# FEDERAL COURT OF AUSTRALIA

## Minister for Immigration and Multicultural and Indigenous Affairs v WALU

## [2006] FCA 657

**MIGRATION – protection visas – well-founded fear of persecution claimed to be based on conscientious objection on religious grounds to compulsory military service – requirement for conscientious objector to serve 12 months of civil service instead of eight months in the military – findings of Tribunal that additional four months was in effect forced labour amounting to persecution involving serious harm**

**Held: Tribunal failed explicitly or inferentially to ask the correct question**

*Judiciary Act 1903* (Cth) s 39B
*Migration Act 1958* (Cth) ss 36(2)(a), 36(3)

*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225
*Applicant A101/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 82 ALD 787
*Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387
*Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293
*Erduran v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 150
*Mijoljevic v Minister for Immigration and Multicultural Affairs* [1999] FCA 834
*Minister for Immigration and Multicultural Affairs v Israelian* (2001) 206 CLR 323
*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323
*MZQAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 85 ALD 41
*Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476
*Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82
*VCAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1005
*VCAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 1

**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS v WALU, WALV, WALW and REFUGEE REVIEW TRIBUNAL**
**WAD 174 of 2005**

**NICHOLSON J**
**30 MAY 2006**
**PERTH**

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA**

**WESTERN AUSTRALIA DISTRICT REGISTRY** **WAD 174 OF 2005**

| | |
|---|---|
| **BETWEEN:** | **MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS**<br>**Applicant** |
| **AND:** | **WALU**<br>**First Respondent** |
| | **WALV**<br>**Second Respondent** |
| | **WALW**<br>**Third Respondent** |
| | **REFUGEE REVIEW TRIBUNAL**<br>**Fourth Respondent** |

**JUDGE:** **NICHOLSON J**

**DATE OF ORDER:** **30 MAY 2006**

**WHERE MADE:** **PERTH**

**THE COURT ORDERS THAT:**

1. It is declared that the purported decision of the fourth respondent made on 26 May 2005 is not a privative clause decision and is void and of no effect.
2. A writ of certiorari issue directed to the fourth respondent removing into this Court the purported decision, to be quashed.
3. A writ of mandamus issue directed to the fourth respondent to hear and determine the first, second and third respondents' application for review according to law.
4. The first, second and third respondents pay the applicant's costs of the application for review.

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

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| **JUDGE:** | **NICHOLSON J** |
| **DATE:** | **30 MAY 2006** |
| **PLACE:** | **PERTH** |

**REASONS FOR JUDGMENT**

1 This is an application for an order of review made in reliance on s 39B of the *Judiciary Act 1903* (Cth). It seeks review of the decision of the fourth respondent ('the Tribunal') dated 26 May 2005 and delivered on 21 June 2005, whereby the Tribunal purported to remit to the applicant the application of the first, second and third respondents for protection (class XA) visas with the direction that the first respondent is a person to whom Australia has protection obligations under the 'Refugees Convention' being the Convention Relating to the Status of Refugees 1951 as amended by the 'Refugees Protocol', being the Protocol Relating to the Status of Refugees 1967.

2 The applicant contends that the Tribunal made one or more errors of law that led it to fail to ask itself the correct question. In response the first respondent contends that correctly understood and inferentially, the reasons of the Tribunal did consider the correct questions.

**BACKGROUND CIRCUMSTANCES**

3 The first, second and third respondents are a husband, wife and son. The Tribunal found them to be citizens of Romania. They arrived in Australia on visitors visas in November 2004. On 20 December 2004 they applied for a protection (class XA) visa as a family unit.

4 For reasons published on 31 January 2005, the application for a protection visa was refused by a delegate of the applicant. It was on review of the delegate's decision that the Tribunal made its decision to remit the application for reconsideration.

5 As recounted in the reasons of the Tribunal, the first respondent came from a Christian family of Baptists consisting of ten brothers and sisters. The basis of his claimed well-founded fear of persecution was that, if he were returned to Romania, he would be drafted into the army in relation to which he had avoided service for a long time in accordance with his religious beliefs. He stated that his fear was not of the army itself but of the treatment he would face for having avoided the army for so long a time.

6 The second respondent, the first respondent's wife, stated that her fear was based on the fact that if her husband were to return to Romania and do military service 'his mind would change and he would not be the same man'. Additionally, she would be alone, they would have no accommodation and no possibility of making a living. That is, her evidence was that her fear was dependent on her husband's fear that he would be called up for military service.

7 On the basis of information before it, the Tribunal accepted the following:

> *'Under the Romanian Constitution military service is compulsory for all male Romanian citizens who have reached the age of 20. The length of compulsory military service was reduced from 12 months to eight months with effect from 2003. Persons who have completed their military service may be summoned for active duty up to the age of 35. Since 1996 citizens who, for religious reasons, refuse to perform military service have been able to apply to the Ministry of Defence to perform alternative civilian service. The right is restricted to members of certain religious groups including Baptists. Alternative service, which formerly lasted for 24 months, was reduced to 12 months at the same time as the length of compulsory military service was reduced from 12 months to eight months. The Romanian Government has announced that it plans to abolish conscription by 2007. …'*

The Tribunal also accepted that the alternative to military service can be performed in public institutions, independent administrations and trade companies working in social and medical

assistance, industrial construction and protection of the environment, agricultural and forestry.

**TRIBUNAL'S REASONING**

8 The Tribunal commenced by referring to the law of general application:

> *'It is well-established that the enforcement of laws providing for compulsory military service, and for the punishment of those who avoid such service, does not ordinarily provide a basis for a claim for refugee status: see* Mijoljevic v Minister for Immigration and Multicultural Affairs *[1999] FCA 834 per Branson J at [23]. This is because such laws are laws which apply generally to everyone and conscription has generally been regarded as appropriate and adapted to achieving a legitimate national objective: see* Applicant S v Minister for Immigration and Multicultural Affairs *(2004) 206 ALR 242 per Gleeson CJ, Gummow and Kirby JJ at [43] and [47].'*

The Tribunal continued by stating:

> *'The fact that someone refuses to perform military service for reasons of their religion or their political opinion is not relevant unless such a person has a well-founded fear that they will be singled out or treated differently, for example by being punished more harshly, when compared to someone whose objection to performing military service is not based on such reasons. Only then can it be said that such a person is being persecuted 'for reasons of' their religion or political opinion because, as is well-established, the definition of a refugee looks to the motivation of the persecutors: see the passage from* Ram v Minister for Immigration and Ethnic Affairs *(1995) 57 FCR 565 at 568 per Burchett J (with whom O'Loughlin and R D Nicholson JJ agreed) quoted with approval by Gummow J in* Applicant A [v Minister for Immigration and Ethnic Affairs *(1997) 190 CLR 225*], *referred to above, at 284, and the passage from the judgment of French J at first instance quoted with approval by Gleeson CJ, Gaudron, Gummow and Hayne JJ in their joint judgment in* Chen Shi Hai v Minister for Immigration and Multicultural Affairs *(2000) 201 CLR 293 at [34].'*

9 Based on these principles, the Tribunal made a number of findings. These were (1) that the first respondent, as a male Romanian citizen who had reached the age of 20, had an obligation to perform military service; (2) he had successfully evaded recruitment largely by staying outside the country but if he were to return to Romania he would still be obliged to perform military service (at least until such time as the requirement is abolished); (3) he holds an opinion opposed to compulsory military service; (4) this opinion is grounded in his religious beliefs, both the first respondent and his wife being Baptists who are one of the groups permitted to refuse to perform military service on religious grounds.

10 The Tribunal then said:

> *'However, as I noted, the period of alternative military service which such conscientious objectors are required to serve is longer than the period of ordinary military service. The latter is now eight months while the former is 12 months ('Romania', from* The Right to Conscientious Objection in Europe, *Quaker Council for European Affairs 2005, downloaded from http://www.wri-irg.org/co/rtba/romania.htm, accessed 9 May 2005). I consider it clear that the law relating to military service in Romania discriminates against conscientious objectors on the basis of their religious beliefs by requiring them to perform an additional four months of compulsory alternative service if they refuse to perform military service. I consider that this additional four months of what is in effect forced labour amounts to persecution involving 'serious harm' as required by paragraph 91R(1)(b) of the Act in that it involves a threat to the* [first respondent]*'s liberty. I consider that his real or imputed political opinion and religious beliefs are the essential and significant reasons for the persecution which he fears, as required by paragraph 91R(1)(a) of the Act, in that, as referred to above, the law in Romania discriminates against conscientious objectors. I further consider that the persecution which the* [first respondent] *fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves his selective harassment for a Convention reason. …'*

In the remaining portion of its reasons the Tribunal concluded that relocation within Romania was not possible. It also concluded that neither the first respondent or his wife or son were excluded from Australia's protection by subs 36(3) of the *Migration Act 1958* (Cth) ('the Act') because they do not have a legally enforceable right to enter and reside in any other country apart from the country of their nationality.

11 The Tribunal therefore found that the first respondent, being outside his country of nationality, had a well-founded fear of being persecuted for reasons of his real or imputed political opinion and religious beliefs if he returned to Romania now or in the reasonably foreseeable future. It also found that he was unwilling, owing to his fear of persecution, to avail himself of the protection of the government of Romania. Therefore, it was concluded he was a person to whom Australia had protection obligations under the Refugees Convention as amended by the Refugees Protocol and so satisfied the criterion in s 36(2)(a) of the Act.

12 The first respondent's wife was found to have fears dependent upon her husband's fear and her and her son's applications were dependent on the outcome of the first respondent's application.

13 Accordingly the Tribunal remitted the matter for reconsideration with the direction that the

first respondent was a person to whom Australia had protection obligations under the Refugees Convention.

**APPLICANT'S CONTENTIONS**

14 The applicant contends that the Tribunal fell into jurisdictional error tainting its conclusion because it did not ask the right question. It is submitted that what the Tribunal needed to consider was whether the law relating to military service as it applied both to persons who complied with the requirement and to conscientious objectors, was appropriate and adapted to a legitimate national objective in a manner not offending the standards of civil society. The fact this amounts to jurisdictional error is supported by reference to *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

15 In support of its application the applicant turns, firstly, to *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at [41]-[49].

16 In *Applicant S* the central issue was whether the Tribunal had been in error in concluding that able bodied young Afghan men did not constitute a social group in relation to the circumstances raised by the conscription policy of the Taliban. During the course of oral argument before their Honours, the Minister (for Immigration and Multicultural Affairs) sought to apply the decision in *Minister for Immigration and Multicultural Affairs v Israelian* (2001) 206 CLR 323 (which was heard at the same time as *Yusuf*). In their reasons for judgment, Gleeson CJ, Gummow and Kirby JJ at 401, at [39] said of that decision:

> *'… The applicant in that case was an Armenian national who was refused a protection visa by the delegate of the Minister. Before the Tribunal, the applicant stated that he had been absent from Armenia when called up for national service. The Tribunal refused the application without expressing any finding as to whether the applicant could be considered a member of a particular social group expressed as draft evaders.*
>
> *In concluding that the applicant was not a member of a particular social group comprised of either or both deserters and draft evaders, McHugh, Gummow and Hayne JJ found that the Tribunal had not committed an error of law and concluded* [Israelian *(2001) 206 CLR 323 at 354-355 [97]; see also at 342 [55], per Gaudron J; cf at 380 [183], per Kirby J (dissenting):*
>
> > "that there would not be persecution of Mr Israelian if he returned to his country of nationality, only the possible application of a law of

general application."'

Their Honours rejected the application of that reasoning in *Israelian* because there was no evidence before the Tribunal that the actions of the Taliban amounted to a law of general application, the policy of conscription being ad hoc and random. At [43]-[45] their Honours continued:

> *'The criteria for the determination of whether a law or policy that results in discriminatory treatment actually amounts to persecution were articulated by McHugh J in* Applicant A. *His Honour said that the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is "appropriate and adapted to achieving some legitimate object of the country [concerned]"* [Applicant A *(1997) 190 CLR 225 at 258.*] *These criteria were accepted in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in* Chen [*(2000) 201 CLR 293 at 303 [28]*]. *As a matter of law to be applied in Australia, they are to be taken as settled. This is what underlay the Court's decision in* Israelian. *Namely, that enforcement of the law of general application in that particular case was appropriate and adapted to achieving a legitimate national objective.*
>
> *In* Applicant A, *McHugh J went on to say that a legitimate object will ordinarily be an object the pursuit of which is required in order to protect or promote the general welfare of the State and its citizens* [Applicant A *(1997) 190 CLR 225 at 258*]. *His Honour gave the examples that (i) enforcement of a generally applicable criminal law does not ordinarily constitute persecution; and (ii) nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory* [Applicant A *(1997) 190 CLR 225 at 258*]. *Whilst the implementation of these laws may place additional burdens on the members of a particular race, religion or nationality, or social group, the legitimacy of the objects, and the apparent proportionality of the means employed to achieve those objects, are such that the implementation of these laws is not persecutory.*
>
> *The joint judgment in* Chen *expanded on these criteria* [Chen *(2000) 201 CLR 293 at 303 [29]]:*
>
> > "*Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object* depends *on the different treatment involved and,* ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity. *Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective." (Emphasis Added)'*

17 In his reasons for judgment at 414, at [80], McHugh J stated that the Court had not yet considered, in any detail, whether compulsory military service could amount to persecution for the purposes of the Refugees Convention. He referred to *Israelian*, but said that *Applicant S* was a case different from *Israelian*. He concluded on the issue at [83]:

> *'Given the Tribunal's findings about the nature of the Taliban's recruitment practices, it was open to the Tribunal to find that the Taliban was not applying a law of general application, but instead was forcibly apprehending members of the particular social group in an ad hoc manner that constituted persecution by the standards of civilised society.'*

18 The applicant then turns to *Erduran v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 150, where Gray J considered the issue of military conscription in relation to the Refugees Convention. At [18], his Honour commenced by stating the general proposition that laws relating to compulsory military service for all men of a certain age were generally to be regarded as laws of general application. A similar statement was made by Branson J in *Mijoljevic v Minister for Immigration and Multicultural Affairs* [1999] FCA 834 at [23], cited by Callinan J in *Applicant S* at 423 in footnote (146). Gray J continued by referring to the fact that if a law is applied in a discriminatory manner to persons within particular protected categories, its application will amount to persecution for a Convention reason. He said:

> *'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.'*

19 Gray J then turned to the line of authority to the effect that a refusal to undergo military service on the ground of conscientious objection to such service may give rise to a well-founded fear of persecution for a Convention reason. After consideration of the authorities he stated that, when an issue of refusal to undergo compulsory military service arises, it is necessary to look further than the question whether the law relating to that military service is a law of general application. His Honour said, in particular, that the question that would have to be asked was whether the conscientious objectors, or some particular class of them, could constitute a particular social group. He continued:

> *'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.'*

20 In *Erduran*, Gray J held that the Tribunal had not embarked on the first stage of the process. Although the decision of Gray J was overturned on appeal, his reasoning in the above respects were not affected as a consequence and was accepted in *VCAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1005 at [32] per Kenny J.

21 In *VCAD* at [35] Kenny J said:

> *'… The Tribunal apparently proceeded on the mistaken basis that a law of general operation, which did not expressly discriminate or inflict disproportionate punishment, could not support a well-founded fear of persecution for a Convention reason. This is plainly erroneous, and involved the Tribunal asking itself the wrong question. There may well be a well-founded fear of persecution because a law, neutral on its face, has an indirect discriminatory effect or indirectly inflicts disproportionate injury, for a Convention-related reason. …'*

However at [36], Kenny J did not consider that the Tribunal's error in this regard entitled the applicant in *VCAD* to relief. That was not a case in which a conscientious objector was a claimant for refugee status because he feared military conscription into active combat if returned to his country of origin. Rather, the claim there was that, on account of his religious beliefs, he had a conscientious objection to military service and was relevant only because he claimed to fear punishment as a deserter if he returned to his country of origin. On the evidence, there was no basis for such fear due to considerable changes in that country. Her Honour's reasoning was upheld on appeal in *VCAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 1.

22 The applicant therefore submits that there is a line of authority in this Court stemming from Gray J's analysis in *Erduran* which proceeds on the premise that a law of general application in its operation and enforcement is capable of amounting to persecution particularly where there is an application of punishment in the selective operation or enforcement of the law. This is said to not be inconsistent with the test enunciated in *Applicant S.*

23 Here the applicant submits there is no suggestion in the evidence that the first respondent might possibly be subject to an outcome other than 12 months compulsory civil service or that he might be specifically punished in a way that was more severe or more onerous than that required of merely serving 12 months in alternative civil service.

24 Returning to *Applicant S*, the applicant submits that the decision of the High Court was that the manner of application and enforcement of the conscription policy by the Taliban was an example of a law designed to protect the general welfare of the State which truly offended the standards of civil societies which seek to meet the calls of common humanity. The applicant submits that whatever the notion of 'punishment' entails and whether it sets a threshold too low in the light of arguably stronger language employed in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 and applied in *Applicant S*, is not an issue requiring determination here. It is submitted it is enough for the success of the application that the Tribunal did not identify and address the correct question required by the above statements of the law.

25 The applicant then turns to *MZQAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 85 ALD 41, a decision of the Full Court comprised by Branson, Marshall and Hely JJ. The applicant contends this is the most recent Full Court application of the principles from *Applicant S* sourced in *Chen* and *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 on the issue of when persecution may arise by the application and enforcement of the law which is in its terms of general application. That was a case where a protection visa applicant claimed that he would be subjected to harm in India because of his support for the Tamil Tigers in Sri Lanka and in particular the dissident group called the LTTE. He contended that the application of the *Prevention of Terrorism Act* in his case constituted a source of a well-founded fear of persecution. The Tribunal had found that such law was one of general application, not being enforced in any selective or arbitrary way. That was upheld by a Federal Magistrate. After reference to *Applicant S* at [42] the Court stated at [20] that determination of whether discriminatory treatment is 'appropriate and adapted to achieving some legitimate objective of the country [concerned]' is ultimately a matter of judgment. The Court referred to the reasoning of Finn J in *Applicant A101/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 82 ALD 787 at [24]-[25] as explicative of the nature of the judgments involved. There his Honour observed:

> *''When it is alleged that the enforcement or manner of enforcement of a generally applicable law is discriminatory by reference to political opinion, a complex inquiry may need to be engaged in. Where such a law is, or is said to be, one having the purpose of protecting a State or its institutions (i.e. it has a "political" purpose), the nature and reach of the law itself and the actual manner of its application will require consideration for the reason that its*

> *reach or use in suppressing political opinion may go beyond, or be inconsistent with, what is appropriate to achieve a legitimate government object according to the standards of civil societies: cf* WAEZ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs *[2002] FCAFC 341 at [32]. It is not unheard of, for example, for a State to utilise sedition-like and public security offences to silence its opponents.*
>
> *The less such a law has an overtly political character (as where for example, its concern is with ordinary criminal acts in a society), the more attention will turn on the integrity of the enforcement process itself and on the risks to which a person might be exposed, e.g. ill-treatment or torture, in the course of that process. Is that process used selectively against critics of the State or against the advocates of particular political views? Is it fraudulently invoked for punitive purposes? Does its improper use expose a person to adverse consequences, e.g. torture in detention, even if that person is not later charged or tried with an offence?'*

26 Turning to the reasoning of the Tribunal in the present proceeding, the applicant submits that the only reference made to *Applicant S* was that appearing in the opening passage of the Tribunal's reasons. It is submitted that when the totality of the Tribunal's reasoning is considered, it is clear there has not been any proper inquiry as to the nature of the laws at issue; that is, whether or not there is a legitimate national objective implemented in a way that is appropriate and adapted for the norms of civilised societies. It is submitted that the Tribunal has not fully apprehended the test from *Applicant S* and has not therefore attended to the elements of the correct question. In particular, it is said that the Tribunal has failed explicitly or implicitly to assess the nature of the alternative duties which might be seen as a legitimate component of the overall legislative regime for dealing with compulsory military service. It is said that it does not elaborate on the question of the relationship between the laws and the objectives of the overall welfare of the State. It has therefore, it is submitted, failed to form a view on whether the evidence discloses any differential treatment offending the standards of societies which seek to meet the calls of common humanity. It is submitted that it seems rather unlikely that the requirement for 12 months civil service could be found by the Tribunal to get close to offending the standards of civil societies. However, the error of the Tribunal was never to ask whether that was the case. Accordingly it is submitted that the Tribunal fell into jurisdictional error.

27 In relation to the remedies sought of declaration, a writ of certiorari and a writ of mandamus, the applicant states that it is sometimes contested whether certiorari is open given the absence of reference to it in s 75(v) of the Constitution or s 39B of the *Judiciary Act*. However, it is

said that it has become accepted that certiorari is necessarily incidental to mandamus: see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 per Gaudron and Gummow JJ.

**FIRST RESPONDENT'S SUBMISSIONS**

28 The first respondent does not contest the appropriateness of the remedy for certiorari, should the applicant succeed.

29 The first respondent submits that a proper reading of the reasoning of the Tribunal shows that it did address the correct question. In particular, is it said the Tribunal looked at the position of compulsory service and alternative service. It is submitted that by inference it is clear the Tribunal considered the position against the calls of common humanity having consideration in relation to the position of a conscientious objector. It is said that when the Tribunal referred to the additional four months being in effect forced labour, it is clear this was a conclusion that it could not be argued that this did not offend the standards of civil societies. Further, it is submitted that the reference to *Applicant S* shows that the Tribunal was cognisant of the relevant question. In particular, when applying the provisions of s 91R of the Act, the Tribunal looked at the nature of the conduct and it is clear by inference that the Tribunal held the view that the standards of civil societies would be offended by such systematic and discriminatory conduct. It is said that while the specific words of the test urged by the applicant were not explicitly used, inferentially the Tribunal turned its mind to the correct question.

**REASONING**

30 I am unable to agree with the submissions for the first respondent that the reasoning of the Tribunal can be seen by inference to have addressed the correct question.

31 In the first place, the only reference to *Applicant S* is in the initial passage cited above where it was referred to in a secondary or indirect way. That reference provides no foundation for inferring that the test was properly appreciated by the Tribunal and applied.

32 Further, it is not clear from the Tribunal's reasons on what basis it concluded that the circumstances before it departed from the norm that the enforcement of laws for compulsory

military service will not amount to persecution. There is no basis for inferring that it has concluded that the law had no legitimate objective, nor can it be inferred that the Tribunal concluded that the way in which Romania pursues the legitimate end is not appropriate and adapted to the legitimate purpose. Further, there is no basis for inferring the Tribunal took it out of the norm because it concluded that the 12 months alternative offended against the standards of civil societies. The conclusion that the additional four months constituted 'in effect forced labour' is not the product either explicitly or inferentially of reasoning derivative from the questions required to be asked by the authorities. At the most it appears as a passing characterisation unmeasured by reference to the required standard.

33 The reference by the Tribunal to s 91R of the Act cannot provide the requisite basis for inference. This is because s 91R is applicable when there is a finding of persecution reached by the route of asking the correct questions. The issue here is whether the Tribunal correctly reached the finding of persecution.

34 Consequently, I consider that the applicant is entitled to succeed on the application for review and that orders should be made as sought by the applicant.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Nicholson.

Associate:

Dated: 30 May 2006

| | |
|---|---|
| Counsel for the Applicant: | Mr RL Hooker |
| Solicitor for the Applicant: | Australian Government Solicitor |
| Pro Bono Counsel for the First, Second and Third Respondents: | Mr DE Moen |
| Date of Hearing: | 28 April 2006 |
| Date of Judgment: | 30 May 2006 |