

N05/52418 [2005] RRTA 346 (20 December 2005)

DECISION RECORD

RRT Reference: N05/52418

Country of Reference: Israel

Tribunal Member: Ms Patricia Leehy

Date decision signed: 20 December 2005

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. “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, *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1, *Minister for Immigration and Multicultural Affairs vs Respondents S152/2003* (2004) 205 ALR 487 and *Applicant S v Minister for Immigration & Multicultural Affairs* (2004) 217 CLR 387.

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. According to the Department's Movements database, the applicant came to Australia as a visitor, left after several months and returned to Australia a number of weeks later. He did his military service in the Israeli army for several years.

The applicant gives no information about family members. He says that he received three years education. He has lived since the 1990s in Area A. He gives no employment information, though he describes his occupation. He travelled to countries X and Y in the 1990s and has visited country Z.

The applicant said that he left Israel because the situation there is "very scary" because of bombs exploding in bus stations. He says that he lost several of his best friends when they were killed serving with the military. The economic situation is bad and it's difficult to find a

job. When you do find a job you are unable to earn enough. The applicant says that he is afraid of being killed by a terrorist attack or he might be put in the army and be killed. He says he does not know whether the Israeli authorities can protect him but they did not protect his friends who were killed. His parents support him.

At the Tribunal hearing the applicant gave the Tribunal a submission. In the submission he describes in some detail his attitude to Israel and the Israeli Defence Forces (IDF) at the time when he began military service, and the ways in which his attitude changed as a result of his experiences in the army. The applicant said that soon after he started his service he knew that he was not suited to combat, but while he wanted to leave, he saw what happened to other soldiers who tried to leave the army. The commanders found reasons to punish them and they were treated unjustly. He says that during his conscription he felt that he was losing his mind. Most of his time was spent in area A which is claimed by both Muslims and Jews who are extremely religious. Area A is one of the worst places to be stationed. The army presence is not wanted either by Jews or Muslims. He says that the incidents he witnessed gave him nightmares and crying fits at night. He felt he was doing things against his conscience every day. He saw other soldiers who asked to be transferred and were refused. Some soldiers did not return from leave, but they were all caught and sent to the Army Gaol. Within three months of a specified year the applicant lost several close friends who were also soldiers. He felt he was to be the next to go. After the deaths of his friends he was forever changed. His nightmares were full of children and women looking at him, and he felt shame thinking about all the times that he had had to fight women and children. He had no discretion to disobey his commanders, but he could not justify to himself fighting against women and children. He describes bursting into houses in the middle of the night to arrest suspected terrorists, and being confronted by crying women and children. He became extremely depressed.

The applicant says that at one time he applied for a specific job. Everyone wanted the job, but the applicant was the one to be chosen. He was very relieved at not being in a war zone. Towards the end of his compulsory military service he was told that when he did his reserve duty it would not be in his present area, but back in the Occupied Territories. He tried to argue against being sent there with the relevant army superiors but was told that he had a choice between being a "refusenik" and going to gaol, or doing his reserve duty in the Occupied Territories. He could not face either doing the reserve duty until the age of 51 for 45 days a year, or struggling against the system by spending two months a year in prison for refusing service. He asked to be put in a non-combat unit for his reserve duty, but he was refused. When the applicant got his a call-up notice for reserve service he was terrified. He knew he

would not be able to go back to the Occupied Territories, but if he refused, not only would he go to gaol, but he would be judged by society and considered a traitor. He decided that he would leave Israel as a way of avoiding reserve duty. He says that since he left Israel his views have become stronger. He knows that he will refuse to carry arms, especially against women and children, and his only option will be to go to gaol. He does not want to spend his future until he is 51 fighting against the system. He objects to the government's policy and actions, and his conscience is weighted down by his past actions as a member of the IDF. The applicant says he does not wish to be forced to harm other human beings against his will. He objects to the political situation in Israel and feels that the government policy should be changed. The way that the Palestinians are being treated in the Occupied Territories needs to be changed by the government to improve the situation in the Middle East.

It was put to the applicant at the Tribunal hearing that he arrived in Australia previously and stayed for several months. The applicant said that he did, and then left Australia for a number of weeks, went to Country D and then returned to Australia. He said that he did this because he knew that when he had received his notice to do his army reserve he had to leave the country to avoid it. He said that he had a friend in Australia who had recommended that he come here. He said that several months after he finished his compulsory military service he received a letter from the IDF asking him to come and meet his new unit for the reserve service. He said that he did not go to the meeting, but sought out two senior commanders to explain to them why he felt he could not serve any more in the army. They both told him that he had to fight.

The applicant said that it was every boy's expectation in Israel that he would be in the army. The applicant said that he thought that he would just do his three years service and get on with his life. However by six months after the start of his service he had seen terrible things. He was in area A for several months. In area A there were Jewish settlers and Palestinians, and the IDF was in the middle, stopping the Jews and Arabs from attacking each other. The applicant described some of the things he had to do, including going to the houses of suspected terrorists at 2 am and having to take away fathers and sons as suspects. He was ordered to do this, and it did not matter to his superiors what he thought. The applicant said that after two months of his service he was having nightmares. He described a particular incident. The applicant said that it was too much for him. The applicant said that after area A he was sent to area B where there was fighting all the time. He said it was a war against people, women and children and boys who were not connected with terror at all. He said that he had to stop people leaving the area, and sometimes they wanted to take medicine and

supplies to their families. The applicant said that he knew that if he objected, he would be going to gaol. He said that it got harder over time. Several friends died within 3-4 months in a specific year. Several were killed in a terrorist shooting and the applicant took it very hard. The applicant also described the death of his best friend from his home town. He said that he could not do anything at all for the seven days of mourning. He had nightmares. He said his conscience could not handle things. Every day there was more blood. He spoke to his commander to get more leave after his best friend died, but he was refused. He said that he was sent to area C where the war was very fierce. Lots of innocent people died. He felt it was not right, that it was for nothing. He said that there were a few terrorists, but a large number of soldiers invaded the town and killed lots of people.

The applicant was asked whether he had considered the alternative. He said that he did not want to sit in gaol for two months of every year. He would also get lots of black marks against him and society would be hostile. His luck changed when a particular job came up during his military service, and he was able to leave the Occupied Territories.

The applicant said that he was very happy to get out of the army at the end of his service. He said that he will remember the terrible things he saw all his life. He said that he used to see people coming to Israel from all over the world and fighting and dying for nothing. The applicant said that he thought he would be able to start a new life at the end of his military service. He had been good in school and had skills. When he got his call-up for the army reserve he knew he would have to leave.

The applicant was asked at the hearing what he feared if he went back to Israel. He said they would ask him questions at the airport. After that he would get a letter saying that he must report for 45 days reserve service. He could not do it again because he had been deeply hurt by his previous experiences and his conscience would not allow him to do these things again. He would not fight against women and children. He thought he would lose his mind if he had to do these things, so he would refuse to fight and would be punished.

The applicant was asked why he had taken so long before applying for protection in Australia. He said that at first he was very excited just to be in the country. Then his mother called saying that a letter had been sent by the army and she had contacted them. They said that the applicant would have to do his reserve service if he came back. He started to have nightmares again and thought what he could do. He knew that if he went back to Israel his parents could not help him and he would have to serve in the army. The applicant said that he has a sibling and he is very worried about him doing military service because he is very

sensitive.

The applicant was asked about his parents' political views. He said that his parents were both on the left and his father had always been pro-peace. However they have been disillusioned over the years. His father has moved to the right. The applicant was asked about his own opinions. He said that the situation is very complicated. He said that when he was in area A he was shocked to see a young Jewish boy shooting at Palestinians. Later a friend was killed and he himself was driving home when a bus behind him was bombed. He said that Arabs are killed too in suicide bombings. The applicant said that he could live in Israel despite these, but he could not do reserve service. If he refused, he would have to sit in gaol for months and then fight the system constantly. There would be a black mark against him throughout his life and people would treat him poorly.

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

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's 2005 Annual Report (for events in 2004) on Israel and the Occupied Territories includes the following:

The Israeli army killed more than 700 Palestinians, including some 150 children. Most were killed unlawfully — in reckless shooting, shelling and air strikes in civilian residential areas; in extrajudicial executions; and as a result of excessive use of force. Palestinian armed groups killed 109 Israelis — 67 of them civilians and including eight children — in suicide bombings, shootings and mortar attacks. Stringent restrictions imposed by the Israeli army on the movement of Palestinians in the Occupied Territories caused widespread poverty and unemployment and hindered access to health and education facilities. The Israeli army destroyed several hundred Palestinian homes, large areas of agricultural land, and infrastructure networks. Israel continued to expand illegal settlements and to build a fence/wall through the West Bank, confining Palestinians in isolated enclaves cut off from their land and essential services in nearby towns and villages. Israeli settlers increased their attacks against Palestinians and their property and against international human rights workers. Certain abuses committed by the Israeli army constituted crimes against humanity and war crimes, including unlawful killings; extensive and wanton destruction of property;

obstruction of medical assistance and targeting of medical personnel; torture; and the use of Palestinians as “human shields”. The deliberate targeting of civilians by Palestinian armed groups constituted crimes against humanity.

Amnesty International’s 2004 report (for events in 2003) included the following:

Scores of Israeli conscientious objectors who refused to perform military service were imprisoned and some were court-martialled...

Scores of 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. Six others who were court-martialled before a military court for refusing to serve in the Israeli army were awaiting sentence. All were prisoners of conscience. (emphasis added)

The number of those refusing to serve in the Occupied Territories in Amnesty International’s 2003 Report was 158, representing a considerable increase over its 2002 Report (33 objectors) and its 2001 Report (5).

Amnesty International issued a Press Release in December 2002 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 (<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.

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.

The US State Department in its 2002 Country Report on Human Rights Practices (released February 2003) for Israel and the Occupied Territories states:

Since its founding in 1948, Israel has been in a state of war with most of its Arab neighbors. Throughout its existence, Israel also has experienced numerous terrorist attacks by a number of terrorist organizations that had as their stated objective the elimination of the Israeli State. With the onset of the "Al-Aqsa Intifada" in September 2000, there was a dramatic escalation in the level of violence directed against Israelis. Since 2000 the number of terrorist incidents, and Israeli casualties due to such attacks, rose sharply...

The "Intifada," or Palestinian uprising, began in September 2000. Its causes are complex and remain highly controversial between the parties. Since 2000 the security situation has deteriorated both within Israel and within the Occupied Territories. Israeli and Palestinian violence associated with the Intifada has claimed 1,782 Palestinian lives, 649 Israeli lives, and the lives of 41 foreign nationals. During the past year, the scale and nature of the violence changed and clashes have continued daily. The conflict was marked by increased Israeli military operations and armed attacks and terrorism by Palestinians against Israeli targets--including civilians within Israel, settlers, and soldiers in the occupied territories and Israel. The attacks also included suicide bombings, roadside bombings, shooting at Israeli vehicles and military installations, firing of antitank missiles and mortars, and use of hand grenades. Israel Defense Forces (IDF) military actions against Palestinians included violence and abuse at checkpoints, incursions into Palestinian-controlled towns and villages, targeted killings, firing toward civilian areas with tanks and fighter aircraft, and intense gun battles with Palestinian shooters. Many observers characterized such actions as punitive. By year's end, Israel reasserted military control, which placed all major West Bank cities except Jericho under IDF control, demolished the homes of suicide bombers and wanted men, conducted mass arrests, and transferred some suspects.

The US State Department in its 2004 Country Report on Human Rights Practices (released February 2005) for Israel states:

During the year, a total of 76 Israeli civilians and four foreigners were killed as a result of Palestinian terrorist attacks in Israel and the occupied territories, and 41 members of the Israeli Defense Forces were killed in clashes with Palestinian militants. During the same period, more than 800 Palestinians were killed during Israeli military operations in the occupied territories...

The country's population is approximately 6.8 million, including 5.2 million Jews, 1.3 million Arabs, and some 290,000 other minorities. It has an advanced industrial, market economy with a relatively high standard of living. Twenty one percent of the population lived below the poverty line in 2003. Unemployment was approximately

11 percent, and was higher among the Arab population. Foreign workers, both legal and illegal, constituted about 7 percent of the labor force...

During the year, terrorist organizations such as the Islamic Resistance Movement (Hamas), Al-Aqsa Martyrs' Brigades, Hizballah, Islamic Jihad, and the Popular Front for the Liberation of Palestine (PLFP), committed numerous acts of terrorism in Israel as well as in the occupied territories.

According to the Government, there was a 45 percent reduction in the number of Israelis killed in such attacks during the year due to the construction of a security barrier ... and effective terrorist interdiction. Seventy-six Israeli civilians and 4 foreign nationals were killed, and over 394 were injured in terrorist attacks during the year. Forty-one Israeli security forces were killed and 195 injured. There were 13 suicide attacks during the year that resulted in 53 Israeli and 2 Palestinian deaths. In addition, eight suicide bombers killed only themselves. In contrast, 26 suicide attacks in 2003 caused 144 deaths...

The Israeli Government continued construction of a security barrier along parts of the Green Line (the 1949 Armistice line) and in the West Bank. The PA alleged that the routing of the barrier resulted in the taking of land, isolating residents from hospitals, schools, social services, and agricultural property. Israel asserts that it has sought to build the barrier on public lands where possible, and where private land was used, provided opportunities for compensation. Palestinians filed a number of cases with the Israeli Supreme Court challenging the routing of the barrier. In June, the Court ruled that a section of the barrier must be rerouted; determining that the injury caused by the routing of the barrier did not stand in proper proportion to the security benefits; various portions of the barrier route were rerouted. On July 9, the International Court of Justice issued an advisory opinion, concluding that "The construction of the wall built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem... and its associated regime, are contrary to international law."

The Daily Telegraph (UK) published the following report ("Has Israel Beaten the Suicide Bombers?" on 30 November 2005)

Israelis are beginning to hope that daily life may be returning to something like it was before the Palestinian uprising. In Tel Aviv, which prides itself on being fun, the bars are full at weekends. Crocodiles of Christian and Jewish tourists are once again thronging the narrow streets of Jerusalem's Old City. The more relaxed mood has a simple explanation. It is three months since the last serious terrorist attack.

The army says there were 25 such attacks in 2002, which killed 147 people. Last year there were 20, killing 141. So far this year there have been only two, in which 19 died. The Israelis are starting to believe that their tactics are working. Palestinian groups fighting them tend to agree. The question is whether the trend marks an irreversible

improvement or is merely a lull while the militant groups, decapitated again and again, regroup and rethink.

One reason cited for the decline in attacks is the barrier being built to separate Arab and Jewish territory... But whatever the claims made for the barrier, it is too early to judge as the project is incomplete. Palestinians say it is not a serious deterrent. "The wall can't stop operatives," said Usama al-Ayasseh, author of a book on suicide bombers. "It has many holes in it."

Both sides agree that the main factor in the decline in activity is Israel's success in killing or capturing the leadership of the most militant groups. Sources close to Hamas, which is responsible for many of the suicide attacks, say that in the West Bank, from where most operations were launched, the organisation has been badly hit.

"There is no money to finance operations," said one. "Many of the leaders are gone and it is difficult to replace them. Hamas needs at least two years to rebuild." (*Daily Telegraph* (UK) of 30 November 2005

<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/05/22/wmid22.xml>)

FINDINGS AND REASONS

On the basis of the applicant's evidence, including the evidence of his passport, the Tribunal accepts that he is an Israeli national and that he has no right of entry to any other country.

The applicant's claims were presented in a brief manner with very little detail in his Protection Visa application. A much more detailed submission was given to the Tribunal on the day of the applicant's hearing, putting forward considerably more detailed claims and changing the emphasis of the applicant's concerns from a general anxiety at being targeted by suicide bombers in Israel to very specific concerns about doing reserve army service in the Occupied Territories, where he had already served in extreme conditions for the majority of his military service. At the Tribunal hearing, the applicant presented his claims in a straightforward and frank manner. His evidence was extremely detailed and in particular his description of his growing revulsion at serving in the Occupied Territories was credible. The Tribunal formed the opinion that the applicant's evidence as presented in both written and oral form on the day of his Tribunal hearing was credible, even though its emphasis was considerably changed from the evidence set out in his original Protection Visa application

The Tribunal accepts that the applicant did his compulsory military service and that the majority of his service were carried out in the Occupied Territories. The Tribunal further accepts that this was a period of increased violence both on the part of Palestinian terrorist groups and of the IDF. The Tribunal accepts that the applicant was extremely frightened and that his conscience was disturbed by the actions he was required to carry out while serving in

the Occupied Territories. It accepts that he felt that he had no alternative but to continue his military service, since he thought that he would be gaoled and that his future would be ruined if he refused to do so. The Tribunal accepts that after the time spent in the Occupied Territories, the applicant felt that Israeli policy there was wrong. It accepts that the applicant, if he returned to Israel and were called upon to do reserve service, a duty for all Israeli males to the age of 51 (with some exceptions) (see page 9, above), would refuse to undertake service in the Occupied Territories because of his belief that Israeli policy is wrong and because of his past experiences as a soldier there.

On the applicant's own evidence, the Tribunal does not find that he has been persecuted in the past for a Convention reason or for any other reason. The Tribunal is, however, required to consider whether there is a real chance that the applicant will be persecuted if he returns to Israel in the foreseeable future.

The Tribunal finds that the applicant has not refused to serve in the past, although he has made numerous attempts to persuade senior officers not to send him on combat duty in the Occupied Territories. The Tribunal notes that the applicant had no objection to serving in the army in a particular occupation. The independent information makes it clear that the applicant will continue to be liable for reserve service if he returns to Israel, and that refusal to serve is punishable by a prison sentence (page 9). The information also indicates that gaol sentences have in fact been given to those who refused to perform military service (Amnesty International, page 11). 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 continuing critical situation in the Occupied Territories, that the applicant will be required to serve there. The applicant claims that because of his political beliefs he will be obliged to refuse service in the Occupied Territories and on the evidence provided at the hearing, the Tribunal accepts this claim. 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, and the Tribunal accepts, that apart from the legal punishment, he will be treated throughout his life in Israel as at worst a traitor and at best as a second-class citizen because of his refusal to serve.

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 9-10) that in Israel the military service laws and regulations are discriminatory, and are administered in a systematically discriminatory fashion. Some people are exempted on the grounds of their gender or their religious persuasion, others may apply for exemption on the grounds of conscientious objection, but there is no formal, legal process for dealing with such applications. The informal committee which considers applications does not appear to operate on a transparent basis. According to the country information, persons whose objection to military service is founded on their objection to Israeli policy in the Occupied Territories are not only not exempted, but are punished for their refusal to serve. Amnesty International regards such persons as “prisoners of conscience” (page 11). 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 does not accept that selective objectors (ie objectors on the grounds of political opinion regarding Palestine) have, at least up to 2002, been treated more harshly than conscientious objectors generally in the matter of their sentencing. However, on the evidence of media reports and WRI’s January 2004 report on the sentencing of 5 refuseniks (pages 12-13), this situation is changing.

The escalation of violence in the Occupied Territories, is, in the Tribunal’s view, likely to lead to greater community disapproval of those opposed to the Israeli Occupation. The media, including the Israeli media, have commented on a decline in community approval for “refuseniks” since “Operation Defensive Shield” began in the Occupied Territories in 2002 (for example, “In the middle, alone” in *Haaretz* of 16 June 2004, www.haaretz.com). There

is no evidence that community opinion generally, nor the opinion of the authorities in particular, is becoming more favourable in relation to objectors to service in the Occupied Territories in the past few years. 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 (pages 12-13). The applicant has developed political views which are opposed to Israeli government policy, and would now, in the Tribunal's view, feel obliged to express such views, specifically by refusing to serve in the Occupied Territories. 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 is satisfied that the reason for such mistreatment would be the applicant's political opinion, both real and imputed. It is therefore satisfied that the applicant has a well-founded fear of persecution within the meaning of the Convention.

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.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant.

Sealing Officer's I.D. PRGWSA