Neutral Citation Number: [2010] IEHC 177

THE HIGH COURT

JUDICIAL REVIEW

2007 1410 JR

BETWEEN/

P.S. AND L.S.

APPLICANTS

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 11th day of May, 2010.

1. By order of Charleton J. of 5th March, 2009 (as subsequently amended by order of 24th March, 2009) leave was granted to the applicants to apply for various reliefs by way of judicial review in respect of two appeal decisions of the first named respondent ("the Contested Decisions") dated 12th September, 2007, including orders of *certiorari* to quash those decisions. The Contested Decisions rejected appeals brought by the applicants against reports and negative recommendations dated 21st December, 2006, made under s. 13 of the Refugee Act 1996 by authorised officers of the Refugee Applications Commissioner which had recommended that the applications for asylum on the part of the applicants be rejected and that they be not declared to be refugees. While the two decisions were made at the same time by the same Tribunal member (Mr. David Goldberg,) the claims for asylum arose essentially out of the same circumstances and he expressly incorporated into the second named applicant's decision his findings on the main claim common to both cases. (The references hereinafter to "Contested Decision" in the singular are accordingly to the decision in the first named applicant's appeal.)

2. Leave was granted to seek judicial review of the Contested Decisions upon the common grounds following:

> (1) The Tribunal member erred in law in respect of the concept of political opinion in the definition of refugee;
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> (2) In particular to (1) but without prejudice to its generality the Tribunal member erred in law in holding that the first named applicants refusal to serve as part of the Israeli Defence Force in the occupied Palestinian territories which refusal was on the grounds that the operations were contrary to international law, human rights law and against the first named applicants "ethnic, moral and political opinions" did not bring him within the definition of refugee;
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> (3) The Tribunal member erred in law in failing to consider and/or apply properly all or at all Article 9.2 (e) of the European Communities (Eligibility for Protection) Regulations 2006 (S. I. No. 518 of 2006) which states that "acts of persecution … can … take the form of … persecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses set out in Article 12 (2)";
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> (4) The Tribunal member erred in law in holding that "a conscientious objector who is only a "partial" objector is not entitled to status";
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> (5) The Tribunal member acted in breach of the applicants' right to fair procedures in failing to put to them or their legal advisers the country of origin information and or case law that he relied upon in particular the Tribunal member's decision number 69/2402/06;
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> (6) The Tribunal member acted in breach of the applicants' right to fair procedures in finding against them for reasons not contained in the s. 13 report of the Refugee Applications Commissioner and in failing to put the applicants on notice of his likely findings thereby depriving them of the right to make submissions in respect of matters that were adverse to their claims.

3. The background to this claim as described in the first named applicant's grounding affidavit and in the Contested Decision can be summarised as follows. The first named applicant (hereinafter referred to as "the applicant") was born in 1974 in what was then the USSR but emigrated with his parents to Israel in 1992. At the age of eighteen he was conscripted into the Israeli Defence Forces ("the IDF") and served his three years of national service. Thereafter he was called up on an annual basis for reserve training. He married the second named applicant in 2005 and a child was born to them in 2006. The second named applicant is from the Ukraine. When on reserve duty in the early part of 2005 in the occupied territories he claims to have witnessed a civilian being killed. When he was again called for military service in 2006 he refused. The incident he witnessed severely disturbed him and he sought psychiatric advice. When recalled to duty in July 2006 he relied on the psychiatric report to justify his refusal to serve. He was court-martialled and imprisoned for fourteen days and given a suspended sentence.

4. In October, 2006, the applicant left Israel with his wife and their son and arrived in the State to apply for asylum. He was interviewed by an authorised officer of the RAC on 6th December, 2006, and, as mentioned, on 21st December, 2006, a s. 13 report with a negative recommendation signed by two authorised officers was issued by the Commissioner. That was appealed on 23rd January, 2007 to the Tribunal. While an oral hearing upon the appeals was available to the applicants, on 1st May 2007, the applicant instructed his solicitor that an oral hearing was not required as the facts of the cases were not in question such that the only issue to be determined by the Tribunal was whether he qualified as a refugee under the Refugee Act 1996. The Contested Decisions were, accordingly, made by the Tribunal member (Mr. David Goldberg) without any oral hearing.

The Section 13 report
5. In the s. 13 report the two authorised officers considered that the applicant's change of attitude towards his yearly reserve duty appeared to be attributable to a direct result of his experiences in the war: "It appears the applicant fears returning to the army because of what he witnessed while completing his annual service in 2005. Although the applicant's fears are understandable, they do not amount to persecution".

6. They cited in particular paras. 167 and 168 of the UNHCR Handbook: "Fear of prosecution and punishment for desertion or draft evasion does not itself constitute well founded fear of persecution … a person is clearly not a refugee if his only reason for desertion or draft evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution". They also cited from Professor Hathaway's book *The Law of Refugee Status*: "A person is clearly not a refugee if his only reason for desertion or draft evasion is his dislike of military service or fear of combat."

7. The officers record that when questioned at interview as to his grounds for refusing his military service, the applicant explained:

> "Because I refuse to serve in action. I refuse to be part of a state killing civilians as they are peaceful people and did not do any harm. It could be possible the terrorist people are among them but most are peaceful and I don't want this."

8. They then cite para. 80 of the UNHCR Handbook to the effect that holding political opinions different from those of the government is not in itself a ground for claiming refugee status. An applicant must show that he has a fear of persecution for holding such opinions. "This presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant …"

9. The officers then conclude that while the reason the applicant refused military service in 2006 was because of what he claimed to have witnessed in 2005, "as such it does not appear that the Convention ground of political opinion is applicable."

The Appeal
10. That section 13 report was then appealed to the Tribunal. In the notice of appeal dated 23rd January, 2007, amongst lengthy and detailed grounds of appeal the following issues were raised which are directly pertinent to the matters considered on the appeal and now the subject of this application for judicial review.

> (1) The Commissioner erred in investigating the claim for asylum by failing to adequately examine the appellant's fear of persecution in Israel based on an imputed political opinion in that he was not adequately questioned about the state of his mind at the time he left Israel in fear of his life.
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> (2) He fears persecution in Israel on the grounds of imputed political opinion as his refusal to go on military service, for good and sufficient cause is not accepted and he was treated as an enemy in refusing to serve the state.
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> (3) The Commissioner misconstrued the appellant's situation in relation to his refusal to perform military service in Israel by relating his refusal to do military service to desertion and draft evasion because of dislike of military service when in the appellant's case the circumstances are entirely different since his refusal to perform military service arises solely from the state of his mental health.
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> (4) The Commissioner erred in stating that the appellant's fears, while understandable, did not amount to persecution when he was imprisoned for a failure to serve in the army which was through no fault of his own, the military commander having refused to accept his medical letter stating that his service should cease and he was regarded as a traitor in not serving the state.
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> (5) The appellant submitted that if returned to Israel he would face imprisonment for the wrong reasons and that the lack of human rights there would mean that would have no protection.

11. With the notice of appeal the applicant lodged a body of documentation consisting of reports largely concerned with the activities of the I.D.F. in the occupied Palestinian territories in 2005, 2006, with particular reference to investigation into alleged abuses of human rights.

The applicant's evidence
12. In view of the absence of an oral hearing on the appeal, it is useful to note the state of the direct evidence from the applicant available at the outset of the appeal as derived from the first stage examination of the application in the office of the Commissioner. In the application for refugee status and questionnaire the applicant had given his reason for leaving Israel in these terms:

> "I left the country … because I did not want and could not participate and be part of the state which occupied lands of nearby countries and kills peaceful citizens of those countries who have nothing to do with terror."

He described in detail the incident which occurred in April 2005 when his unit was ordered to surround a small area to cover for a special task unit carrying out some undisclosed operation. "Sometime later firing started. Suddenly people started running in different directions. A man wounded in the back fell several metres away from me. I tried to pull him away behind the fence. I started calling for a nurse. At this moment he looked at me and uttered something in Arabic and stopped breathing. All this affected my psychological condition. I started having depression. I started seeing nightmares and having sleeping problems. Several weeks after this incident my condition got worse and I went to seek help from a psychiatrist."

13. In the section 11 interview he described the incident again. The man in question was a civilian and when medical help arrived he was dead. He did not know who shot him. He said that in the course of his own military duties he had never killed anyone. His unit was aware of the impact the incident had had on him and his commander told him to go home for two or three days and have a rest.

14. When he was again called up for service on 23rd July, 2006, he refused to sign the document acknowledging his acceptance of his gun. He had been receiving treatment from Dr. Bella, a psychiatrist. Dr. Bella furnished him with a letter or report dated 6th July, 2007, which is referred to by the Tribunal member in the Contested Decision. It described him as suffering from anxiety, depression fear and recommended that his military service should cease. He sent the report to the military authorities but received no response. When he reported for duty as summoned in July 2006 he was charged with refusing orders, held for fourteen days in a cell and then sentenced by the military tribunal to 65 days detention suspended for a period of 60 months.

15. When asked of his claim to fear persecution on grounds of political opinion he explained: "Because I refused to serve in action. I refused to be part of a state killing civilians as they are peaceful people and did not do any harm. It could be possible that terrorist people are among them but most are peaceful and I don't want this."

16. He was asked whether he could have stayed in Israel and put forward his case after he had been released from detention. He said it would be pointless "because it is nearly impossible to get off military service as the situation in the country is always tense and it is possible I will be called in 2007. The commander said during the Tribunal if everyone started to refuse what would we do so I cannot be an example of what can be done". Asked what he would fear if returned to Israel he said: "that I will be imprisoned or alternatively I would have to go in the army to kill people".

The Contested Decision

17. In section 7 of the Contested Decision under the heading "Analysis of the Applicant's Claim" the Tribunal member describes the essence of the claim made by the appellant as "that he is a conscientious objector". He then sets out the basis of the claim and notes the following points.

> o The appellant did his three year national service and his annual reserve training up to 2005 and there "seems to have been no complaint during these periods".
>
> o The psychiatric report is very brief and does not state that the applicant suffered post traumatic stress disorder although he notes that this would not be surprising as army personnel are so affected after encounters in the field.

18. The Tribunal member acknowledges that a person who is a "genuine" or "absolute" conscientious objector may be entitled to refugee status and for this purpose incorporates into the decision an earlier Tribunal decision no. 69/2402/06 in which the same Tribunal member had set out an extensive review of the law in relation to conscientious objection in closely analogous circumstances of an asylum claimant conscripted into the I.D.F.

19. The Tribunal member considers that in accordance with that case law, a conscientious objector who is only a "partial" objector is not entitled to refugee status. He points out that this applicant did not raise objection until April 2007, which was some two years after the incident he claimed to have witnessed and finds it strange that the onset of trauma was so delayed.

20. The Tribunal member places particular emphasis, however, on the fact that the applicant does not appear to have made an attempt to obtain formal exemption from military service on medical grounds. This is known as a "Profile 21" or "White Ticket". He states that the Tribunal is aware "from curial deference" (presumably from having dealt with or consulted similar cases,) that the IDF does not want soldiers to suffer from suicidal ideation and recognises that those suffering from mental problems are entitled to claim exemption. The Tribunal member states:

> "The Tribunal considers that the delay of two years in refusing to serve is significant and that failure to claim a profile 21 is difficult to reconcile with the facts particularly when he was court martialed and imprisoned for fourteen days."

21. The Tribunal member notes that in Israel there are a number of organisations which assist and advise conscientious objectors and says that there are very large numbers of objectors and that the number is continually increasing. "Therefore there were several avenues open to the appellant before seeking the refusal of the international community." He also finds:

> "The Tribunal is satisfied that there are avenues and remedies open to the appellant even if he were to be returned to Israel now."

22. The Contested Decision concludes:

> "The Tribunal does not consider that the punishment suffered and which was suspended is disproportionate within the law. The Tribunal also notes that the Lebanon conflict is over for the past twelve months and there is no resumption. The Tribunal is further aware that civilians do get killed in all conflicts. The state policy of the IDF is not to kill or target civilians and they go to some lengths to try and avoid them. The appellant does not come within the exceptions set out in the case law or come within the framework of the UNHCR Handbook. The Tribunal does not consider that for the reasons set out *supra* and in decision 69/2402/06 that the appellant has demonstrated a well founded fear of persecutions for reasons of political opinion."

23. It is clear, accordingly, that the applicant's appeal was rejected by the Tribunal member upon the basis that he was, essentially, a "partial conscientious objector"; that his delay in raising objection and the absence of any formal application for exemption from military service together with his failure to seek protection in Israel through the various avenues available to objectors, meant that he had not established that any fear he had by reason of political opinion was a well founded fear for a Convention reason.

Grounds (5) and (6)

24. It is appropriate to consider first the two final grounds listed at paras. (5) and (6) in paragraph 2 above which allege that the validity of the Contested Decision is vitiated by procedural unfairness. In particular, exception is taken to (a) the reliance placed by the Tribunal member on decision no. 69/2402/06 when it was not brought to the applicant's attention in advance so that it might be commented upon; and (b) the fact that the appeal was rejected for reasons not contained in the s. 13 report. It is not contested that prior to the determination of the appeal, the applicant's advisors had not had access to that earlier decision. It is submitted that they were denied a fair procedure in the making of the decision by the failure of the Tribunal member to give the applicant and his advisors a prior opportunity to consider and comment upon that decision and upon his proposed reasons and findings prior to determining the appeal.

25. Reliance is specifically placed in support of these grounds upon the judgment of Clarke J. of 10th May, 2005 in *V.I. v. M.J.E.L.R. & Anor*. [2005] IEHC 150. The judgment in question was given on an application for leave to seek judicial review of an R.A.T. decision so that Clarke J. was considering not the substantial issue but whether an arguable case had been made out for the grounds proposed to be advanced. He described the approach to be taken by the Tribunal member on this aspect of the principle of fair procedures in administrative decisions of the present kind as follows:

> "It should be recalled that the process before the R.A.T. is an inquisitorial one in which a joint obligation is placed on the applicant and the decision-maker to discover the true facts. It seems to me that an inquisitorial body is under an obligation to bring to the attention of any person whose rights may be affected by a decision of such a body any matter of substance or importance which that inquisitorial body may regard as having the potential to affect its judgment. In that regard an inquisitorial body may, in many cases, be in a different position to a body which is simply required to adjudicate upon the contending positions of two competing parties in an adversarial process. In the latter case the adjudicator simply decides the issues on the basis of the case made whether by evidence or argument by the competing parties. However, the principles which have been developed by the courts since the decision of the Supreme Court in *Re: Haughey* (1971) I.R. 217 are equally applicable, in principle, to inquisitorial bodies. The precise way in which those principles may be applied, of course, may differ. However the substantial obligation to afford a party whose rights may be affected an opportunity to know the case against them remains. In those circumstances it seems to me that whatever process or procedures may be engaged in by an inquisitorial body, they must be such as afford any person who may be affected by the decision of such body a reasonable opportunity to know the matters which may be likely to affect the judgment of that body against their interest. … if a matter is likely to be important to the determination of the R.A.T. then that matter must be fairly put to the applicant so that the applicant will have an opportunity to answer it. If that means the matter being put by the Tribunal itself then an obligation so to do rests upon the Tribunal. Even if, subsequent to a hearing, while the Tribunal member is considering his or her determination an issue which was not raised, or raised to any significant extent, or sufficient at the hearing appears to the Tribunal member to be one of significant importance to the determination of the Tribunal then there remains an obligation on the part of the Tribunal to bring that matter to the attention of the applicant so as to afford the applicant an opportunity to deal with it. This remains the case whether the issue is one concerning facts given in evidence by the applicant, questions concerning country of origin information which might be addressed either by the applicant or by the applicant's advisors, or indeed legal issues which might be likely only to be addressed by the applicant's advisors. In setting out the above I would wish to make clear that the obligation to fairly draw the attention of the applicant or the applicant's advisors to issues which may be of concern to the Tribunal arises only in respect of matters which are of substance and significance in relation to the Tribunal's determination. … I am also satisfied it is at least arguable that there must be some reasonable proportionality between the extent to which attention is drawn to an issue and the importance which the Tribunal is likely to attach to it. A mere casual reference to a matter which turns out to be central to the Tribunal's determination may be insufficient to meet a test of "drawing reasonable attention to factors which may influence the Tribunal's determination".

26. As is clear from the terms in which the above statement is couched, the application of the principle of procedural fairness articulated in *Re: Haughey* and subsequently developed, to contexts other than those of quasi-criminal procedures of an adversarial character affecting personal rights, is something that must be done with caution. The principle which requires that an individual likely to be so affected be informed of the case to be met and given an opportunity to rebut it is an incident of the historical rule of natural justice "*audi alteram partem*".

27. As Clarke J. impliedly acknowledges in that passage, the procedures for the examination of asylum applications under the 1996 Act are not concerned with imposing a liability on an applicant or with determining issues of right or wrong as between an applicant and an adversary. The procedure is concerned with determining whether an applicant has established the existence of the conditions required in order to be declared entitled to the protection afforded by refugee status in international law. The process is declaratory. A negative decision does not deprive an asylum seeker of a subsisting right; it declares that in the applicant's case the status of refugee has not been shown to exist. In so far as the asylum seeker can be said to have "a case to meet" it lies in the reasons given in the s. 13 report for the negative recommendation which is sought to be reversed by the appeal.

28. In applying the approach of Clarke J. it is important therefore to bear in mind in each case the subject matter of the appeal which is before the Tribunal and the issues which the appeal raises. This is especially relevant in the present instance because this was a case in which an oral hearing on appeal had been available to the applicant but was waived because the facts were not in dispute and the only issue to be determined was whether those facts brought the applicant within the definition of "refugee". This was not therefore a case in which credibility was in issue and where inquiries by a Tribunal member or the consultation of country of origin information could disclose facts which, if true, would serve to rebut or contradict material parts of the basis upon which the claim to be a refugee had been made.

29. The Court accepts that while the entitlement to answer a case made in this way arises principally in relation to matters of fact and the admission of evidence, it may also involve, as Clarke J. points out, an obligation to alert legal advisors to "legal issues". In the Court's judgment, however, this obligation does not impose upon the Tribunal an obligation to consult legal advisors in advance on all findings of law proposed to be made in determining the appeal. Legal representatives must be taken to be able to anticipate legal issues relevant to or resulting from their client's claim. The obligation arises only, in the Court's view, in respect of material findings which will be determinative of the appeal and which have not been raised or considered by the applicant's legal advisors in entering the appeal or lodging legal submissions. It arises where the Tribunal member proposes to make a finding upon a legal issue which will, in effect, come as a surprise to the appellant's advisors and in respect of which counter arguments or submissions might have been made which, if accepted, would have altered the outcome of the appeal. It follows that the obligation may be somewhat greater where no oral hearing takes place at which the legal issue might have been canvassed and discussed.

30. It is necessary therefore to consider the significance and effect of the reliance placed by the Tribunal member on the previous decision no. 2402/06 which the Tribunal member expressly incorporates into the Contested Decision "as if it were part of it". In doing so it is worth bearing in mind the respective bases upon which the authorised officers in the s. 13 report and the Tribunal member in the Contested Decision rejected the applicant's claim.

31. The section 13 report does not contain an explicit finding as to whether the applicant was or was not regarded as a conscientious objector or had exemption remedies on medical grounds available in Israel but the citations from the UNHCR Handbook and from Professor Hathaway's book indicate that the officer considered the applicant's refusal to serve in 2006 was equivalent to avoiding draft because of fear of combat and dislike of military service rather than a conscientious objection as such. Thus the s. 13 report turns upon two findings:

> (a) His fear of returning to Israel and being obliged to take up military service is based upon his previous experience

of the incident in which the civilian was killed but that is not a fear of persecution for a Convention reason; and

(b) His refusal because of the previous incident and his objection to the treatment of civilians to complete his annual duty and the subsequent conviction and punishment he received, was not persecution on grounds of political opinion for the purposes of the Convention.

32. The Contested Decision, on the other hand, finds that the applicant was a "partial" conscientious objector and, as such, was not entitled to refugee status. In addition, however, the Tribunal member placed emphasis upon a finding that the applicant could have (if necessary with the assistance of organisations who help objectors) made formal application for exemption ("Profile 21 or White Ticket") but did not do so. He finds that the IDF does not want soldiers to suffer from suicidal ideation and recognises that those suffering from mental problems are entitled to claim exemption. These are, in other words, findings based upon conditions existing in Israel.

33. Decision no. 2402/06 was adopted in 2007 by the same Tribunal member and concerns the somewhat analogous situation of an applicant who had emigrated from Russia to Israel and claimed to fear persecution as a conscientious objector if called up as a reservist in the IDF on return to Israel. The decision is a lengthy and detailed one in which the Tribunal member has clearly taken considerable care in conducting research and consulting country of origin information in relation to the treatment of conscientious objectors by military authorities and courts in Israel. He sets out at length his appreciation of legal authorities on the issue of conscientious objection as a factor which may entitle an asylum seeker to claim refugee status. It is to be noted, however, that this was an appeal in which an oral hearing had taken place and, as the Tribunal member points out, one in which he had drawn the attention of the appellant and his counsel at the hearing to the leading case law on that topic.

34. More importantly, however, the decision records that following the hearing, the Tribunal member conducted further country of origin searches in relation to the position of conscientious objectors in the Israeli army and this "revealed that there were many organisations in Israel which had been formed in recent years to give active assistance to those who claim conscientious objection". Since 1999 or 2000 a number of successful cases had been taken to the Israeli courts to uphold the position of such objectors. On foot of this research the Tribunal member wrote to the legal representatives of that applicant placing that information before them and directing them to the sources from which it had been gleaned. The appellant was given fourteen days in which to make submissions on those matters to the Tribunal and the resulting submissions are then taken into account by the Tribunal member.

35. The decision in question (apart from an appendix) runs for approximately 40 pages, a large part of which is devoted to the Tribunal member's exposé of the information gleaned in the researches on the treatment of conscientious objectors in the Israeli Army; the avenues of remedy available to objectors to obtain exemption from service; and of extensive case law both in the Israeli courts and in other jurisdictions relating to the recognition of the rights of conscientious objectors to military service. Bearing in mind that this entire text falls to be treated as read into the Contested Decision in the present case so as to form part of it, the following matters highlighted by the Tribunal member are, in the view of the Court, directly pertinent to the grounds for review now under consideration in this judgment:

(a) The terms of conscription for military service and subsequent annual reserve training in the IDF are described. It is noted that since 1980 men over 35 are often not called up for reserve training as they are deemed medically unfit.

(b) The availability of exemption based upon "other reasons" in National Service Law Art. 36 as interpreted in court decisions is outlined. Such "other reasons" have been held to cover exemption from regular service of conscientious objectors who object to the framework of military service as a matter of principle.

(c) The IDF is concerned at suicides by members of the forces such that exemption for medical unfitness is granted in the process described as "Profile 21" or "the White ticket".

(d) In paragraphs 19-26 of decision no. 2402/06 Israeli law relating to the distinction between full conscientious objectors and "partial" objectors is set out.

(e) In paragraphs 27-58 the Tribunal member undertakes an examination of the interpretation of the Convention on this subject by other courts and authorities including, for example, judgments of English courts in *Sepet & Another v. Secretary of State* [2003] 1 W.L.R. 856; and *Krotov v. Secretary of State* [2004] 1 W.L.R. 1825; and *Davidov v. Secretary of State* [2005] CSIH 51.

(f) In paragraphs 59-71 the Tribunal member examines a number of decisions of the Israeli Supreme Court in relation to the protection of human rights in Israel. The thrust of the analysis made by the Tribunal member is that the Israeli Supreme Court acknowledges that the operations of the IDF are subject to the constraints of international law. The Tribunal member concludes: "From these citations it is clear beyond peradventure that the Israel Supreme Court, more than any other perhaps, has held both the human rights and international law obligation as the guiding light of its deliberations. It has demonstrated this without fear or favour and despite considerable criticism from all sides."

36. In reaching his decision in that case, the Tribunal member places considerable emphasis on the fact that the researches he has carried out and the documentation he has consulted demonstrate that for those who have conscientious objection to military service "there are avenues of redress available in Israel without the need for flight … notwithstanding the concerns of the international community." He points out that several objectors have brought proceedings in the Israel Supreme Court and some have obtained redress thereby paving the way for others. The Tribunal member endeavours to envisage what would happen to that applicant if returned to Israel and called up for service if he refused. "He would be sent to prison for 30 days. He could apply immediately to the Supreme Court on human rights grounds. Equally he would be released after detention and called up again at a later date when he would refuse again. There is no certainty how many times the army would call him. The Tribunal does not accept that it would be for life."

37. The Tribunal member also had difficulty in finding that the applicant in question was a genuine objector on grounds of religion, moral or political belief. In accordance with case law he could not claim persecution for political opinion unless it was demonstrated objectively that this was the real reason for the punishment he had received for refusing military service. He had received the same treatment as that given to all objectors in the IDF and could not therefore claim to have suffered discrimination or a severity of punishment amounting to persecution.

38. In conclusion, the Tribunal member upholds the negative recommendation in that case upon the ground that the appellant in question was not considered to be a genuine and full conscientious objector because objectors have organisations available to them

to assist them and there are remedies in the Israeli legal system which ought to have been exhausted before international protection was sought.

39. It will be clear from this recital of some of the salient aspects of decision no. 2402/06 that it is one of considerable substance so far as the issues are concerned and that it is based upon extensive research into the relevant conditions in Israel as well as a thoughtful analysis of the remedies available to conscientious objectors in the Israeli legal system and the laws governing the IDF. It is also clear from the language in which many of the observations are expressed that the analysis is informed by an appreciation of the pressures and tensions affecting Israeli institutions and society not only as a result of the continuous conflict and effects of terrorism but also as a result of the pressures created within the Israeli population by large scale migration inflows from Russia and Eastern Europe.

40. It is clear therefore that the crucial findings upon which the present Contested Decision has been based can be traced directly to the approach adopted by the same Tribunal member in decision no. 2402/06 as, indeed, he intended by reading the latter into the Contested Decision. Thus, the findings that the applicant was not a genuine or absolute conscientious objector but a "partial" one and that remedies would have been available to him in Israel within the legal system and if necessary with the help of voluntary organisations established for that purpose, are based directly upon the researches undertaken for decision no. 2402/06 and the approach adopted in that case.

41. The material contained in that decision is, in the Court's judgment, of such substance, importance and materiality that it ought to have been put to the legal representatives of the applicant for possible comment in this case as, indeed, had been done in case no. 2402/06 itself. Although, as indicated above, much of the content of the decision in question is devoted to an exposé of case law, that is not done exclusively for the purpose of identifying the correct legal principles to be applied or to ascertain the correct interpretation of particular concepts of the Convention or asylum law. In effect, the excursion into the jurisprudence of the Israeli courts is applied for the purpose of demonstrating that remedies would be available to a conscientious objector or a soldier suffering mental trauma in Israel through military procedures and the legal system. It is being employed, therefore, to supply a factual basis for the resulting conclusion in relation to the conditions prevailing for such persons in the country of origin.

42. Because this was a case in which there was no oral hearing and because decision no. 2402/06 had such significance for the purpose of the appeal determination and was unknown to the applicant and his legal representatives, this was, in the Court's judgment, an instance in which the fairness of the procedure required that the Tribunal member should have alerted them to the reliance that was to be placed upon the decision and given an opportunity to answer it. The entitlement to an oral hearing had been waived upon an (admittedly unilateral,) understanding that, in the light of the s. 13 report, the basic facts were not in dispute and only the application of the definition of "refugee" to those facts remained to be considered by the Tribunal member. As indicated above, the s. 13 report had undertaken no equivalent examination of the treatment received by conscientious objectors in the Israeli legal system and contained no finding in relation to the availability of "Profile 21" or an entitlement to formal exemption from military service on medical grounds. The Court notes that subsequent to the delivery of the Contested Decision, by letter of 19th September, 2007 the applicant's solicitors sought to obtain a reconsideration of the case by lodging additional submissions running to a dozen pages. These address, *inter alia*, the question of the "Form 21 Certificate" so that it is reasonably clear that, had there been an oral hearing in this case and had decision no. 2402/06 been brought to the applicant's attention, a challenge would have been made to the proposition that the applicant could reasonably have expected to obtain exemption.

43. For these reasons the Court is satisfied that the last two grounds for which leave was allowed listed as (5) and (6) in the order at para. 2 above, have been made out and that it is necessary to quash the Contested Decision for procedural unfairness in the manner in which it was reached. In quashing the Contested Decision on this ground, however, it should be made clear that the Court is not holding that there is a general obligation on the Tribunal in all appeals where there is no oral hearing to give advance notice of findings and an opportunity for comment and especially in respect of findings on legal issues. As indicated in paragraphs 25-29 above, such an obligation may only arise where an appeal is to be determined by applying some finding of law not previously raised in the asylum procedure in question or which is not consequential upon submissions made by the appellant; or where, as here, the legal finding involves importing into the case some factual material of which the appellant could not be expected to have been aware.

44. As the quashing of the decisions will require the appeals to be determined afresh (and possibly by a different Tribunal member,) it is neither necessary nor appropriate to consider the further grounds in respect of which leave has been granted and that is so for two particular reasons in this case. First, it is clear that the applicant's claim turns ultimately upon the inferences and conclusions to be drawn from the facts relating to the applicant's refusal to serve in July 2006. As indicated by the recital of the evidence in paragraphs 12 -15 above and stated even more explicitly in the belated "Additional Submissions" of 19th September 2007, the applicant claimed that his refusal was that of a deserter not a conscientious objector. Whether that claim is made out is something that must first be determined by the Tribunal as the administrative decision-maker. Because the body of material in Decision No.69/2402/06 may have a bearing on that issue, it should be left for such fresh determination by the Tribunal. Secondly, as the assessment of a well founded fear of persecution is a forward looking exercise, the appeal will fall to be determined taking into account any intervening changes of circumstances in the country of origin which may be relevant whether based on new evidence and information to be supplied by the applicant or derived from country of origin information consulted by the Tribunal. This may include, no doubt, current information relating to the age for reserve service and the other conditions adverted to by Mr. Goldberg for reserve service in the IDF.

45. An order of *certiorari* will therefore issue to quash both appeal decisions of the Tribunal dated 12th September 2007. As explained above (see paragraph 1,) the Tribunal member explicitly read into the decision in the case of the second named applicant so as to form part of it, the findings made by him on the husband's claim because that was also the main claim of the wife. It follows that both decisions are vitiated by the same flaw and must therefore be quashed.