REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75378

AT AUCKLAND

Before:	B Burson (Member)
Counsel for the Appellant:	D Mansouri-Rad
Appearing for the NZIS:	No Appearance
Dates of Hearing:	2 March & 29 April 2005
Date of Decision:	19 October 2005

DECISION

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[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS), declining the grant of refugee status to the appellant, a national of the Republic of Turkey.

INTRODUCTION

[2] The appellant claims a well-founded fear of being persecuted if returned to Turkey as a result of his involvement with the People's Democracy Party (HADEP) and because he objects to performing compulsory military service in the Turkish Army.

[3] Before assessing the appellant's claims in this regard, a summary of his evidence to the Authority will be set out.

THE APPELLANT'S CLAIM

[4] The appellant was born in X, a small village situated in the south eastern region of Turkey. He is a Kurd. His parents were not allowed to register his birth with the Kurdish name they had chosen, instead having to use a name acceptable to the Turkish authorities. Nevertheless, while growing up, the appellant was instilled with a strong sense of Kurdish identity.

[5] By the time of his birth, the appellant's family had lived in X for many generations and the village was inhabited by many of his close relatives. X was a farming community and the appellant's family owned land and stock with which they made their living.

[6] With the onset of the armed campaign by the Kurdistan Workers Party (PKK) in the 1980s, X was subjected to stringent controls which included regular searches of the village by the army. During one search, soldiers found books and other material in the Kurdish language in his parents' home. The appellant's father, uncles and grandfather were detained by the army for two days, returning to their homes with marks all over their bodies. They had been hit with rifle butts and otherwise beaten.

[7] Understanding the situation was only going to deteriorate, the appellant's father decided to move away from the area and the family left X a few weeks after his release. The appellant's extended family remained in X.

[8] Despite having two years of schooling in the south east of Turkey, the appellant had to resume school from the beginning as he could not speak Turkish, Kurdish being the only language spoken at home and in X. His new teachers berated him for his inability to speak Turkish. He was told repeatedly by them that he was a Turk and should be a "Turkish patriot". Despite the pressures at school, the appellant realised at an early age that he was a Kurd and not a Turk. He believed even then that he would never grow up to be a Turkish patriot.

[9] In the early 1990s, the appellant began attending the Mesopotamia Cultural Centre (MKM), a Kurdish cultural centre in Istanbul. He went on a weekly basis until the late 1990s, at which time he went to university in Y. Thereafter, he attended the MKM whenever he was in Istanbul on a break from his studies.

[10] The appellant enrolled in classes at the MKM to learn traditional Kurdish instruments and took part in plays which drew on the experiences of the Kurdish community in the south east. He began taking part in many political discussions at the MKM about the lack of human rights for Kurds in Turkey. These discussions had a great impact on the appellant and made him want to get more involved in Kurdish politics.

[11] He therefore joined the local branch of HADEP in the mid-1990s. He joined because HADEP was a political party dedicated to the Kurdish people and because it promoted Kurdish interests through dialogue and not through violence.

[12] He took the opportunity to refine his understanding of political matters by discussing matters with his uncle, CC, who, along with other members of the appellant's extended family, had by now been forcibly displaced from X and were living in Istanbul. CC was very knowledgeable about the situation in the south east and about the situation of the Kurds in Turkey in general.

[13] He learnt from CC and the other relatives that the Turkish army had come to X and razed it to the ground, burning not only the houses but also the land and killing all the livestock. Being a rural community, this deprived the entire village of any livelihood and the entire village was depopulated.

[14] CC became the leader of a branch of HADEP in Istanbul. The appellant often took friends to visit the uncle in his HADEP offices for political discussions. Shortly after attaining this position, CC, another of the appellant's uncles and his grandfather were taken to the anti-terror branch in *Vatan Cadessi* (Vatan Avenue). They were held for 15 days where they were subjected to torture. The treatment of the appellant's grandfather caused him to have a stroke. Some time afterwards, CC and the other uncle were arrested again and similarly held for a period of three months.

[15] Along with other HADEP youth branch members, the appellant often put posters up promoting Kurdish events and helped prepare venues where cultural events or speeches were to be given. The youth branch of HADEP had its own newspaper and the appellant also regularly attended the HADEP offices to discuss issues that should be included.

[16] He went on 40 or 50 demonstrations. While some were organised protests, often however these were Kurdish cultural events such as *Newroz* (Kurdish New Year) which although starting peacefully, ended up as demonstrations. The Turkish security forces watching these events, objected to the singing of Kurdish songs or chanting of political slogans and often violently dispersed the gathering, arresting people as they could.

[17] In the mid-1990s, the appellant suffered his first detention. He was at the MKM centre when it was raided by the police. He was taken to the anti-terror branch in *Vatan Cadessi*. He was kept overnight during which time he was kicked, punched and otherwise beaten by the police officers. He was interrogated about what was being planned at the MKM. The police recorded his particulars from his identity card, which showed that his origins were in the south east.

[18] The appellant suffered his second and final detention two years later while celebrating *Newroz*. When the crowd began chanting slogans, the police, who had been watching the festivities, dispersed the crowd. The appellant was arrested and taken to *Vatan Cadessi* where he was held overnight. During this time, he was beaten and subjected to *falaka* (being hit on the soles of his feet with a stick). While not interrogated, he was nevertheless challenged by his torturers to repeat his celebration of the Kurdish New Year.

[19] When he turned 20, the appellant became liable for his compulsory military service. The appellant resolved that he would not serve as required. After receiving his papers, he undertook the obligatory physical examination and registration process. He did so because if he failed to do any one of these he would be liable to be arrested.

[20] The appellant, however, used this time to enrol in a university, as this was a legitimate way to defer his military service obligations. He therefore enrolled in courses over the next three or so years, each time obtaining a deferral of his military service obligation. As this period of study drew to a close, the appellant enrolled in a course in an overseas country. He obtained a deferral of his military service obligations until his course was completed.

[21] The night prior to his departure, the family had a gathering at his home with 20 or 30 of the appellant's relatives. Policemen raided the house and took away

the appellant's uncle, CC, despite the protestations of the family that they were simply saying goodbye to the appellant. The next day the appellant tried to visit his uncle in the police station. The policeman checked the uncle's file before responding that he could not visit him. The appellant explained that he was leaving for overseas study that evening, but the policeman told him that if he did not leave he would take his passport. Not wanting to jeopardise his trip, the appellant left without seeing his uncle. When the appellant arrived at his country of overseas study, he telephoned his uncle who told him that he had been beaten but eventually released.

[22] As his period of study ended, he obtained a three-month extension to his passport but was told by the embassy officials that he would need to return to Turkey at that time to do his military service. Instead he came to New Zealand.

[23] The appellant has spoken to his family since arriving in New Zealand and has been informed by them that the police have come to the house on three occasions searching for him because he has failed to report for military service as required.

[24] In 2003, he lodged his application for refugee status. He was interviewed by the RSB in respect of that claim on 4 February 2004. By decision dated 31 August 2004, the RSB dismissed his application and the appellant duly appealed to this Authority.

[25] The appellant has continued to support HADEP while in New Zealand making monetary donations. Also, in January 2005, he organised the sending of some reading material to a school in the south east of Turkey as he had heard from a friend that this school, populated by Kurdish staff and children, were facing resource shortages.

[26] At a general level, the appellant does not believe in violence. In his view, once a person puts a gun in their hand, that gun becomes their political opinion. He sees the violence in Turkey as futile. More particularly, the appellant objects to service in the Turkish army. The Turkish army was responsible for the mistreatment of his father and others, the burning of his village and the displacement of his family from their traditional areas. The Turkish army has killed many innocent people and done many bad things in Turkey against the Kurds. He

could not join such an army. It would not matter to him that he would be sent to a unit that might not be in the south east or might not be involved in combat; such unit would, nevertheless, be part of the army which has carried out and continues to carry out human rights abuses.

[27] Beyond this, he understands the situation in the south east to be "hotting up". The conflict has begun again. He fears that if he were conscripted now, he might be sent to the south east and he might be required to carry out acts which are human rights abuses given what has happened in the past.

[28] He believes that his past history with HADEP and his uncle's position will be factors held against him when sentenced to imprisonment. If forcibly sent to a unit, he would be unable to keep his mouth shut and would talk about the injustices. This, he thinks, would place him in a situation where he would be ill-treated by his superiors or ethnic Turkish soldiers.

[29] The appellant also fears that because the authorities are aware of his involvement in HADEP and because of his uncle's profile, he will be arrested and detained at the airport which will give rise to a real chance of his suffering some form of serious harm.

OTHER EVIDENCE

[30] On 23 March 2005, the Authority received from counsel a translated copy of a letter from CC dated February 2005 and a receipt from HADEP in respect of a donation the appellant made while here in New Zealand. In his letter to the appellant, CC confirms that he and other of the appellant's uncles have continued to be detained. He described the restrictions on their ability to return to their village - there was still in place a 50 kilometre exclusion zone around it.

[31] The Authority also heard from the appellant's wife who confirmed the contents of a statement she filed as to the strength of her husband's beliefs and refers to his sending educational material to a school in the south east of Turkey in January 2005.

[32] On 11 May 2005 the Authority received from counsel further submissions as to the implications for the appellant of recent changes to Turkish law regarding

military service and country information relating to the treatment of conscripts.

THE ISSUES

[33] 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."

[34] In terms of *Refugee Appeal No 70074/96* (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?

ASSESSMENT OF THE APPELLANT'S CASE

1. CREDIBILITY

[35] The appellant and his wife are accepted as credible witnesses. The Authority accepts his account of his and his family's displacement from the south east and the detentions and mistreatment he and his family have suffered both there and in Istanbul. The Authority accepts that the views he has expressed as to his not wanting to perform military service are genuinely held and are sufficiently close to his own sense of human identity that they can be considered to be his core beliefs. The issue is whether these beliefs bring him within the scope of the Refugee Convention.

[36] As this was the immediate cause of the appellant's flight from Turkey, this aspect of his claim will be considered first. If necessary, the Authority will then consider his fears in relation to his involvement with HADEP.

2. THE APPELLANT'S LIABILITY TO PERFORM MILITARY SERVICE

[37] The UNHCR *Background paper on Refugees and Asylum seekers from Turkey* (September 2001) at p64 (the UNHCR paper), notes that Turkey has a compulsory military service system that makes no provision for conscientious objection. Recent country information, however, establishes that the Turkish government has approved a reduction in the period of compulsory military service, from 16 months to 12 months for university graduates such as the appellant - see Canadian Immigration and Refugee Board, Research Directorate (CIRB) *Turkey: Military service, including penalties for evasion, definition of "severe prison sentence", treatment of conscientious objectors (January 2003-2004) TUR42660.E* (August 2004).

[38] The UNHCR paper (*supra*) at p66, para 241, notes that the possibility of pecuniary compensation is available only to Turkish citizens working outside Turkey for more than three years who then had to perform one month's military service instead of 16.

[39] The Authority accepts counsel's submission that this does not apply to the appellant. The Authority, therefore, finds that were the appellant to return to Turkey, he would become eligible for military service for a period of 12 months. He accepts that he would be drafted into the Army and accepts that he would refuse. The Authority accepts that the appellant would be submitted to a term of imprisonment.

[40] War Resisters International *Mehmet loves Baris Documentation: Conscientious Objection in Turkey* (2005) notes that the term of imprisonment prescribed under Article 63 of the Turkish Penal Code varies according to the time lapse between the date of required and actual reporting. This material states that those who report themselves after three months are liable to imprisonment for a period between four months and two years; for those who are arrested after three months, this increases to six months and three years. The Authority accepts the appellant would not report and faces a real chance that he would be arrested for draft evasion at the airport and become liable to the heavier sanction.

[41] The issue is whether a term of imprisonment amounts to his being persecuted. That can only be answered by an assessment of his rights under

international law to assert an objection to performing military service.

THE RIGHT TO CLAIM REFUGEE STATUS ON GROUNDS OF CONSCIENTIOUS OBJECTION

1. THE APPROACH OF THE AUTHORITY

[42] The leading decisions of the Authority on conscientious objection and claims for refugee status are *Refugee Appeal No 70742/97* (28 January 1999) and *Refugee Appeal No 71219/98* (14 October 1999). From these decisions the following propositions may be extracted:

1. Persons who claim refugee status on the basis of a refusal to perform military service are neither refugees *per se* nor excluded from protection.

2. There is, in general, no right to refugee status arising from objections based on religion or conscience, where the state fails to recognise that belief by providing for an alternative form of service. While the existence of any alternative service provision may be a relevant factor in considering whether or not the level of punishment amounts to persecution, its absence does not *per se* establish persecution.

3. Conscription laws are laws of general application and the infliction of punishment for their breach is not motivated by the belief of the claimant. There is, therefore, no nexus between the punishment and a Convention ground.

4. Nevertheless, a valid claim for refugee status on the basis of conscientious objection may be made where:

   (a) conscription is conducted in a discriminatory manner in relation to one of the five Convention grounds;

   (b) prosecution or punishment for evasion or desertion is biased in relation to one of the five Convention grounds; and

   (c) the objection relates to being required to participate in military action

where the military engages in internationally condemned acts. In such cases it is necessary to distinguish between cases:

(i) where the internationally condemned acts were carried out as a matter of government policy. If so, all conscripts face a real chance of being required to so act; and

(ii) those where the state encourages or is unable to control sections of its armed forces. In such circumstances a refugee claimant is required to show there is a real chance he/she will be personally involved.

[43] Both decisions pre-date the Authority's recent re-examination of its approach to the determination of the issue of "being persecuted". In *Refugee Appeal No 74665/03* (7 July 2004), the Authority reaffirmed its preference for determining refugee status issues via what has become known as the "human rights approach" and further explain the content of this approach. It is, therefore, appropriate that the Authority consider the appellant's reliance on conscientious objection as a basis for claiming refugee status in light of the illumination of the human right approach in *Refugee Appeal No 74665/03*.

2. THE HUMAN RIGHTS APPROACH AND "BEING PERSECUTED"

[44] One of the central arguments that underpin *Refugee Appeal No 74665/03* is that international human rights law centred on international treaty law, as opposed to customary international law, provides the most appropriate framework for considering and determining the issue of "being persecuted" in the refugee status determination process - see [62]-[64]. As to this approach, the Authority observed at [115]:

> "The human rights standard requires the decision-maker to determine first, the nature and extent of the right in question and second, the permissible limitations which may be imposed by the state. Instead of making intuitive assessments as to what the decision-maker believes the refugee claimant is entitled to do, ought to do (or refrain from doing), instead of drawing on dangerously subjective notions of "rights", "restraint", "discretion" and "reasonableness", there is a structure for analysis which, even though it may not provide the answer on every occasion, at least provides a disciplined framework for the analysis. A framework which is principled, flexible, politically sanctioned and genuinely international. Under the human rights approach, where the risk is only that activity at the margin of a protected interest is prohibited, it is not logically encompassed by the notion of "being persecuted". A prohibition is to be understood to be within the ambit of a risk of "being persecuted" if it infringes basic standards of international human

> rights law. Where, however, the substance of the risk does not amount to a violation of a right under applicable standards of international law, it is difficult to understand why it should be recognised as sufficient to give rise to a risk of "being persecuted"."

[45] Under this approach, the treaties comprising the International Bill of Rights, namely the Universal Declaration of Human Rights 1948 (UDHR), the International Covenant on Civil and Political Rights 1966 (ICCPR) and International Covenant on Economic Social and Cultural Rights 1966 (ICESCR), provide the core, but not exclusive framework of rights and freedoms upon which the question of "being persecuted" is to be addressed – see [67]–[70].

[46] The critical question is, therefore, whether an objection by a refugee claimant to the performance of military service, can be considered to be within the ambit of a right contained in any of the treaty instruments underpinning the Authority's approach to the issue of being persecuted.

3. OBJECTION TO THE PERFORMANCE OF COMPULSORY MILITARY SERVICE OBLIGATIONS UNDER THE HUMAN RIGHTS APPROACH

The International Bill of Rights

[47] It is clear, that under no Article of any of the treaties that comprise the International Bill of Rights, is there expressly set out a right to object to performing compulsory military service. Indeed, as Nowak *UN Covenant on Civil and Political Rights: ICCPR Commentary* (N.P. Engel, Strasbourg, 1993) at p323 notes, the listing under Article 8(3)(c)(ii) ICCPR of "military and national service" as an exemption to the prohibition on forced or compulsory labour, means that it cannot be said that States parties to the ICCPR were considered by the framers of the Covenant to be under a general obligation to recognise such an objection.

[48] However, Nowak also makes the point that performance of military service may nevertheless constitute an interference with other rights guaranteed to an individual under the International Bill of Rights and, in particular, the Article 18 ICCPR right to freedom of thought, conscience and religion.

Article 18 ICCPR and Objections to the Performance of Compulsory Military Service

[49] The question of whether Article 18 includes a generalised right to object to the performance of compulsory military service, the terms of Article 8(3)(c)(ii) notwithstanding, is a matter of some debate.

[50] Article 18 ICCPR relevantly provides:

> "(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 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 the fundamental rights and freedom of others."

[51] There are, however, some general points that can be made.

[52] Firstly, although freedom of thought, conscience and religion is contained in Article 18 UDHR, for the purposes of the Refugee Convention it is Article 18 ICCPR that is key, because it is through the operation of the ICCPR that binding obligations under international law are imposed on states in relation to freedoms of religion and belief – see J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) p109.

[53] Secondly, the mere fact that the framers of the ICCPR do not appear to have contemplated the Covenant as giving rise to a generalised right to assert an objection to the performance of military service does not preclude the establishment of such a right for all time. At the very least, international law recognises that treaty provisions such as Article 18 ICCPR, can have a norm creating function informing the development of binding rules of customary international law – see the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases 1969 ICJR 3 at [70] and [71].

[54] Moreover, the ambit of the rights guaranteed under the ICCPR are not limited to the circumstances contemplated by the framers for all time. As *Refugee Appeal No 74665/03* demonstrates, in relation to the Article 17 ICCPR right to privacy, the scope of the right can change over time – see discussion at [63]-[79]. This is not a matter generating new and binding norms via customary international law, but rather the expansion of the reach of existing norms of international treaty

law to circumstances not contemplated by the framers of the treaty – see [92]-[93] and [104]-[111]. An issue arises as to whether, in this broad sense, there is any difference between Articles 17 and 18 ICCPR. In this regard, Nowak suggests (at p292) some commonality, namely that despite their plain textual differences, the question of permissible interference with Article 17 rights is to be addressed in terms of the broad criteria under Article 18(3).

[55] Since the Authority issued its decision in *Refugee Appeal No 70742/97* (28 January 1999) and *Refugee Appeal No 71219/98* (14 October 1999), the House of Lords in *Sepet and Bulbul* v *Secretary of State for the Home Department* [2003] INLR 322 considered the case of two Turkish Kurds who objected to conscription into the Turkish army on grounds similar to the appellant in this case. Owing to findings of fact made, and agreement between the parties (see [4]-[5] at p327), the case came before their Lordships on the narrow basis of whether each appellant could claim refugee status simply on the basis of their accepted objections.

[56] Lord Bingham (with whom Lords Steyn, Hutton and Rodger agreed) held, after reviewing the position in international law, there was no right to claim refugee status in such circumstances. There was no express right under international treaty law and there was no settled state practice and *opinio juris* so as to ground the claim in customary international law. While it may well be, his Lordship stated, the "international consensus of tomorrow", it did not represent the state of international law today - see p338 at [20]. Lord Hoffman also agreed that states do in general have the right to impose military service obligations on their citizens – see [36] at p342.

[57] In *Applicant S* v *Minister for Immigration and Multicultural Affairs* [2004] INLR 558, the High Court of Australia considered the case of a young Afghani whom the Taliban had attempted to forcibly recruit while in power. The case turned on the issue of whether the applicant was part of a particular social group and the court did not, therefore, deal in depth with the issue of conscientious objection as a right *per se*. There are, however, some brief *obiter* comments in the majority judgments suggesting the conscription policy of the Taliban was unlawful because it did not allow for conscientious objection – see joint judgement of Gleeson CJ, Gummow and Kirby JJ at footnote 63, p573; see also McHugh J at p582 [83]. Callinan J dissenting, refers (at p589 [101]-[103]), to a line of authority

in the Federal Court of Australia (see *Mijolejevic* v *Minister for Immigration and Multicultural Affairs* [1999] FCA 834) and asserts without analysis that liability for conscription is not persecution.

[58] The Authority notes UNHCR *Handbook on Procedures for Determining Refugee Status* (UNHCR, Geneva, 1992) at [167]-[174] also does not assert a right to ground a claim for refugee status on the basis of a generalised right to conscientious objection - see [167].

[59] As against the above, the Authority notes that there is a plethora of regional agreements, UN resolutions and other material pointing towards, at the very least, developing consensus as to such a right. These are helpfully set out in the judgment of Waller LJ in the decision of the Court of Appeal in *Sepet and Bulbul* v *Secretary of State for the Home Department* [2001] INLR 376, 443–449 at [194].

[60] Furthermore, while it remains the case that in its early jurisprudence the Human Rights Committee (the Committee) indicated that the ambit of Article 18 did not extend to a generalised right to conscientious objection, nevertheless it has been observed that in recent concluding observations, the Committee has acknowledged that Article 18 may now do so - see Joseph, Schultz and Castan *The International Covenant on Civil and Political Rights: Cases Materials and Commentary*, 2nd ed, (OUP, Oxford) at pp511–513. As noted in *Refugee Appeal No 74665/03* refer [73], while the status of decisions of the Committee are the subject of some controversy and are not binding on the Authority, they are of a persuasive nature.

[61] What is clear is that Article 18 relates to different things: thoughts, matters of conscience and matters of religion. Plainly the drafters of the ICCPR did not consider them synonymous. Article 18(1) is thus of wide reaching import, a point recognised by the Committee in General Comment No 22 CCPR/c/21/Rev.1/Add.4 (30 July 1993):

> "1. The right to freedom of thought conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far reaching and profound: it encompasses freedom of thought on all matters, personal conviction and the commitment of religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is reflected in the fact that this provision cannot be derogated from, even in times of public emergency as stated in article 4.2 of the Covenant."

[62] The text of Article 18 is not, however, free from complications. The terms "thought" and "conscience" referred to in the opening sentence of Article 18(1) are not repeated, the text of the article referring thereafter only to "religion or belief(s)". In particular, the freedom to manifest in public under Article 18(1) appears limited to matters of religion or belief. Thus, while Article 18(1) guarantees the freedom of individuals to develop and act on their own thoughts and conscience *in private*, as Nowak points out (p315), any *public* act taken by an individual in accordance with their thought or conscience is protected under Article 18(1) only insofar as the act represents "a practice or some other form of public manifestation of a religion or a belief". This distinction has been usefully described in terms of the "active" and "passive" components to Article 18 – see Joseph, Schultz and Castan (*supra)* at p506, [17.11].

[63] As to what constitutes belief, the *traveaux preparatiores* to the ICCPR, make clear that protected beliefs are not limited to religious beliefs – see Nowak (*supra*) at p316. This is the position taken by the Committee, who state in General Comment No 22:

> "2. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right to not profess any religion or belief. The terms "belief" and "religion" are to be construed broadly."

[64] Reinforcing this idea, that Article 18 covers the broad range of beliefs including secular beliefs, the Committee state (at para 5) that the protection afforded by Article 18(2) against coercion aimed at forcing a person to have or adopt a particular religion or belief, is enjoyed by holders of all beliefs including those of a non-religious nature.

[65] Of course the text of the ICCPR must be interpreted in good faith, in light of its context, as well as the object and purpose of the treaty – see Article 31 Vienna Convention on the Law of Treaties and discussion in *Refugee Appeal No 74665/03* refer [44]-49]. That said, nothing from these considerations would seem to exclude ideas informing an objection to the performance of military service, as forms of thought, conscience, religion or belief *per se*. Potentially, they are matters that can, therefore, come within the ambit of Article 18. While there may be debate as to the requirement of states parties to the ICCPR to recognise them, this is a separate issue; it is difficult to discern how this debate affects their underlying nature as forms of thought, conscience, religion or belief.

[66] To be potentially within the ambit of Article 18, any objection must, however, be one that can be appropriately categorised as a belief, if it is to be capable of being relied on by the individual to ward off a requirement of state that they perform military service against their will. Objections arising from matters amounting to personal inconvenience would not qualify. While the individual concerned has the right under Article 18(1) to privately think he/she should not be obligated to serve because of matters of inconvenience, this cannot sensibly be described as a belief. "Belief", in this sense, transcends mere point of view and rather describes a state of mind that is fundamental to the identity of the individual as a human being.

[67] If the basis upon which the individual objects to the performance of military service can, on the facts as found, be categorised as a religious or other belief, then it appears in principle to be a belief that is capable of falling within the ambit of Article 18(1). What must be borne in mind, however, is that although Article 18 is a non-derogable right (Article 4(2) ICCPR), as noted by the Authority in *Refugee Appeal No 74665/03*, refer [85]–[87], very few of the rights under the ICCPR can be properly described as absolute. The rights under Article 18 cannot be so described, its non-derogable nature notwithstanding. Rather, Article 18(3) makes clear that the right to publicly manifest a religion or belief may be the subject of certain limitations.

[68] There is no doubt that forcing a person who is found to hold such religious or other beliefs prohibiting his/her service in the armed forces, constitutes a limitation on the right to manifest that belief through practice. The issue is whether the limitation is justified. This is an issue that must be decided by reference to the criteria in Article 18(3). If the state action limiting manifestation of such a belief meets these criteria, it is permissible and, therefore, lawful; the freedom contained in Article 18(1) gives way to the permissible limitation and ceases to be enforceable against the state.

[69] It is not, however, on the facts of this case, necessary to reach any final conclusion as to whether such an objection may be relied on to found a valid claim for refugee status in all circumstances. This is because, as the jurisprudence of the Authority makes clear, it is recognised that even if no generalised right exists, there are nevertheless some circumstances in which a person cannot be compelled to perform compulsory military service; any limitation on the right to

publicly manifest any religious or belief-based objection in these circumstances ceases to be permissible. This is a matter of some significance in this appeal and it is to this the Authority turns.

Limitations of the Right to Freedom of Religion and Belief under Article 18(3) ICCPR

[70] For the limitation to justify the interference with the right to freedom to manifest a belief, the limitation must under Article 18(3) ICCPR:

(a) be prescribed by law; and

(b) be in pursuit of one of the aims legitimated by Article 18(3); and

(c) be necessary to achieve that specified aim. The measure adopted must, therefore, have an inherent relationship of proportionality to the legitimate aim.

[71] As to limitation clauses generally, regard can be had to the United Nations Economic and Social Council *Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political rights* UN Doc E/CN.4/1985/4 (the Siracusa principles) and the Commentary thereto by A. Kiss *Commentary by the Rapporteur on the Limitation Provisions* (1985) 7 Hum.Rts. Q. 15. The Siracusa principles, at part A, list some general interpretive principles. While plainly not binding on the Authority, they also are of a persuasive nature.

Prescribed by Law

[72] It is not necessary for the purposes of this decision to embark on a detailed analysis of what this criteria requires. In general terms, however, this criteria necessitates that there is some identifiable basis for the interference under the domestic law of the country in question. It goes beyond this strict formalism to include the idea that the law itself must have the quality of law. That is to say, it must be publicly accessible and be sufficiently certain so as to enable citizens to foresee the harm that breach would bring, so as to modify their behaviour – see generally H Mountfield QC “The concept of a Lawful Interference With

Fundamental Rights" in *Understanding Human Rights Principles* (Jowell and Cooper (eds), Hart Publishing, Oxford, 2001) at 6–15; Harris, Boyle and Warbrick *The Law of the European Convention on Human Rights* (Butterworths, London, 1995) at pp285–289; Siracusa principles at paras 15–19; Kiss (*supra*) at p18-19.

[73] Thus, secretive or *ad hoc* conscription policies may not meet this criterion. Indeed this is one possible interpretation of the reasoning of the joint judgment in *Applicant S* in relation to the conscription*,* the *ad hoc* nature of the Taliban's conscription practises meant they were not prescribed by law see [41]*.*

In Pursuit of a Legitimate Aim

[74] Nowak notes, that while the aims justifying interference under Article 18(3) do not include national security, the concept of "public safety" is nevertheless broad enough to justify interference for the purposes of national security. The Authority agrees. The Siracusa principles (at para 33) define "public safety" as meaning:

> "… protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property."

It is hard to conceive of a situation where an issue of national security would not involve an issue of public safety so defined.

[75] That a policy of compulsory military service can be legitimated under the rubric of public safety is supported by Lord Hoffman in *Sepet and Bulbul,* who states at p345, [46]:

> "In the present case, the human right relied upon as founding a right to conscientious objection is the freedom of thought conscience and religion: article 18 of the ICCPR and article 9 of the ECHR. Although both articles give an unqualified right to hold religious opinions and to manifest that belief in "worship, observance, practice and teaching", the right to manifest a religion or belief in other ways may be limited so far as "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". The framers of the covenants appear to have believed as I have said, that public safety was a legitimate reason for not allowing a religion or belief to be manifested by refusal to do military service… ."

[76] In *Applicant S,* the question of compulsory military service was also considered within the framework of Article 18 ICCPR. Delivering their joint judgment, Gleeson CJ, Gummow and Kirby JJ addressed the question in the language of legitimacy of aim and proportionality of action:

> "[43] The criteria for the determination of whether a law or policy that results in

> discriminatory treatment actually amounts to persecution were articulated by McHugh J in Applicant A. His Honour said that the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is "appropriate and adapted to achieving some legitimate object of the country [concerned]". These criteria were accepted in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Chen Shi Hai*. As a matter of law to be applied in Australia, they are to be taken as settled. This is what underlay the court's decision in Israelian. Namely, that enforcement of the law of general application in that particular case was appropriate and adapted to achieving a legitimate national objective.
>
> [44] In Applicant A, McHugh J went on to say that a legitimate object will ordinarily be an object the pursuit of which is required in order to protect or promote the general welfare of the state and its citizens. His Honour gave the examples that: (i) enforcement of a generally applicable criminal law does not ordinarily constitute persecution; and (ii) nor is the enforcement of laws designed to protect the general welfare of the state ordinarily persecutory. While the implementation of these laws may place additional burdens on the members of a particular race, religion or nationality, or social group, the legitimacy of the objects, and the apparent proportionality of the means employed to achieve those objects, are such that the implementation of these laws is not persecutory."

[77] While not expressed clearly in terms of the tripartite requirements of prescription by law, pursuit of a legitimate aim and proportionality, the analysis is plainly located within an Article 18(3) paradigm. Although there was a disagreement as to whether the Taliban regime enjoyed sufficient legitimacy so as to have vested in it a state's authority to conscript as a function of its sovereignty (compare on this point Gleeson CJ, Gummow and Kirby JJ at pp572-73 para [47] with Callinan J at p589, [101]–[102]), there was no suggestion that a policy of conscription *per se* could not be a matter "designed to protect the general welfare of the state" and thus be in pursuit of a legitimate aim.

[78] The Authority finds that state policy requiring compulsory military service can, in principle, amount to the pursuit of an aim deemed legitimate by Article 18(3). The mere fact such a policy exists will not, without more, therefore, ground a valid claim for refugee status on the basis that by having such a policy, the state is intrinsically acting in breach of its obligations under the ICCPR.

Proportionality

[79] While a policy of compulsory military service is not fundamentally illegitimate, the policy must be no more than is necessary to achieve its aim – see Siracusa principles at para 11. As Kiss (*supra*) at p17 notes, this concerns not the adoption of the limitation, but its application. Under Article 2(1) ICCPR, states are

under a positive duty to both respect and ensure to all individuals in their territory, the enjoyment of the rights contained in the Covenant. Article 5(1) provides that the states cannot act so as to limit the enjoyment of the ICCPR rights and freedoms to a greater extent than the Covenant provides for. The requirement of proportionality thus recognises, that any state action taken under Article 18(3), operates so as to limit the enjoyment of what is otherwise a right that the state is under a positive duty to guarantee. If the action limiting enjoyment of the right is not necessary to achieve the aim, the state becomes in breach of this positive duty by limiting the enjoyment of the right by the individual to a greater degree than is required.

[80] Viewed this manner, it is arguable that the issue of proportionality represents the locus of the debate, as to whether there exists a generalised right to object to military service on the basis of a religious or other belief. Just as the holders of such beliefs are not excluded from the potential ambit of Article 18(1), nor can they be exempted from the operation of Article 18(3). The issue is thus whether it is in the circumstances, a proportionate act of the state to force such persons to serve against such beliefs. As mentioned, however, this is not a matter this Authority needs to resolve.

[81] What is clear is that if conscription laws are selectively enforced or breaches selectively punished, this can be seen to be a disproportionate method of achieving the legitimate aim.

<u>As to selective recruitment policies or punishment</u>

[82] It is implicit in the concept of public safety that legitimates a compulsory military service policy that the benefit accrues to society as a whole, which in turn demands that all persons of eligible criteria undertake it. If only a certain category of persons within that portion of the population prescribed by law as being eligible are, in fact, subject to conscription or punished for refusing, such conscription could be disproportionate. Absent any compelling reason objectively justifying the policy, given the wider pool of eligibility in law, it is not necessary for the burden of compliance to fall only on the group or groups subjected to recruitment. For any member of a group selectively conscripted, the interference with their right goes further than is required.

[83] In the case of excessive punishment, the level of harm inflicted exceeds that warranted by the refusal. It is not necessary for the state to inflict that level of harm on the individual to ensure compliance with the otherwise lawful obligation to serve.

[84] In either case the resulting harm can be fairly described as satisfying the serious harm limb of the definition of "being persecuted" – see *R* v *Immigration Appeal tribunal, ex parte Shah and Islam* [1999] 2 AC 629, 653 (HL) per Lord Hoffman, adopted in *Refugee Appeal No 71427/99* [2000] NZAR 545,569.

Alternative service

[85] As to the absence of alternative service provisions, Nowak *(ibid*), at 325–329, observes that unlike Articles 14(1), 21 and 22(2) ICCPR, there is no reference under Article 18(3) to the limitation being necessary in a democratic society. He argues the relevant criterion is not, therefore, to be found in some common minimum democratic standard, but rather whether the policy was proportional in any given sense. The consequence of this is that while some nations with democratic systems of government may recognise alternatives to military service, this cannot be said to form some minimum requirement. This may explain why it is that refugee claimants from those states which do not have alternative service provisions cannot, as recognised in *Refugee Appeal No 71219/99* (14 October 1999), be said, without more, to face an unjustified limitation on their right to manifest a genuinely held belief that they should not be compelled to serve in the armed forces.

[86] This is not to say that states which are not democratically accountable have unfettered ability to interfere with the Article 18(1) rights by forcing citizens to serve in the armed forces against their will. The limitation must meet all Article 18(3) criteria. By reason of their undemocratic nature, the likelihood is that the security apparatus of such states will be used to maintain political control in ways which could not be justified in terms of Article 18(3) and render the interference unlawful on this basis. This however, is a question of fact and not a matter of principle.

Article 18 ICCPR and Participation in "Internationally Condemned Conflicts"

General Principles

[87] It is appropriate to note at the outset that the phrase "internationally condemned conflict" is apt to mislead. There is no need for the particular conflict to have been the subject of a formal condemnation by resolution of a supranational body, although plainly the existence of such condemnation would be relevant to the inquiry. Rather, what is happening on the ground as to observance of the laws of war by parties to the conflict is key - see *Krotov* v *Secretary of state for the Home Department* [2004] INLR 304, 323-324; *Ciric and Ciric v Canada* [1994] 2 FC 65.

[88] At the heart of this lies the proposition that no one can be compelled to undertake military service where a real chance exists that this will require the refugee claimant to commit human rights abuses. In *Sepet and Bulbul*, Lord Bingham (*supra*) at p329, [8], puts it thus:

> "There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment: see, for example, Zolfagharkhani v Canada (Minister of Employment and Immigration) [1993] FC 540; Ciric v Canada (Minister of Employment and Immigration) [1994] 2 FC 65; Canas-Segovia v Immigration and Naturalization Service (1990) 902 F 2d 717; UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paras 169, 171."

[89] In the Authority's view, it is the Article 18(3) requirement that any limitation on the right to manifest belief be in pursuit of a legitimate state aim, which provides the answer as to why it is that refugee status is appropriately recognised in these circumstances. Quite simply, the state does not enjoy the right to wage war in whatever manner it chooses. As L C Green *The Contemporary Law of Armed Conflict* (Manchester University Press, Manchester,1993), at p18 observes:

> "It has been recognised since earliest times that some restraints should be observed during armed conflict. Already in the Old Testament there are instances of limitations ordained by God.
>
> Sun Tzu maintained that in war one should attack the enemy armies, and 'the worst policy is to attack cities. Attack cities only when there is no alternative'. In ancient India the sacred writings sought to introduce some measure of humanitarianism. The Mahabharata states that 'a King should never do such an injury to his foe as would rankle the latter's heart', and went on to ordain that a sleeping enemy should not be attacked, while 'with death our enmity has

> terminated', thus rejecting desecration of the corpse. Moreover, it prohibited the killing of those suffering from any natural, physical or mental incapacity, and 'he is no son of the Vrishni race who slayeth a woman, a boy or an old man'.
>
> According to Homer the ancient Greeks considered the use of poison on weapons to be anathema to the gods, and among the city states.
>
> By the 7th century some of these principles had spread to the Islamic world and the Caliph Abu Bakr commanded his forces, 'let there be no perfidy, no falsehood in your treaties with the enemy, be faithful to all things, proving yourselves upright and noble and maintaining your word and promises truly'. The leading Islamic statement on the law of nations written in the ninth century to some extend reflects principles laid down in the Old Testament, with its ban on the killing of women, children and the old, or the blind, the crippled and the helpless insane."

I Detter *The Laws of War* (Cambridge University Press, Cambridge, 2000) at pp151–154 also refers to this history.

[90] While even a cursory glance at the history of mankind will reveal truly horrendous examples of breaches of such teachings, it simply cannot be said that the modern laws of war have sprung up out of the blue and much less represent an expression of a Eurocentric view as to the limits of state behaviour during conflict. Rather, they can properly be considered as the contemporary embodiment of a long held and diverse tradition, namely those with the power and authority to wage war, do not enjoy unfettered freedom of action in this area.

[91] It is for this reason that where a state's armed forces are participating in an armed conflict in a manner that involves breaches of the laws of war, this can, in principle, give rise to a valid claim for refugee status.

[92] Detter notes (at p159) that the laws of war exist on a number of planes:

(a) rules on weapons, which abolish, restrict or regulate specific weapons or their use in war;

(b) rules on methods of warfare, including rules on permissible tactics and strategies an on illegitimate targets; and

(c) humanitarian rules.

[93] Most cases will involve allegations that, in the course of their military service, the claimant may be required to commit actions which amount to a breach of specific rules as to the treatment of civilians during armed conflict. This is

because reports of individual breaches committed against the civilian population are those most likely to be reported on by governmental and non-governmental agencies. This will not always be the case however. In *Zolfagharkani* v *Minister of Employment and Immigration* [1993] 3 FC 540, the issue concerned the potential use by the Iranian military of weapons in breach of The Convention on the Prohibition of the Development, Protection and Stockpiling of Bacterial (Biological) and Toxin Weapons and On their Destruction 1972. It having been accepted their use was probable, the Court held the Iranian conscription policy to be persecutory.

[94] While military action in breach of the laws of war is in a sense disproportionate, the Authority finds that such actions are better understood as being fundamentally illegitimate. That this is so is supported by the observations of the International Court of Justice in *Nicaragua* v *United States of America* (Merits) (1986) ICJR 14 that Common Article 3 of the Geneva Conventions represents a peremptory norm of international law:

> "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflict, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (Corfu Channel, Merits, ICJ Reports 1949, p22; paragraph 215 above).
> …
> The Court considers that there is an obligation on the United States Government in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even to "ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression."

[95] Given Common Article 3 is "elementary" in nature, the restraints it places on state action are more compellingly understood within the concept of legitimacy than proportionality. Proportionality suggests that there is nothing unlawful *per se* about the particular action, but rather that it was not an appropriate or justified action in response to the circumstances at hand. The prohibitions set out in Common Article 3(1) are, however, of a different quality, being unjustified "at any time and in any place whatsoever". They resonate with a fundamental illegitimacy.

[96] Secondly, the jurisdiction of the International Criminal Court under the Rome statute points towards such fundamental illegitimacy. The Rome statute is, however, not without controversy; for a discussion as to some of the issues raised by the reliance on the Rome statute in dealing with Article 1F Refugee Convention

in the process of refugee determination, see generally the judgment of the Federal Court of Australia in *SRYY* v *Minister of Immigration and Multicultural and Indigenous Affairs* (N57/2004, Merkel, Finkelstein and Weinberg JJ, 17 March 2005) at [59]–[77]. Nevertheless, it is appropriate to consider this document, being as it is, the most recent international instrument dealing with offences arising from breaches of the laws of war.

[97] The jurisdiction of the International Criminal Court over international crimes of genocide, crimes against humanity and other specified war crimes is in respect of all natural persons (Article 25). Official capacity, including that as head of state (Article 27), does not absolve the individual from responsibility – see also in this context *R* v *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Uguarte* (No 3) [2000] 1 AC 147. That no individual, regardless of their military or civilian capacity, is immune from prosecution for actual involvement or complicity in such crimes, is strongly suggestive that conduct of this nature is fundamentally illegitimate in international law; no-one may act in this way in the name of the state.

[98] For these reasons, the Authority finds that any legitimate aim the state may have in conscripting persons for participation in armed conflict, does not extend to forcing participation in conduct that amounts to breaches of the laws of war. When military operations breach the laws of war, the aim of any conscription policy ceases to be for a legitimate aim. It is difficult to see how such actions can relate to public safety. As recent events in Kosovo and Rwanda show, such actions often invite reprisals against the civilian population of the countries whose armed forces commit such actions. Moreover, such actions expose troops to prosecution for their participation in them. The state may not, therefore, lawfully interfere, under Article 18(3), with an individual's right to manifest a belief that he/she should not participate in such a conflict, by refusing to be conscripted.

Serious Harm and Conflict in Breach of The Laws of War

[99] Detter cogently argues, (*supra*) at pp158–161, against importing hierarchical distinctions between the "law of the Hague" governing belligerents in war and the "law of Geneva" concerning the protection of individuals. Such a distinction fails to recognise that the behaviour of belligerents in armed conflict inevitably impacts upon individuals and thus, she argues, rules on victims cannot be separated from rules of warfare.

[100] The Authority agrees. The international crime of genocide involves the aggregation of countless individual breaches of each victim's right under Article 6 ICCPR to the right to life; a crime against humanity encompass, *inter alia*, the torture, rape and other inhumane acts against a civilian population in breach of their rights under Article 7 ICCPR, when committed as part of a widespread or systematic attack. There is an inherent relationship between international humanitarian law, as expressed through the laws of war, and international human rights law as expressed through the provisions of the International Bill of Rights.

[101] The imposition of a term of imprisonment in such circumstances amounts to serious harm for the purposes of the Refugee Convention. Any loss of personal liberty for refusal to participate in such conflicts, arising from genuinely held religious or other beliefs, undermines human dignity in a key way and is appropriately categorised as "being persecuted" – see J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) at p108.

The Standard of Proof

[102] In *Refugee Appeal No 70472/97* (28 January 1999) at p14, the Authority drew a distinction between situations where state forces are committing human rights abuses as a matter of state policy and those where human rights abuses are carried out by individual units and the state either encourages or is otherwise unable to control their actions. The distinction is apposite but requires further explanation.

[103] Some breaches of the laws of war operate at a level of generality or scope that they intrinsically form part of a wider policy. Under Article 2 of the Genocide Convention 1948, the crime of genocide involves the specific intention to destroy "a substantial part" or "a considerable number" of a national, ethnical, racial or religious group. Just as genocidal intent at an individual level can be inferred from the circumstances - see *Mugesara* v *Canada (Minister of Citizenship and Immigration) 2005 SCC 40* (28 June 2005) at [89], so too can the underlying policy; the scale of the crime evidences the policy element to it.

[104] A crime against humanity prohibits acts such as murder, deportation or other inhuman acts against a civilian within the context of a widespread or systematic attack against any civilian population. While it is not a necessary

ingredient of the crime to establish the existence of a formal policy, nevertheless, a systematic or sufficiently widespread attack may implicitly suggest the existence of state policy - see *Mugesara* at [153]-[158].

[105] At the other end of the spectrum will be cases where, in the course of the conflict, individual war crimes are carried out by individual soldiers or units – a distinction recognised by the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law since 1991 (ICTY) in *Prosecutor* v *D Tadic* (IT-94-I-T, 7 May 1997) at para [648]. Echoing this distinction, Potter LJ in *Krotov* v *Secretary of State for the Home Department* stated (*supra*) at p320, [37]:

> "In my view, the crimes listed above, if committed on a systematic basis as an aspect of deliberate policy, or as a result of official indifference to the widespread actions of a brutal military, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate will constitute persecution within the ambit of the Refugee Convention.
>
> I would substitute the words 'in which he maybe required to participate' for the words 'with which he may be associated' as emphasising that the grounds should be limited to reasonable fear on the part of the objector that he will be personally involved in such acts, as opposed to a more generalised assertion of fear or opinion based on reported examples of individual excesses of the kind which almost inevitably occur in the course of armed conflict, but which are not such as to amount to the multiple commission of inhumane acts pursuant to or in furtherance of a state policy of authorisation or indifference."

[106] In cases where the scale of abuse revealed by country material supports a finding of the existence of a policy, expressed or otherwise, to order or condone breaches of the laws of war by the states armed forces, there will be a real chance that all military units will be directed to so act - see in this regard the recent approach to claims by Sudanese nationals who objected to military service in *Refugee Appeal No 74844* (18 February 2004) and *Refugee Appeal No 73378* (11 December 2003). In those cases where breaches of the laws of war are truly isolated events, the real chance threshold will plainly not be reached. It is likely, however, that most cases will fall some where in the middle.

[107] In cases where the claimant has deserted after being ordered to commit an action that amounts to a breach of the laws of war, the task of evaluation will be much easier. However, draft evaders are also potentially within the scope of this exception. It will usually be impossible for these claimants to establish in advance which particular unit they will be posted to or where that unit may be deployed. Given this impossibility, it is, the Authority finds, wrong in principle to insist on

proof as to actual unit deployment. The Authority does not understand the decision in *Refugee Appeal No 70472/97* to require such a level of proof, when endorsing Kuzas' point of a requirement that the refugee claimant show a real chance of personal involvement – see Kuzas "Asylum for Unrecognised Conscientious Objectors to Military Service: Is there a Right Not to Fight?" *Virginia Journal of International Law* (Vol 31) 447, 465 - 467.

[108] Insofar as Kuzas appears to draw a distinction between those conscripted into "third world armies" and those who are not, this is to be treated with caution. The use of the term "third world" is inherently problematic, not in the least because of its historical provenance and because its generality masks significant demographic, structural, economic and political differences in the states to which the term has been applied. Moreover, as a matter of principle, the approach must be the same irrespective of the state in question. That said, it will ordinarily be much harder for a refugee claimant from a functioning democratic state, in which the armed forces are truly subordinated to the rule of law (including the laws of war) and to civilian government, to credibly claim that the risk of their being forced to commit an act that amounts to a breach of the laws of war, crosses the real chance threshold.

[109] It must be emphasised that what must be shown is a real chance of being forced to participate in a conflict in which the claimant could be required to commit breaches of the laws of war; the claim cannot be based on mere conjecture or surmise – see *Minister of Immigration and Ethnic Affairs* v *Guo* (1997) 191 CLR 559, 572 per Brennan CJ. There must be a sufficiently solid evidential basis in the country information or other evidence. Whether the risk of being exposed to harm of this nature crosses the real chance threshold will depend on an assessment of matters such as:

(a) the history of the conflict: does it suggest a localised or more generalised conflict? Is it a new conflict? The more generalised and lengthy, the greater the chance of the claimant being engaged in the conflict;

(b) the history of reports of human rights abuses by the armed forces: does country material show this has been a regular feature of the conflict so as to establish an institutionalised propensity to commit breaches of the laws of war or is it a case of isolated acts? If the former, the greater the chance of

the individual being so required to act;

(c) the state response to evidence of any such abuses: does it suggest state indifference which may point to a tacit state policy suggesting a greater likelihood of the conduct continuing in the future?; and

(d) the current reports of human rights abuses: how do they compare with past levels? Does country material show an increase suggesting a greater risk of being ordered to commit them? If they have reduced, what is the chance of their being resumed at past levels?

Intention to Persecute and Nexus

[110] In *Refugee Appeal No 71219/99* (14 October 1999), the Authority held that in order to succeed, a refugee claimant seeking protection on the basis of an objection to military service must show that the state is motivated to punish non-compliance by reason of one of the five Convention grounds – see p12 at (c). As conscription laws are laws of general application, it was held that this will ordinarily not be the case.

[111] The Authority held however, that where the conscription policy was being selectively enforced, or punishment selectively applied against an individual possessing a Convention-protected interest, the nexus requirement was satisfied; it could be inferred that the state was motivated to punish the individual by reference to the protected interest – see p14. Where the avoidance of military service was because the military action had been condemned as violating international standards, the nexus requirement was satisfied because the evasion or desertion reflected an implied political opinion and it may be inferred that the state intends or is motivated to punish the individual by reason of that opinion - see p15.

[112] The proposition that proof of the motivating intent on the part of the persecutor is a necessary ingredient in establishing that the Article 1A(2) Refugee Convention criteria have been met, can be contrasted with the later decision of the Authority in *Refugee Appeal No 72635* (6 September 2002). Here, the Authority examined in some detail the question of the nexus between the harm feared and the Convention grounds - see [162]-[180]. As to the standard of causation, it

concluded that it was sufficient to found the nexus requirement if the Convention-protected ground was a "contributing cause" to the risk of being persecuted. The Authority noted at [168]:

> "The focus is on the reasons for the claimant's predicament rather than on the mindset of the persecutor, a point forcefully recognised in Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 at [33] & [65] (HCA). At a practical level the state of mind of the persecutor may be beyond ascertainment even from the circumstantial evidence.
>
> In this regard we respectfully, but nevertheless strongly disagree with the contrary view expressed in Immigration and Naturalisation Service v Elias-Zacarias 502 US 478 (1992), a decision in which the Supreme Court of the United States required a refugee claimant to establish two separate and distinct states of mind. First, an intention to persecute. Second, an intention to persecute because of a specific attribute of the victim (i.e. his or her race, religion, nationality, membership of a particular social group or political opinion). The Court thereby imposed a double burden on refugee claimants - first, to prove clearly that they possess a political opinion or recognised status; and, second, to prove that their persecutor is motivated to harm them because of hostility to that opinion or status."

[113] This Authority prefers the approach in *Refugee Appeal No 72635/01* (6 September 2002) and respectfully disagrees with the reasoning in *Refugee Appeal No 71219/99* (14 October 1999), insofar as the latter relies on the lack of Convention ground related motivating intent, as the basis upon which claims based on conscientious objection must fail.

[114] In the Authority's view, approaching the issues raised in cases of this nature by reference to the law being one of general application devoid of any persecutory intent, tends to focus the gaze away from the proper issues to be addressed, namely whether the act of conscription is prescribed by law, pursues a legitimate aim and, if so, does so in a proportionate fashion. It is these qualities that confer any state action limiting rights and freedoms guaranteed under the ICCPR with the mantle of permissibility; state activity taken under a generally applicable law limiting rights and freedoms which does not possess these qualities will be impermissible.

[115] Once it is accepted that the refugee claimant genuinely subscribes to the religious or other belief informing the claimed objection to military service, there can be no doubt that this contributes to the predicament of the claimant.

[116] Considering claims of this nature in this way avoids making fine and arguably artificial distinctions as to the political or other nature of the belief, depending on whether the conflict is "internationally condemned" or not. It is

difficult to discern how the nature (political or otherwise) of the objection changes with the form of service that may be required. Under any circumstance, an objection by an individual to a law requiring compulsory military service is inherently an expression of an opinion as to the boundaries of state power in relation to the individual; it is inherently political – see generally Heywood *Politics* (2nd ed, Palgrave, Basingstoke 2002) at p4, who places politics within the realm of conflict resolution in which competing ideas (here, between the individual and the state) are resolved. As noted by Goodwin Gill *The Refugee In International Law* (Clarendon Press, Oxford 1996) :

> "Military service and objection thereto, seen from the point of view of the State, are also issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of State authority; it is a political act."

[117] This proposition was accepted by the Court in *Zolfagharkani* v *Minister of Employment and Immigration (supra).* The Authority respectfully agrees.

4. APPLICATION OF THE ABOVE TO THE APPELLANT'S CLAIM

The Claim based on the conduct of the Turkish army

[118] Having considered the documentary evidence before it, the Authority is satisfied that the chance of this is real. This arises from the cumulative effect of the following:

1. The history of the conflict

[119] There can be little doubt that the history of the Kurds in Turkey, since the foundation of the Turkish state in the 1920s has been characterised by one of conflict with the state. M Somer, "Turkey's Changing Conflict: Changing Context and Domestic and Regional Implications" *Middle East Journal* (Vol 58 Number 2, 2004), traces the history of the development of Turkish and Kurdish identity. Somer observes (pp239–240) that at the formative stage of the Turkish state in the 1920s and 1930s, they developed as a "conflictual, rather than accommodative relationship"; see also in this context McDowell *A Modern History of the Kurds* (I B Taurus, London) at 184-211); Kendal "Kurdistan in Turkey" in G Chalinan (ed) *A People Without a Country: The Kurds and Kurdistan* (Zed Books, London, 1993) at 46–62.

[120] Gurbey, “The Kurdish Nationalist Movement in Turkey since the 1980s” in *The Kurdish Nationalist Movement In the 1990s: Its Impact on Turkey and the Middle East* (R Olsen (ed) Kentucky University Press, Kentucky, 1996), notes the primary internal causes of the conflict being “a strict application of the Kemalist notion of state which defines the Turkish nation as a sum of its citizens without consideration of ethnic identity” and secondly the principle of the indivisible unity of as states people and its territory”.

[121] The conflict is not a new one. The drivers of the conflict are embedded in the very foundational fabric of the Turkish state itself. The fact it is driven by matters that strike at the fundamental tenets upon which the Turkish state is founded means that the basic source of the conflict continues and is likely to continue in the future. Indeed, recent country information indicates that open conflict has resumed.

2. The resumption of the conflict

[122] Country information establishes that the relative lull in armed conflict which existed for the early part of this decade has come to an end. On 30 May 2004, the Kurdish nationalist paramilitary organisation known as PKK, but now called *Kongra-gel* (PKK/KG), announced that its five-year unilateral ceasefire was at an end – see Vesely “Kurdish unrest: Egypt’s pre–invasion warning comes true” *The Middle East* (July 2004) at p18.

[123] Country information confirms clashes between Turkish forces and PKK/KG fighters since the end of the ceasefire. For a summary indicating their frequency and wide geographical scope, see Research Directorate, Canadian Immigration and Refugee Board *Turkey: Situation and Treatment of members, supporters and sympathisers of Kurdistan workers party (PKK) and Hezbollah by state and non state agents (January 2003 – September 2004)* TUR42990.E (21 September 2004) at p3 (hereinafter the CIRB report).

[124] The conflict continues presently and reports of fighting in the south east of Turkey have again been on the increase. A perusal of country information covering 2005 is illustrative of the extent of the resumption.

(a) On 13 May 2005, nine “rebels” were killed by Turkish soldiers in Tuncelli

province as part of a massive operation involving some 10 000 soldiers – see *Nine rebels killed in southeast Turkey – officials* Reuters (11 May 2005) http://www.alertnet.org/printable.htm?URL=/theenews/newsdesk/L13680155.htm.

(b) On 10 May 2005, three Kurdish militants were killed, again in Tuncelli Region – *Turkey Kills Three Kurd Rebels, Warns of Militant Bombs* Reuters (11 May 2005) http://www.alertnet.org/printable.htm?URL=/theenews/newsdesk/L11122566.htm. The reports refer to a rise in violence in the region since the end of the PKK ceasefire and reports that the military were stepping up operations in the area and sending more units. An estimated 300 PKK fighters were involved along with 8000 soldiers. The report quotes the Turkish Land Forces commander as saying "the organisation [PKK] is at the same level as it was when its separatist leader was apprehended in 1999". The report goes on to state that although the conflict has mainly been limited to the villages or mountainous areas of the south east, there have also been sporadic attacks in western cities.

(c) On about 27 April 2005, there was fighting in the area north of Diyabakir in which security forces clashed with "Kurdish separatists" during the course of a three day army operation backed by helicopters – see *One Killed, Two hurt in southeast Turkey* Reuters (27 April 2005) http://www.alertnet.org/printable.htm?URL=/theenews/newsdesk/L27547567.htm.

(d) On about 15 April 2005, fighting took place in the Besta area bordering Siirt and Sirnak provinces between "PKK militants" and three brigades of soldiers supported by 2000 village guards and warplanes and helicopters – see *Turkish troops pursue rebels after 25 die* Reuters (15 April 2005) http://www.alertnet.org/printable.htm?URL=/thenews/newsdesk/L1580689.htm; see also *Turkey Kills 21 Kurdish Fighters* BBC News (15 April 2005) http://news.bbc.co.uk./go/pr/fr/-/2/hi/Europe/444775.stm.

(e) On about 11 April 2005, there was fighting in Sirnak province. Soldiers seized weapons, bomb-making material as well as food and clothing – see *Two Kurdish rebels killed in southeast Turkey* Reuters (11 April 2005) http://www.alertnet.org/printable.htm?URL=/thenews/newsdesk/L11677874.htm.

(f) On about 4 April 2005, a five day military operation was carried out backed by helicopter gunships in Sirnak province – see *Ten killed in Turkey separatist violenc*e Reuters (4 April 2005) http://www.alertnet.org/printable.htm?URL=/theenews/newsdesk/L0545386.htm.

(g) On about 2 April 2005, there was fighting in Bingol province - see *Three Killed in Kurdish rebel Violence in Turkey* - Reuters (2 April 2005) http://www.alertnet.org/printable.htm?URL=/theenews/newsdesk/L02673482.htm.

(h) In January 2005, fighting took place on the Turkish/Iraqi border between security forces and members of PKK/KG who were making their way into Turkey from Iraq - see "Turkish troops kill two rebel Kurds on Iraq Border" *Asian Africa Intelligence Wire* (2 January 2005) (Infotrac).

[125] Furthermore, there have been reports of attacks outside the south east suggesting an intensification of the conflict across large parts of the country.

(a) In July 2005, a tourist minibus was bombed in Kusidasi in western Turkey, two weeks after another tourist destination was also bombed. Although some analysts suggest this may be the work of Islamic groups, the Turkish authorities believe these attacks to be the work of Kurdish separatist groups. Indeed one such group (not the PKK), has claimed responsibility, a group which bombed two hotels in Istanbul in August 2004 – see "Who is to blame - PKK or Al-Qaida?" *The Guardian* (18 July 2005) http://www.guardian.co.uk/print/0,3858,5241486-103,681,00.htm; "PKK 'behind' Turkey resort bomb" *BBC News* http://www.bbc.co.uk.

(b) In April 2005, there was a bomb attack in Kusadasi, a resort in Western Turkey – see *Rebel Kurd Group claims bloody blast at Turk resort* - Reuters (1 May 2005) http://www.alertnet.org/printable.htm?URL=/theenews/newsdesk/L01196532.htm.

(c) In January 2005, a warehouse outside Istanbul was attacked - see *PKK claims responsibility for warehouse fire Near Istanbul* (Xinhua News Agency) 26 January 2005 (Infotrac).

[126] These reports establish that at the present time, there is a significant resumption in the armed conflict between the Turkish armed forces and Kurdish separatists, principally, but not exclusively, in the south east. This conflict involves large scale military operations involving significant numbers of ground troops backed up by aerial power. While the PKK/KG recently declared a unilateral ceasefire, this expired on 3 October 2005 and, in any event, this action did not result in a cessation of military operations against them - see "Two Kurdish guerrillas killed in southeast Turkey" Reuters (27 September 2005) http://www.aler tnet.org/printable.htm?URL=/thenews/newsdesk/L2934110.htm.

3. A history of scale human rights abuses on a widespread scale

[127] That the Turkish armed forces have, in the course of the conflict with the Kurds, committed many breaches of the laws of war is a matter that has been reported on by human rights NGOs for many years and noted by the Authority. The recent history is succinclty summarised in Human Rights Watch *"Still Critical": Prospects in 2005 for Internally Displaced Kurds in Turkey* (March 2005) at pp5–6. In *Refugee Appeal No 74146/2003* (16 December 2003) the Authority observed at [48]:

> "For decades the Turkish government has adopted a policy of forcing the Kurds in Turkey to assimilate with the majority. It has actively repressed any attempt to express Kurdish identity. The consequent widespread abuse of basic human rights of Kurds by the Turkish authorities has been well documented."

[128] In *Refugee Appeal No 73122–25/*01 (20 June 2002) and *Refugee Appeal No 73963/02* (12 February 2003), the Authority noted, in particular, the well-documented abuses of detainees by both police and security forces – see [73] and [44] respectively. The Authority agrees with these conclusions.

[129] There can be little doubt, in light of the above, that the Turkish ground forces routinely and for many years, conducted their military operations against the PKK/KG in a manner that at the very least involved breaches of Common Article 3 of the Geneva Conventions on a regular and widespread basis. This past history provides a good indicator of how the conflict may be fought in the future. In *Refugee Appeal No 74146* (16 December 2003), the Authority reviewed recent developments in Turkey and concluded, at [58], that the human rights situation has improved for some Kurds, a result of legislative changes, but not all. Crucially, it noted continuing reports of torture and other forms of mistreatment – see [53]–[56].

[130] The report "Violence in the southeast overshadows EU drive" Reuters (27 September 2005) http://www.alertnet.org/printable.htm?URL=/thenews/newsdesk/L27718170.htm refers to a massive upswing in the number of persons killed during the current fighting with some 123 being killed in the last three months, compared with 14 for the whole of 2002. It refers to a "climate of violence [which] contaminates all of Turkey" and a poisonous political atmosphere which is playing into the hands of hardliners in the political, judicial and military establishments who see democratic reform as a danger and hampering the ability of the armed forces to fight the PKK/KG.

[131] While the report refers to the security forces exercising restraint thus far, lest Turkish Kurds look to their Iraqi counterparts and not the European Union (EU) as a solution, there must be a real question as to what "restraint" means for an armed force with such a poor human rights record. Moreover, a real issue exists as to how long any actual restraint will last, given the controversial nature of Turkey's accession to the EU within both Europe and Turkey, the expected 15 year duration of the accession talks and the uncertainty that the talks will lead to accession in any event – see "Barroso fires EU warning to Turkey" *The Guardian* (4 October 2005).

[132] Indeed, country information indicates that the actions which characterised the fighting during the last period of conflict are also emerging in the current fighting. The United States Department of State *Country Report for Human Rights Practices 2004: Turkey* (28 February 2005) notes at s1(a), there are credible reports that the security forces, including soldiers, unlawfully killed a number of persons in the south east and east for allegedly failing to obey stop warnings. It concludes that the government as well as the PKK/KG continued to commit human rights abuses against the civilian population.

[133] There is at least one report by Amnesty International of a person caught in the army during the fighting on 15 April having their detention unregistered - see Amnesty International *Possible "disappearance" fear of torture or ill-treatment*. EUR 44/017/2005 (20 April 2005). In the past this has been a precursor to torture and violence – see Amnesty International *Turkey: An End to Torture and Impunity is Overdue* (October 2001) at pp9-12.

[134] In the report by Human Rights Watch, *A Crossroads for Human Rights?*

Human Rights Watch's key concerns on Turkey for 2005 (15 December 2004), reference is made to the massive internal displacement of the Kurds during the early 1990s and notes concerns as to the government's Return to Village and Rehabilitation Programme. It states that returning can be a "risky business" and cites attacks on civilians by village guards in the areas of return concluding:

> "… the recent shootings are an alarming reminder for the potential for lethal state violence against civilians."

[135] The Authority notes the European Council report *2003 Regular Report On Turkey's Progress Towards Accession* records (at p24) that since October 2002 the European Court had not only delivered 92 judgments concerning Turkey, of which only one was found not to have been in violation of the European Convention on Human Rights (another 47 were settled), but the Court received some 2,614 new applications regarding Turkey.

[136] The above material establishes that, despite some improvements, there remains within the Turkish state security apparatus, including the armed forces, an institutionalised propensity to commit human rights violations. The conflict is deepening and there are concerns that the situation could deteriorate further. Reports of human rights violations have begun to emerge. In broad terms, this will render it more likely that those soldiers engaged in the current conflict will be required to act in breach of the laws of war.

[137] This propensity is encouraged by a continuing climate of impunity. That there operates an effective climate of impunity for those who commit human rights abuses has been commented upon by human rights NGOs for some time – see for example Amnesty International *An End to Torture and Impunity is overdue!* (November 2001). The United States Department of State *Country Report on Human Rights Practices 2004: Turkey* (28 February 2005) at s1(d) makes clear this climate remains operative. It records that in 2004 alone, while some 2,395 separate prosecutions were brought against security personnel on torture and ill-treatment charges, of the cases decided that year, the majority were acquitted. Those that were convicted received minimal punishment and sometimes sentences were suspended. The report notes that the state allowed officers accused of abuse to remain on duty and, in some cases, even promoted them during the trial.

The risk of the appellant's participation in the resumption of the conflict

[138] According to information available to the Authority, the Turkish Armed force comprise an estimated 514,000 soldiers, including an estimated 391,000 conscripts – see Reuters Country Profile: *Turkey Military Statistics* http://www.alertnet.org/printable.htm?URL=/thefacts/countryprofiles/220770.htm. These figures represent an increase in the number of professional soldiers. In 1994, of some 393,000 soldiers, some 345,000 were conscripts – see GlobalSecurity.org *Military: Turkish Land Forces* http://www.globalsecurity.org/military/world/wurope/tu-army.htm.

[139] As to the risk of being deployed in the south east as a conscript, figures vary. The UNHCR Report 2001 *(supra)* p65 at [237], reports that the previous system whereby those from the region were not required to serve there, was abandoned in 1993 and the system became randomised. However, it goes on to state that, including *Jandarma* (soldiers performing police functions), in 2001 there were approximately 700,000 conscripts of which approximately 20 per cent were sent to the south east. In contrast, D McDowell, *Asylum Seekers from Turkey II* (November 2002) at p66, states that of the estimated 525,000 conscripts in military service at any one time, it is generally estimated that 40 per cent yearly did all or part of their service in the south east during the 1990s.

[140] Plainly there is great variation in the figures but nevertheless, two points emerge: firstly that the Turkish army is overwhelmingly comprised of conscripts and secondly, a randomised system of unit allocation establishes a likelihood of deployment to the south eastern region that transcends the real chance threshold. Even taking the lowest of the figures (20 per cent), this is enough to take the risk of the appellant being deployed to the south east beyond the realm of conjecture or surmise.

Conclusion on well-foundedness

[141] The appellant is liable for conscription at a time when the conflict between the Turkish state and PKK/KG has resumed after a hiatus. The resumption of conflict is characterised by large scale military operations involving significant numbers of troops. The Turkish army remains overwhelmingly a conscript army, whose deployment policy means there is at least a 20 per cent chance of the appellant being sent to the region where the fighting is taking place. Reports of breaches of the laws of war by the armed forces have begun to resurface, against

a background of widespread breaches during the last period of conflict.

[142] As for the appellant's exposure to such breaches, the Authority reminds itself that the standard of proof in refugee matters is one which does not require it to be satisfied that the appellant will probably be so required or that it is even likely to happen. Given the history of the conflict, attendant breaches of the laws of war on a widespread scale in the past and a continuing climate of impunity for those who commit the breaches, the chance of the appellant being personally involved by being required to commit acts in breach of the laws of war now that open conflict has resumed, cannot be dismissed as mere surmise or conjecture. There is a sufficiently solid evidential foundation to establish that the risk to the appellant crosses the real chance threshold.

[143] Given this risk, the conscription of this particular appellant, at this particular time in the conflict, would not be in pursuit of a legitimate aim. Any imprisonment of him would amount to his being persecuted for the purposes of the Convention. The first principal issue is answered in the affirmative.

Convention reason and nexus

[144] Plainly, his predicament is contributed to by a genuinely held belief that is central to him. This belief is political in nature relating to the boundary of state power. His predicament is being contributed to by his political opinion and the second principal issue is also answered in the affirmative.

The claim based on the appellants pacifist beliefs

[145] Given the above finding, it is not necessary for the Authority to consider this aspect of the appellant's claim.

The claim based on risk as a HADEP member

[146] Given the above finding, it is not necessary to consider the appellant's alternative basis of claim.

CONCLUSION

[147] For the reasons set out above, the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

.....
B Burson
Member