed was the failure of the Pakistani authorities to protect her from violence committed against her by her husband.

29 The Minister, the appellant in *Khawar*, sought to have overturned decisions of the Federal Court at first instance and on appeal which had set aside the decision of the Tribunal rejecting the claims for protection visas. The Minister in this Court submitted that the withholding of police protection to Mrs Khawar, as mere inactivity, could not itself amount to persecution, whatever the definition of the social group in Pakistan to which she belonged[32]. That argument was not accepted. The outcome was that the matter was sent back to the Tribunal for the making of further findings[33].

---

30 (1997) 190 CLR 225 at 309.

31 (2002) 210 CLR 1.

32 (2002) 210 CLR 1 at 3-4.

33 (2002) 210 CLR 1 at 14 [36], 29 [88], 44 [131].

30 On first blush, the claimed particular social group in *Khawar* appears to be defined solely by reference to the persecutory conduct (ie, the failure of the Pakistani authorities to enforce the criminal law). However, a majority of the Court (Gleeson CJ, McHugh, Gummow and Kirby JJ; Callinan J dissenting) concluded that it would be open to the Tribunal to find that the first respondent was a member of a particular social group[34]. After acknowledging the limitation accepted by the majority of the Court in *Applicant A*, McHugh and Gummow JJ emphasised the operation of cultural, social, religious and legal factors, rather than any perceptions held by the community, as determining that married Pakistani women were a group that was distinguished or set apart from the rest of the community[35]. Their Honours said[36]:

> "Those considerations [ie, the limitation] do not control the present case. The membership of the potential social groups which have been mentioned earlier in these reasons would *reflect the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society* and upon their particular situation in family and other domestic relationships. The alleged systemic failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group." (emphasis added)

Left-handed men

31 The example of left-handed men given by McHugh J in *Applicant A*[37] indicates how it is possible that over time, due to the operation of social and legal factors prevailing in the community, persons with such a characteristic may be considered to hold a certain position in that community (his Honour's first proposition). Left-handed men share a common attribute (ie, they are left-handed), but, ordinarily, there is nothing to separate or to distinguish them from the rest of the community. However, to expand on his Honour's example, if the

---

34 (2002) 210 CLR 1 at 13 [32], 28 [83], 43 [127].

35 The House of Lords in *Shah* were explicit, referring to the "institutionalised discrimination" of women in Pakistan: [1999] 2 AC 629 at 645 per Lord Steyn, 635 per Lord Hoffmann, 658 per Lord Hope. In other words, their Lordships concluded that, viewed from an objective perspective, discrimination against the social group appeared to be culturally and socially acceptable.

36 (2002) 210 CLR 1 at 28 [83]; see also at 44 [130] per Kirby J.

37 (1997) 190 CLR 225 at 264.

community's ruling authority were to legislate in such a way that resulted in discrimination against left-handed men, over time the discriminatory treatment of this group might be absorbed into the social consciousness of the community. In these circumstances, it might be correct to conclude that the combination of legal and social factors (or norms) prevalent in the community indicate that left-handed men form a particular social group distinguishable from the rest of the community.

32 The decision in *Chen*[38] may also be understood in this way. Gleeson CJ, Gaudron, Gummow and Hayne JJ concluded that children born in contravention of China's "one child policy" could constitute a group defined other than by reference to the discriminatory treatment or persecution they feared[39]. To reach this conclusion, their Honours relied on the Tribunal's finding that a "child is a 'black child' irrespective of what persecution may or may not befall him or her"[40]. Kirby J[41] emphasised that the membership by the children of the particular social group was defined not by anything they had done but by the "wrongdoing" of their parents.

33 In *Chen*, the Tribunal had found that "black children" were a "particular social group" within the meaning of the Convention definition, but had held against the applicant on other grounds. In the Full Court, it had been held by the majority that such children could not, as a "pure question of law", constitute such a group because they were defined by reference to the persecutory conduct liable to be suffered by their members. The effect of the orders of this Court was that the matter was remitted to the Tribunal to be dealt with on the basis that the appellant was entitled to refugee status[42].

34 There is no reason in principle why cultural, social, religious and legal norms cannot be ascertained objectively from a third-party perspective. Communities may deny the existence of particular social groups because the common attribute shared by members of the group offends religious or cultural

---

38 (2000) 201 CLR 293.

39 (2000) 201 CLR 293 at 302 [23].

40 (2000) 201 CLR 293 at 302 [22].

41 (2000) 201 CLR 293 at 318 [74].

42 (2000) 201 CLR 293 at 306-307 [42]-[43].

beliefs held by a majority of the community[43]. Those communities do not recognise or perceive the existence of the particular social group, but it cannot be said that the particular social group does not exist.

35 The third-party perspective is a common feature in the decision-making by the Tribunal and by the delegates of the Minister. Decisions made by these decision-makers may rely on "country information" gathered by international bodies and nations other than the applicant's nation of origin. Such information often contains opinions held by those bodies or governments of those nations[44]. From this information it is permissible for the decision-maker to draw conclusions as to whether the group is cognisable within the community. Such conclusions are clearly objective. However, as accepted by McHugh J in *Applicant A*, subjective perceptions held by the community are also relevant.

Conclusions as to "particular social group"

36 Therefore, the determination of whether a group falls within the definition of "particular social group" in Art 1A(2) of the Convention can be summarised as follows. First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*[45], a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand[46].

---

43 cf *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 180 at 185 [25], [30], 193 [69], 196-197 [96], 197-198 [98]; 203 ALR 112 at 118, 119, 129, 135, 136.

44 The Tribunal in this matter referred to reports of international bodies, the Commonwealth Department of Foreign Affairs and Trade and the United States State Department.

45 (1997) 190 CLR 225 at 241.

46 See, eg, *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1099 [72] per Kirby J; 197 ALR 389 at 404.

Persecution

37 The Minister made two related submissions regarding the issue of persecution. First, the Minister submitted that forcible recruitment by the Taliban does not amount to persecution under the Convention, because, although there may be a foreseeable risk of harm[47], the critical element of enmity or malignity is absent; the regime merely sought to harness the valued resource of those capable of fighting rather than inflict harm upon the individuals conscripted. Those conscripted, so it was submitted, may die or suffer harm in the fighting, but the purpose of the regime is not to rid itself of young men. This submission should not be accepted.

38 *Chen* decided that persecution can proceed from reasons other than "enmity" and "malignity"[48]. From the perspective of those responsible for discriminatory treatment, the persecution might in fact be motivated by an intention to confer a benefit[49]. This in itself does not remove the spectre of persecution.

39 Secondly, during oral argument the Minister sought to apply the decision in *Minister for Immigration and Multicultural Affairs v Israelian*[50]. The applicant in that case was an Armenian national who was refused a protection visa by the delegate of the Minister. Before the Tribunal, the applicant stated that he had been absent from Armenia when called up for national service. The Tribunal refused the application without expressing any finding as to whether the applicant could be considered a member of a particular social group expressed as draft evaders.

40 In concluding that the applicant was not a member of a particular social group comprised of either or both deserters and draft evaders, McHugh, Gummow and Hayne JJ found that the Tribunal had not committed an error of law and concluded[51]:

---

47 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 304 [33].

48 (2000) 201 CLR 293 at 305 [35], 311-312 [60].

49 (2000) 201 CLR 293 at 305 [35].

50 (2001) 206 CLR 323, heard together with *Minister for Immigration and Multicultural Affairs v Yusuf*.

51 (2001) 206 CLR 323 at 354-355 [97]; see also at 342 [55] per Gaudron J; cf at 380 [183] per Kirby J dissenting.

"that there would not be persecution of Mr Israelian if he returned to his country of nationality, only the possible application of a law of general application".

Law of general application

41 In the present appeal, the Minister submitted that the facts here also reveal "a law of general application" and therefore the conclusion in *Israelian* must follow. This is not the case. There was no evidence before the Tribunal that the actions of the Taliban amounted to a law of general application. The policy of conscription was ad hoc and random.

42 Further, what was said in *Israelian* does not establish a rule that the implementation of laws of general application can never amount to persecution. It could scarcely be so given the history of the Nuremberg Laws against the Jews enacted by Nazi Germany which preceded, and help to explain, the purposes of the Refugees Convention. Rather, the Court majority determined that, on the facts of that case, it had been open to the Tribunal to conclude that the implementation by Armenia of its laws of general application was not capable of resulting in discriminatory treatment. A law of general application is capable of being implemented or enforced in a discriminatory manner.

43 The criteria for the determination of whether a law or policy that results in discriminatory treatment actually amounts to persecution were articulated by McHugh J in *Applicant A*. His Honour said that the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is "appropriate and adapted to achieving some legitimate object of the country [concerned]"[52]. These criteria were accepted in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Chen*[53]. As a matter of law to be applied in Australia, they are to be taken as settled. This is what underlay the Court's decision in *Israelian*. Namely, that enforcement of the law of general application in that particular case was appropriate and adapted to achieving a legitimate national objective.

---

52 (1997) 190 CLR 225 at 258.

53 (2000) 201 CLR 293 at 303 [28].

44 In *Applicant A*, McHugh J went on to say that a legitimate object will ordinarily be an object the pursuit of which is required in order to protect or promote the general welfare of the State and its citizens [54]. His Honour gave the examples that (i) enforcement of a generally applicable criminal law does not ordinarily constitute persecution; and (ii) nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory[55]. Whilst the implementation of these laws may place additional burdens on the members of a particular race, religion or nationality, or social group, the legitimacy of the objects, and the apparent proportionality of the means employed to achieve those objects, are such that the implementation of these laws is not persecutory.

45 The joint judgment in *Chen* expanded on these criteria [56]:

> "Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object *depends* on the different treatment involved and, *ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity.* Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective." (emphasis added)

That ultimate consideration points to the answer in the present case.

46 The Taliban can be taken to have been the de facto authority in Afghanistan at the relevant time, but it does not necessarily follow that it pursued legitimate national objectives in the sense indicated above. An authority recognised by Australia and other states as the government *de facto*, if not *de jure* (to use the terminology which was employed in customary international law when the Convention was adopted[57]), of a state may pursue objects that offend

---

54 (1997) 190 CLR 225 at 258.

55 (1997) 190 CLR 225 at 258.

56 (2000) 201 CLR 293 at 303 [29].

57 *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 906, 957-958. In 1988, Australia abandoned the practice of formally recognising or withholding recognition of foreign governments; rather, relations, formal or informal, would be conducted "with new régimes to the extent and in the manner which may be required by the circumstances of each case": Starke, "The new

(Footnote continues on next page)

the standards of civil societies which seek to meet the calls of common humanity. Such regimes would also have been all too well known in Europe itself when the Convention was adopted. The traditional view that the recognising state was not concerned with the legality of the state of things it was recognising[58] is not all that is involved here. The notion in the case law construing the "refugee" definition of a law of general application, given the nature of the Convention, involves more. The point may be seen in the discussion by Lord Wilberforce in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*[59], with reference to Locke, of a government without laws as inconsistent with at least "a civilised and organised society" and by Lord Salmon in *Oppenheimer v Cattermole*[60] and Lord Steyn in *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)*[61] of arbitrary activities not deserving of recognition as a law at all.

47 Although there was no material before the Tribunal indicating for exactly what purpose young men were being recruited, oral argument before this Court appeared to proceed on the basis that the new recruits were being sent to serve on the front-line of the Taliban's military operations. In other words, it could be said that the objective of the conscription policy was to protect the nation. Generally speaking, this is an entirely legitimate national objective[62]. However, in this case the position of the Taliban as an authority which was, according to the Tribunal, considered by international standards a ruthless and despotic political body founded on extremist religious tenets must affect the legitimacy of that object.

48 Furthermore, assuming for a moment that the object was a legitimate national objective, it appears that the conduct of the Taliban could not have been considered appropriate and adapted, in the sense of proportionate in the means used to achieve that objective. The policy of conscription described by the

---

Australian policy of recognition of foreign governments", (1988) 62 *Australian Law Journal* 390 at 390. See also Shaw, *International Law*, 5th ed (2003) at 376-383.

58 *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 957.

59 [1967] 1 AC 853 at 954.

60 [1976] AC 249 at 282-283.

61 [2002] 2 AC 883 at 1101-1102.

62 See, for example, Pt IV of the *Defence Act* 1903 (Cth), which is headed "LIABILITY TO SERVE IN THE DEFENCE FORCE IN TIME OF WAR".

evidence was implemented in a manner that was random and arbitrary. According to the Tribunal, this would not be condoned internationally[63].

49 These conclusions by the Tribunal indicate that, had it by application of the correct principles respecting "perception" reached the stage of considering whether no more was involved than a law of general application, the Tribunal correctly would have concluded that the Taliban was not pursuing a "legitimate national objective" spoken of in *Chen*.

Disposition of the appeal

50 The majority of the Full Court erred in law by requiring that there had to be evidence before the Tribunal that would support the claim that Afghan society *perceived* young able-bodied men as comprising a separate group. Further, however, the Tribunal failed to consider the correct issue. This was whether because of legal, social, cultural and religious norms prevalent in Afghan society, young able-bodied men comprised a social group that could be distinguished from the rest of Afghan society. Given the correct issue was not considered, the evidence put before the Tribunal in respect of the position of young able-bodied men in Afghanistan was scant and related only to the Tribunal's finding that the Taliban appeared to be recruiting young men.

51 The appeal should be allowed with costs, the orders of the Full Court set aside and in place thereof, the appeal to that Court should be dismissed with costs. The effect of these orders is to reinstate the order of Carr J that the Tribunal decision be set aside and the matter be remitted to it for redetermination according to law.

---

63 The Taliban's policy did not allow for conscientious objectors. The Tribunal appeared to accept the appellant's claims that he was a pacifist and that he was not committed to the aims and objectives of the Taliban.

52 It should be added that this appeal is disposed of at a time when there have been many changes to the situation which obtained in Afghanistan when the matter was last before the Tribunal. The significance to be attached to any further evidence to be placed before the Tribunal upon these matters will be for the Tribunal when it makes its fresh determination[64].

---

64 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

53 McHUGH J. This appeal raises once again the meaning of the indeterminate expression "a particular social group" in Art 1A(2) of the Convention relating to the Status of Refugees[65] as amended by the Protocol relating to the Status of Refugees[66] ("the Convention"). In particular, it raises the question whether proof of "a particular social group" requires evidence that the relevant society in which the group exists perceives the group to be a collection of individuals who are set apart from the rest of that society.

Statement of the case

54 The appeal is brought against an order of the Full Court of the Federal Court[67] that allowed an appeal against an order of Carr J in the Federal Court[68]. Carr J ordered the Refugee Review Tribunal ("the Tribunal") to rehear an application for a protection visa on the ground that the Tribunal had not considered whether the appellant, Applicant S, was a member of "a particular social group".

55 The appellant, an Afghan male who arrived in Australia in July 2000 aged 20, applied for a protection visa under s36 of the *Migration Act* 1958 (Cth) ("the Act")[69] on the ground that he was a refugee as defined in Art 1A(2) of the Convention:

> "[Any person who] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

56 The appellant claims that, if he were returned to Afghanistan, he would be persecuted for reasons of his membership of a particular social group. He

---

65 Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

66 Opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967; entered into force for Australia 13 December 1973).

67 *Minister for Immigration and Multicultural Affairs v Applicant S* (2002) 124 FCR 256.

68 *Applicant S v Minister for Immigration and Multicultural Affairs* [2001] FCA 1411.

69 The appeal is determined according to the legislation as it stood prior to the commencement of the *Migration Legislation Amendment Act (No 6)* 2001 (Cth).

identifies the social group as "young, able-bodied Afghan men" and claims that, as a member of that group in Afghanistan, he would be subject to forcible conscription by the Taliban and required to fight in the Taliban army. A delegate of the Minister for Immigration and Multicultural Affairs refused his application for a protection visa. The Tribunal confirmed this decision[70]. The Tribunal found that the Taliban did not target the appellant[71], that it conscripted soldiers on an ad hoc basis[72] and that, if the appellant were returned to Afghanistan, he would not be persecuted[73].

57 On an application to the Federal Court for judicial review of the Tribunal's decision, Carr J found that the Tribunal had failed to consider whether the appellant was a member of "a particular social group", and whether he was persecuted for reasons of his membership of that group[74]. Carr J remitted the matter to the Tribunal for rehearing. However, an appeal by the Minister to the Full Federal Court (Whitlam and Stone JJ, North J dissenting) succeeded[75]. Stone J said that she could[76]:

> "find no trace of any evidence before the Tribunal that would support a claim that Afghan society perceived young able-bodied men as comprising a separate group either as a result of the Taliban's recruitment process or for any other reason."

---

70 RRT Reference: N00/35095 (Unreported, Refugee Review Tribunal, 4 January 2001, Fordham TM).

71 RRT Reference: N00/35095 (Unreported, Refugee Review Tribunal, 4 January 2001, Fordham TM) at [63]. References to particular paragraphs of the Tribunal's decision use the paragraph numbering system adopted by Carr J in *Applicant S v Minister for Immigration and Multicultural Affairs* [2001] FCA 1411.

72 RRT Reference: N00/35095 (Unreported, Refugee Review Tribunal, 4 January 2001, Fordham TM) at [30].

73 RRT Reference: N00/35095 (Unreported, Refugee Review Tribunal, 4 January 2001, Fordham TM) at [69]-[70].

74 *Applicant S v Minister for Immigration and Multicultural Affairs* [2001] FCA 1411 at [48]-[49].

75 *Minister for Immigration and Multicultural Affairs v Applicant S* (2002) 124 FCR 256.

76 *Minister for Immigration and Multicultural Affairs v Applicant S* (2002) 124 FCR 256 at 275.

Whitlam J said that, like Stone J, he could "find no evidence or material before the Tribunal which would support a claim that Afghan society perceived young able-bodied men as comprising a particular social group."[77] Thus, the majority judges decided the case on the basis that there was no evidence before the Tribunal which could support the appellant's claim that *Afghan society perceived* young able-bodied men as comprising "a particular social group". Accordingly, the majority held that the Tribunal had not erred in law in reaching its decision confirming the delegate's refusal of the visa[78]. The Full Court's decision accorded with that of a differently composed Full Court in *Minister for Immigration and Multicultural Affairs v Applicant Z*[79].

58 Subsequently, this Court granted the appellant special leave to appeal against the order of the Full Court.

Legislative framework

59 Section 36(1) of the Act provides for a class of visas to be known as protection visas. Section 36(2) states that:

> "A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

One class of non-citizen to whom Australia owes protection obligations is a person who has a well-founded fear that he or she will be "persecuted ... for reasons of race, religion, nationality, membership of a particular social group or political opinion".[80]

---

77 *Minister for Immigration and Multicultural Affairs v Applicant S* (2002) 124 FCR 256 at 257.

78 *Minister for Immigration and Multicultural Affairs v Applicant S* (2002) 124 FCR 256 at 257 per Whitlam J, 275 per Stone J.

79 (2001) 116 FCR 36. In that case the Full Court (Sackville, Kiefel and Hely JJ) decided that there was insufficient evidence to require the Tribunal to consider whether able-bodied Afghan men constituted a particular social group (at 41 per Sackville J) or to justify the conclusion that there was a "public perception" in Afghan society, or some clearly identifiable section of it, that able-bodied Afghan men constituted a particular social group (at 40 per Sackville J, 45 per Hely J).

80 See s 36(3)-(5) of the Act.

Meaning of "a particular social group"

60 The appellant contends that the Full Court erred in requiring evidence that Afghan society perceived young, able-bodied Afghan men as comprising "a particular social group". In my opinion, this contention is correct. Although the Full Court did not expressly say so, its reasoning in the present case appears to be based on the reasoning in the earlier decision of *Minister for Immigration and Multicultural Affairs v Zamora*[81]. In *Zamora*, the Full Court of the Federal Court (Black CJ, Branson and Finkelstein JJ) extracted three propositions from the decision of this Court in *Applicant A v Minister for Immigration and Ethnic Affairs*. The Full Court said[82]:

> "First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be *recognition within the society* that the collection of individuals is *a group that is set apart* from the rest of the community." (emphasis added)

61 In my opinion, the third of these propositions does not accurately state the effect of *Applicant A*. First, it is not necessary that "a particular social group" be recognised as a group that is set apart from the rest of society. Second, there is no requirement of a recognition or perception by the society in which the group exists, or some clearly identifiable section of that society, that the collection of individuals comprises "a particular social group".

62 To qualify as "a particular social group", the group must be a cognisable group within the relevant society, but it is not necessary that it be recognised as a group that is set apart from the rest of that society. In *Applicant A*, Dawson J said[83]:

> "A particular social group, therefore, 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.*" (emphasis added, footnote omitted)

---

81 (1998) 85 FCR 458. See also *Applicant Z* (2001) 116 FCR 36 at 40 per Sackville J.

82 *Zamora* (1998) 85 FCR 458 at 464.

83 (1997) 190 CLR 225 at 241.

63 This passage indicates that, for a group of persons to be "a particular social group", it must be cognisable within the society in which the group exists. Nothing in the statement of Dawson J suggests, however, that the relevant society must itself recognise that the group is a group that is set apart from the rest of that society.

64 A number of factors points to the necessity of the group being cognisable within the society. Given the context in which the term "a particular social group" appears in Art 1A(2) of the Convention, the members of the group, claimed to be a particular social group, must be recognised by some persons – at the very least by the persecutor or persecutors – as sharing some kind of connection or falling under some general classification. That follows from the fact that a refugee is a person who has a "well-founded fear of being persecuted for reasons of ... membership of a particular social group". A person cannot have a well-founded fear of persecution within the meaning of Art 1A(2) of the Convention unless a real chance exists that some person or persons will persecute the asylum-seeker for being a member of a particular class of persons that is cognisable – at least objectively – as a particular social group. The phrase "persecuted for reasons of ... membership" implies, therefore, that the persecutor recognises certain individuals as having something in common that makes them different from other members of the society. It also necessarily implies that the persecutor selects the asylum-seeker for persecution because that person is one of those individuals. But it does not follow that the persecutor or anyone else in the society must perceive the group as "a particular social group".

65 The group must in fact be a *social* group, however, and it must be a *particular* social group. It is not enough that its members form a demographic division of the relevant society, such as people aged 33 or those earning above or below a certain amount per annum. As Gummow J pointed out in *Applicant A*[84], the words "particular" and "social" indicate that the term "a particular social group" "is not apt to encompass every broadly defined segment of those sharing a particular country of nationality." A demographic division of persons may constitute a group because, for statistical or recording purposes, those persons may be properly classified or considered together. Nevertheless, such a group of persons is not necessarily "a particular social group" within the meaning of Art 1A(2) of the Convention. Many demographic groups may constitute "a particular social group" for the purposes of the Convention. Aged persons, for example, are a demographic division and in many – probably most – societies are also generally regarded as a particular social group. However, that is because aged persons are perceived both within those societies and by those living outside those societies as having a recognisable and independent social presence.

---

84 (1997) 190 CLR 225 at 284-285.

66 In formulating the third of three propositions in *Zamora*, the Full Court relied on a passage in my judgment in *Applicant A*, where I said [85]:

> "The fact that the actions of the persecutors can serve to identify or even create 'a particular social group' emphasises the point that the existence of such a group depends in most, perhaps all, cases on external perceptions of the group. The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit. Only in the 'particular social group' category is the notion of 'membership' expressly mentioned. The use of that term in conjunction with 'particular social group' connotes persons who are defined as a distinct *social* group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. **If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group**. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group. (emphasis in bold added)

67 It would be a mistake to see the emphasised sentence in this passage as asserting that "a particular social group" does not exist unless it is always perceived as such *by the society* in which it exists. Evidence of such a perception on the part of that society is usually compelling evidence that the relevant group is "a particular social group" in that country. That does not mean, however, that for the purposes of Art 1A(2) of the Convention, the society in which the group exists must recognise the group as a group that is set apart from the rest of the community.

68 To require evidence of a recognition or perception *by* the society that the collection of individuals in that society comprises "a particular social group" is to impose a condition that the Convention does not require. A "particular social group" may exist although it is not recognised or perceived as such by the society in which it exists. For example, those who form the "particular social group" may be perceived by the society in which the group exists as aberrant individuals and may even be described by a particular name, yet the society may not perceive these individuals as constituting a particular social group. Nevertheless, those living outside that society may easily recognise the individuals concerned as comprising a particular social group. No doubt such cases are likely to be rare. That they exist, however, is shown by cases such as *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs; Appellant S396/2002*

---

85 (1997) 190 CLR 225 at 264.

v Minister for Immigration and Multicultural Affairs[86]. The evidence in those cases suggested that Bangladesh society prefers to deny the existence of homosexuality within that society[87]. On the other hand, there was evidence that police, hustlers and others in that society singled homosexuals out for discriminatory treatment amounting to persecution because they were homosexuals[88]. Both the Tribunal and this Court accepted in *Appellant S395/2002* and *Appellant S396/2002* that homosexuals in Bangladesh are a particular social group[89]. Objectively, homosexuals in Bangladesh society comprise "a particular social group", whether or not that society recognises them as such.

69 Thus, although the group must be a cognisable group within the society, it is not necessary that it be recognised generally *within the society* as a collection of individuals which constitutes a group that is set apart from the rest of the community. To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle. As I have indicated, it is not necessary that the persecutor or persecutors actually perceive the group as constituting "a particular social group". It is enough that the persecutor or persecutors single out the asylum-seeker for being a member of a class whose members possess a "uniting" feature or attribute, and the persons in that class are cognisable objectively as a particular social group.

"Young, able-bodied Afghan men" as a particular social group

70 In its reasons, the Tribunal accepted that the 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."[90] The Tribunal also referred to "the ad hoc practice of recruitment and press-ganging new recruits"[91]. The

---

86 (2003) 78 ALJR 180; 203 ALR 112.

87 See, eg, the findings of Lindgren J at first instance: *Kabir v Minister for Immigration and Multicultural Affairs* [2001] FCA 968 at [17].

88 See, eg, *Kabir* [2001] FCA 968 at [10] per Lindgren J.

89 See, eg, (2003) 78 ALJR 180 at 190 [55] per McHugh and Kirby JJ, 192 [65] per Gummow and Hayne JJ; 203 ALR 112 at 126, 128.

90 RRT Reference: N00/35095 (Unreported, Refugee Review Tribunal, 4 January 2001, Fordham TM) at [44].

91 RRT Reference: N00/35095 (Unreported, Refugee Review Tribunal, 4 January 2001, Fordham TM) at [49].

Tribunal also accepted that the appellant "is of fighting age and had faced conscription in Afghanistan and was at risk of facing it again."[92] However, the Tribunal made no finding as to whether this risk of conscription was for the reason that he was a member of "a particular social group" within the meaning of the Convention.

71 Carr J held that the Tribunal had erred in not considering whether "young able-bodied men" were a particular social group within the meaning of Art 1A(2) of the Convention[93]. His Honour said that the "particular social group (able bodied Afghan men) is not defined by reference to the discriminatory treatment that its members fear."[94] Consequently, the failure to make a finding as to whether the group of which the appellant claimed to be a member was "a particular social group" amounted to jurisdictional error[95].

72 In my opinion, Carr J was correct in finding that the Tribunal had erred in not considering whether "able-bodied young men" were "a particular social group" and that the error constituted jurisdictional error[96]. In most societies "able-bodied young men" would no more constitute "a particular social group" than would "good swimmers" or "fit athletes". Such classifications are intellectual constructs, not social groups. As Tamberlin J pointed out in *Mahmoodi v Minister for Immigration and Ethnic Affairs*[97], descriptions such as "able-bodied Afghan males" are descriptions "of characteristics based on gender and health or fitness." However, it is possible that in Afghanistan the press-ganging of "able-bodied young men" has created a perception that they are "a particular social group". It is true that the appellant put no evidence before the Tribunal of any such perception in Afghan society or within some section of it or any evidence that would enable the inference to be drawn objectively that they

---

92 RRT Reference: N00/35095 (Unreported, Refugee Review Tribunal, 4 January 2001, Fordham TM) at [30.3].

93 *Applicant S v Minister for Immigration and Multicultural Affairs* [2001] FCA 1411 at [42].

94 *Applicant S v Minister for Immigration and Multicultural Affairs* [2001] FCA 1411 at [45].

95 *Applicant S v Minister for Immigration and Multicultural Affairs* [2001] FCA 1411 at [49] per Carr J.

96 *Applicant S v Minister for Immigration and Multicultural Affairs* [2001] FCA 1411 at [48]-[49].

97 [2001] FCA 1090 at [7]; cited with approval by Kiefel J in *Applicant Z* (2001) 116 FCR 36 at 45.

were "a particular social group". Without such evidence, it seems difficult to see how "able-bodied young men" can constitute "a particular social group".

73 Carr J thought that "able-bodied Afghan men" were "not defined by reference to the discriminatory treatment that its members fear."[98] That proposition is true only if young, able-bodied Afghan men are cognisable as a particular social group, independently of the conduct of their persecutors. As I have indicated, ordinarily, the description "able-bodied young men" is an intellectual construct, not "a particular social group". In the absence of evidence that at the relevant time young, able-bodied Afghan men were cognisable as such a group, the basis for the appellant's claim for refugee status must fail.

74 Carr J[99] thought that the situation of the appellant was comparable to that of the "black child" in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*[100]. In *Chen Shi Hai*, it was claimed on behalf of the asylum-seeker, a young child, that he faced a real chance of persecution in China in contravention of the Convention, because he was "what is known in China as a 'black child'."[101] In that case it was found that there was a clear societal perception that "black children" constituted a particular social group which could be defined independently of their persecutory treatment[102]. This case is also unlike cases such as *Appellant S395/2002* and *Appellant S396/2002*[103]. In those cases it was held that homosexuals, the alleged "particular social group", were not a mere intellectual construct; rather, it was held that the descriptor "homosexuals" identified a group of persons which shares a particular sexual preference that unites them, sets them apart, and makes them a cognisable group within their society.

75 Without evidence of some objective perception – which may be but is not necessarily required to be found in Afghan society or a section of it – that "able-bodied young men" comprise "a particular social group", in circumstances where

---

98 *Applicant S v Minister for Immigration and Multicultural Affairs* [2001] FCA 1411 at [45].

99 *Applicant S v Minister for Immigration and Multicultural Affairs* [2001] FCA 1411 at [37].

100 (2000) 201 CLR 293.

101 (2000) 201 CLR 293 at 297 [6] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

102 *Chen Shi Hai* (2000) 201 CLR 293 at 297 [6], 301-302 [22]-[23] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

103 (2003) 78 ALJR 180; 203 ALR 112.

the perception is capable of being identified independently of the persecutory treatment, the appellant's claim must fail. Without such evidence, the appellant and those like him are in no different a position from that of the appellant in *Applicant A*[104]. In that case it was found that the group, described as "parents in the reproductive age group" or "parents with one child", could only be defined by reference to the persecutory conduct. For the purposes of Art 1A(2) of the Convention, the group had no independent existence as "a particular social group".

76 The Full Court of the Federal Court allowed the Minister's appeal on the ground that there was no evidence that Afghan society perceived "able-bodied young men" as comprising "a particular social group". With respect, in the context of the Tribunal's error, this was not a ground for allowing the Minister's appeal. If the Tribunal had considered the issue that it was legally required to consider, it was open to the Tribunal to investigate whether such a perception existed, whether within Afghan society or some section of it, or objectively. Indeed, arguably in the context of its inquisitorial process, the Tribunal had a duty to seek evidence concerning this vital matter. This may require the consideration of legal, social, cultural and religious norms prevalent in Afghan society to determine whether young, able-bodied Afghan men comprise a particular social group that may be distinguished from society at large. In *Sanchez-Trujillo v Immigration and Naturalization Service*, the United States Court of Appeals for the Ninth Circuit found that a "class of young, urban, working-class [El Salvadorian] males of military age who had maintained political neutrality" was not a "particular social group"[105]. But it does not follow that in Afghanistan young able-bodied men are not "a particular social group". Different legal, social, cultural and religious norms in different countries may bring about different results concerning similar groups or classes.

77 By failing to consider whether young, able-bodied Afghan men constituted "a particular social group", the Tribunal prevented itself from obtaining evidence concerning that issue, evidence that might have determined the application in favour of the appellant. In the circumstances of this case, therefore, the failure of the appellant to put evidence before the Tribunal concerning the perception issue was not a ground for refusing to set aside the Tribunal's decision, once it is accepted that the Tribunal erred in not considering the issue of "a particular social group".

---

104 (1997) 190 CLR 225.

105 801 F 2d 1571 at 1571, 1576 (1986). The decision in *Sanchez-Trujillo* has been criticised for adopting an unduly narrow interpretation of the phrase "a particular social group": see *Applicant A* (1997) 190 CLR 225 at 260-261 per McHugh J.

78 Accordingly, the Full Court erred in allowing the Minister's appeal.

Persecution

79 The Minister contends that the Tribunal's decision should be upheld because, even if the appellant was a member of a particular social group within the meaning of the Convention, he did not have a well-founded fear of persecution for reasons of his membership of that group. The Minister argues that forcible recruitment cannot amount to "persecution".

80 This Court has not yet considered, in any detail, whether compulsory military service can amount to persecution for the purpose of the Convention. The issue was touched upon in *Minister for Immigration and Multicultural Affairs v Israelian*[106], a case concerning an Armenian national who had sought to avoid being called up for military service in his home country. The primary issues in that appeal were whether – as the Minister argued – the Tribunal was obliged to make findings on material questions of fact and, if so, whether a failure to make such findings constituted reviewable error. The Minister succeeded. As a result, Mr Israelian's notice of contention – that the Tribunal had failed to consider whether he had a well-founded fear of persecution for reasons of his membership of a particular social group consisting of deserters and/or draft evaders – became relevant.

81 In our joint judgment, Gummow and Hayne JJ and I said that, even if Mr Israelian was a member of a particular social group comprising deserters or draft evaders, the Armenian law which operated to punish those who had avoided a call-up notice was one of general application. Accordingly, Mr Israelian would not be the subject of persecution. Gummow and Hayne JJ and I said [107]:

> "[The Tribunal] concluded that there would not be persecution of Mr Israelian if he returned to his country of nationality, only the possible application of a law of general application. The Tribunal is not shown to have made an error of law in that respect."

82 Gaudron J said [108]:

> "The Tribunal's conclusion that the punishment Mr Israelian would face 'for avoiding his call-up notice ... would be the application of a law of

---

106 (2001) 206 CLR 323 (heard together with *Minister for Immigration and Multicultural Affairs v Yusuf*).

107 *Israelian* (2001) 206 CLR 323 at 354-355 [97].

108 *Israelian* (2001) 206 CLR 323 at 342 [55].

> common application' necessarily involves the consequence that that punishment would not be discriminatory and, hence, would not constitute persecution." (footnote omitted)

83 This case is different from *Israelian*. Given the facts found by the Tribunal in the present case, the finding was open that the conscription methods of the Taliban constituted persecution. On the Tribunal's findings, the Taliban had an ad hoc practice of recruitment, which practice included press-ganging new recruits in a manner that would not be "condoned internationally"[109]. Accordingly, if the Tribunal had decided the particular social group issue in favour of the appellant, it was also open to the Tribunal to find that the appellant had a well-founded fear of persecution for a Convention reason. Given the Tribunal's findings about the nature of the Taliban's recruitment practices, it was open to the Tribunal to find that the Taliban was not applying a law of general application, but instead was forcibly apprehending members of the particular social group in an ad hoc manner that constituted persecution by the standards of civilised society.

Orders

84 The appeal should be allowed.

---

109 RRT Reference: N00/35095 (Unreported, Refugee Review Tribunal, 4 January 2001, Fordham TM) at [49].

85 CALLINAN J. This appeal is another which raises questions as to the identification of a particular social group and as to the nature of persecution within the meaning of s 36 of the *Migration Act* 1958 (Cth)[110] ("the Act") which relevantly incorporates the Refugees Convention as amended by the Refugees Protocol.

Facts

86 S, now 24 years old, is from Afghanistan. He entered Australia on 11 July 2000. He came by boat with the assistance of a people smuggler. On 25 July 2000 he applied for a protection visa. His application was refused by a delegate of the respondent.

87 It is his claim that he is a Pashtun by ethnicity, married and a former resident of a village under Taliban control for two years, where his wife, father, mother and four brothers still live. When the Taliban took control of the area in which the village is situated, some of its members detained him and his father on suspicion of concealing weapons. They were held for 20 days, maltreated, but then released. Approximately three weeks before his departure from Afghanistan, the Taliban leaders sought to conscript him into their forces, but he was able to buy them off. About a week before his departure, the Taliban again came to his village to conscript him. He was able to distract them by telling them that he needed to speak to his parents. He immediately left Afghanistan with the assistance of a people smuggler to whom his father paid more then US$6,000. The appellant claimed that he feared that if he were to return to Afghanistan he would be hanged by the Taliban because of his refusal to fight for them, and because he would be accused of being a Godless person, the evidence of which was his departure for a Western country.

The decision of the Refugee Review Tribunal

88 The Refugee Review Tribunal ("the Tribunal") affirmed the decision of the delegate of the respondent Minister. The Tribunal stated:

"1. He is Afghan.

2. He is Pashtun, the same ethnic group as the Taliban.

---

110 The appeal is determined according to the legislation as it stood prior to the commencement of the *Migration Legislation Amendment Act (No 6)* 2001 (Cth).

3. He is of fighting age and had faced conscription in Afghanistan and was at risk of facing it again.

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

5. The Taliban has been in control of his area for two to two and a half years and continues to be so.

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

...

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.

...

In the time that he and his family lived under the control of the Taliban he made no claim to have opposed their 'social restrictions' and he made no claim to have suffered in a discriminatory way under the Taliban.

While the ad hoc practice of recruitment and press-ganging new recruits including young students as described in the independent material ..., 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.

...

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.

While I accept that Pakistani extremists both promote and support the movement and accept the evidence ... that many Afghan Taliban were trained in Madrassas in Pakistan I do not accept the Applicant's view 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.

...

The nature of the recruitment process is such that there are no criteria for selection save being able-bodied and, being in the wrong place at the wrong time.

By his own account he 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 paid to allow him to avoid the recruitment drive.

When the second group came they took no action when he said he wanted to speak to his parents first and indicated that he may also pay them.

Given Taliban's rigid approach to compliance this action leads me to conclude they were not concerned about the Applicant who had no skills or any significant value to them apart from his youth and the fact he was able-bodied. No immediate follow up occurred and he was not required to report to them.

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 and, in the random manner of such an ad hoc drive he was able to avoid recruitment for a second time.

...

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.

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.

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

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.

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.

I accept that he may face serious harm as a consequence of being recruited into the Taliban militia as a consequence of fighting 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.

This being the case, I find that his claims are such that I cannot 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.

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."

The Federal Court

89 The appellant subsequently applied to the Federal Court (Carr J) for review of the Tribunal's decision. His Honour concluded [111]:

"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.

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 *Minister for Immigration and Multicultural Affairs v Yusuf*[112]."

---

111 [2001] FCA 1411 at [48]-[49].

112 (2001) 206 CLR 323.

The Full Court of the Federal Court

90 An appeal to the Full Court of the Federal Court (Whitlam and Stone JJ, North J dissenting) succeeded. Stone J, with whom Whitlam J agreed, said this [113]:

> "The issue to be decided here is whether the facts before the Tribunal in this case could justify it in reaching the conclusion, contrary to that to which the Tribunal in *Applicant Z*[114] came, that able-bodied men in Afghanistan (or able-bodied men with or without the financial means to buy off the conscriptors) comprise a particular social group within the meaning of the Convention. Following *Khawar*[115] it is clear that this description is not sufficient to justify such a conclusion. Additional evidence to support a claim that they are perceived as such by their society is necessary.
>
> ...
>
> It is well established that the Tribunal should not limit itself to the case articulated by an applicant where the facts found by it, (or, as Sackville J stated in *NAAT v Minister for Immigration and Multicultural Affairs*[116], not negated by its findings) might support an argument that the applicant is entitled to the protection of the Convention; *Paramananthan v Minister for Immigration and Multicultural Affairs*[117]; *Saliba v Minister for Immigration and Ethnic Affairs*[118]. In this case, however (unlike the position in *Khawar*), I can find no trace of any evidence before the Tribunal that would support a claim that Afghan society perceived young able-bodied men as comprising a separate group either as a result of the Taliban's recruitment process or for any other reason. In my view there is

---

113 *Minister for Immigration and Multicultural Affairs v Applicant S* (2002) 124 FCR 256 at 274 [70], 275 [73]-[74].

114 *Minister for Immigration and Multicultural Affairs v Applicant Z* (2001) 116 FCR 36.

115 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.

116 [2002] FCA 332 at [43].

117 (1998) 94 FCR 28.

118 (1998) 89 FCR 38.

nothing to distinguish this case from that considered by the Full Court in *Applicant Z*.

Although the Tribunal may initiate additional inquiries (ss 424 and 427(1)(d) of the *Migration Act* 1958 (Cth)) it is not required to do so. Comments to the contrary in *Prasad v Minister for Immigration and Ethnic Affairs*[119] and *Luu v Renevier*[120] are not relevant here for reasons explained in *Kola v Minister for Immigration and Multicultural Affairs*[121] and *NAAT v Minister for Immigration and Multicultural Affairs*[122]. In my view the Tribunal cannot be in error in failing to come to a conclusion that is not supported by the material before it."

The appeal to this Court

91 The appellant appeals to this Court upon the following grounds:

1. The Full Court of the Federal Court erred when it held that there was no evidence before the Refugee Review Tribunal that Afghan society perceived young, able-bodied men as comprising a particular social group. The Full Court ought to have held that there was evidence and material before the Tribunal that young, able-bodied men may comprise a particular social group.

2. Alternatively, the Full Court of the Federal Court erred in law in holding that it was necessary for there to be evidence before the Refugee Review Tribunal that Afghan society perceived young, able-bodied men as comprising a particular social group.

   The Full Court ought to have held, as a matter of law that:

   (a) if there was evidence before the Refugee Review Tribunal that young, able-bodied men comprised a particular social group then the Tribunal was obliged as a matter of law to consider whether the appellant was a member of that group and feared persecution by reason of such membership;

---

119 (1985) 6 FCR 155.

120 (1989) 91 ALR 39.

121 (2002) 120 FCR 170.

122 [2002] FCA 332.

(b) such evidence may, but did not necessarily have to, include evidence as to the perceptions of Afghan society as to whether there was such a social group; and

(c) the learned primary judge was correct in holding that the Tribunal had erred in not considering whether the appellant was a member of that group and feared persecution by reason of such membership.

92 It is the appellant's contention that there was evidence before the Tribunal capable of satisfying the conditions for a grant of refugee status to him as prescribed by Art 1A(2) of the Convention which has been adopted by s 36 of the Act. Article 1A(2) provides that a person is a refugee who:

> "owing to [a] 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

93 The appellant's application for a protection visa and his rights of appeal following a refusal of it are governed by s 476(1) of the Act in the form that it had before 2 October 2001. The appellant has contended and continues to do so that the Tribunal made an error of law within the meaning of s 476(1)(e) of the Act.

94 At the outset it was necessary for the appellant to identify the particular social group or groups of which he claimed to be a member. These were, he said, either: able-bodied Afghan men; able-bodied young men; able-bodied Afghan men without the means of buying exemption from conscription; or young able-bodied men without the means of buying exemption from conscription. The circumstances of this case are different from those which the Court had to consider in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim*[123], of instability, anarchy and murderous shiftings in clan allegiances[124]. The Taliban was for all practical purpose the government of the country.

95 The issue presented to the Court is a relatively narrow one: was the likelihood of the appellant's conscription to fight for the Taliban *de facto* government, as surely it at least was, persecution of him for reason of

---

123 (2000) 204 CLR 1.

124 (2000) 204 CLR 1 at 79 [222] per Callinan J.

membership of a social group, namely of a category of able-bodied men throughout most, if not all of Afghanistan.

96 Because the Article requires a form of singling out, the need to locate an applicant in a particular group, it imports the notion of difference, that is to say of the identification of a group that can be seen to be particular, and therefore separate from the rest of the population, and on that account the subject of differential and *persecutory*, and not merely discriminatory treatment, as unpleasant as the latter may be.

97 It is convenient to deal with the appellant's second ground of appeal first. In pursuance of it, the appellant submitted that the Full Court erred in holding that "a social group" could be constituted as such for the purposes of the Convention only if the group were identified in the country of the refugee as a particular group: that a holding to the same effect of the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Zamora*[125] upon which the Full Court relied here was also erroneous and stemmed from a misreading of the decision of this Court in *Applicant A v Minister for Immigration and Ethnic Affairs*[126]. The particular proposition said to have been erroneously extracted from *Applicant A* in the earlier of the Full Court cases is the third of those in the following passage[127]:

> "... there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community."

98 I would accept this submission. There is nothing in the relevant Article of the Convention or s 36 of the Act adopting it which states or implies such a requirement. The question is not whether some undefined section of, or minority, or majority, or leaders of a country regard and recognise a particular group as a social group, as relevant and helpful to the giving of an answer to the correct question, an answer to that question might be. The correct question is simply whether an identifiable group or class of persons constitutes a particular social group. The attitude expressed by acts or words of people within a country

---

125 (1998) 85 FCR 458.

126 (1997) 190 CLR 225.

127 *Minister for Immigration and Multicultural Affairs v Zamora* (1998) 85 FCR 458 at 464 per Black CJ, Branson and Finkelstein JJ.

towards others may, and usually will provide cogent evidence that those others are of a particular social group, but such acts or words cannot be conclusive of the issue.

99 Both Dawson J[128] and Gummow J[129] in *Applicant A* stressed that a group must be recognisable as such, but said ultimately that it is for the Tribunal and a court of review or appeal, to accord that recognition or not. I would not take what McHugh J[130] said in *Applicant A* to be to any contrary effect.

100 The acceptance of the appellant's argument in relation to this ground of appeal does not mean that the appellant's appeal must succeed. In fact, in this case, it is, and was always clear that the Taliban regime did recognise the appellant and other able-bodied men whether young or not, for what they were, candidates for conscription to maintain the regime, or otherwise to further its ends, just as have, on occasions, most regimes both despotic and democratic from time immemorial.

101 Conscription into a military force or a militia inevitably carries the risk of harm, indeed of death itself. The existence of that risk does not however conclude the issue of persecution. Between 1960 and 1970 able-bodied young men in Australia qualified by age to be balloted into national military service and of undertaking it in war in Vietnam, were a particular social group and were so regarded by many in this country. But it is another question whether they were, in consequence, a particular social group having a well-founded fear of persecution. The relevant question is whether a liability to give military service to or for the government, *de facto* or *de jure*, of a country with all the consequential risks that such service carries, is persecution for reason of membership of a particular social group. In my opinion it is not.

102 It was not suggested that the appellant's opposition to service with the Taliban was based on any "ethical, moral or political grounds[131]." There was no evidence that the appellant, either alone or as a member of a group sharing political, moral, ethical or religious convictions, was singled out for military service. The Taliban was the party in power. The fact that they may have come to power in an undemocratic way does not alter the fundamental character of the conscription which they sought to impose in an indiscriminate way.

---

128 (1997) 190 CLR 225 at 241-242.

129 (1997) 190 CLR 225 at 285.

130 (1997) 190 CLR 225 at 264-266.

131 cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 342 [54] per Gaudron J, 354 [94] per McHugh, Gummow and Hayne JJ.

103 Previous authority[132] fairly consistently holds that liability for conscription is not persecution for a Convention reason and with that holding I generally agree.

104 Had the Full Court asked itself the correct question, not as to the existence or otherwise of the perception of some undefined section of Afghan society, of young or able-bodied men liable to be conscripted as a particular social group, but whether those men answered the description of a relevant social group contained in the Convention incorporated in s 36 of the Act, the answer would still have been the same, a negative one. Such men were not the subject of persecutory treatment.

105 I would dismiss the appeal with costs.

---

132 *Mijoljevic v Minister for Immigration and Multicultural Affairs* [1999] FCA 834 at [23] per Branson J:

> "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". (footnotes omitted)