N02/44086 [2003] RRTA 949 (9 October 2003)

REFUGEE REVIEW TRIBUNAL

DECISION AND REASONS FOR DECISION

RRT Reference: N02/44086

Country of Reference: Israel

Tribunal Member: Ms Patricia Leehy

Date decision made: 9 October 2003

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 he 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) 187 ALR 574.

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 was educated for 12 years and obtained a trade qualification in Tel Aviv. He worked at various jobs until the mid 1990s, including a number of years in the Israeli Defence Forces and some months on a working holiday in Europe. In the following years, the applicant lived in various places in Australia. He then spent a brief period in Israel and subsequently Country A and Country B before coming to Australia again. The applicant’s family are currently resident in Israel.

The applicant first applied for a Protection Visa in a number of years ago. In a statement forwarded with the Protection Visa application, the applicant’s adviser says that the applicant, since becoming politically aware in his late teens, began to reject the practices of the state of Israel in relation to the Palestinians. He says he also resents the religious orthodoxy of Israeli society. While the applicant was serving with the Israeli Defence Forces (IDF) in the late 1990s, he went to the Gaza Strip to quell an independence demonstration. The IDF fired rubber coated steel bullets and tear gas in to crowd of mainly children and teenagers, and detained many of them in cells. The applicant did not engage in these IDF activities and refused to fire at the crowd. He

was apprehended by military police and strapped to his bed for a few days. He was beaten and otherwise mistreated, and was accused of being a double agent working for the Palestinian "terrorists". He escaped and hitchhiked to his family's house in Israel from the Gaza Strip. A few days later the military police came to his house and took him back to the army. He remained in barracks for a few days before escaping to a relative's house. He hid there and was unable to conduct a normal life. He then presented himself to the IDF. He feared for the safety of his family. He was sent to gaol for several days, where he was abused, brutalised and humiliated. He was returned to serve in Gaza. There is compulsory military service for 45 days each year in Israel for persons under 55. The applicant travelled to avoid his military service. He fears returning to Israel because he will be unable to serve in the army, and he is sure that he will be caught and imprisoned.

The Department's Movements records indicate that the applicant (his name spelt differently) arrived in Australia in the early 1990s and departed a number of weeks later. He arrived in Australia again in the mid 1990s and departed in the following year. He arrived again in the late 1990s and departed a couple of months later. He was granted a new Israeli passport several months later, leaving Israel and arriving in Australia in the latter part of the 1990s. He left Australia again some months later. He arrived in Australia most recently in the early 2000s. In the Departmental Delegate's decision refusing his first Protection Visa application, it was noted that the Department's Movements database indicated that the applicant was in Australia at the time he claims to have been mistreated by the military police in the late 1990s. The Delegate noted that the applicant "had previously been granted two separate Israeli passports and departed Israel on at least three separate occasions and returned on at least two separate occasions between [particular years]". The applicant withdrew his appeal against the primary decision in a letter received on a particular date, saying that he was leaving Australia on a specified date in the latter part of the late 1990s.

The applicant applied for a Protection Visa again, soon after his most recent arrival. The applicant provides the same personal details and information about family members as previously. He says that his current passport was issued in Tel Aviv during his last stay in Israel, and that the previous passport has been retained by the Israeli authorities when the current one was issued.

The applicant's adviser provided a submission on the applicant's behalf with his Protection Visa application. On this occasion, the adviser says that it was during the applicant's service with the IDF in the late 1980s that the events occurred described in the earlier Protection Visa submission as having occurred in the late 1990s. The adviser does not describe the applicant's activities between the late 1980s and the latter part of the late 1990s. S/he says that the applicant returned to Israel, but was forced to flee after a number of weeks. The adviser claims that gun attacks and a suicide bombing took place in the applicant's neighbourhood, including an attack by gunmen on his street. The applicant fears he may be the target of attack as an Israeli. He also fears hard liner Israelis in his neighbourhood, who have accused him of allowing terrorism to take place inside Israel because he refused to serve in Gaza. The applicant now fears in the current circumstances that he may become the victim of a suicide bombing or gun attack and the target of harassment by Israeli hardliners opposed to his "dovish" views. The applicant now fears Palestinian militants from a number of factions, including Hamas and Islamic Jihad, and also fears Israeli

militants. He believes that the authorities are unable to protect him adequately, given the level of violence.

The Departmental Delegate wrote to the applicant enclosing a number of articles relating to Israel's military strength and the views of some Israeli reservists which appear to be similar to the applicant's. The applicant was invited to comment. The applicant wrote to the Department saying that he was terrified of returning to Israel because of the escalating levels of violence there. He says he wants to have a Protection Visa until the military situation in Israel is "safer".

The applicant's adviser responded to the Department's letter enclosing an article on the increasing phenomenon of Israelis refusing to serve in the IDF, or refusing to serve in the Occupied Territories. The adviser also comments that the vast majority of Israelis consider those who refuse to serve as traitors, and that about 40 of the objectors have been imprisoned. She says that the IDF is unable to protect Israelis from suicide bombers.

The applicant's adviser forwarded to the Department a translation of a document issued to the applicant by the IDF. It is dated and says that it confirms that the applicant is a member of the reserve forces and that if he does not commit to the service he will be "charged and punished". The original of the IDF document was also sent to the Department.

The applicant's adviser forwarded to the Department an IDF document, which says the applicant must report to the Conscription Centre but does not provide dates in the appropriate spaces (ie the date on which the applicant is to report). The notice says that it is against the law not to confirm the receipt of the order to report for duty.

The applicant's adviser made a submission on the applicant's behalf with his application for review by the Tribunal. The adviser repeats the claims made in the Protection Visa application. The applicant further submits that he would have an adverse political opinion imputed to him by the army authorities, and would therefore be open to "significant abuse and serious threat of harm". The applicant also fears the trauma and social disruption that fear of suicide bombings engenders. Attached to the submission is an article downloaded from the Internet about an Israeli "refusenik" who claims to be a pacifist, and who was sentenced to 28 days in a military prison for refusing to serve in the IDF. The article refers to the IDF "Conscience Commission", established in 1995, which decides whether people who say they are conscientious objectors are true pacifists or impostors.

The Tribunal wrote to the applicant putting a number of matters to him. The first matter requests confirmation that the applicant was in Australia for a specified period in the early 1990s, though his name at that time was slightly differently spelt. The second matter requests the applicant's advice on whether events in which he was involved as a member of the IDF occurred in the late 1990s, as claimed in his first Protection Visa application, or in the late 1980s, as claimed later. The applicant was also asked to confirm that the consequences of the applicant's actions as an IDF member in Palestine (arrest, detention and mistreatment) occurred in or about a specified year in the late 1980s. The applicant was also asked to comment on the fact

that he was able to enter and leave Israel on a number of occasions, and renew his passport in Israel, even though he had obligations as a reservist.

The applicant's adviser wrote to the Tribunal in a letter received in response to the Tribunal's letter. The adviser confirms that the applicant was detained and maltreated in the late 1980s during the first intifada. The adviser says that this made him fearful of the Israeli military, and in particular fearful of conscription to the IDF. The applicant says that the Israeli army remains in control of 60% of the Gaza Strip and the entire West Bank except for Bethlehem, and is likely to remain in the West Bank to oversee the construction of the Israeli "security fence". The US sponsored peace initiatives because of this and other reasons are unlikely to achieve long term success. There have been outbreaks of violence. The applicant, if forced to return to Israel, will return to a country at war, where he may be conscripted to serve in Palestine. He is a committed pacifist with a deep repulsion for military life. The applicant says he was able to legally obtain a passport and leave Israel because he only stayed there for a short visit. He was not there long enough for the military bureaucracy to catch up with him and was able to leave before his latest call up for service. The applicant has received many notices from the IDF to attend reserve duty. The applicant says that the limited duration of his trip to Israel in the past has enabled him to avoid reserve service, but if he stays there, this will not be possible.

The applicant attended a Tribunal hearing with his adviser. An interpreter in the Hebrew language was also in attendance, but since the applicant is fluent in English, her services were rarely required. The applicant was extremely distressed and anxious for most of the hearing. He submitted a written psychologist's report.

The psychologist, Registered Psychologist NSW, says in his report, that he has been seeing the applicant for chronic depression for most of a particular year on a fortnightly basis. He has been tested on several psychological indices which "reveal high scores for depression and anxiety". He says the applicant presented first with a classic profile of Post Traumatic Stress Disorder. While the applicant has responded to treatment, "he is still adamant he will be suicidal if he is again forcibly inducted into the Israeli Army." The psychologist says that the applicant presented as a sincere and genuinely distressed young man. He says that the "horrific" incidents which the applicant experienced occurred while he was in the Israeli army as a teenager. He has recurrent nightmares of events "including being handcuffed to an Army bunk and beaten and earlier incidents where fellow soldiers beat him with their rifle butts and generally victimized and psychologically abused him over a period of several weeks for espousing his pacifist views and refusing to shoot at rioting women and children". The psychologist describes how the applicant's Australian fiancée left him because she could not cope with the intensity of his symptoms. The psychologist concludes: "I strongly recommend that [the applicant] be allowed to remain in Australia because his repatriation has a significant likelihood of triggering [medical problems], given previous trauma and current psychological outlook."

The applicant was asked at the hearing why it was that he obtained a new Israeli passport during his last stay, when he already had a passport which was valid. He said that the passport had been damaged in frequent travelling and had also been water damaged, so he got a new one.

The applicant said that his family were resident in Israel. His siblings are various ages. All the siblings did their compulsory military service with the exception of one. All have done periods of reserve service. The applicant said that he was fairly close to some of the members of his family, less so with others. He talked to relative A by phone about once a month.

The applicant was asked at the hearing what he feared about going back to Israel. He said that he was afraid of having to do military service, especially in the Occupied Territories. His relative A is continuing to receive call-up notices for him, even though she has told the military that he is not in Israel. The applicant said that when he was in Tel Aviv during the late 1990s he got call-up notices. He said that he was able to show the authorities that he had already booked and paid for his air fare out of Israel. In those circumstances, a person is allowed to leave, provided he reports to the authorities as soon as he returns to Israel.

The applicant said that he joined his unit for compulsory military service in the late 1980s and he completed his compulsory service. He said that he was gaoled for the first time in the army during that time. He was not physically harmed but he was put in a prison which also contained civilians, and he was expected to monitor people to prevent certain incidents. He was forced to be in the presence of a variety of people some of whom were crazy because of drug withdrawals. He said that it was a horrifying experience for him. He said that he was then sent back to an area where the training camp was. He said that he ran away from the training camp many times, and went to his family's house. They would come to the house and pick him up and take him back to his unit. He said that in the beginning they did not lock him up. They had people keeping watch on the applicant to prevent him from running away. The applicant described witnessing incidents which amounted to serious maltreatment of Palestinian children, and he said that he could not stand it. He said that he could not refuse to do his duty as a soldier or he would be locked up, but his fellow soldiers knew that he did not like what they were doing, and they started to hate him. They would call him a Palestinian and say that he should go and live with them. The applicant could not live with his colleagues and he escaped again. An officer came to collect the applicant at his family's house, but the applicant escaped. A soldier came and caught him again and took him to the camp where he was kept for a few days. He was assaulted by other soldiers. His hands were untied only to allow him to eat. He managed to escape when a childhood friend gave him a knife. He managed to hitch a lift to his family's place but only stayed there a night. He went to other relatives and hid for a while before giving himself up. He was locked up with others waiting for a court to conduct hearings on their desertion from the army. Though the applicant was found guilty of desertion, he was released because he had already served his sentence while waiting for the court. For desertion less than 14 days, the sentence is much lighter than for a longer period. The applicant said that he was physically mistreated while he was in detention. He was subjected to certain ill-treatment by officers. They also physically abused him.

The applicant was sent back to his unit to complete his military service. He was told he was to have an interview with a superior officer. His superior said that he did not want people like the applicant in his company. He was made to work arranging supplies for other soldiers. He continued to be stationed in Gaza.

After the applicant finished his military service, he started work on a construction site for a period but he was determined to leave Israel and did so. The applicant was interviewed by the IDF after he finished his compulsory service and told that he would be put in a unit to serve in Country C when he did his reserve service. He was determined never to be in the army again. He left Israel but was forced to come back because of a lack of money.

The applicant was asked about his eldest sibling who had not done any reserve military service. The applicant said that his sibling never did compulsory military service. His sibling was a peace activist and could not serve in the army and was given an exemption. The applicant was asked why he had not attempted to do this. He said that he was a supporter of Peace Now, and one of his neighbours was a peace activist. She told him, having seen him in uniform, and knowing that he served with a unit in Gaza, that what the IDF was doing in Gaza was not right. The applicant said that he had in fact been directed to see a psychologist while he was in the army, so he went to the unit. The psychologist however said he had to go back to his unit because there was no reason for him to be absent.

The applicant said that he had been called up for reserve service on several occasions. He travelled in a number of countries, including Europe, Country B and Country A. He said that he had an Australian girlfriend and applied for permanent residence in Australia as the de facto partner of his girlfriend. However, the relationship broke up, because of the state of his health.

The applicant said that when the Department rejected his application for a Protection Visa he became extremely upset and stressed. He returned to Europe, but could not stay there. He could get only short term visas. The applicant said that he stayed in Israel for a few months between when he last left Australia and when he returned. He got call-up notices for service in the reserve IDF. He returned to Australia because he thought it was the only place he might be able to feel settled.

The applicant was asked whether he always notified the army authorities when he returned to Israel. He said that the rule is that as soon as you return to Israel you contact your army unit. However you must always have a ticket to leave Israel, and it must be a ticket that has been bought before you get your notice of call-up.

The applicant was asked whether he had ever had any involvement with a political group or organisation. He said that he had not had, but that he had been a supporter of Peace Now. However they also seem to have given up recently.

It was put to the applicant that because the penalties for evading military service appear to have been prescribed under an Israeli law which applies to all Israeli citizens, the punishment is not selective, as is required under the UN Convention to found a claim for refugee status. Under the Convention, a person must be subjected to serious harm amounting to persecution for one of the five Convention reasons. The applicant did not appear to have demonstrated to the Tribunal that the penalty he faced would be imposed selectively, for a Convention reason. The applicant said that he would be abused by the military because he refused to co-operate with the Israeli army’s policies. He had an opinion about the Israeli government: that it should not harm children and commit other atrocities in the Occupied Territories. He said that he

hated the Israeli government and he blamed them for what they had done to the country and to him.

The applicant was asked at the hearing about his claim that he feared to return to Israel because of the violence caused by suicide bombers and similar incidents. The applicant said that last time he was in Tel Aviv, he heard shooting from an individual who was an Arab. He did not kill anyone, but he saw Israeli soldiers kill him. They had to do this, but the general level of violence is very high, and he is afraid of it. He said that a very old friend of his relative A had been killed by a bomb. When the applicant was a child, he saw a Palestinian hijack a bus and he was very frightened. The applicant said that he cannot stand the violence in Israel. He said that he cannot live in Israel because of his political opinion, and his fear of the military. There is no life there. They violated him and he has had no life until now, because they killed his soul.

The applicant's adviser drew the Tribunal's attention to para 170 of the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status:

There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, ie when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

The Tribunal said that Australian law is not bound by the Handbook, though the Tribunal would give it due consideration.

The applicant said that he cannot live in Israel, and that whatever happens he cannot go back there.

The Tribunal wrote to the applicant regarding the applicant's fear of returning to Israel because of his fear of terrorist attacks there. The Tribunal said that its independent information indicated that while there are continuing terrorist attacks, the Israeli authorities have taken significant measures to protect its citizens. It noted that Australian law does not require that a country guarantee protection to its citizens in order to be considered to provide effective protection. Copies of documents from CISNET were forwarded to the applicant, extracts from which appear below. The applicant was invited to comment on these matters.

The applicant wrote to the Tribunal. He reiterated that he is afraid to go back to Israel because he will be forced to go back to the reserve army, and will most likely serve in the Occupied Territories. He says that he was traumatised by his experiences in the Israeli army. The applicant says that he is so terrified of being a victim of one of the attacks of the suicide bombers that he cannot sleep at night. He says that though the Israeli authorities may have taken significant measures to protect their citizens, they have not successfully solved the problems. The applicant attaches material concerning the conflict in the Middle East, including reports of BBC interviews with Israelis and Palestinians. These include an interview with a member of the military wing of Hamas who says that he will not hesitate to conduct a suicide bombing mission. The Hamas member says that he will never accept a two state solution as the basis for

lasting peace, and can never recognise the state of Israel. An Israeli peace campaigner describes how Israelis suffer because they are fearful of terrorism. She describes how she takes precautions to minimise personal danger. She says that Ariel Sharon will never make peace, though she believes there will be peace eventually. The applicant also provided a travel advisory from the Australia Government, dated 17 September 2003 which says in part:

In view of continuing tensions in the Middle East, the ongoing risk of terrorism and the upsurge of violence in Israel and the Occupied Territories, Australians should consider carefully their need to travel to Israel at this time... Australians in Israel should exercise extreme caution, particularly in commercial and public areas, and should take into account the overall security situation when planning their activities...

The overall security situation in Israel remains tense and the risk of indiscriminate terror attacks remains high.

The Tribunal also had before it independent information relevant to the applicant's claims. 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 2002, 31 March 2003, chapter 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 Australia 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 Australia 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 2002 Annual Report (released May 2003) dealing with Israel and the Occupied Territories, says:

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 2002 Report represents a considerable increase over its Reports for 2001 (33 objectors) and 2000 (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)

BBC News (http://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.

The applicant was sent for comment a number of documents about the Israeli government's commitment to protecting its citizens. Extracts from these documents include comment on the security wall which the Israeli authorities are erecting in Palestine to "prevent terrorist incursions" (The Economist, 24 and 31 July 2003, CISNET Documents CX83713 and CX83714); and on "targeted killings" of Hamas leaders by the Israeli army, with Israeli Prime Minister Ariel Sharon saying that Hamas members are "marked for death" (The Australian, 8 September 2003, CISNET Document CX84544).

FINDINGS AND REASONS

The Tribunal finds, on the basis of the applicant's evidence, including the evidence of his passport which he brought to the Tribunal hearing, that he is an Israeli national. He has no right of entry to any other country.

The applicant was extremely distressed almost throughout the Tribunal hearing, and his evidence was on occasion less than coherent. He said at the conclusion of the hearing that he had confided the fact that he had been assaulted when he was a teenager only to his psychological counsellor and, very briefly, to his adviser, before the Tribunal hearing. While the Tribunal is of the view that the applicant exaggerated some aspects of his account, notably the frequency of call-up notices for the IDF reserve, it finds that the applicant was a credible witness and generally accepts his account as truthful. It accepts that there was an error in his first Protection Visa application regarding the dates of his compulsory military service which was subsequently corrected.

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, especially in the Occupied Territories, which is repugnant to him; that he will be punished for refusing to do reserve service; that he will become the victim of suicide bombing or other violence by Palestinian militants; that he will become the victim of harassment or violence by Israeli militants opposed to his views on the mistreatment of Palestinians.

The Tribunal accepts that the applicant completed his compulsory military service during the late 1980s and that in the course of performing military service he was subjected to serious and repeated mistreatment by superiors and fellow soldiers, which amounted to persecution in a Convention sense. While much of the serious harm inflicted on the applicant appears to have been done to him as a result of casual violence by particular individuals in the context of military detention, at least some of the serious harm was done to him by fellow soldiers who resented his views on the military treatment of Palestinian civilians and, by implication, his criticism of their

actions. The Tribunal accepts that the applicant's views on the treatment of Palestinians amounted to political opinion in a Convention sense, and that some of the serious harm done to him was done to him for a Convention reason. The applicant did not claim, however, that he complained to anyone about his treatment at the hands of fellow soldiers, or that his army superiors condoned such activity. The Tribunal does note, however, that even if superior officers were not directly involved in harming the applicant, they were negligent in allowing persecutory behaviour against him by fellow soldiers. The Tribunal finds that the applicant completed the remainder of his military service, some two years, without experiencing further harmful incidents. The applicant does not claim to have been harmed by the authorities or any other individuals since his discharge from the army. The Tribunal accepts, however, the report of the applicant's counsellor which is to the effect that he has sustained long-term psychological harm, up to the present, as a result of his experiences in the late 1980s.

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, probably in the Occupied Territories, and that his refusal to do so will result in punishment. The applicant claims, and the Tribunal accepts, that he has avoided doing reserve duty in the IDF because he has arranged to be out of the country, or committed to being out of the country by having an overseas ticket booked and paid for, for much of the past several years. The information at page 15 from the Israeli Consulate that "there is no punishment ... relating to reservists being abroad while called to reserve duty" does not conflict with the applicant's claims in this matter. However, 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 (page14). 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; that, given his views, he will refuse to perform the service; and that he will be liable to punishment. The Tribunal 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 Tribunal notes the applicant's evidence to the effect that he went to great lengths to avoid being returned to the Occupied Territories when he was doing his compulsory military service some years ago, even applying to be exempted from service on psychological grounds, but was refused, and sent to the Territories to continue his service there. That time, the first intifada, was also a critical time in Israel/Palestine relations. The Tribunal has accepted that some of the serious harm done to the applicant at that time was motivated by the Convention reason of political opinion. The applicant has claimed that he would be more harshly treated in detention (for refusing to perform reserve service) because of his political opinion if he returned to Israel in the foreseeable future. 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 (page 15) 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 them does not appear to operate on a transparent basis. 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 15). 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 treated more harshly than conscientious objectors generally in the matter of their sentencing. There are however 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 was persecuted during the first intifada for his political views. He was not withdrawn from service in the Occupied Territories. He was not exempted from service in the Occupied Territories, despite repeated attempts to escape and an appeal to an army psychologist. He was taunted about his political opinion and seriously mistreated without receiving protection from his superior officers in the army, even if there was no collusion by his superiors in his mistreatment. 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. Prime Minister Sharon is quoted recently as making implied threats against selective objectors (BBC News, page 17). The applicant is himself a traumatised person whose psychological state is fragile. 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.

The Tribunal has considered whether such harsh treatment of selective objectors to service in the Occupied Territories might be justified on the grounds of the Israeli government's necessity to defend itself or to protect the general welfare of the state, such that it could be considered a legitimate state measure not amounting to persecution. It is clear from the evidence quoted above (eg page 17) that the Israeli government has committed very extensive resources to the defence of the country, going beyond what some human rights observers consider to be what is necessary for simple defence (Amnesty International, page 15). By comparison with the numbers of IDF personnel committed to the country's defence, the number of conscientious objectors, and of selective objectors is insignificant, even if it is increasing. In the Tribunal's view, there is no reasonable justification for disproportionately harsh treatment of those objecting to Israel's policy in relation to Palestine.

Taking all the circumstances into consideration, the Tribunal is satisfied that there is a real chance that the applicant will face Convention-based persecution if he returns to Israel in the foreseeable future. It is therefore satisfied that he has a well-founded fear of persecution.

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.