

0903074 [2009] RRTA 595 (26 June 2009)

DECISION RECORD

RRT CASE NUMBER: 0903074

DEPT REFERENCE(S): CLF2007/44338

COUNTRY OF REFERENCE: Israel

TRIBUNAL MEMBER: Dominic Lennon

DATE DECISION SIGNED: 26 June 2009

PLACE OF DECISION: Melbourne

DECISION: The matter is remitted for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the Migration Act 1958 (the Act).
2. The applicant, who claims to be a citizen of Israel, first arrived in Australia [in] November 2005. She applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] March 2007. The delegate decided to refuse to grant the visa [in] June 2007 and notified the applicant of the decision and review rights by letter [on the same date].
3. The delegate refused the visa application as the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal (the first Tribunal) [in] July 2007 for review of the delegate's decision. The first Tribunal affirmed the decision [in] November 2007. The visa applicant applied to the Federal Magistrates Court for determination and [in] October 2008 the Federal Magistrates Court dismissed the application. The visa applicant applied to the Federal Court and [in] March 2009 the Federal Court ordered that the Tribunal's decision be set aside and the matter be remitted to the Tribunal for reconsideration.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.
6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied.
7. Section 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

8. Australia is a party to the Refugees Convention and the Refugees Protocol and generally speaking, has protection obligations to people who are refugees as defined in them. Article 1A(2) of the Convention relevantly defines a refugee as 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; or who, not having

a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

9. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 205 ALR 487 and *Applicant S v MIMA* (2004) 217 CLR 387.

10. Sections 91R and 91S of the Act now qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

12. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

13. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

14. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

15. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on

mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

16. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

17. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

18 The Tribunal has before it the Department’s file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

19. Documentary evidence in the Department’s file shows that the applicant arrived in Australia [in] November 2005 as the holder of a visitor visa, subclass 676, granted in Israel [in] August 2005. The visa was valid [to] May 2006, at which time the applicant was granted a further visitor visa, subclass 676, valid [to] March 2007.

20. The delegate noted that the applicant applied to the Department for a Protection (Class XA) visa [in] March 2007, but that application was incomplete and she was asked to complete the application which she did. The completed application was received [in] June 2007, however, [the date in] March 2007 is taken to be the date on which she made the application.

21. The delegate decided to refuse the grant of the visa [in] June 2007.

22. The application documents show that the applicant is a 27 year old female citizen of Israel, born in Israel [in] 1982. She cites her occupation as ‘Member of the Entertainment Team’, and never married. She states she left Israel for travel in Australia. She states she has a passport and visa in her own name and her travel documents have been extended by the Australian authorities while she was in Australia. The applicant previously travelled to Cyprus as part of her then employment

23. The applicant states that her reason for leaving Israel to come to Australia was for tourism (only). She felt that the situation in Israel deteriorated while she was in Australia and so had her visitor visa renewed (in August 2006) After she had been in Australia 14 months she decided she wanted to stay.

24. The applicant also stated that girls in her situation in Israel must serve in the army for 30 days a year and in the current circumstances this puts her at risk of being called upon to serve.

25. In the application for review the applicant states (verbatim)

I as an Israeli nationality owner, I’m persecuted for my religion and my nationality. I know that I am not the only Israeli in the world, and the problem that my country [is] suffering from are not only against me, but also against 6 million

people like me, but the different between us is that I just can't live this way. ... In Israel as a result from this situation (like terrorists) bombing busses and restaurants in the middle of the day the people in Israel just got used to this situation so they don't care anymore [for] one another. So I just can't live like that, I can't go back home to my country and just live in fear all the time, and watch my neighbours, friends or even my family die.

Hearing before the first Tribunal

26 The applicant appeared before the Tribunal [in] September 2007 to give evidence and present arguments.

27. The applicant gave the following evidence.

28. The applicant corroborated the details about her identity and her arrival in Australia; that she had intended to travel to Australia only as a visitor; and that she had travelled overseas from Israel to Cyprus on two occasions, in March to November 2004 and in September to November 2005.

29. She had a visa to come to Australia before she went to Cyprus on the second occasion, but she went there for work to get some extra money before coming to Australia She said she did not seek refugee status in Cyprus because she only went there for work, English is not widely spoken and she did not feel that it was the right place for her to stay.

30. The applicant has no family in Australia, they are all in Israel. She is not currently working but has been travelling in parts of Australia.

31. Asked why she thought she was a refugee, the applicant said it was because Israel is a hard place to live, the neighbouring countries are hostile and bombings are common. In Israel she is persecuted by the Palestinians and terrorists and the form of persecution is the fear that she will be a victim of the next bomb attack.

32. The applicant said she served in the Army, as is required by all eligible Israeli citizens. She was a communications specialist and that occupation requires that she also serve in the Army for 30 days per year until she reaches a certain age.

Statutory Declaration submitted to the second Tribunal

33. [In] June 2008 the applicant's agent submitted the following statutory declaration (declared by the applicant [in] May 2009) to the Tribunal:

I want to provide more detail about my claims.

I was born in Haifa in Israel on [date] 1982. I am now 27 years of age.

I am an Israeli national and have an Israeli passport.

My family members live in Israel.

My mother's name is [name]. My mother is an Accountant.

My father's name is [name]. His current occupation is Electronic Engineer but he has retired and now teaches [type of] classes in school.

My parents are still together and live in [location].

I have two brothers, [name] and [name]. [Name] is studying Management and

Industry at University and [name] is at school.

I completed my secondary schooling in Israel. I attended the [school] in [location], Israel, from 1988 until 1990 and then the [school] in [location] in Israel between September 1990 and July 1994.

I attended the [school] in [location], Israel, from September 1994 to July 1997 and I concluded my schooling at the [school] in [location], Israel, between September 1997 and July 2000.

At school we are taught about all the wars that the Israelis have been through and about the holocaust. We were taught slogans like "Fight for Israel" and "Death to the Arabs". We were always taught that we were surrounded by enemies of Israel and that Israel always had to fight for existence. My home city of [location] is in the north of Israel and close to Lebanon and Syria and so we have a large Arab population. We were taught never to trust the Arabs.

Between October 2000 and July 2002 I undertook my compulsory military service in the Israeli Army. Every boy and girl aged 18 gets a letter requiring them to report at a particular place and time. I was placed in the Communications section so every time something happened on the north border I had to go and listen. The communications were between the units - if they had seen a suspect. My role was to listen to the communications and take important matters to higher level officers. I lived at an army base. I learned how to shoot and we did patrols at night to check that there were no intruders. We all knew that our enemies were the Palestinians and the Arabs generally. At the time I just accepted everything I was taught.

Israel requires that even after an individual has completed their compulsory military service of two years, that women complete an additional 30 days per year military service, until she reaches the age of 35 years.

The obligation to perform military service is enforced by the authorities. If I had refused to go I would have been taken to gaol by the military police and would probably be in gaol for at least 30 days or more. I would end up with a criminal record and my future education and work appointments would be limited. At the time I had no thought of refusing to do my military service.

After completing my military service obligations I secured employment as a member of an entertainment team with [name] between November 2002 and May 2005. [Name] is the owner of the company and the company is engaged by hotels to run these activities. I stayed in the hotel and organised hotel activities for guests during the day and musicals at night. I really enjoyed it.

From May 2003 to November 2003 I was employed by [name] as an entertainment team manager.

From December 2003 to February 2004 I was employed by [company] as a sales representative.

Between March 2004 and November 2004 I worked for [name] as a member of an entertainment team in Cyprus. I was coordinating tourist activities for English tourists. I improved my English during this time. In Cyprus I was exposed to anti-Semitic people. For example one night I went out with a girlfriend and we were targeted by others because we are Jews. I had mixed feelings about Cyprus as a result. One morning we saw the Nazi symbol out

of our window.

I left Israel for Cyprus on about [date] September 2005 and remained in Cyprus until [date] November 2005. While in Cyprus I still held mainstream Israeli political views.

Between December 2004 and August 2005 I worked in customer service with [name] Insurance Company in Israel.

[In] November 2005 I arrived in Australia from Israel as the holder of a visitor visa.

My intention in coming to Australia was to be a tourist. I had heard a lot about Australia and wanted to see this beautiful country myself. I intended to travel and then return to Israel.

I first arrived in Melbourne I travelled the east coast from Melbourne to Cairns then to Alice Springs and Adelaide and back to Melbourne. I then flew to Cairns, Darwin and Perth Then I stayed in Adelaide for about one year and went to Melbourne in about September 2008.

In Australia I have not had permission to work. I had some savings from my previous work and my parents have sent me money. My parents are glad that I am safe and happy.

I applied for a protection visa [in] March 2007. I prepared the application for a protection visa myself and tried to explain the basis of my claims. I filed my application for a protection visa because I had a very strong fear of returning to Israel It is true that I am very afraid of living in Israel because it is a generally violent place, and because terrorist attacks can happen all the time. However, there is more to it than that. Since I have been living in Australia I have come to question the politics and belief systems I have learned in Israel. When I was in Israel I did not question anything. I was brainwashed by my education and by all of the popularly held opinions of most Israelis. Most Israelis consider our Arabic neighbours to be enemies of Israel. Everyone just assumes that this is the case. No one in Israel, that I knew at least, has made an effort to consider the perspective of our neighbours like the Palestinians.

Since I have been in Australia I have come to question many of these things.

I am now opposed to the mainstream political position of Israel towards its neighbours and in particular towards the Lebanese and the Palestinians. I think that Israel's refusal to recognise Palestine and efforts to control the Palestinians by withdrawing services like electricity and water which are entirely under the control of the Israelis is cruel, inhumane and potentially dangerous for Israel. I do not believe in violence and I do not believe in a violent solution to the problems in the Middle East.

I believe that the Israeli military just does the work of the Israeli government which is to put down and suppress its neighbours in a violent way and I cannot now support the Israeli government or the Israeli military.

If I had to go back to Israel I agree that I would be afraid of just general living in Israel. I would be afraid of being blown up at a cafe because of a terrorist attack, that is true. I would also find myself unable to keep my views, my opposition to the mainstream politics of Israel to myself. Now that I have

seen how the world can work, and how it is possible to live peacefully, I would publicly express my opposition to the Israeli government policies. If I went back to Israel I would be required to undertake military service. I would not do this military service. I feel unable to do military service because I am opposed to the objectives of the Israeli military and the objectives of the Israeli government as served out by the military.

I am obliged to do 30 days military service per year. I would not do it. I would be charged with an offence and sent to gaol. I don't want to go to gaol but I won't do military service. A record for refusing to do military service will shut lots of doors. It would be hard to get work. There would be no acceptance of these views by former friends. My parents know what I think and I have had arguments with them about politics.

I do ask the Australian Department of Immigration and Citizenship to consider all of my claims and to accept that I am a refugee. I cannot go back to Israel because if I go back there I will be persecuted because I will refuse to do my military service as required because of my political opinions and I will be persecuted and punished as a result of this decision.

Hearing before the second Tribunal

34. The second hearing was conducted [in] June 2009. The applicant appeared in person and gave sworn evidence and was assisted by an interpreter and represented by her agent who appeared by telephone link from Adelaide.

35. In addition to confirming the statements made in a statutory declaration the applicant gave the following evidence:

36. She completed two years full time compulsory military service between 2000 and 2002 She still had an obligation to do 30 days military service per annum

37. She then worked for about two years as an entertainment host in the tourist industry presenting performances and music.

38. In 2003 she was notified by the military in relation to her obligation to do 30 days military service but her boss was able to explain that she was needed at work The military released her from the 30 day call up

39. In 2004 (aged 22) her employer took her to Cyprus where she worked for about six months hosting entertainment activities.

40. In 2004 she was notified by the military in relation to her obligation to do 30 days military service but her mother was able to explain that she was working in Cyprus. The military released her from the 30 day call up

41. She then returned to work at an insurance company for about 10 months and saved money for a holiday in Australia. She then went back to Cyprus for about two months to do more entertainment work. She then returned to Israel.

42. In 2005 (just before she came to Australia) she was notified by the military in relation to her obligation to do 30 days military service but explained that she had purchased a non-refundable air ticket for Australia. Once you have a ticket the government cannot compel you to do military service. The military released her from the 30 day call up

43. In November 2005 she departed Israel to Australia on a one-year tourist visa.

44. She lodged her application for a protection visa in January 2007, a month before the expiration of her visitor visa which had been extended to February 2007. She has been in Australia ever since.

45. She is still subject to a commitment to 30 days military service per annum.

46. Asked when that ends, she stated at the age of 30 or 35. The Tribunal noted that it was surprised, given that her fear of compulsory military service was the core of her claim, that she did not know the detail of her outstanding commitments for military service. The Tribunal noted that if compulsory military service was the core of her claim before the Department, the first Tribunal, the Federal Magistrates Court and the Federal Court it would expect that (even if she didn't know at the time she lodged) that she would know these details now, two years later. She explained that it varied depending on which service (Army, Navy or Air Force) and she had lost communication with the people in her unit. The Tribunal reiterated that, whilst a citizen's obligation to military service may well depend on the service and indeed other factors such as gender it was somewhat incongruous that she was claiming a fear of compulsory military service but did not know the details of the extent to which she would be required to undergo military service. She responded that the unit with which she did her reserve military service was a casual unit. She and her colleagues did shifts and swapped weekends of service with friends and sometimes did three weeks at a time. It was flexible.

47. The Tribunal asked the applicant why she delayed lodging her application until January 2007. She responded that her intentions in coming to Australia in November 2005 were just to travel. She then saw how she could live in safety in Australia and thought "Why go back to Israel?" Asked whether she was seeking protection because she thought she would have a better lifestyle in Australia she stated that that was not the only reason. She wanted to live in a country where people tolerated each other and not in Israel where you are expected to hate Arabs. She was also fearful of being harmed or injured in Israel. She also feared being forced to do military service. She wouldn't be able to silence herself about her objection to military service.

48. The Tribunal noted that she would have been in a position to realise that Australia was a reasonably safe place to live within a few months of her arrival (say by April or May 2006) and asked why, in those circumstances she didn't lodge her application until January 2007. She stated that it is a daunting prospect to lodge an application for a protection visa. She stated that the catalyst was the June- July 2006 war. The Tribunal asked why, if that were the case, she didn't lodge an application in July 2006. She stated that she thought it would be easier to seek an extension on a tourist visa and couldn't perceive herself as a "refugee": she had always regarded refugees as "low level people". Not everyone wants to be known as a refugee.

49. Asked to expand on her claim to be fearful of military service she stated that she couldn't be silenced on her anti-war views any more. The Tribunal noted that she had not objected to the two years military service and had relied on work commitments rather than moral or philosophical objections in responding to call-up notices. Asked when she formed her anti-war view, she stated that it was during her

two years military service when she saw what the Arabs were doing to them and also what the Israelis were doing to the Arabs. Asked why she didn't raise her philosophical objections when she was called up in 2003 she stated that she was still in Israel and maintained her silence to keep her job. Employers don't like conscientious objectors and regard them as "Arab lovers".

50 She stated that if she returned to Israel and was called up she could not be silenced anymore. She would speak out against the war and participate in demonstrations. Asked what harm she might face as a consequence, she stated that she would be overlooked for jobs and educational opportunities. Asked whether she had any plans to undertake further study, she stated that she did. She added that if she returned to Israel and spoke out against the war some of her friends would abandon her. The Tribunal noted that being discriminated against for a job and a position in a course at a university may not necessarily constitute "persecution". The Tribunal asked what, if any, other harm she would suffer by virtue of being a conscientious objector. She stated that she would object to further call up and be imprisoned by the military police. The Tribunal noted that on her evidence she appeared to have been able to avoid military service relatively easily. She stated that everyone gets one chance to avoid the 30 day call-up. The Tribunal noted that she had avoided the 30 three times; in 2003, 2004 and 2005. She stated that it in fact took a lot of negotiation to avoid the 30 day call-ups. The Tribunal noted that she was released on flimsy grounds which suggested that the Israeli Defence Force had an accommodating attitude to those who did not want to respond to the call up. She responded they were insisting on the 30 day call-up in late 2005 and only released her from the obligation because she had purchased a non-refundable air ticket. The Tribunal noted that the fact the IDF were prepared to release someone who already missed two annual call-ups just because they had purchased non-refundable air ticket for a holiday in Australia suggested that compulsory military service was not strictly enforced. The Tribunal noted that, on that history, it did not appear particularly likely that she would have to do military service as it could very easily be avoided. She repeated that she had purchased a non-refundable ticket which gave the government no choice. She will not have that excuse in the future, she will be asked to do military service and she will refuse on the basis of her political beliefs and be sentenced to 30 days in jail

51 The Tribunal noted that, in a long detailed handwritten statement with her visa application, she didn't make any mention of being a conscientious objector and the persecution that she now claimed would flow from that. She stated that she prepared her application all by herself and didn't know what the law of refugees was. She stated that she did say in her application form that she would refuse to serve in the army (she stated that she was liable for military call up but did not refer to being a conscientious objector) She also claimed that she faced persecution as race and religion (Jewish) by the Arabs. The State cannot protect her from these dangers. She concedes that this affects all Israelis. The Tribunal observed that she didn't articulate the claim of persecution as a conscientious objector on appeal to the first Tribunal. She stated that she didn't have an opportunity it was a very quick hearing. She told the Tribunal that she didn't want to do military service but didn't have chance to explain to the first Tribunal.

52 At the end of the hearing the applicant's agent submitted that the claim of persecution as a conscientious objector it was an unarticulated claim. She submitted however that the Federal Court had found that although the applicant had not fully articulated the claim she had put the first Tribunal on notice of the claim and it was an error for the first Tribunal not to ask her about and give her an opportunity to articulate it.

POST-HEARING SUBMISSION

53. [In] June 2009 the applicant's agent lodged the following submission:

(the agent cited the definition of refugee in the Convention)...

The applicant is unwilling to return to Israel due to her fear of being persecuted for her political opinion. The applicant is opposed to the Israeli government's military policies and will refuse to complete her required military service on the basis of her conscientious objection.

Background

The applicant's background is set out in detail in her statutory declaration. An unsigned copy has been sent to the Tribunal. We are chasing our client for the signed copy and will forward that to the Tribunal as soon as possible.

Israel requires all Israeli citizens and permanent residents to perform regular and reservist military service. There is no provision in Israeli law to excuse citizens or permanent residents from service on the basis of their conscientious objection.

Section 46 of Defence Service Law states that a failure to fulfil a military service duty is punishable by up to two years imprisonment and attempting to evade military service is punishable by up to five years imprisonment. Refusal to perform reserve duties is punishable by up to 56 days imprisonment, the sentence being renewable if the objector refuses repeatedly. Israeli law does not provide for an alternative form of civil service. Nor does the country have an independent decision making body to hear and determine requests for exemption from military service on the basis of conscientious objection.

Article 18 of the ICCPR provides that every person has a right to freedom of thought, conscience and religion. The United Nations Committee on Human Rights has reiterated an individual's right to refuse to perform military service in several resolutions. In 1998 the Committee adopted Resolution 1998 / 77 that stresses a state should not imprison conscientious objectors and recommended states form a foundation for a form of alternative service and an independent decision making body to determine whether a person has a genuine conscientious objection.

In Israel, conscientious objectors are seen as traitors and political dissidents. A 2002 article by Dani Ben Simhon reported that military police arrested and detained a high school student who expressed his objection to military service in a letter to the Prime Minister. In 2008 War Resisters International and Ynet News reported Israeli conscientious objectors, including four women, were repeatedly imprisoned for their refusal to enlist. New Profile is an organisation in Israel assists citizens who do not wish to do military service. In April 2009 six members of this organisation were detained and interrogated by Israeli police. Helping someone to evade military service is also punishable imprisonment. This suggests

that while compulsory Military Service requirements are of general application, the law is not applied indiscriminately. We submit that the law is in fact used to discriminate against those citizens of Israel who have an alternative political opinion to that of the Israeli government and those citizens who have a genuine conscientious objection to military service. Citizens who object to military service on religious grounds are exempt from service, while citizens who object to military service on political or moral grounds are imprisoned.

We submit that if the applicant returns to Israel and refuses to perform military service, she will be liable to punishment without being afforded the right to a fair trial and should the applicant be imprisoned, we submit there is a real chance that she will be treated more harshly in detention due to her political opinion and the fact that she will be seen as an opponent to Israeli policy in the Occupied Territories.

Commentary on Evidence

[The applicant] appeared before the Tribunal [date] June 2009 and we represented her by telephone. We submit that [the applicant] gave her evidence well. She provided the Tribunal with a compelling account of a young woman whose political views were formed over a period of time and to some extent in response to her own experiences. She indicated that she began to question the Israeli military action in neighbouring countries when she was required to undertake compulsory military service between the ages of 18 to 20 years. At the time she said she was effectively "brainwashed" as a result of her education and had always previously seen the Arab population of Israel and its neighbours as the "enemy". Whilst [the applicant] began to question the politics and policies of her country she did not express those views publicly at the time. She told the Tribunal that it was easier to simply avoid the requirement for military service and to try to find a way out of Israel. She did not then want to bring upon herself the inevitable persecution, criticism and social stigma that would flow from a public expression of her political views.

[The applicant] told the Tribunal that she avoided a call for military service in 2003 on the basis that she was undertaking employment and that the authorities will generally excuse an individual from undertaking military service once. In 2004 she was again called to undertake her reservist duty but was in Cyprus at the time. In 2005 she was again called to undertake reservist duty but was able to avoid the requirement on the basis that she had already purchased a ticket for travel to Australia. At no time in the past has [the applicant] refused to undertake military service on the basis of her conscientious objection to military service and her political objection to the policy and programs implemented by Israel. The Tribunal put to [the applicant] that she appears to have escaped military service duty in the past relatively easily, the implication being that [the applicant], if she returned to Israel, would be able to continue to avoid military service obligations relatively easily by creating "excuses" for not performing those duties.

We submit there is no guarantee whatsoever that [the applicant] will be able to come up with excuses for avoiding military service if she returns to Israel, or that those excuses will be accepted by the authorities. [The applicant] has stated clearly to the Tribunal that if she is returned to Israel she will refuse to undertake her military service obligations and she will cite as her reason for objecting to that service, her political and conscientious objection to that duty.

In these circumstances we submit that [the applicant's] case is akin to those faced by the Bangladeshi homosexuals in S395. It would be an error on the part of the Tribunal to find that [the applicant] is not a refugee on the basis that she can avoid future military service by being "discreet" in the sense of coming up with non-political excuses for avoiding future military service.

In S395 Gummow & Hayne JJ stated:

`If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences. "

Application of the law to the facts

The definition of "refugee" contains four key elements:

1. The applicant must be outside his or her country. It is submitted that this element is satisfied as [the applicant] is Israeli and is currently in Australia.
2. The applicant must be at risk of persecution.

Mason CJ referred to persecution as requiring "some serious punishment or penalty or some significant detriment" (*Chan -v- Minister for Immigration and Multicultural Affairs* - 1989 169 CLR 379-388).

The applicant claims that her refusal to complete her reservist military service in Israel will lead to her imprisonment and that there is a real risk that she will suffer serious harm while detained due to her conscientious objection to military service. In the case of *Erduran v Minister for Immigration and Multicultural Affairs*⁶, Justice Gray was of the view that:

"Forcing a conscientious objector to perform military service may itself amount to persecution for a convention reason."

We also refer you to the case of *Minister for Immigration, Local Government and Ethnic Affairs v Che Guang Xiang* where the Full Federal Court said:

"Denial of fundamental rights or freedoms, or imposition of disadvantage by an executive act, interrogation or detention for the purpose of intimidating the expression of political opinion will constitute persecution. "

3. The reasons of persecution must be found in the singling out one or more of the Convention reasons.

The applicant's conscientious objection to military service is an expression of her political opinion. The applicant fears persecution on the basis of her political opinion. In addition, the applicant fears persecution on the basis of her membership of a particular social group, being individuals in Israel who object to

military service on the basis of conscience.

4. The applicant's fear of persecution for a Convention reason must be "well founded"

The objective test is to determine whether or not a fear of persecution is well founded. The court in Chan found that a person may have a well-founded fear of persecution even if there is less than a 50% chance of persecution occurring.

Each year conscientious objectors are imprisoned in Israel.

In Chan, McHugh J. stated:

"Nor is it a necessary element `persecution' that the individual should be the victim of a series of acts. A single act of oppression may suffice ... the persecution need not be the product of any policy of the government of a person country of nationality It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution ... or other forms of harm short of interference ... may constitute `persecution' for the purpose of the Convention and protocol."

Other decided cases

There is a line of authority that refusal to undergo military service on the grounds of conscientious objection may give rise to a well founded fear of persecution for a Convention Reason.

O'Loughlin J in *Magyari v Minister for Immigration and Multicultural Affairs* stated:

"That there may be cases in which conscientious objection to military service will be the basis of a well founded fear of persecution for a Convention Reason. For example, the refusal to perform military service may derive from one's religious beliefs, or it may be a virtue of one's political opinion. "

In the case of *Erduran v Minister for Immigration and Multicultural Affairs*, Grey J reviewed previous case law regarding this issue and concluded:

"It is well established that, even if a law is a law of general application, its impact on a person who possesses a Convention related attribute can result in a real chance persecution for a Convention Reason.

In 2008 the Refugee Review Tribunal found that an Israeli conscientious objector was a person to whom Australia had protection obligations under the Refugee's Convention. The Tribunal Member found:

"It is clear from the country information that in Israel the military service laws and regulations are discriminatory, and are administered in a systematically discriminatory fashion. Some people are exempted on the grounds of their gender or their religious persuasion, others may apply for exemption on the grounds of conscientious objection, but there is no formal legal process for dealing with such applications. The informal committee which considers applications does not appear to operate on a transparent basis... According to the country information, persons whose objection to military service is founded on their objection to Israeli policy in the occupied territories are not only not exempted, but are punished for their refusal to serve."

Summary

We submit that there is a real risk that the applicant faces "serious harm" due to her political opinion should she be required to return to Israel. The applicant is a person to whom Australia has protection obligations under the Refugee's Convention as amended by the Refugee's Protocol as a result of her refusal to perform military service in Israel on the basis of her conscientious objection to such service

Independent Country Information

The *United States Department of State Country Reports on Human Rights Practices - 2006*, which was released by the Bureau of Democracy, Human Rights, and Labor, on 6 March 2007 included the following relevant information about the situation in Israel:

With a population of approximately 7 million, including approximately 5.3 million Jews, Israel is a multiparty parliamentary democracy. "Basic laws" enumerate fundamental rights. The 120-member, unicameral Knesset has the power to dissolve the government and mandate elections. On March 28, the 17th Knesset was elected democratically. On May 4, Prime Minister Olmert presented his government to the Knesset.

The judiciary is independent and has sometimes ruled against the executive, including in some security cases. Notwithstanding some cases of abuse by individuals, the civilian authorities maintained effective control of the security forces.

An *Amnesty International Report 2007, Israel and the Occupied Territories* provides some information about the situation in Israel vis-a-vis the Palestinians to the effect that larger numbers of Palestinians than Israelis were killed during 2006. The 34 day war which broke out on 12 July 2006 after Hizbollah's military wing crossed into Israel and attacked an Israeli patrol, killing three soldiers and capturing two others, involved heavy Israeli attacks into Lebanon and Hizbollah missiles fired into Israel, causing the deaths of 43 civilians.

Amnesty reports that killings of Israelis by Palestinian armed groups continued but decreased to half the previous year's level and to the lowest since the beginning of the intifada in 2000. In total 21 Israeli civilians and 6 soldiers were killed in Palestinian attacks. There was a significant increase in the launching of homemade 'Qassam' rockets by Palestinian armed groups from the Gaza Strip into the south of Israel.

Israeli settlers in the West Bank repeatedly attacked Palestinians and their property as well as international peace activists and human rights defenders. In June the Israeli Supreme Court issued a ruling instructing the army and police to protect Palestinian farmers seeking to work their land from attacks by settlers. The incidence of attacks decreased but several more were carried out in the presence of Israeli security forces who failed to intervene.

Military Service

Sources consulted such as the Economist Intelligence Unit and the US Department of State indicate that all Israeli citizens and permanent residents of both sexes are liable for compulsory military service. Overseas Jews may also volunteer for service. No provision is made for alternatives to military service for conscientious

objectors although there are categories of persons exempt from military service. Military service usually lasts for 4 years for officers, 3 years for men, 21 months for women, with some variations for certain specialists such as medical personnel and new immigrants.

54. The applicant's agent referred to the following sources of information and media reports:

- Ynet News, IDF chief. Draft Dodgers have no shame, 31 July 2007
- Israel: Four women conscientious objectors sentenced to second prison term, 14 October 2008 and Israel: Conscientious objector Neta Mishli sentenced to 20 days imprisonment, 24 April 2009
- Conscientious objector to IDF service jailed, 20 August 2008
- Amnesty International Report 2008: Israel and the Occupied Palestinian Territories, also see WRI articles
- Dani Ben Simhon - Conscientious Refusal - Those who say "No!", January - February 2002.
- War Resister's International - Israel: WRI Affiliate New Profile raided by police, 4 May 2009.
- War Register's International, Israel: Four women conscientious objectors sentenced to second prison term, 14 October 2008.
- War Register's International, Israel: Conscientious objector Neta Mishli sentenced to 20 days imprisonment, 24 April 2009
- Ynet News, Conscientious objector to IDF service jailed.
- Ynet News, IDF Chief: Draft dodgers have no shame.
- *Erduran v Minister for Immigration & Multicultural Affairs* [2002] FCA 814 (27 June 2002).
- N03 / 47474 [2004] RRTA 292 (14 April 2004).
- Amnesty International Report 2008 - Israel and the Occupied Palestinian Territories
- *AZAAB -v- Minister for Immigration and Citizenship* [2009] FCA 248 (27 March 2009)

55. The applicant's agent also submitted the signed original of the statutory declaration (declared by the applicant [in] May 2009 the draft of which was submitted to the Tribunal [in] June 2009) to the Tribunal.

SUMMARY OF THE CLAIMS

56. The applicant has given a variety of reasons as to why she does not wish to return to Israel:

- (visa application form) *this situation (like terrorists) bombing busses and restaurants in the middle of the day the people in Israel just got used to*

this situation so they don't care anymore [for] one another. So I just can't live like that, I can't go back home to my country and just live in fear all the time, and watch my neighbours, friends or even my family die.

- (oral evidence at the hearing before the first Tribunal [in] September 2007).

Israel – as we all know, it's a really hard place to live. Like, apparently all of our neighbours just want to get all the Israelis out of Israel and have the country for themselves. So some people living in Israel just choose to live with this situation, just look at it as an ordinary thing, like you wake up in the morning, maybe one of the buses right next to you will blow up and people will be dying and life goes on. I don't think – I don't see it that way, just

... and I just couldn't go back to the mess in Israel. That's the only thing. I just think that what's going on is wrong – what's going on in our side and also in their side, what our army doing to them – it's also wrong. I just can't live with it being – and this is why I think I just – I need you to let me stay here.

And in relation to further army service, she said:

And if I won't go, so they just come and take me and put me in gaol or something like that.

Yes, I understand how it works. This applies to all Israeli citizens?

Yes.

...

Well, I can live my life as I did before I came here, and just in fear that the next place that I'm going to be is going to blow up by a terrorist or something. And also the army – it's also arrest you to go back there and something can happen. You're just frightened to go back there.

This evidence was found by the Federal Court to have given rise to an unarticulated claim of a fear of persecution as a conscientious objector.

- (statutory declaration submitted to this Tribunal) *Israel requires that even after an individual has completed their compulsory military service of two years, that women complete an additional 30 days per year military service, until she reaches the age of 35 years.*

The obligation to perform military service is enforced by the authorities. If I had refused to go I would have been taken to gaol by the military police and would probably be in gaol for at least 30 days or more. I would end up with a criminal record and my future education and work appointments would be limited. At the time I had no thought of refusing to do my military service.....

Since I have been living in Australia I have come to question the politics and belief systems I have learned in Israel. When I was in Israel I did not

question anything. I was brainwashed by my education and by all of the popularly held opinions of most Israelis. Most Israelis consider our Arabic neighbours to be enemies of Israel. Everyone just assumes that this is the case. No one in Israel, that I knew at least, has made an effort to consider the perspective of our neighbours like the Palestinians.

Since I have been in Australia I have come to question many of these things.

I am now opposed to the mainstream political position of Israel towards its neighbours and in particular towards the Lebanese and the Palestinians. I think that Israel's refusal to recognise Palestine and efforts to control the Palestinians by withdrawing services like electricity and water which are entirely under the control of the Israelis is cruel, inhumane and potentially dangerous for Israel. I do not believe in violence and I do not believe in a violent solution to the problems in the Middle East.

I believe that the Israeli military just does the work of the Israeli government which is to put down and suppress its neighbours in a violent way and I cannot now support the Israeli government or the Israeli military.

If I had to go back to Israel I agree that I would be afraid of just general living in Israel. I would be afraid of being blown up at a cafe because of a terrorist attack, that is true. I would also find myself unable to keep my views, my opposition to the mainstream politics of Israel to myself. Now that I have seen how the world can work, and how it is possible to live peacefully, I would publicly express my opposition to the Israeli government policies. If I went back to Israel I would be required to undertake military service. I would not do this military service. I feel unable to do military service because I am opposed to the objectives of the Israeli military and the objectives of the Israeli government as served out by the military.

I am obliged to do 30 days military service per year. I would not do it. I would be charged with an offence and sent to gaol. I don't want to go to gaol but I won't do military service. A record for refusing to do military service will shut lots of doors. It would be hard to get work. There would be no acceptance of these views by former friends. My parents know what I think and I have had arguments with them about politics.

I do ask the Australian Department of Immigration and Citizenship to consider all of my claims and to accept that I am a refugee. I cannot go back to Israel because if I go back there I will be persecuted because I will refuse to do my military service as required because of my political opinions and I will be persecuted and punished as a result of this decision

- (summary of oral evidence at the hearing before the second Tribunal [in] June 2009). She feared being forced to do military service. She wouldn't be able to silence herself about her objection to military service She would speak

out against the war and participate in demonstrations. She stated that she would object to further call up and be imprisoned by the military police. She will not have any excuses to avoid military service in the future, she will be asked to do military service and she will refuse on the basis of her political beliefs and be sentenced to jail.

AGENT'S SUBMISSIONS ON THE EVIDENCE

57. The agent made the following submissions in response to the Tribunal's concerns with aspects of the applicant's evidence at the hearing [in] June 2009:

- (in response to the suggestion that the applicant had easily avoided military service in the past and so would be able to avoid it in the future) At no time in the past has [the applicant] refused to undertake military service on the basis of her conscientious objection to military service and her political objection to the policy and programs implemented by Israel. We submit there is no guarantee whatsoever that [the applicant] will be able to come up with excuses for avoiding military service if she returns to Israel, or that those excuses will be accepted by the authorities. [The applicant] has stated clearly to the Tribunal that if she is returned to Israel she will refuse to undertake her military service obligations and she will cite as her reason for objecting to that service, her political and conscientious objection to that duty.
- In these circumstances we submit that [the applicant's] case is akin to those faced by the Bangladeshi homosexuals in S395. It would be an error on the part of the Tribunal to find that [the applicant] is not a refugee on the basis that she can avoid future military service by being "discreet" in the sense of coming up with non-political excuses for avoiding future military service.
- The applicant's conscientious objection to military service is an expression of her political opinion. The applicant fears persecution on the basis of her political opinion. In addition, the applicant fears persecution on the basis of her membership of a particular social group, being individuals in Israel who object to military service on the basis of conscience.

COUNTRY INFORMATION

58. The Tribunal has considered the country information provided by the applicant's agent and considered information available on its own resources. Of particular relevance is the following information:

- There is no provision in Israeli law to excuse citizens or permanent residents who have already served in the military from service on the basis of their conscientious objection.
- Section 29 of Defence Service Law states that in the case of a woman of any age from 18 to 34 years annual reserve service consists of up to 31 days of service every year
- Section 39 of the Defence Service Law states that the following persons shall be exempt from the duty of defence service: the mother of a child, a pregnant woman, a married woman, a woman who by reasons of conscience or

reasons connected with the family's religious way of life prevent her from serving in defence service, or a person who considers herself aggrieved by a decision of an authority may object there to before objection committee appointed by the Minister of defence

- "Although the law treats female conscientious objectors more generously than males, this is not to say that Israel fully recognizes the rights of female conscientious objectors to exemption from military service. Female applicants face difficulties in seeking official recognition and exemption from military service. Women sometimes faced long delays before the exemptions committee hears their applications. Like the conscientious objection committee, members of the exemptions committee appeared to view their role as being a way of accommodating the applicant within the IDF rather than conducting an independent and impartial assessment as to whether the applicant is a genuine conscientious objector.

Additionally the Israeli law does not recognize the right of women who have already served in the IDF to seek exemption from military service on grounds of conscientious objection

Women are only entitled to submit applications to the committee before they are called up for the first time for military service." (From "Israel the price of principles: imprisonment of conscientious objectors" Amnesty International September 1999, underlining is the Tribunal's)

- Section 40 of the Defence Service Law provides the exemption for reasons of religious conviction of must declare that she observes the dietary laws of home and away and this does not ride on the sabbath before a civil court or a judge of the rabbinical court
- Section 46 of the Defence Service Law creates an offence of failing to perform military service punishable by up to five years imprisonment
- Citizens who object to military service on religious grounds are exempt from service, while citizens who object to military service on political or moral grounds are imprisoned.
- Media report: "Israel and the occupied territories: Israeli teenagers jailed for refusing to serve in the army" 19 December 2008
- Media report: "Israel and the occupied territories: more Israeli women dodging the draft" 18 March 2009

RELEVANT LAW

59. As indicated above, Australia is a party to the Refugees Convention and the Refugees Protocol and generally speaking, has protection obligations to people who are refugees as defined in them. Article 1A(2) of the Convention relevantly defines a refugee as 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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

60. In the case of *Erduran v Minister for Immigration and Multicultural Affairs*, (2002) FCA 814 (27 June 2002) Justice Gray was of the view that:

Forcing a conscientious objector to perform military service may itself amount to persecution for a convention reason.

61 His Honour notes at [18]:

.. Laws relating to compulsory military service for all men of a certain age are generally to be regarded as laws of general application. Liability to punishment under a law of general application does not ordinarily provide a foundation for a fear of persecution for a Convention reason. As the Tribunal said, if a law is applied in a discriminatory manner to persons within the protected categories, its application will amount to persecution for a Convention reason. Thus, if persons of a particular race, religion or political opinion are more likely to be punished, or if their punishment is likely to be of greater severity, than others to whom the law applies, this may amount to persecution of those within the group concerned. (the Tribunal's underling)

And, later, at [28]:

.. It may be that the conscientious objection is itself to be regarded as a form of political opinion. Even the absence of a political or religious basis for a conscientious objection to military service might not conclude the inquiry. The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason. It is well-established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason. .. (the Tribunal's underling)

62. On 8 October 2008 the Federal Magistrates Court dismissed the application for judicial review by the applicant (*AZAAB v the Minister* (2008) FMCA 1380).

Although an appeal against the decision by the Court was upheld by the Federal Court, the Federal Court did not take issue with the Federal Magistrate's statement that:

Compulsory military service in the context of conscientious objection which has a basis in religious or political views or membership of a social group may amount to persecution within the meaning of the Convention.

63. As indicated above, [in] March 2009, the Federal Court found that the applicant's evidence to the first Tribunal gave rise to an unarticulated claim of a fear

of persecution as a conscientious objector. In *AZAAB v the Minister* FCA (2009) 248 (27 March 2009) Mansfield J held at paragraph 19- 20 that:

there was also squarely raised on the material a claim that the appellant feared persecution by reason of being a conscientious objector to further compulsory military service. That claim was not addressed by the Tribunal. It should have been. If it was, and if it was addressed in the manner set out in [6] above, that claim would have been incorrectly addressed for the reasons discussed by the Federal Magistrate. The Tribunal would have needed to consider, in the appellant's particular circumstances, the reason for her objection to compulsory military service to determine whether the consequence of such objection might amount to persecution for a Convention reason. Those questions were not considered by the Tribunal.

The claim was not specifically articulated, but in the passages I have referred to it is apparent that:

- (1) the appellant expressed criticism not simply of the Palestinian or other terrorist activities but also of the response of the Israeli government;
- (2) she did not see the situation as "an ordinary thing" where she would simply live with that situation; and
- (3) she adverted on two occasions to the prospect of being imprisoned by the Israeli government for refusing to do further compulsory military service, and (on one of those occasions) of a fear of that consequence

64. The Court also referred to considered paragraph 28 of *Erduran* where Gray J said:

The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason. It is well-established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention

DISCUSSION AND FINDINGS

65. The applicant's claim to be a conscientious objector was first hinted at in the hearing before the first Tribunal and subsequently articulated in a statutory declaration and her evidence in the hearing before the second Tribunal. In light of the applicant's failure to mention that she was a conscientious objector in her initial statement (in her visa application form), the Tribunal had some doubt as to whether the claim that she was a conscientious objector was genuine or an embellishment. The Tribunal notes the applicant's explanation that she was unrepresented at the time she made the statement and notes that she did refer to military service in her application form, albeit without indicating that she would refuse to do military service on the basis of being a conscientious objector. The Tribunal is, on balance, prepared to accept that the applicant's failure to mention that she was a conscientious objector in her visa application form was due to an oversight and ignorance of the need to particularise the Convention

ground which is being relied upon and does not undermine the credibility of her claim to be a conscientious objector.

66. The Tribunal also had, in light of the applicant's evidence about her avoidance of previous military call-ups, some misgivings about the extent to which her obligation to perform military service has been, and would in the future be enforced by the authorities.

67. The Tribunal is mindful, however, that a person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. Further, while a "real chance" is one that is not remote or insubstantial or a far-fetched possibility, a person can be said to have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

68. With that in mind and having considered the country information, the Tribunal is satisfied to the degree necessary that the applicant would be liable for further call-ups and that it would be difficult for her to avoid those further call-ups. The Tribunal makes the following findings:

- The applicant is a 27 year old female citizen of Israel, born in Israel [in] 1982.
- Between October 2000 and July 2002 she undertook compulsory military service in the Israeli Army.
- Israel requires that even after an individual has completed their compulsory military service of two years, that women complete an additional 31 days per year military service, until she reaches the age of 34 years.
- The obligation to perform military service is enforced by the authorities.
- The applicant is genuinely objects to the practices of the Israeli military
- As an individual who has already completed two years military service the applicant would find it difficult to obtain exemption from the exemptions committee in light of the country information that "Women are only entitled to submit applications to the committee before they are called up for the first time for military service."
- If returned to Israel the applicant would be forced to be discreet about her political opinions to avoid punishment and would be forced to undertake additional 31 days per year military service, until she reaches the age of 34 years. This would amount to persecution for a Convention reason (political opinion and membership of a particular social group, namely conscientious objectors)

APPLICATION OF THE LAW

69. The Tribunal is satisfied that the applicant meets the definition of "refugee". Whilst the applicant fears persecution by the organizations, or members of those organizations, that are hostile to Israel (such as Palestinians and terrorists) she is also in fear of the ramifications of refusing to undertake further military service. Although the requirements under the Defence Service Law are of wide application, the Tribunal does

not consider that they are of *general* application given the eligibility for exemption based on, for example, incompatibility with adherence to orthodox religious practice or (where the individual has been called up for the first time), conscientious objection to military duty. Even if the Defence Service Law were to be regarded as a law of general *application* the principle that treatment under a law of general application will not amount to Convention-related persecution is subject to the proviso that it does not *impact differentially* upon a particular individual by virtue of their race, religion, political opinion or membership of a particular social group. Applying *Erduran*, if persons of a particular race, religion or political opinion are more likely to be punished, or if their punishment is likely to be of greater severity, than others to whom the law applies, this may amount to persecution.

70. The applicant is exposed to the real chance of a differential impact of the Defence Service Law (either being forced to serve against her conscience or face prosecution for refusing to serve) by reason of the Convention grounds of her membership of a particular social group (conscientious objectors) and political opinion (conscientious objection).

CONCLUSIONS

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

DECISION

72. The matter is remitted for reconsideration with the direction that the applicant satisfies section 36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. prrt44