

AT AUCKLAND

<b>Appellants:</b>	<b>EA (Iran)</b>
<b>Before:</b>	M A Roche (Member)
<b>Counsel for the Appellants:</b>	D Mansouri-Rad
<b>Counsel for the Respondent:</b>	C Pendleton
<b>Date of Hearing:</b>	12 December 2016
<b>Date of Decision:</b>	24 January 2017

---

**DECISION**

---

**INTRODUCTION**

[1] This is an appeal against decisions of a refugee and protection officer, declining to grant refugee status and/or protected person status to the appellants, citizens of Iran.

[2] The appellants are brothers. They are both agnostic and do not wish to perform compulsory military service. The appellants are not pacifists and do not object to military service *per se*. Rather their objection is based on their opposition to the Iranian regime and because, in the army, they will either be forced to participate in Islamic religious practices, or will be harmed should they refuse to participate in those practices.

[3] This is the second time the Tribunal has considered these appeals. In 2014 the Tribunal (differently constituted) dismissed the appellants' appeals against the decline of their claims for refugee and protection person status; see *CV (Iran)* [2014] NZIPT 800343 and *CW (Iran)* [2014] NZIPT 800440.

[4] The appellants sought leave from the High Court to appeal and judicially

This is an abridged version of the decision. Some particulars have been removed from or summarised in the decision pursuant to s151 of the Immigration Act 2009. Where this has occurred, it is indicated by square brackets.

review the Tribunal's decisions. Duffy J found a number of errors in the consideration of the appellants' claims for refugee status. She granted leave to bring the judicial review proceedings and remitted the proceedings to the Tribunal for reconsideration.

[5] The respondent appealed against Duffy J's decision. That appeal was dismissed in a decision dated 28 October 2016; see *Refugee and Protection Officer v CV & CW* [2016] NZCA 520. In its decision, the Court of Appeal agreed generally with deficiencies identified by Duffy J in the Tribunal's analysis but commented that the test for being persecuted that she proposed and set out at [140] of her judgement was not helpful and had the potential to lead fact-finders into error. The Court also agreed that [103] of Duffy J's judgment appeared to wrongly equate discrimination as a breach of human rights with persecution.

[6] After consideration of the test now applied by the Tribunal in *DS (Iran)* [2016] NZIPT 800788, the Court of Appeal at [82] directed an approach to the Article 1A(2) inquiry and at [85] identified the matters that in the Court's view, the Tribunal should have addressed in assessing the appellants' claims. These aspects of the Court of Appeal decision will be considered in more detail later in this decision.

## **THE SCOPE OF THE REMITTED HEARING**

### **The Issue**

[7] Under section 198 of the Immigration Act 2009 ("the Act"), on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellants as:

- (a) refugees under the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") (section 129); and
- (b) protected persons under the 1984 Convention Against Torture (section 130); and
- (c) protected persons under the 1966 International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[8] There was a dispute between the parties as to the scope of the remitted

hearing. The appellants' position is that the findings of fact and credibility made by the Tribunal in its previous decisions stand and that the Tribunal's task in respect of the remitted appeal is to apply the test formulated by the Court of Appeal to these findings.

[9] The respondent's position is that, as the previous decisions have been set aside, the Tribunal is seized of the jurisdiction to determine all matters *de novo* in accordance with the tests set out in the Court of Appeal decision.

[10] The issue concerning the scope of a remitted appeal was discussed in *DS (Iran)* at [13]-[20]. In *DS (Iran)* the Tribunal found that the appeal had been remitted by the High Court for a full *de novo* hearing. It stated at [20]:

[20] In any case, once re-seized of jurisdiction by direction of the High Court, the statutory duty of the Tribunal under section 129 is necessarily re-engaged. Consistent with the statutory duty on the Tribunal to recognise the appellant as a refugee in accordance with the Refugee Convention, if there is additional evidence before the Tribunal on the remitted hearing which leads it to the view that the findings of the first panel are now in doubt, it is not simply open to the Tribunal to revisit the findings made, but it must do so as a matter of law.

[11] The Tribunal agrees with the reasoning and the conclusion made in *DS (Iran)*. In any case, the appellants conceded that updating factual evidence, particularly concerning the health of one brother, will be relevant as well as the updated country information which has been filed. Accordingly, the hearing proceeded on the basis that everything was at large notwithstanding that the Tribunal was entitled under section 231(a) of the Act to rely on the findings of credibility and fact made by the previous panel.

### **The Appellants' Cases**

[12] The accounts which follow summarise the evidence given by the appellants at both the initial and remitted appeal hearings. It is assessed later.

#### *The older brother AA*

[13] AA is in his 20s and is of Azeri ethnicity. When he began attending school, he had difficulties because of his lack of fluency in Farsi, not being the language he spoke at home or in his neighbourhood. The family was not particularly religious, although the mother was an observant Muslim.

[14] AA has never been religious and in particular has always disliked Islam which he considers to be a backward religion that belongs in Saudi Arabia. He

considers that Islam is false and lacks the attributes a religion should have. He believes Islam is a religion of bloodshed, inhumane punishment, and disrespect to women which has destroyed Iranian civilisation.

[15] At intermediate school AA came into conflict with the school authorities because of his unwillingness to attend prayers. Because of this he was twice prevented from taking his final examinations and as a result had to repeat two years of his schooling. Although he had no wish to repeat the years, he felt that his right to be true to himself and not to practise a religion he did not believe in was more important. His parents then sent him to a private rather than a state high school where there was less emphasis on Islam and he subsequently attended a private university for similar reasons.

[16] While at university AA supported the Green Movement and, following the disputed 2009 presidential elections, took part in protests in Tehran over a period of several weeks.

[17] AA did not intend to participate in compulsory military service in Iran. Students are able to defer military service. The rules regarding exemptions and buyouts from service change frequently in Iran and AA hoped that a buyout opportunity would arise. He intended to stay at university for as long as possible, completing a PhD if necessary, and during this time to wait for an opportunity for an exemption from service to arise. AA did not want to perform military service because he did not want to be part of the Islamic regime.

[18] In late 2010 AA became involved in a political argument with a senior member of his extended family. He was subsequently attacked and beaten by a group of *Basij* members who left him bruised and bleeding and told him that the next time would be worse if he didn't "shut his mouth". He became fearful and decided to leave Iran. Because he had not undertaken military service, he obtained a passport on the premise that he wished to [withheld]. His father acted as guarantor in the event the appellant failed to return to Iran [withheld]. The passport was issued in February 2011.

[19] After obtaining a visitor visa for [withheld], AA departed Iran and entered [withheld] from where he travelled to New Zealand.

[20] In September or October 2012 AA heard from his family that military conscription officials had telephoned the family home looking for him and his brother BB. The family told the officials that the brothers were in New Zealand.

[21] AA anticipates that if he returns to Iran he will be arrested at the border for breaching the condition that his passport was issued for, namely, a brief journey to [withheld]. He expects that he would then be required to perform military service and is adamant that he would refuse to perform such service. When asked hypothetically whether, should he be in the army, would he go along with the required religious observances such as Friday prayers and the observance of Ramadan, he was adamant he would not despite the consequences. He considers that to do otherwise would involve lying to himself.

*The younger brother's case*

[22] BB is the youngest in his family. He recalls having difficulties at school because of his lack of fluency in Farsi and because of his attitude to religion. He recalls being beaten for failing to pay attention in religious classes and says that he was something of a "black sheep" at primary school. He attended private intermediate and high schools where there was less emphasis on Islam.

[23] BB began playing a team sport at a young age and his ambition was to play professionally.

[24] BB is close to AA and shares his views about religion and the Iranian regime. In June 2009 BB travelled with AA and two of his friends to Tehran and took part in a protest about the outcome of the election.

[25] Later that year BB was granted a passport. A notation entered in the passport stipulated that it was valid for travel until a date shortly before he turned 18 and became eligible for military service. The reason he obtained this passport was to enable him to travel internationally to play sport.

[26] Shortly after obtaining his passport he attended a two-week sports camp in Tehran. The purpose of the camp was to select players for an overseas tournament. BB expected to be selected because of his ranking within the players attending the camp.

[27] One night during the camp BB talked to his roommates about his views concerning the regime and Azeri rights. A few days later, he was called to the office of the *Herasat* at the camp where he was warned not to talk about political matters and told that he would be expelled from the camp if it happened again. He signed an undertaking not to do so.

[28] Following the camp, BB found out that he had not been selected for the

national team. He asked an official what had happened and was told that the *Herasat* had opposed his selection. He continued to play his sport after this experience but received no further invitations to play for the national team.

[29] In mid-2010, BB was stopped by the *Entezami* (Police/Law Enforcement Services) because of his 'western' clothing and hairstyle and was taken to their base, where he was detained for one week. During his detention, he was verbally abused, beaten, his clothing was torn and his hair was cut by force. His father secured his release by providing a guarantee.

[30] BB completed his secondary schooling in mid-2010 and applied for entrance to university because he wished to study physical education. Two or three weeks after sitting the entrance exam, he checked online and found that he had been selected for the course he wanted to study. Before starting the course he needed to complete one year of pre-university study. He went to the physical education department of the university to reserve a place for the following year. A staff member, after checking his application on the computer, said that he could not enrol because of a problem with the *Herasat* and that he must go to the *Herasat* office to sort it out. BB did not go to the *Herasat* office because he did not want any more problems and he was afraid they would arrest him.

[31] In late 2010 one of the appellants' cousins, CC, obtained an exemption from military service on medical grounds. CC had developed mental problems after being detained and tortured following desertion from the army. BB had been diagnosed with diabetes several years earlier. The appellants' father sought the assistance of the contact who had secured CC's exemption and tried to obtain an exemption for BB. However he was told that diabetes did not provide a ground for exemption and the contact could not help. BB understands that there are medical exemptions for military service but that these are only available for severe conditions or disabilities.

[32] After failing to get into university, BB decided to leave Iran in order to avoid military service. He had hoped, like his older brother, to avoid this service by staying at university until an opportunity for an exemption arose. He now had a limited window where he could use his passport prior to turning 18.

[33] [Withheld], BB [withheld] left Iran in January 2011. [Withheld.]. His brother AA, arrived in New Zealand in early June 2011.

[34] Since he has been in New Zealand BB has heard from his family in Iran that military conscription officials have made inquiries regarding him and his brother and that the family advised the officials that the brothers are overseas.

[35] BB says that if he is returned to Iran he will refuse to perform military service even if that would result in his imprisonment. He does not want to be part of the Islamic regime. In Iran, politics are based on a religion that he believes to be backward and not applicable to his people. He hated religious instruction at school where the teachers used Arabic words when he was already struggling with Farsi. He hates that under Islam, women do not have rights and are treated “like disabled people”. He says that in Iran if you try to leave Islam you are considered to be an infidel and will be in danger. When asked why he couldn’t simply perform prayers in order to keep himself safe in the military, he responded that he simply could not lie to himself. He might be able to manage it for one or for two days, but not for a long period of time.

[36] He also considers that he would have difficulties given his six years in New Zealand and the fact that he has become used to being westernised and free.

[37] The appellant has managed his diabetes successfully as an adult. He takes insulin and is able to work as a professional sports player.

#### *Submissions and country information*

[38] The Tribunal has before it a large volume of material pertaining to the appellants’ refugee and protection claims, their first Tribunal appeals, the proceedings in the High Court and appeal to the Court of Appeal. This material fills six Eastlight files and includes multiple sets of submissions and considerable country information concerning issues arising from military conscription in Iran.

[39] Prior to the remitted hearing, both counsel filed written submissions and additional country information including information concerning medical exemptions from military service in Iran and the recent deployment of *Artesh* (regular army) forces in Syria. The submissions and country information filed will be dealt with later in this decision.

#### *Credibility*

[40] In determining whether the appellants are refugees or protected persons, it is necessary first to identify the facts against which the assessment is to be made.

That requires consideration of the credibility of the appellants' accounts.

[41] The appellants presented as credible witnesses. Their accounts were consistent with their evidence to the first panel of the Tribunal and with the accounts they gave at their Refugee Status Branch interviews in 2012. Neither appellant appeared to embellish their account of their experiences in Iran which are accepted.

[42] It is accepted that both appellants have no religion and further that they are opposed to Islam and the Islamic regime in Iran.

[43] In her closing submissions, Ms Pendleton submitted that neither appellant had established that they held deep convictions to the extent that, if returned to Iran, they would refuse military service with the attendant consequences of possible imprisonment and threats to life. She also submitted their lack of deeply held convictions and opinions meant that while religious requirements in the military may be annoying and unsupported by the appellants, they would not cause "serious harm" to them.

[44] The Tribunal does not accept Ms Pendleton's submissions concerning the absence of evidence establishing deep convictions on the part of the appellants. To the contrary, the evidence of each appellant is that, from a young age, they had rejected Islam, and refused to participate in religious rituals in their schooling. Both participated in the Green Movement protests although BB less extensively than AA due to his young age at the time. Both appellants have demonstrated consistent opposition to religion and to the regime, and have borne the consequences. For BB this meant being beaten at primary school, being denied participation in his chosen sport at a national level, and being denied entrance to university. For AA this meant being held back and having to repeat two years of schooling at intermediate level and being attacked by a group of *Basij* following his expression of anti-regime opinions at a social gathering.

## **Findings of Fact**

### **Appellants' Personal Circumstances**

AA

[45] The Tribunal finds that AA is a male Iranian national, aged in his mid-20s. He has no religion and rejected Islam at a young age. While at intermediate

school he refused to participate in religious rituals and as a result was held back and made to repeat two years of his schooling. He entered university after completing high school with the intention of remaining there until the opportunity to be exempted from military service arose. However, he left Iran after being beaten up by a group of *Basij* following his expression of anti-regime views at a social gathering. Because of his outstanding military service obligation, AA's officially sanctioned departure from Iran was conditional on him returning following [withheld]. He is in breach of this condition and is liable for a period of compulsory military service. He does not wish to perform this service because he does not want to be part of the arm of the Islamic regime and does not want to be part of an Islamic organisation.

[46] AA is agnostic. He does not believe in any religion and is particularly opposed to Islam which he despises. He has a sincerely held objection to performing military service because he regards the armed forces as a branch of the Islamic regime and this forms a deeply held belief by him.

#### *BB*

[47] BB is a male Iranian national aged in his early 20s. Like AA, he has no religion and rejected Islam at a young age. He was beaten at primary school for refusing to participate in religious activities. He expressed his opposition to the regime to teammates during a sports-selection camp and as a result was left out of the national team and subsequently denied entry to university. He was detained for a week and beaten because of his western clothing and hairstyle in 2009. He has an outstanding military service obligation and has breached the conditions in his passport requiring him not to travel after reaching the age of 18. Like AA, he does not wish to perform military service because he does not wish to be part of the arm of the Islamic regime.

[48] BB has no religion and is deeply opposed to Islam which he considers is foreign to Iran. It is accepted that he has a sincere and deeply held objection to performing military service because of his views concerning the regime and Islam which he sees as inseparable. Like AA, BB has breached the conditions in his passport which permitted him to travel only until reaching the age of eligibility for military service. It is likely that the breach of this condition would be picked up on his return to Iran.

[49] BB's diabetic condition has not been an impediment to him playing sport at a professional level in New Zealand. An attempt made by his father to organise a military exemption for him arising from this condition was unsuccessful.

*Predicament on return to Iran*

[50] Having made findings regarding the appellants' personal circumstances it is now necessary to assess what is likely to occur, in terms of their outstanding military service obligations, should they return to Iran. This involves consideration of the nature of compulsory military service in Iran, its enforcement, and the consequences for those who evade. It is also necessary to consider the availability, if any, of exemptions from military service available generally, and in the case of BB, in respect of medical grounds.

[51] As noted earlier, the Court of Appeal at [85] of its decision, directed the Tribunal to address the consequences for the appellants should they refuse military service, the consequences or predicament for the appellants if they do serve, both if they conceal their religious beliefs and if they do not, and whether the compulsory religious observances that are a component of military service in Iran breach Article 18(2) of the International Covenant on Civil and Political Rights.

[52] Ms Pendleton submitted that the Court of Appeal required the Tribunal to determine what the appellants were likely to do on return, that is to serve or not serve, and did not require consideration of both options. She submitted that her approach was supported at [83] of the Court's decision where it was stated that the predicament of a claimant on return to their country of origin is a question of fact for the fact-finder to determine and at [53] where the Court questioned why the Tribunal would consider the situation the appellants would face if they did serve, if they had made a finding that they would refuse to serve.

[53] In Ms Pendleton's submission, the appellants were likely to serve, given (in her view), their lack of deep conviction and the relatively short nature (two years) of military service.

[54] Mr Mansouri-Rad took the opposite view. He submitted that the Tribunal must consider the predicament of the appellants both if they serve and do not serve because a finding of fact in this regard would be inherently unreliable. Mr Mansouri-Rad's position was that the Court of Appeal at [85] obliged the Tribunal to consider both options.

[55] Prior to determining this issue aspects of relevant country information relating to military service will be reviewed. This is because consideration of the consequences for draft evasion are relevant to both the assessment of the likelihood of the appellants' refusing to serve if returned to Iran, and their predicament if they so refuse.

#### *Military service obligations in general*

[56] In *DS (Iran)*, the Tribunal summarised the country information it had been provided concerning the structure and composition of the Iranian forces. At [61]-[69], the Tribunal noted that regulations published by the Iran Public Conscription Organisation in 2014 provided that Iranian males are subject to conscription regulations in the month during which they reach their 18th birthday. The Tribunal noted that according to section 4, general conscription service is for a period of 30 years, comprising four stages which commence with an initial period of mandatory service, generally for 24 months.

[57] The Netherlands Ministry of Foreign Affairs (*Ministerie van Buitenlandse Zaken*) states in its December 2013 General Official Report on Iran that all men, upon reaching the age of 18, are called up as part of their military service duties. They must report to the military authorities within one month after the start of the Iranian calendar year in which they turn 18.

#### *Sanctions for draft evasion*

[58] The sanctions for draft evasion were discussed in the previous Tribunal decisions concerning the appellants, in *CV (Iran)* [2014] NZIPT 800343 at [64]-[71] and in *CW (Iran)* [2014] NZIPT 800440 at [55]-[63]. The Tribunal noted that country information on the punishment of draft evaders was scant. The Tribunal recorded that a War-Resistor's International Report written in 1998, stated that draft evasion and desertion are punishable under the 1992 Law on Punishment of Crimes Concerning the Armed Forces and that conscripts who are absent without leave for more than 15 days are subject to between six months to two years imprisonment, and/or 12-month extension of their service. It states that desertion is punishable by two to 12 months imprisonment, and that those who avoid call-up for military service are considered deserters.

[59] The Tribunal noted that an informal translation of the Public Military Service Act of 1984, attached to an Immigration and Refugee Board of Canada report, provided that draftees for military service who do not report are regarded as

absentees, and if arrested, are sent to service. After the completion of service, such persons are tried in competent courts for having been absent and are liable for deprivation from receiving their “service completion card” for the period of one to two years and that there is a discretion to sentence the absentee to other “punishments”; Refugee Board of Canada *Information on the procedures for an officer to reside in his position in the military after about four years of service* IRN20340.E (12 April 1995).

[60] The Danish Refugee Council in *Human Rights Situation for Minorities, Women and Converts, and Entry and Exit Procedures, ID Cards, Summons and Reporting etc – Fact Finding Mission to Iran 24th August – 2nd September 2008* (30 April 2009) records an Iranian lawyer as advising that military law provided for the extension of the length of military service for persons who evade. The Marine Corps Intelligence Activity report *Cultural Intelligence for Military Operations: Iran* at [www.endusmilitarism.org](http://www.endusmilitarism.org) stated that the penalty for draft dodging and desertion in Iran includes prison time, fines, and disqualification from future government jobs.

[61] In *DS (Iran)* at [68]-[69] the coercive power of the state to compel the performance of service in the form of administrative and legal consequences for people who are unable to prove that they have satisfactorily completed their compulsory military service was noted. Similarly, the Netherlands Ministry of Foreign Affairs *General Official Report on Iran (December 2013)* noted that sanctions for draft evaders, in addition to prosecution and extension of service, included the loss of social benefits and civic rights including the right to work, to education, and to set up a business.

[62] An article filed by Mr Mansouri-Rad prior to the hearing suggests that in recent times, the Iranian authorities have increasingly been arresting young men who have attempted to avoid military service. The article records General Musa Kamali, Chief Conscription Officer for the Iranian armed forces, as stating that the authorities are actively enforcing conscription laws that allow people to be arrested if they fail to enlist or pay absence fines, that between 30,000 and 35,000 people had already been arrested in 2016 for attempting to dodge military service and that the process of identifying and arresting fugitives will be intensified; “Iran to crack down on evaders of military service” *Middle East Eye* (20 June 2016).

*Exemptions – buyouts and medical exemptions*

[63] Consideration was given to the issue of whether BB would be entitled to an exemption from military service because of his status as a diabetic. He gave evidence that an attempt on the part of his father to obtain an exemption for him was unsuccessful. Both the Canadian Immigration and Refugee Board report *Iran: military service, including recruitment age, length of service, reasons for exemption, the possibility of performing a replacement service in the treatment of people who refuse military service by authority; whether there are sanctions against conscientious objectors* IRN104809.E (28 March 2014) and the recent United Kingdom Home Office Country Policy and Information Note *Iran: Military Service* (October 2016) record information from the website of the Iranian embassy in the Hague that, according to the regulations for medical exemption of military service, conscripts can be generally categorised into four main groups in terms of their conditions being:

- (a) individuals being in a state of complete physical and mental health and hence entirely capable of being drafted to the mandatory service period;
- (b) individuals who have a handicap or suffer from a certain illness and are thus not in a complete state of health, however well capable of carrying out non-combat/military-related services in offices;
- (c) those who, due to weak disposition, growth deficiency, was suffering from physical or mental illnesses and are temporarily not capable of serving the mandatory period; and
- (d) those who due to handicaps or mental and/or physical illnesses are permanently unable to be drafted for the mandatory service period.

[64] A Human Rights Watch report briefly mentions diabetes in relation to the exemptions available to transgender Iranians who reportedly can be classified either as “people with hormonal imbalance” or “diabetics”; Human Rights Watch *We are a Buried Generation “Discrimination and Violence Against Sexual Minorities in Iran”* (15 December 2010). There is no further information before the Tribunal concerning the possibility of a medical exemption from military service for diabetics.

[65] Having regard to the evidence of BB and the country information, the Tribunal finds that it is not established that an exemption is available to him from military service on the ground of his diabetes. The assessment of his predicament will proceed on the basis that such an exemption is not available and that if he is not considered suitable for combat/military related service, he will perform non-combat service.

[66] At the hearing, consideration was given to whether it would be possible for the appellants to buy out their military service obligations. There are reports that an “absence fine” scheme was available to those who defaulted on their service for more than eight years; Financial Tribune *Cash Penalty in lieu of Military Service* (3 March 2015). A later report, however, indicated that the deadline for registration for this scheme was 21 August 2015; Financial Tribune *Some Reprieve for Draft Dodgers* (19 September 2015). A translated Iranian news article filed by the respondent at the hearing quoted General Kamali as stating that absentee fines were available to those absent for more than eight years and that absent conscripts, if they are absent for less than eight years, can undertake military service or obtain an exemption on medical or family grounds; “Verification of Registered Military Service Absentees, Paying Absentee Fines Program” *Mizan News* (9 August 2016). General Kamali is also recorded as stating that all absentees must be registered by 21 August 2016 and that absentees who do not register within the prescribed period will be identified, located and eventually arrested.

[67] Neither appellant has been an absentee for a period of eight years. In addition it is unclear whether the exemption programme has any application to draft evaders who failed to register by the August 2016 deadline. Again this is not established on the country information. After considering the available country information, the Tribunal is not satisfied that the option of obtaining a buyout or exemption is available to either appellant.

*Conclusion as to whether the appellants will serve or not*

[68] The Tribunal finds that it is likely that both appellants will come to the attention of the authorities in Iran at the border on return because both are in breach of passport conditions relating to their outstanding military service. They have both been the subject of inquiries made by the conscription authorities with their family. Their outstanding military service obligations are likely to be apparent to the authorities at the airport. Given their outstanding military service

obligations, the breach of their passport conditions, and the recent country information concerning the active enforcement of conscription laws, the Tribunal finds that they are likely to be arrested or otherwise detained on arrival at the airport and not given the opportunity to further avoid military service.

[69] It is difficult to predict whether either of the appellants would then refuse to serve. They are both adamant that they would do so. However, taking such a stance in the safety of a New Zealand Tribunal hearing room is quite different from doing so in Iran in the presence of officers of the regime and in light of the attendant consequences which may include arrest and imprisonment. In any case, the dichotomy between serving and refusing to serve is somewhat artificial given that the country information indicates that the penalty for refusing to serve is an extension of service.

[70] The Tribunal is mindful of the Court of Appeal's direction at [85] that consideration should be given to the consequences for the appellants should they serve and should they refuse to serve. With respect, this choice does not arise on the facts. The Tribunal has found that, given their profile, they will be detained at the airport leaving no further opportunity for draft evasion. The consequence for those who refuse to serve is extended service. An alternative predicament for those who refuse, such as imprisonment only, is not established in the country information. Accordingly, the Tribunal will assess the appellants' predicament on the basis that, should they refuse to serve, they will be subjected to an extension of service. In other words, it is inevitable that they will have to perform military service.

#### *Enforced religious practice in the army*

[71] The Tribunal next turns to the information concerning enforced religious practice during military service.

[72] Section 16 of the 2014 General Conscription Regulations provides:

"All those eligible individuals who enter the mandatory service period will take the oath of allegiance to the Islamic Revolution, the Islamic Republic political system, the Constitution, and the Supreme Leader (the commander-in-chief of the armed forces of the Islamic Republic of Iran) according to the disciplinary bylaws of the armed forces."

[73] Military service begins with an enrolment process. In *DS (Iran)* the Tribunal accepted that upon enlistment, conscripts would be required to indicate their

religion on a form. This finding was made in reliance on country information indicating that in Iran generally there is a high degree of filing of forms which require a person concerned to state their religion and a statement in a Danish Immigration Service Report citing a NGO representative as commenting that a declaration of religion is required upon registration for military service; see *DS (Iran)* at [82] and Danish Immigration Service *Update on the Situation of Christian Converts in Iran* (June 2014).

[74] Religious education and political supervision of *Artesh* (regular army) personnel is managed by a representative of the Ayatollah Khamenei. Clerics attached to the Ideological and Political Organisation of the army are present in every unit; Hossein Aryan "The Artesh: Iran's Marginalized and Under-Armed Conventional Military" *Middle East Institute* (15 November 2011) at p47.

[75] In *DS (Iran)*, the Tribunal reviewed country information concerning enforced religious practice during military service at [83]-[103]. At [104] the Tribunal found that *Artesh* (regular army) conscripts are required to attend compulsory *Namaz-e Jamaat* (group prayer) daily at noon and, on a less regular basis, the *Namaz-e Jomeh* (Friday prayer). In addition, conscripts are required to fast during Ramadan, to undertake daily religious recitation of the *Quran*, and to display "religious passion" on dates of significance in the *Shiite* calendar.

[76] In light of this information, the Tribunal finds that, as conscripts, the appellants will be subjected to these religious practice requirements except that, as a diabetic, BB will not be expected to observe Ramadan. They will also be required to take the oath of allegiance described at [72] above.

## **ASSESSMENT OF THE CLAIMS TO REFUGEE STATUS**

[77] The Tribunal now turns to the question of the appellants' entitlement to be recognised as refugees.

[78] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[79] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

[80] For the purposes of refugee determination, “being persecuted” requires serious harm arising from the sustained or systemic violation of internationally recognised human rights, demonstrative of a failure of state protection – see *DS (Iran)* [2016] NZIPT 800788 at [114]-[130] and [177]-[183].

[81] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008), at [57].

*Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Iran?*

[82] The Tribunal has found that on return to Iran the appellants will be required to perform a period of compulsory military service for approximately two years. Should they refuse, this period will be extended. They will be required to fill in a form regarding their religious affiliation and to take an oath of allegiance to the Iranian regime on induction. The oath and the induction form will require the appellants to deny their true beliefs. The issue of whether or not the appellants would voluntarily fill in the form or take the oath was not canvassed at the hearing. In any case, these things are of momentary duration. Of more serious concern is that during their years in the military they will be required to perform various compulsory religious observances, in particular daily prayers. Their forced participation in Islamic rituals will be contrary to their genuine and strongly held beliefs concerning the rejection of Islam.

[83] The compulsory religious practice the appellants will be expected to observe while performing military service raises issues of breaches of religious

freedom, in particular to the right to freedom of thought, conscience and religion recognised in the ICCPR.

[84] Article 18 of the ICCPR provides as follows:

**Article 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[85] Compelling the appellants to perform compulsory religious observances would appear to breach Article 18(1), which recognises the right to freedom of thought, conscience and religion, and Article 18(2), which gives them the right to be free from coercion that impairs the freedom to have or adopt a religion or belief of the right holder's choosing.

[86] In *DS (Iran)* consideration was given to whether, pursuant to Article 18(3), the limitation on the appellant's right to freedom of religion is justified in the context of Iran which is an Islamic state. The Tribunal found an absence of evidence supporting the proposition that compulsory religious observance in the Iranian army is justified by military necessity and concluded that compulsory religious observance in the army is about the enforcement of Islam as a religion rather than being connected to military discipline; see [292]-[298]. No information is before the Tribunal that suggests that these findings should be departed from.

*Conclusion on Article 18*

[87] The Tribunal finds that the appellants' right to freedom of religion and to freedom from coercion in respect of religion would be breached on a sustained and ongoing basis during their period of military service. They will be required to declare their religion as "Muslim" on induction which would be contrary to their strongly held belief that Islam is not their religion. They will be required to swear

an oath of loyalty to the regime which is contrary to their belief that the regime is wrong. Of greater significance, they will be required to attend daily prayer and other enforced religious observances during the two-year period they can expect to serve.

*Serious harm*

[88] The breach of the appellants' right to religious freedom is insufficient to establish that their treatment in the military will result in their "being persecuted". What is also required is a real chance that serious harm will arise from this breach.

[89] It is acknowledged that the denial of religious freedom and of the right to be free from religious coercion of itself constitutes "harm". If there were no consequences for the appellants beyond the breach of the right to these freedoms it would be necessary to consider whether this, of itself, amounted to "serious harm". There are however further consequences to consider.

[90] The Tribunal has determined that whether one or both of the appellants initially attempt to resist performing compulsory military service, it is likely that they will be compelled to do so for the usual two-year period, if not for an extended period due to any initial resistance. Having regard to the characteristics and history of both appellants, the Tribunal finds it is unlikely that they will fully comply with the Islamic practices that they will be coerced into performing on a daily basis. They both have a history of strong resistance to compulsory religious practice that dates back to their childhoods. They have both become used to exercising their right to religious freedom in New Zealand. Both appellants have demonstrated strong contempt for and opposition to Islam. It is likely that these views will come to light during the course of their compulsory military service.

[91] Coercion concerning the observance of religious practices is a fact of life in Iran for the many who are but nominal Muslims or who have rejected Islam. The difference and difficulty in terms of military service is that there is no private sphere to which the appellants may retreat and be themselves. Military service requires conscripts to live in the military facility to which they are assigned.

[92] As the Court of Appeal noted at [83], it is difficult to conceal something which is an integral part of a person such as their religious belief or sexuality. In the circumstances, it is more likely than not, as has occurred for both appellants in the past in Iran, that their true views will come to light either in respect of their lack of compliance with the religious observance requirements, or, through the

perception by others of their contempt for Islam. The appellants' lack of commitment or their resistance to Islam will likely come to the attention of the Ideological and Political Organisation cleric of their unit, their fellow recruits, or their immediate supervisors.

[93] The question then arises as to the sanctions, if any, that will befall them. There is little country information concerning the sanctions that would be applied to recalcitrant and religiously objecting conscripts such as the appellants, or on military discipline generally. In a recent report, the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) stated that no information had been found concerning the treatment of conscripts who transgress; ACCORD *Iran: Political Opposition Groups, Security Forces, Selected Human Rights Issues, Rule of Law: COI Compilation* (July 2015) at p 209.

[94] In *DS Iran* the Tribunal accepted a submission that, in assessing what is likely to happen to conscripts who transgress religious observance requirements, it was appropriate to have regard to the general position of human rights in Iran and to consider the established institutionalised propensity of the Iranian authorities (and their agents) to use violence and other forms of physical harm against those engaged in practices that are oppositional to the regime. In this regard, it is relevant to note that renunciation of Islam (apostasy) is a serious offence within Iran where Muslim citizens have no right to choose, change, or renounce their religious beliefs. The Penal Code specifies the death sentence for proselytising and attempts by non-Muslims to convert Muslims, as well as for *moharebeh* (enmity against God), and *saab al-nabi* ("insulting the prophets"). Although apostasy is not addressed by the Penal Code, it is a crime punishable by death under Sharia law; the United States Department of State *Annual Report on International Religious Freedom 2015: Iran* (10 August 2015).

[95] The conclusion reached in *DS Iran* was that, given the country information concerning the lack of observance of human rights in Iran and the regime's propensity for violence, it is likely that some physical sanction in the form of a beating would be likely to be applied for repeat offenders. This would be either as a formal or an informal but officially sanctioned or tolerated punishment, and could potentially rise to a level of severity such as to constitute cruel, inhuman or degrading treatment or punishment in terms of Article 7 of the ICCPR.

[96] The initial response to the appellants' lack of religious conviction may be additional religious instruction or the imposition of additional military service. However given the centrality of the appellants' beliefs to their identities and their

history of resistance to Islam, it is likely that they would progress to more severe sanctions including physical assaults on an ongoing basis throughout their period of service. It follows that the treatment the appellants are likely to receive during their, at least, two-year period of compulsory military service gives rise to a real risk of serious harm to them.

*Conclusion on well-founded fear of being persecuted*

[97] For the above reasons, the Tribunal finds that both appellants have a well-founded fear of being persecuted in Iran. Both face breaches of their right to religious freedom, the distress of being subjected to compulsory participation in daily religious rituals to which they object, and physical punishment for their likely resistance. The harm they face arising from a breach of their internationally recognised human rights is of a nature and of sufficient intensity and duration to be appropriately described as “being persecuted”. The first principal issue is answered in the affirmative.

*Is there a Convention reason for the persecution?*

[98] The reason for the appellants’ predicament is their lack of religious belief and their rejection of Islam. The relevant Convention ground is religion.

**Conclusion on Claim to Refugee Status**

[99] For the reasons mentioned above, the Tribunal finds the appellants are refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted.

**The Convention Against Torture**

[100] Section 130(1) of the Act provides that:

A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.

**Assessment of the Claim under Convention Against Torture**

[101] Section 130(5) of the Act provides that torture has the same meaning as in the Convention Against Torture, Article 1(1) of which states that torture is:

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third

person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

[102] The appellants have been recognised as refugees. In accordance with New Zealand's obligations under the Refugee Convention and by virtue of section 129(2) of the Act (the exceptions to which do not apply), they cannot be deported from New Zealand. Accordingly, the question of whether there are substantial grounds for believing that they would be in danger of being subjected to torture if deported from New Zealand does not arise. They are not persons requiring protection under the Convention Against Torture. They are not protected persons within the meaning of section 130(1) of the Act.

### **The ICCPR**

[103] Section 131 of the Act provides that:

- (1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.
- ...
- (6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.

### **Assessment of the Claim under the ICCPR**

[104] By virtue of section 131(5):

- (a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards:
- (b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.

[105] For the reasons already given, the appellants cannot be deported from New Zealand. Accordingly, the question of whether there are substantial grounds for believing that they would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand does not arise. The

appellants are not persons requiring protection under the ICCPR. They are not protected persons within the meaning of section 131(1) of the Act.

## **CONCLUSION**

[106] For the foregoing reasons, the Tribunal finds that the appellants:

- (a) are refugees within the meaning of the Refugee Convention;
- (b) are not protected persons within the meaning of the Convention Against Torture;
- (c) are not protected persons within the meaning of the Covenant on Civil and Political Rights.

[107] The appeals are allowed.

### **Order as to Abridgement of Parts of Research Copy**

[108] The disclosure of parts of this decision beyond the parties (and those to whom disclosure is permitted by section 151(2)) would tend to identify the appellants and/or be likely to endanger the safety of the appellants or others.

[109] Pursuant to clause 19 of Schedule 2 of the Act, the Tribunal orders that, until further order, paragraphs [18], [19], [21], [33] and [45] (or portions thereof) are to be withheld from the research copy of this decision. A gist of the redacted information may be given, but does not constitute part of the Tribunal's decision.

"M A Roche"  
M A Roche  
Member

Certified to be the Research  
Copy released for publication.

M A Roche  
Member