



KNOWLEDGE-BASED HARMONISATION OF EUROPEAN ASYLUM PRACTICES

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Case Summary

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| Country of Decision/Jurisdiction | United Kingdom |
| Case Name/Title | BE (Iran) v Secretary of State for the Home Department |
| Court Name <i>(Both in English and in the original language)</i> | Court of Appeal |
| Neutral Citation Number | [2008] EWCA Civ 540 |
| Other Citation Number | |
| Date Decision Delivered | 20 May 2008 |
| Country of Applicant/Claimant | Iran |
| Keywords | Persecution |
| Head Note (Summary of Summary) | Once it is established that the individual concerned has deserted rather than commit a sufficiently grave abuse of human rights, whatever punishment or reprisal that consequently faces him will establish a well-founded fear of persecution for reasons of political opinion. |
| Case Summary (150-500) | The appellant, born in 1970, carried out his two years' military service and then in 1988 joined up as a regular soldier. In 1998 he was sent to the Baneh area of Kurdistan, where he was required to plant landmines in a populated area. Rather than do this he went absent without leave, but was found and sentenced to 3 months' imprisonment. On release he was demoted from sergeant and in September 1999 was sent back to Kurdistan. There he was told that an officer who had been refusing to plant landmines had been shot and his death blamed on Kurdish rebels. A week later the appellant was again ordered to plant landmines. Believing that to do so might result in civilian deaths, he deserted and fled to the United Kingdom. |
| <i>Facts</i> | <p>His asylum application was refused as he had, <i>"signed on as a regular soldier without any apparent qualms, and that civilian deaths were an unfortunate consequence of war which did not justify desertion. [The Secretary of State] also correctly pointed out that desertion out of fear or dislike of combat does not make a soldier a refugee"</i>.</p> <p>In February 2002, his appeal failed on the ground that although the appellant's evidence was credible, it did not disclose a Refugee Convention reason for the anticipated persecution.</p> <p>The Immigration Appeal Tribunal accepted the adjudicator's finding that the appellant had been ordered to plant mines and had refused because he genuinely believed that to do so might lead to the killing of innocent civilians. But the Tribunal dismissed both the asylum and the human rights claims on the ground that the orders to which the appellant objected were not contrary to either national or international law (the mine ban treaty not having been signed by Iran and the Geneva Conventions depending on there being a state of war), and that the appellant faced no more than condign</p> |



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| | <p>punishment for disobeying orders.</p> <p>The Court of Appeal remitted to appeal to be reheard by the Immigration and Asylum Tribunal (IAT). It was agreed by the parties that the IAT had, contrary to <i>the Court of Appeal judgment in Krotov v SSHD [2004] EWCA Civ 69</i>, considered only whether the acts he was ordered to perform amounted to a breach of international humanitarian law, which applies only at times of conflict, rather than whether the appellant is or may be <i>'required on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognised by the international community'</i>. The Court in <i>Krotov</i> indicated that, in times of peace, those 'basic rules of human conduct generally recognised by the international community' would find their reflection in international human rights law rather than international humanitarian law.</p> <p>Following its refusal again by the Asylum and Immigration Tribunal (AIT, which had by then replaced the IAT), the appeal was again granted permission to appeal again to the Court of Appeal on the 'war and peace' point.</p> |
| <p><i>Decision & Reasoning</i></p> | <p>The issues:</p> <p>"13. [The Appellant's] <i>argument before this court has been in essence that, accepting that conscientious objection alone does not entitle a soldier to international protection as a refugee, the contrary contention that a soldier is entitled only to refuse to commit war crimes and crimes against humanity is unjustifiably narrow: the soldier's right of refusal, and the entitlement to international protection which it attracts, extends (at least in peacetime) to orders to commit any human rights violation of sufficient seriousness. Such a level of seriousness is reached where, as here, the order would breach international humanitarian law were it to be given in the course of an armed conflict, because the protection given to civilians in peacetime by art. 6 of the ICCPR cannot be weaker than that accorded to them in war.</i></p> <p>14. [The Respondent's] <i>contention, again in short form, is that whether or not the planting of these landmines would have been a crime in time of war – something which he does not necessarily accept – the material protection of civilians in peacetime is against atrocities and gross violations of human rights. The setting of these devices, he submits, while deplorable and while now a criminal offence in UK law, cannot be so characterised. Iran had neither signed the Ottawa Convention outlawing anti-personnel landmines nor legislated domestically against them, and no norm of customary international law forbids their use</i>".</p> <p>The Court agreed with the AIT that <i>'there is neither a rule of customary international law forbidding the use of these weapons nor any simple reading across into peacetime of the restrictions placed on their use in warfare by international humanitarian law'</i> but that <i>'Ms Webber is still entitled to ask, as she does, why civilians should be entitled to expect less legal protection in time of peace than they would have if there were a war on'</i>. The Court held that it <i>'is in our view right to describe the outlawing of such weapons as an emerging norm of international law'</i>. Particularly, the laying of landmines fell</p> |



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| | <p>in breach of Articles 6 and 7 of International Covenant on Civil and Political Rights (1966)</p> <p><i>'35. It follows, in our judgment, that the order given to the appellant to plant anti-personnel mines in roadways was an order to commit a grave violation of human rights. If it is necessary to characterise such a violation as gross before it can rank as a sufficient breach to attract refugee protection, we would so characterise it'.</i></p> <p><i>40. In our judgment, on the limited facts before the tribunal, this appellant was entitled to succeed in his claim for international protection. It is common ground that, once it is established that the individual concerned has deserted rather than commit a sufficiently grave abuse of human rights, whatever punishment or reprisal consequently faces him will establish a well-founded fear of persecution for reasons of political opinion'.</i></p> |
| <i>Outcome</i> | The appeal was allowed. The Court found the Appellant to be entitled to refugee status. |