N03/47474 [2004] RRTA 292 (14 April 2004)

REFUGEE REVIEW TRIBUNAL

DECISION AND REASONS FOR DECISION

RRT Reference: N03/47474

Country of Reference: Israel

Tribunal Member: Ms Patricia Leehy

Date decision made: 14 April 2004

Place: Sydney

Decision: The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

In accordance with section 431 of the Migration Act 1958 the Tribunal will not publish any statement which may identify the applicant or any relative or dependant of the applicant.

BACKGROUND

The applicant, who claims to be a citizen of Israel, arrived in Australia and lodged an application for a protection (class XA) visa with the Department of Immigration and Multicultural and Indigenous Affairs under the Migration Act 1958 (the Act). A delegate of the Minister for Immigration and Multicultural and Indigenous Affairs refused to grant a protection visa and the applicant applied for review of that decision.

THE LEGISLATION

Under s.65(1) of the Act a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied.

Subsection 36(2) of the Act relevantly provides that a criterion for a protection 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. (Subsection 36(2) of the Act as in force before 1 October 2001 was substantially to the same effect.) “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”

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.

The High Court has considered this definition in a number of cases, notably Chan Yee Kin v Minister for Immigration & Ethnic Affairs (1989) 169 CLR 379, Applicant A & Anor v Minister for Immigration & Ethnic Affairs & Anor (1997) 190 CLR 225, Minister for Immigration & Ethnic Affairs v Guo & Anor (1997) 191 CLR 559, Chen Shi Hai v Minister for Immigration & Multicultural Affairs (2000) 201 CLR 293, Minister for Immigration & Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1, and Minister for Immigration & Multicultural Affairs v Khawar (2002) 210 CLR 1.

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.

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

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.

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.

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.

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.

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.

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

The Tribunal has before it the Department’s file, which includes the protection visa application and the delegate’s decision record. 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. The applicant gave oral evidence to the Tribunal.

According to his Protection Visa application, the applicant is a single male who is Jewish. He has travelled to a number of countries as a tourist as well as Australia. He provides no information about family members. The applicant was educated for a number of years, did his compulsory military service and had been employed in a variety of jobs.

The applicant claims that because he is Jewish and Israeli his life in Israel is impossible. He says that he is terrified by terrorist bombings. He also says that he is forced to serve in the reserve army for a period of days a year which is very dangerous and against his political beliefs. The applicant says that during the last several years he travelled overseas every time he saved enough money because he “cannot stand the stress of living in Israel”. He does not think that the Israeli government can protect him because they are not able to stop the terror groups. He fears that if he returns to Israel he might be a victim of attacks by one of these groups.

The applicant’s passport contains a valid US visa.

The applicant submitted a statement with his review application to the Tribunal. In the statement he reiterates that he is terrified of returning to Israel because he might be a victim of a terrorist suicide bomber. He believes that the Palestinians and Israelis are very far from achieving peace. He says that he has been on a few occasions very close to areas where terror attacks have taken place. He says that though he has a visa to the US, it does not give him any rights to work or live there. He says that the length of time a person can stay on a tourist visa is determined by US officials. Even though he has a visa for that country it does not give him "the liberty to live there". The applicant says that he has served three years in the Israeli Army, most of the time outside Israel's borders. He felt he was forced to act against his political beliefs and had no choice but to obey orders. People with the applicant's political views were abused by the other soldiers and officers. It was not in his power to object to a big system like the army. After the applicant's release from the Army he was called to the Reserve and his choice was to do it or to go to prison. The last time he was called he refused to go. He says: "After a long fight I succeeded to convince the army that it would not be safe to give me a weapon. I was not mentally capable anymore to fight against civil population." The applicant says he was not exempted permanently from the reserve, and he still fears that they will force him to go. He says that he has a conscientious objection against serving in the army especially in the Occupied Territories. He objects to the Israeli policy in regard to the Occupied Territories. The applicant says that the essential and significant reason for his persecution is his political opinion about Arabs, Palestinians and the Occupied Territories.

The applicant presented several documents at his hearing. The documents include country information (War Resisters' International (WRI) Report of 31 January 2003; Court Report of 15 April 2003 "Five Conscientious Objectors State Their case in Military Court"; WRI press release of 20 September 2002 re repeated imprisonment of conscientious objectors in Israel; WRI Report of January 2004, "Conscience on Trial"; Medical Report from a medical centre in Tel Aviv saying that the applicant was treated at the Centre. The report says that after psychiatric and psychological assessment he was diagnosed as suffering from a medical condition and treated with medication and counselling. The applicant also submitted a psychological report from a consultant psychologist in Australia. The report says that the applicant approached the psychologist for treatment of recurrent symptoms of his medical condition, following the rejection of his "latest application to extend his stay in Australia". The psychologist says that he had several meetings with the applicant in which he said that when he was a child he received daily beatings by his father. As a result of this he felt socially isolated and became introverted and submissive. While serving in the IDF found himself having to chase Palestinian stone throwers (many of them children). This caused emotional distress, seeing the fear and terrors his action inflicted on others, in the light of his own childhood experience. While the applicant received treatment in Israel, he "felt that the therapy success was limited due to the environment he lived in. Frequent bombing in public places and ongoing periods of military service has undermined the effects the treatment could have had." The applicant's condition gradually improved in Australia. The psychologist says that he finds the applicant to be a "genuine, honest and sensitive person" and that "the traumatic experiences of childhood abuse have made him weak and incapable of leading a normal life in Israel as it is today". The applicant also provided a further written submission.

In the submission, the applicant said that he was the eldest child of his family, and that he has been the victim of violence for his entire life. He says that his father used to beat him on a daily basis from when he was 5 years old. The applicant's teacher intervened when he was a teenager and had realised that he was being beaten at home. After that he was not beaten on a daily basis and his situation improved. The applicant says that he tried to put his childhood behind him, but when he entered the army all his emotions "exploded out". He says he was forced to serve as a combat fighter for 3 years, which severely damaged his mental health. He was sent to military service as soon as he finished high school. He had to use violence against children and against his will. He thought that if he refused he would be sent to prison. His childhood experiences of being locked up by his father for hours made him terrified at the thought of prison. He says that every time he saw soldiers fighting children he would feel "the same horrible feelings" he had as a beaten child. On one occasion he refused to fight a group of children. He was punished by the commander who made him stay at army base for a period of time without any home leave. The applicant's army service coincided with the intifada. Because he was young and naïve, he was unable to handle the situation very well. He suffered depression.

The applicant says that he has a conscientious objection to serving in the IDF because he is opposed to Israeli government policy relating to Arabs, Palestinians and the Occupied Territories. When he began his service in the army he began to wonder what he could do when his state was destroying the "lives and rights of three million people". He was distressed by the contradiction between his own values and those of the state. He was particularly distressed by having to fight against children and women in the Intifada. After he finished his service he knew he would not be able to do it again. Every time he was called up to the reserve, he went overseas to escape service.

The applicant says that he has been called to the reserve army many times since he completed his compulsory service. He tried to explain to the army that he could not serve, but their answer was either you go to the army or to prison. It happened that on a few occasion the applicant was in Israel when he got the call up notice. He could not get permission to leave and he was forced to go to the reserve service. On the second occasion of his reserve service he had to get psychological treatment and medication.

The applicant says that his parents are still receiving call up notices even though they had told the IDF that the applicant has left Israel.

The applicant says that he is terrified of the bomb attacks in Israel.

The applicant says that if he refuses to do reserve service he faces a gaol term. If he speaks out he will be imprisoned. He says that the punishment imposed as a result of refusal to service is imposed in a discriminatory fashion for political reasons.

There was an interview with the applicant in relation to his US visa immediately prior to the hearing. The object of the interview was to establish whether the applicant had a right of entry into the US. The applicant said that it was his belief that even though he had a valid visa, the US authorities could refuse him entry. In any event, there was no guarantee of work or a stay longer than 6 months. The applicant said that he was in the US previously for a period of time. The applicant had obtained the visa in order to

avoid having to do Reserve duty with the IDF by travelling to the US. He was asked at the interview whether he considered applying for asylum while in the US. He said that he did not. He had no friends there and found it daunting. He did not know how to go about applying for asylum. The applicant was advised that information available to the Tribunal indicated that his US Visa did not in fact provide a right of entry to the US.

At the Tribunal hearing, the applicant was asked about his family. He said that his family lives in Tel Aviv. His father is a retired. He has siblings. They have done their compulsory military service. The applicant said that he was last in Israel over a year ago. At that time he stayed with his family. He spent only a short period of time in Israel on that occasion.

The applicant stated when he first travelled overseas to avoid service and how long he was away including a period of time in Australia. He was asked why he did not apply for asylum at that time. He said that he did not know about it. He then returned to Israel for a period of months, before leaving again. He then went to other countries and stayed away for several months. He then remained in Israel for a few years. He lived first at home, and then in shared accommodation in Tel Aviv.

The applicant was asked whether he was called up for Reserve service during a particular five year period. He said that he was called up on many occasions. Sometimes he was called up for training exercises but he spent a period of many days in Location A at that time. His unit had a list of suspected people and they would look for them in house-to-house searches at night. They would wake up families, including children, while they looked for weapons under beds. During the day they would shoot at people who were firing at them. The applicant said that he would freeze and could not do anything. He was reprimanded by his Commander and punished by not being allowed home for leave.

The applicant was asked about his 3 years' compulsory military service. He said that they were stationed in the West Bank and in Lebanon. In Lebanon they spent about 3 months inside the country and another three months on the border. When they were in the Occupied Territories it was the time of the intifada and they had to fight innocent civilians. He stated when he was first called up for the Reserve, which involved training only. He left Israel before he got the next letter ordering him to do Reserve service. The letter arrived after he left.

The applicant was asked whether he served in the Occupied Territories during a particular 2 year period. He said that he had not. He said that he remembered he was called up for Reserve duty every year or more often after his compulsory service. He said he remembered he was called up about 2 years after that period. He did not go then because he had an injury from which he took a while to recover. He was asked when he last received a call-up notice for Reserve service. He when it was, before he left Israel. He was asked what Reserve duty he had done. He said that he served for many days in the Occupied Territories, in Gaza. He was not allowed to go home. He was told that if orders were not obeyed he would be put in gaol.

The applicant was asked about his application for exemption from military service. He said that he first applied for exemption when he last returned to Israel after his time in

Location A. He went once to see an army psychologist, who said to him, “If everyone said the same thing, the Arabs would take over Israel”. He later applied again to the Army psychology unit, after he got another call-up notice (this was after his service in the Occupied Territories), but did not get exemption. The applicant said that he thought he had convinced the army psychologist at that time that he was unable to serve, but he then got another call-up, and he went to see a private psychiatrist. His last call up was in the following year, and he left the country. He did not have any problems leaving. He went to Country A, then Country B. He went back to Israel and stayed several days before leaving again. He came to Australia for several weeks. He left Australia so as to extend his visa. He was asked why he had not applied for a Protection Visa on that visit to Australia. He said that he wanted to go home because he was missing his family and friends. However, he began to feel much better in Australia. He had been very stressed in Israel, but the stress went away in Australia. He met a nice girl in Australia.

He was asked about his relationship with his family. He said that he did not have a good relationship with his father. They do not talk much. His mother misses him, but understands what he has done. His sister has visited him in Australia, and they speak once a week on the phone. His brother is much tougher than the applicant. He has lots of friends in the army and does his Reserve service almost as recreation. The applicant said that because of his own experience with his father, he hated children getting hurt. The applicant was asked whether his brother had had the same experience with their father. He said that his father did not beat his brother. He was exhausted after the applicant. The applicant said that because he would be beaten over his homework, he undertook to check his brother’s homework to save him from beating.

It was put to the applicant that in his Protection Visa application, he emphasised his concern about suicide bombers rather than about military service in the Occupied Territories. He said that when he left Israel, suicide bombers were on his mind. He did not want to think about the Army at that time. He was asked whether he was still concerned about terrorists. He said that he is still concerned. He is always checking his E-mail and the Internet to see what is happening. For example, recently there was news that the Israeli had killed children in an attack in the Occupied Territories. The applicant said that there were two issues for him: the terrorist bombings in Israel and service in the Occupied Territories.

The applicant was asked why he applied for a Protection Visa when he had not done so previously. He said that he had decided that he had had enough. He noticed that he did not wake up stressed, and realised that he wanted to stay. Originally he did not plan to apply for asylum. He wanted to settle down, but it was always in his mind that he had to do Reserve service in the Occupied Territories.

It was put to the applicant that information available to the Tribunal indicated that men of over 35 are not often called up for Reserve service, and the applicant is in that age bracket. He said that he had not heard about this, and in fact he had been supposed to serve a couple of years ago. The applicant was asked if he had any call-up notices with him. He said that he had not, but his family continued to receive them when he was away. He said that he could get them sent to him. He was given 21 days to provide call-up notices and make any additional submissions.

The applicant was asked what he thought about Israeli policy in the Occupied Territories. He said that there was no right and wrong in the situation. He said that in the Occupied Territories, civilians were mixed with combatants, and this is a situation against all the Geneva rules. There are Palestinian groups which want to make peace, and others which try to stop peace being made. The IDF is constantly looking for suspects. It keeps on with its search even in the peace process. With ceasefires, it is always one side which breaks them. In Israel people are sure that the peace process is not going to work. People are getting hurt on both sides. Innocent people are hurt, and it is like a guerrilla situation rather than a war. The Israeli policy is not right. The applicant was asked what he thought about the building of the wall as a way of protecting Israeli citizens. He said that it won't stop the terror, though the government wants to protect its citizens. It might be the only thing to do to stop the terror, but it is not the right way to treat others. It is like a kind of gaol, "That's your place. Just stay inside, keep suffering". On the other hand, the Palestinians are not doing much to keep the peace process alive. Hate has built up over the years and spiritual leaders are needed. The applicant was asked whether he had discussed these things with others when he was doing reserve service. He said that he could not. It was better to keep quiet.

The applicant was asked whether he had had problems doing his initial 3 years compulsory service. He said that in the beginning he was like a robot which obeyed orders, but it took its toll. In Lebanon it was like a real war. They were facing soldiers. Over time the applicant started to think about things, and "got softer". He said that he was a good soldier. He did his training and was in good shape. But in the Occupied Territories he was very confused. He could not sleep even when he was doing his military service. Once he took a gun and while he was half-asleep he fired it in the air. He did not know why he had done this. His commander came and asked him what he was doing. He said he saw a Palestinian.

The applicant was asked what he feared. He said that he would feel very stressed and fearful when he got a letter or phone call calling him to do reserve duty. He is also afraid of suicide bombers. He is very uncomfortable when surrounded by lots of people. He watches out for people on buses. He is in constant fear. Sometimes he fears that the bombers are following him even though this is not the case. He once left a shopping mall in Israel just before a bomb went off.

The applicant was asked whether he was still receiving treatment. He said that he was taking medication for over a year in Israel, and that his sister sends him medication. However the dosage decreased, and he stopped the medication when he was in Australia. He started seeing a psychologist in Australia after the Department refused his Protection Visa application.

The applicant responded to the Tribunal's request for a copy of a call-up notice. He sent the original of a notice in its envelope which had various stamps on it. A translation of the letter and the writing on the envelope was provided. The letter was stamped Army Post and dated. It said that it was a reminder notice for him to respond to a call-up for reserve duty for a particular period of time for training. The applicant is asked to confirm by detaching a slip on the letter that he has received the notice.

The applicant also wrote a letter to the Tribunal. In the letter he says that in Israel if you object to military service because you don't agree with what Israel is doing in the Occupied Territories, you are not only not exempt, but are punished for refusing. He says that people who refuse duty in the Occupied Territories end up in prison on repeated occasions. He says that he can be called up until he is 50, and could receive repeated prison sentences. He says that he has heard stories which scare him because the prison guards hate those detained for this reason.

The applicant says that he saw a military psychiatrist who promised that he would recommend at least a temporary release from future service. The army ignored him saying they could not afford to lose trained fighters in his specialist field. He saw a private psychiatrist in Israel and he said that he could not be involved in active service any more. The IDF did not acknowledge the applicant's condition and ignore his psychiatrist's assessment. The applicant says that every time his parents receive another call up for him to do reserve service they contact him. This always caused him great psychological distress. His private psychiatrist contacted the military psychiatrist saying that he was worried about the applicant's health and that he was not suitable for service.

The applicant says that soldiers such as himself could never be treated fairly if he were given a prison sentence. For him to say "no more" is seen in Israel as the ultimate betrayal. The applicant says that the situation is different for him than it is for other Israelis who are called up because

He has been diagnosed with a medical condition and has been assessed as not fit for service; the defence force rejects both opinions;

He is trained in covert and urban operations and such training is more than ever in demand, so he will be called up;

If he returns he will refuse the call up because of his beliefs and his health;

He will be gaoled if he refuses service;

He will not be treated fairly because he has been trained in the IDF;

His options if he returns to Israel are to serve in the Occupied Territories or go to gaol; he cannot deal mentally with such options.

The applicant says that the army's treatment of exemption from service is discriminatory.

The Tribunal also had before it independent information relevant to the applicant's claims.

In relation to the rights given by the applicant's US visa, the Tribunal made written enquiries in relation to a visa of the kind held by the applicant previously. The Head of the Visa Unit with the Consulate General of the USA in Australia sent the following reply by email:

In response to your subject inquiry:

1. No visa entitles the holder to automatic entry to the U.S. A visa merely entitles the holder to travel to the U.S. and apply for entry.

2. Visa holders may be called upon to demonstrate at the time of application for entry that they are entitled to admission in a particular category, e.g. visitor for business or tourism. That is, the traveler may be required to demonstrate that they do indeed intend to enter the U.S. for the purpose indicated by the visa. Immigration inspectors may also check for other ineligibilities such as on health, criminal, or national security grounds.

3. INS exercises discretion within the bounds described above in refusing entry to applicants.

4. INS officers may take this fact into account, but such decisions would be intensely fact-specific. It is therefore impossible to draw any general observations on this point.

(Consulate General of the United States of America 2002)

It is indebted to Member Whitlam for collating much of the country information which follows.

All Israeli citizens and permanent residents are liable to perform military service. Arab Israelis may volunteer to perform military service but few do so.

Exemptions from military service are given to or are available for Jewish and Druze religious scholars, Orthodox Jewish women, married women, pregnant women, mothers, all non-Jewish women and all Palestinian men except for the Druze and Circassians.

Military service lasts for three years for men and 20-21 months for women. Reserve service is required up till the age of 51 for men and up to 24 for women. Reserve duty involves up to 43 days annually. About a third of Israel's men are called up for reserve duty. The reserve forces are about 450,000, more than double the size of the standing army. Men of over 35 are often not called up for reserve duty. Usually men are discharged at the age of 41 or 45. Women are as a rule not called up for reserve duty at all.

Citizens generally are free to travel abroad and to emigrate, provided they have no outstanding military obligations.

Male conscientious objectors (COs) usually try to claim exemption through 'unsuitability' under article 36 of the National Defence Service Law. Such claimants appear to be dealt with in a non-systematic way. There is an informal military board known as the Conscience Committee which deals with persons who state to an Israeli Defence Forces (IDF) official that they cannot perform military service on grounds of conscientious objection. Official figures show a low number of accepted applications and many COs (especially selective objectors) never get referred to the Committee. In

addition, many COs are not aware of the existence of the Committee and thus do not apply.

Applications by absolute pacifists are believed to be more likely to be granted than those made by partial objectors. And an application is more likely to be granted if it has not been the focus of public attention, as the authorities are not keen on CO cases turning into political cases.

Failure to fulfil a duty imposed by the National Defence Service Law is punishable by up to two years' imprisonment. Attempting to evade military service is punishable by up to five years. Refusal to perform reserve duties is punishable by up to 56 days, the sentence being renewable if the objector refuses repeatedly. Those who disobey call-up orders are regarded as refusing to perform military service and can receive five years. In practice, sentences do not exceed more than a year.

If an application for exemption from military service is rejected, the individual is ordered to perform military or reserve service. Continued refusal may lead to being disciplined or court-martialled. Military courts have sentenced COs to up to 1.5 years. Sentences are frequently much shorter but may be imposed repeatedly. They may be from seven to 35 days and may be renewed up to five times. The sentence for refusing to perform reserve duty in the Occupied Territories is usually 28 days. Usually COs get exempted after serving a total of more than 90 days but recently COs were sentenced again and again after having spent more than 150 days in prison.

(Sources: War Resisters' International, Conscientious objection to military service in Israel: an unrecognised human right , 31 January 2003 (http://www.wri-irg.org/en/index.html - accessed 28 April 2003); US State Department, Country reports on human rights practices 2003, March 2004, on Israel and the occupied territories; ' Israel's reservists angry over army duty extension proposal', Associated Press, 13 March 2003 (FACTIVA); Amnesty International, Israel: the price of principles: imprisonment of conscientious objectors , September 1999, AI INDEX 15/49/99.)

War Resisters International also states, in relation to selective conscientious objectors:

There are many COs whose applications for exemption or for assignment to a post within the pre-1967 borders (in cases of selective conscientious objectors) have been rejected but who continued to refuse to serve, and have been sent to prison ... In other cases informal arrangements within the armed forces are apparently made with reservists who decline to serve in the Occupied Territories. This is at the discretion of the individual commander, each case being dealt with on its merits without providing a precedent. In such cases arrangements may be made within the unit itself, which may lead to assignment in Israel, postponement of service until such time as the unit would not be sent to the Occupied Territories, unarmed service within the armed forces or discharge on medical, domestic or work grounds. However, there is no legal right to this kind of arrangements; the selective conscientious objector is left at the mercy of his/her commander.

In relation to the matter of call-up for reserve duty of a person overseas, the Tribunal contacted the Consulate General of Israel in Sydney on 23 December 1997 requesting

information about the treatment of a person who had served compulsory military service but failed to perform reserve duty whilst overseas. The Israeli Consulate in Sydney responded as follows:

Any Israeli citizen who has completed compulsory army service, is not considered a deserter by the army for missing his annual reserve duty while abroad. Moreover, the annual reserve service is not accumulated while the reservist is overseas.

There is no punishment or stigma of any kind relating to reservist being abroad while called to reserve duty. Every Israeli citizen has a right to spend as much time abroad as he wishes, whether on vacation, business or study, regardless of his reserve duty. However, in cases of war, when an absentee reservist is called to return to Israel for military service, and does not obey, he might be asked to provide a satisfactory explanation for his insubordination. (Consulate General of Israel 1997)

Amnesty International, in its 2003 Annual Report (released May 2003) covering events of 2002, includes these comments on Israel and the Occupied Territories:

At least 1,000 Palestinians were killed by the Israeli army, most of them unlawfully. They included some 150 children and at least 35 individuals killed in targeted assassinations. Palestinian armed groups killed more than 420 Israelis, at least 265 of them civilians and including 47 children, and some 20 foreign nationals, in targeted or indiscriminate attacks. Prolonged closures and curfews were imposed throughout the Occupied Territories and more than 2,000 homes were destroyed. Thousands of Palestinians were arrested. Most were released without charge, but more than 3,000 remained in military jails. More than 1,900 were held in administrative detention without charge or trial, and some 5,000 were charged with security offences, including involvement in attacks against Israelis. More than 3,800 were tried before military courts in trials that did not meet international standards. Ill-treatment of Palestinian detainees was widespread. Israeli soldiers used Palestinians as "human shields" during military operations. Certain abuses committed by the Israeli army constituted war crimes. These included unlawful killings, obstruction of medical assistance and targeting of medical personnel, extensive and wanton destruction of property, torture and cruel and inhuman treatment, unlawful confinement and the use of "human shields". The deliberate targeting of civilians by Palestinian armed groups constituted crimes against humanity...

At least 158 Jewish Israelis who refused to perform military service or to serve in the Occupied Territories were sentenced to terms of imprisonment of up to six months. They were prisoners of conscience. (CISNET Document CX78904)

The number of those refusing to serve in the Occupied Territories in Amnesty International's 2003 Report represents a considerable increase over its 2002 Report (33 objectors) and its 2001 Report (5).

Amnesty International had earlier issued a Press Release relating to those refusing military service in the Occupied Territories:

Amnesty International has today written to Shaul Mofaz, Israeli Minister of Defence, to express concern over the imprisonment of Israeli conscripts and reservists who

refuse to perform military service or to serve in the Occupied Territories, as they believe that by doing so they would contribute to, or participate in, human rights violations

Some 180 conscientious objectors and refuseniks have been jailed in the past 26 months.

"Members of the IDF (Israeli Defence Forces) who commit grave human rights violations and war crimes, such as killing children and other unarmed civilians, recklessly shooting and shelling densely populated residential areas or blowing up houses on top of people and leaving them to die under the rubble are not brought to justice and held accountable for their acts."

"At the same time conscripts and reservists who refuse to serve, precisely to avoid participating in such acts, are sent to jail for months. What kind of message is such a policy sending to Israeli society?" Amnesty International asked.

The impunity enjoyed by IDF members responsible for human rights violations and the imprisonment of conscientious objectors are grave concerns, each in their own right; the combination of both constitutes an extremely worrying trend.

Conscripts who make it known that they are unwilling to serve on grounds of conscience and because they believe that the army is committing human rights violations are imprisoned, whereas other conscripts are routinely granted deferral or exemption from performing military service on religious grounds. (AI Index: MDE 15/169/2002, 18 December 2002, CISNET Document CX78849)

Since that time, there have been reports of a number of people refusing military service in Israel.

BBC News (h ttp://news.bbc.co.uk) published the following on its website on 25 September 2003:

A group of Israeli air force reservist pilots have been widely condemned at home for their refusal to take part in attacks on the Palestinian territories.

Israel's military and political leaders, as well as the media, have hit back hard against the 27 pilots who signed a letter refusing to carry out targeted killings or other operations in the West Bank and Gaza because they considered them "immoral and illegal".

According to Israeli radio, the deputy chief of the Israeli air force, Brigadier General Eli'ezer Skeydi, accused the pilots themselves of "immoral" action.

He was quoted as saying they were making "cynical use of the Israeli air force to express a civilian view".

He defended the tactics employed by Israeli forces who, he said, were making "a major effort to prevent harm to innocent people".

And Israel's chief of staff, Moshe Ya'alon, expressed alarm that the pilots had bypassed military commanders to speak directly to the media about concerns which were "political and not ethical".

"I feel that what they did should not be associated with the IDF in any way," he said.

The view from Israel's political leaders was equally damning.

Prime Minister Ariel Sharon said the "IDF (Israel Defence Forces) is not an organisation where you can do as you please," in comments carried by IDF radio. "This matter will be dealt with appropriately by the defence establishment."

Foreign Minister Shaul Mofaz called the pilots "conscientious objectors in uniform", adding that their action had "nothing to do with morals"... And newspaper commentators across Israel also questioned the pilots' rationale in submitting their joint letter.

In December 2003, BBC News reported that there has been strong criticism by the authorities of one group of reserve soldiers:

Senior Israeli officials have sharply criticised a group of army commandos who have refused missions in the Palestinian territories. Thirteen reservists from the elite Sayeret Matkal unit wrote to Prime Minister Ariel Sharon saying they would not be part of a "rule of oppression".

Deputy Defence Minister Zeev Boim told public radio the group should "face judgement", AFP news agency reported.

Three months ago, 25 pilots refused to take part in Israeli bombing raids.

"These soldiers should be stripped of their uniform and face judgement for their disobedience and rebellion, regardless of the unit in which they serve, whether they be pilots, cooks or mechanics," Mr Boim told public radio. (BBC News report, CISNET Document CX87437 of 22 December 2003)

In January 2004, War Resisters' International reported on the end of the trial of 5 “refuseniks” in Israel (“Conscience on Trial”). Having noted that treatment of objectors has become harsher in the past two years or so, WRI claims that a “new phase” is beginning in Israel’s treatment of “refuseniks” (the five on trial had refused to serve in the Occupied Territories):

On 4 January 2004, the "trial of the five" came to an end. The 11 months trial marathon finished with a harsh sentence: one year imprisonment for five young conscientious objectors, on top of the 11-14 months they had already spent in military arrest or "open detention" at a military base.

The "trial of the five" ... marks a new phase in Israel's treatment of conscientious objectors...

On 23 December the prosecution and the defence set out their arguments regarding the "punishment" of the Five. Prosecutor Kostelitz said: "What we have here are ideological criminals, and former Supreme Court Judge Yitzhak Zamir already noted that these are the worst of criminals, since they not only break the law, but flout its authority, and therefore should be doubly punished. The very fact that they are idealistic people and in many ways positive characters should be counted against them, since it helps them find followers and spread their law-breaking further into the society." (...) "These persistent lawbreakers must be made to render the military service which they owe to their country. It doesn't matter how long it will take: in the end they will be made to do it. If a heavier punishment and the fear of a still heavier one is the only way, then this way must be taken. It happened before. There were refusers as defiant as these ones, and the military courts knew what to do with them.

FINDINGS AND REASONS

On the applicant’s evidence, including the evidence of his passport, the Tribunal accepts that he is an Israeli national. Furthermore, on the evidence provided, including the country information relating to the applicant’s only current visa, his US visa (see page 13), the Tribunal finds that the applicant has no right of entry to any other country.

The Tribunal found the applicant to be a credible witness in the main, though it is of the view that the applicant, in part because of general anxiety and stress, has exaggerated aspects of his claims, including the frequency of call-up to the reserve of the IDF. The Tribunal was also concerned, initially, that the applicant’s main reason for not wanting to return to Israel was his fear of suicide bombers. However, his account of his experiences of military services in the Occupied Territories, and of his views on the policy of the Israeli government in relation to Palestine, convinced the Tribunal that he has a highly-developed subjective fear of being forced to serve in the Occupied Territories.

The applicant has claimed to fear to return to Israel for a number of reasons: that he will be forced to do reserve military service which is repugnant to him because of his political opinion and his psychological condition; that he will be punished for not doing reserve service; and that he will become the victim of suicide bombing by Palestinian militants.

The Tribunal accepts that the applicant completed his compulsory military service and that for a substantial part of that service he was serving in the Occupied Territories during the time of the first intifada. It further accepts that the applicant developed the view while serving in the Occupied Territories that it was repugnant to him to fight against civilians, particularly children, and that the Israeli government and the IDF should not be involved in this.

The Tribunal accepts that the applicant after he completed his military service, travelled out of Israel repeatedly over a period of some years because he wished to avoid being called up for reserve duty. It accepts that he was required to perform military service in Location A, and later in Gaza, and that following each of these occasions he applied to the army psychologists to be exempted from military duty. While he thought he had obtained a permanent exemption, he subsequently received

further call-up notices, most recently after he left Israel, for service in the following month. The Tribunal accepts the call-up notice submitted by the applicant as genuine.

The applicant claimed that because of his reluctance to carry out operations against civilians in the Occupied Territories, he was threatened by his superior officers, on one occasion with imprisonment. He was also punished by not being allowed to access leave during his military service. The applicant has claimed that he suffered severe psychological damage from having to serve in the army, particularly in the Occupied Territories, and submitted psychological reports from Israel, and from Australia, stating that he suffers from depression. The Israeli report does not explicitly link the depression with army service, though the most recent report in Australia does. The Tribunal accepts that the applicant has suffered serious and long-term psychological distress as a result of performing military service, particularly in the Occupied Territories. While he therefore suffered serious harm, it was not inflicted on him because of a Convention reason. That is, he was not singled out for reasons of his race, religion, nationality, membership of a particular social group or political opinion to serve in the Occupied Territories. While the Tribunal accepts that the applicant was punished by his army superiors by being denied leave, for his attitude to service in the Occupied Territories (a real or imputed political opinion), he was not otherwise harmed by them. The harm done to him by his army superiors in the past was not, in the Tribunal's view, sufficiently serious as to amount to persecution in a Convention sense.

The Tribunal is required to consider whether there is a real chance that the applicant will be persecuted if he returns to Israel in the foreseeable future. From the applicant's evidence at the Tribunal hearing, the Tribunal formed the view that he is most concerned that he will be required to perform duty in the army reserve, and that his refusal to do so will result in imprisonment. While the applicant claims that from his last return to Israel until he left Israel he was forced to serve only twice in the Occupied Territories, he was able to avoid service on other occasions, or was required only to perform military training. The Tribunal accepts that he left Israel for periods of time following his service and medical treatment, in order to avoid being called up to the reserve. The information at page 15 from the Israeli Consulate that "there is no punishment ... relating to reservist being abroad while called to reserve duty" does not conflict with the applicant's claims in this matter. The Tribunal finds that the applicant has not refused to serve in the past, despite his views on Israeli policy in the Occupied Territories, though he has attempted in a number of ways to avoid military service.

Nevertheless, the independent information makes it clear that the applicant will be liable for reserve service for some years, and that refusal to serve is punishable by a prison sentence (page 14). The information also indicates that gaol sentences have in fact been given to those who refused to perform military service (Amnesty International, page 15). The Tribunal is therefore satisfied that there is a real chance that the applicant will be required to do military service if he returns to Israel. It also considers that there is a real chance, in the current critical situation in the Occupied Territories that the applicant will be required to serve there. The applicant claims that because of his political beliefs and because of his psychological condition he will be obliged to refuse service in the Occupied Territories. It was evident at the Tribunal hearing that in the recent past, at least, the applicant has given considerable thought to

the matter of Israel and the Occupied Territories, and has arrived at the conclusion that he would not be justified in participating in military actions in the Occupied Territories, and would refuse service there. Taking into account all of the applicant's evidence, the Tribunal is satisfied that there is a real chance that, despite the fact that he has not refused to do reserve service in the past, he will refuse service in the future. Furthermore, the Tribunal is satisfied that if the applicant refuses to perform the service, he will be liable to punishment. The applicant has claimed that he would not be treated fairly if he were detained, by implication that he would be more harshly treated in detention because of his political opinion. The Tribunal accepts this claim, and finds that there is a real chance that the applicant would indeed be treated more harshly in detention, essentially for reasons of his political opinion as an opponent of Israeli policy in the Occupied Territories.

The Tribunal has carefully considered the issue of the punishment to which the applicant, in this case, would be subjected for refusing military service. It is aware that in Mijoljevic v MIMA [1999] FCA 834 Justice Branson observed:

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.

As her Honour noted in that case, the Federal Court has consistently held that conscription - even of conscientious objectors - will not of itself found a Convention claim. This is primarily because it lacks the necessary selective quality.

It is clear from the country information (pages 13-14) 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. The applicant's experience of approaching an army psychologist who appeared to accept his application for exemption is consistent with this. 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. Amnesty International regards such persons as "prisoners of conscience" (page 13). While the Tribunal has noted that there has been an increase in selective objectors since the beginning of the second intifada, and there is evidence that selective objectors routinely receive prison sentences of 28 days, on occasion receiving repeated sentences (War Resisters International, "Update on 12 imprisoned conscientious objectors and refuseniks", 22 January 2003; "Conscientious objection to military service in Israel: an unrecognised human right", 31 January 2003), it is also the case that conscientious objectors generally may be subjected to similar prison sentences and repeated sentencing (War Resisters International, Appendix to "Conscientious Objection", 31 January 2003). On a careful consideration of the evidence, the Tribunal is not satisfied that selective objectors (ie objectors on the grounds of political opinion regarding Palestine) are currently treated more harshly than conscientious objectors generally in the matter of their sentencing, though, on the

evidence of media reports and WRI's January 2004 report on the sentencing of 5 refuseniks (pages 16-17), this situation is changing. The language of some senior officials, including the Prime Minister, in relation to people refusing service appears to be very harsh, and the Tribunal is of the view that it must reflect the attitude of a substantial number of people in the community. Furthermore, the escalation of violence in the Occupied Territories, especially since the recent killing of the Hamas leader (22 March 2004), is, in the Tribunal's view, likely to lead to greater community disapproval of those opposed to the Israeli Occupation, a disapproval which could be expected to be reflected in sentencing of objectors.

In this case, there are a number of factors which have led the Tribunal to form the view that there is a real chance that the applicant will be treated more harshly in detention than would be the case for conscientious objectors generally. The applicant's evidence was to the effect that during his service during the first intifada it was made clear by his superior officers that his political views were unacceptable, and he was threatened with imprisonment, and subjected to punishment. There is no evidence that community opinion generally, nor the opinion of the authorities in particular, is any more favourable in relation to objectors to service in the Occupied Territories in the second intifada than it was during the first intifada. Not only the Prime Minister, Mr Sharon, is quoted as making implied threats against selective objectors, but the language of other senior figures in Israel indicates harsh opposition to refuseniks. The applicant is himself a traumatised person whose psychological state is not good. In these circumstances the Tribunal is satisfied that there is a real chance that the applicant would be treated more harshly than conscientious objectors generally if he were to be detained pursuant to a law of general application relevant to military service requirements in Israel.

CONCLUSION

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 satisfies the criterion set out in s.36(2) of the Act for a protection visa.

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.