Judgments - Sepet (FC) and Another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)

HOUSE OF LORDS

SESSION 2002-03
[2003] UKHL 15
on appeal from:[2001] EWCA Civ 681

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE
Sepet (FC) and another (FC) (Appellants)
v.
Secretary of State for the Home Department (Respondent)
ON
THURSDAY 20 MARCH 2003

The Appellate Committee comprised:
Lord Bingham of Cornhill
Lord Steyn
Lord Hoffmann
Lord Hutton
Lord Rodger of Earlsferry

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IN THE CAUSE

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[2003] UKHL 15

LORD BINGHAM OF CORNHILL

My Lords,

1. The issue in this appeal is whether the applicants, both of them Turkish nationals of Kurdish origin, should have been granted asylum on the ground that they were refugees within the meaning of article 1A(2) of the 1951 Geneva Convention relating to the Status of Refugees and the 1967 Protocol to that Convention. The ground upon which asylum was claimed related to their liability, if returned to Turkey, to perform compulsory military service on pain of imprisonment if they refused. Their claims for asylum were rejected by the respondent Secretary of State, and

challenges to his decisions were successively rejected by the Special Adjudicator (Mr J R L G Varcoe CMG), the Immigration Appeal Tribunal (Collins J and Mr P R Moulden) and the Court of Appeal (Waller, Laws and Jonathan Parker LJJ: [2001] EWCA Civ 681). In argument before the House, as in the Court of Appeal, helpful submissions were made on behalf of the United Nations High Commissioner for Refugees.

2. By section 8(1) of the Asylum and Immigration Appeals Act 1993 (in force at the relevant time)

> "A person who is refused leave to enter the United Kingdom under the 1971 [Immigration] Act may appeal against the refusal to a special adjudicator on the ground that his removal in consequence of the refusal would be contrary to the United Kingdom's obligations under the [1951] Convention".

Paragraph 334 of the Immigration Rules (HC 395, 1994) expands the language of the subsection:

> "An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) he is in the United Kingdom…..; and
>
> (ii) he is a refugee, as defined by the Convention and Protocol; and
>
> (iii) refusing his application would result in his being required to go … in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group."

These last words reproduce some of the language of the Convention itself, made in 1951 in direct response to what was then very recent history. Thus the preamble to the Convention referred to the rights and freedoms recognised in the Universal Declaration of Human Rights approved in 1948 and recorded that the United Nations had

> "on various occasions manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms".

For purposes of the Convention a refugee was defined by article 1A(2) to mean any person who

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

In the very extensive discussion of this definition the five grounds specified have conveniently come to be known as "Convention reasons". Article 1 of the Convention also contains, at F, an important exclusion:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

3. In any asylum case the facts are all-important and these cases are no exception. The first applicant, now aged 32, has not claimed to have a conscientious objection to bearing arms, serving his country or donning a uniform. His objections to military service stemmed from his political opposition to the policies of the then Turkish Government and from his wish not to be required to participate in actions, including atrocities, which he alleged to be perpetrated against his own people in the Kurdish areas of the country. The special adjudicator accepted that this applicant's reluctance to perform military service stemmed from his genuine political opinions, but found no reasonable likelihood that he would be required to engage in military action contrary to the basic rules of human conduct, even assuming that he was required to serve in a predominantly Kurdish area of Turkey. This applicant's wish to avoid military service was at least one of his reasons for leaving Turkey (which he did in 1990). He would still be regarded as liable for conscription on his return and might be charged with the offence of draft evasion, not having returned sooner. Any further refusal on his part would almost certainly lead to the preferment of charges against him.

4. The second applicant is now 25. He arrived in the United Kingdom in 1996. He later claimed that he would have received his call-up papers in August 1997 and become liable to call-up in about February 1998. He would be liable to be apprehended on his return to Turkey and to face a charge of draft evasion if he continued to refuse to serve. He has not claimed that he would refuse to wear uniform in all circumstances. His objection to performing military service related to his general antipathy towards the policy of the then Turkish Government to oppose self-determination for the Kurdish people. He also feared that he might be sent to the operational area and required to take part in military action, possibly involving atrocities and abuse of human rights, against his own people. The special adjudicator found that this applicant's objection was not one of moral conviction but, rather, stemmed from

his political views. He found no reasonable likelihood that this applicant would be required to engage in, or be associated with, acts offending against the basic rules of human conduct.

5. Turkish law at present provides no non-combatant alternative to military service. Draft evaders are liable to a prison sentence of between 6 months and 3 years. On completion of the sentence the offender is required to undertake his military service. It is an agreed fact that those who refuse to perform military service in Turkey (including Kurds) are not subject to disproportionate or excessive punishment, in law or in fact, as a result of their refusal. Draft evaders are liable to prosecution and punishment irrespective of the reasons prompting their refusal.

6. The task of the House is to interpret the 1951 Convention and, having done so, apply it to the facts of the applicants' cases, between which it is unnecessary to distinguish. In interpreting the Convention the House must respect articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969:

> Article 31
> General rule of interpretation
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
> Article 32
> Supplementary means of interpretation
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable."

It is plain that the Convention has a single autonomous meaning, to which effect should be given in and by all member states, regardless of where a decision falls to be made: *R v Secretary of State for the Home Department Ex p Adan* [2001] 2 AC 477. It is also, I think, plain that the Convention must be seen as a living instrument in the sense that while its meaning does not change over time its application will. I would agree with the observation of Sedley J in *R v Immigration Appeal Tribunal, Ex p Shah* [1997] Imm AR 145, 152:

> "Unless it [the Convention] is seen as a living thing, adopted by civilised countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism."

I would also endorse the observation of Laws LJ in *R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477, 500:

> "It is clear that the signatory states intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded."

7. To make good their claim to asylum as refugees it was necessary for the applicants to show, to the standard of reasonable likelihood or real risk, (1) that they feared, if they had remained in or were returned to Turkey, that they would be persecuted (2) for one or more of the Convention reasons, and (3) that such fear was well-founded. Although it is no doubt true, as stated in *Sandralingham v Secretary of State for the Home Department; Ravichandran v Secretary of State for the Home Department* [1996] Imm AR 97, 109, that the Convention definition raises a single composite question, analysis requires consideration of the constituent elements of the definition. At

the heart of the definition lies the concept of persecution. It is when a person, suffering or fearing persecution in country A, flees to country B that it becomes the duty of country B to afford him (by the grant of asylum) the protection denied him by or under the laws of country A. History provides many examples of racial, religious, national, social and political minorities (sometimes even majorities) which have without doubt suffered persecution. But it is a strong word. Its dictionary definitions (save in their emphasis on religious persecution) accord with popular usage: "the infliction of death, torture, or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it;" "A particular course or period of systematic infliction of punishment directed against the professors of a (religious) belief . . .": *Oxford English Dictionary*, 2nd ed, (1989). Valuable guidance is given by Professor Hathaway (*The Law of Refugee Status* (1991), p 112) in a passage relied on by Lord Hope of Craighead in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495:

> "In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community."

In this passage Professor Hathaway draws attention to a second requirement, no less important than that of showing persecution: the requirement to show, as a condition of entitlement to recognition as a refugee, that the persecution feared will (in reasonable likelihood) be for one or more of the five Convention reasons. As Dawson J pointed out in the High Court of Australia in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 247-248:

> "By including in its operative provisions the requirement that a refugee fear persecution, the Convention limits its humanitarian scope and does not afford universal protection to asylum seekers. No matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention. And by incorporating the five Convention reasons the Convention plainly contemplates that there will even be persons fearing persecution who will not be able to gain asylum as refugees."

8. 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. But the applicants cannot, on the facts as found, bring themselves within any of these categories. Nor have they been found to have a rooted objection to all military service of any kind, or an objection based on religious belief. Their unwillingness to serve is based on their strong and sincere opposition to the policy of the Turkish Government towards their own Kurdish community. There can be no doubt that the applicants' fear of the treatment which they will receive if they are returned to Turkey and maintain their refusal to serve is well-founded: it is the treatment described in paragraph 5 above. The crucial question is whether the treatment which the applicants reasonably fear is to be regarded, for purposes of the Convention, as persecution for one or more of the Convention reasons.

9. The core of the applicants' argument in the Court of Appeal was summarised by Laws LJ in paragraph 19 of his judgment in these terms:

> "(i) There exists a fundamental right, which is internationally recognised, to refuse to undertake military service on grounds of conscience.
>
> (ii) Where an individual, motivated by genuine conscientious grounds, refuses to undertake such service and the state offers no civilian or non-combative alternative, the prospect of his prosecution and punishment for evading the draft would if carried into effect amount to persecution for a Convention reason within article 1A(2) (assuming, what is not in contention in these cases, that the nature of the punishment would be sufficiently severe to amount to potential persecution).
>
> (iii) Proposition (ii) applies alike to cases of absolute and partial conscientious grounds; and the [applicants], on the proved or admitted facts, are refugees according to this reasoning."

This was the thrust of the applicants' case before the House also. The key is to be found in submission (i): for while discriminatory infringement of a recognised human right may not necessarily constitute persecution for Convention reasons, Mr Nicol QC for the applicants accepted that there could be no persecution for Convention reasons without discriminatory infringement of a recognised human right. So it is necessary to investigate whether the treatment which the applicants reasonably fear would infringe a recognised human right.

10. The leading international human rights instruments, literally interpreted, give little assistance to the applicants' argument. The Universal Declaration of Human Rights in 1948 prohibited slavery or servitude (article 4) and declared a right to freedom of thought, conscience and religion, including a right to manifest religion or belief publicly or privately (article 18), but it made no express reference to a right of conscientious objection. A very similar right to freedom of thought, conscience and religion is embodied in the European Convention on Human Rights (article 9) and in the International Covenant on Civil and Political Rights ("the ICCPR") (article 18). Each of these instruments also (in articles 4 and 8 respectively) outlaws slavery, servitude and forced or compulsory labour. But in article 8(3)(c) of the ICCPR it is expressly provided that "forced or compulsory labour" shall not include:

> "(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors."

Despite minor differences of wording, article 4(3)(b) of the ECHR is to identical effect. At the time when these provisions were drafted and adopted, it was plainly contemplated that there could be states, parties to the respective conventions, which did not recognise a right of conscientious objection and did not provide a non-combatant alternative to compulsory military service. Articles 4(3)(b) and 8(3)(c) have not been amended by international agreement, and there has been no later convention recognising or defining or regulating a right of conscientious objection.

11. For reasons on which I have already touched, the reach of an international human rights convention is not forever determined by the intentions of those who originally framed it. Thus, like the Court of Appeal, the House was appropriately asked to consider a mass of material illustrating the movement of international opinion among those concerned with human rights and refugees in the period, now a very significant period, since the major relevant conventions were adopted. A large number of these materials were listed by Waller LJ in paragraph 194 of his judgment, and they were also considered at length by Laws LJ. From these materials it is plain that several respected human rights bodies have recommended and urged member states to recognise a right of conscientious objection to compulsory military service, to provide a non-combatant alternative to it and to consider the grant of asylum to genuine conscientious objectors. But resolutions and recommendations of this kind, however sympathetic one may be towards their motivation and purpose, cannot themselves establish a legal rule binding in international law. I shall accordingly confine my attention to five documents which seem to me most directly relevant in ascertaining the point which international opinion has now reached.

12. Mention must first be made of the *UNHCR Handbook* which, subject to minor editing, dates from 1979 and is recognised as an important source of guidance on matters to which it relates. It is necessary to quote paragraphs 167-174:

> "*Deserters and persons avoiding military service*
>
> 167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.
>
> 168. A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.
>
> 169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.
>
> 170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.
>
> 171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as

contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of states have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies. In the light of these developments, it would be open to contracting states, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

174. The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions."

Some of these paragraphs may very readily be accepted. The paragraph most helpful to the applicants is paragraph 170. But this appears to be qualified by paragraph 171, which immediately follows and is much less helpful to the applicants. Less helpful also is paragraph 172, in its tentative suggestion that a person "may be able to establish a claim to refugee status". The same comment may be made of paragraph 173: "it would be open to contracting states to grant refugee status". Read as a whole, these paragraphs do not in my opinion provide the clear statement which the applicants need.

13. The applicants understandably placed reliance on General Comment No 22 of the United Nations Human Rights Committee (30 July 1993), which in paragraph 11 said (with reference to article 18 of the ICCPR):

"11. Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of states have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites states parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service."

This is perhaps the nearest one comes to a suggestion that a right of conscientious objection can be derived from article 18 of the ICCPR. But it is, again, a somewhat tentative suggestion ("believes that such a right can be derived"), and the Committee implicitly acknowledges that there are member states in which a right of conscientious objection is not recognised by law or practice. Thus while the thrust of the Committee's thinking is plain, one finds no clear assertion of binding principle.

14. I turn next to the Joint Position adopted by the Council of the European Union on the harmonised application of the term "refugee" in article 1 of the 1951 Convention (4 March 1996). Paragraph 10 of this Joint Position was entitled "Conscientious objection, absence without leave and desertion" and reads:

"The fear of punishment for conscientious objection, absence without leave or desertion is investigated on an individual basis. It should in itself be insufficient to justify recognition of refugee status. The penalty must be assessed in particular in accordance with the principles set out in point 5.

In cases of absence without leave or desertion, the person concerned must be accorded refugee status if the conditions under which military duties are performed themselves constitute persecution.

Similarly, refugee status may be granted, in the light of all the other requirements of the definition, in cases of punishment of conscientious objection or deliberate absence without leave and desertion on grounds of conscience if the performance of his military duties were to have the effect of leading the person concerned to participate in acts falling under the exclusion clauses in article 1F of the Geneva Convention"

The reference to "point 5" appears to refer most specifically to sub-paragraph 5.1.2(b) which reads:

"*Discriminatory punishment*

Punishment or the threat thereof on the basis of a universally applicable criminal law provision will be discriminatory if persons who breach the law are punished but certain persons are subject to more severe punishment on account of characteristics likely to lead to the award of refugee status. The discriminatory element in the punishment imposed is essential. Persecution may be deemed to exist in the event of a disproportionate sentence, provided that there is a link with one of the grounds of persecution referred to in article 1A."

This statement recognises the grounds for claiming asylum to which I have referred in paragraph 8 above. But it goes no further, and the statement is prefaced by a rider that "it shall not bind the legislative authorities or affect decisions of the judicial authorities of the member states."

15. I refer next to the Charter of Fundamental Rights of the European Union (2000/C 364/01) (18 December 2000), which includes article 10:

"Freedom of thought, conscience and religion.

"1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right."

While paragraph 1 is said to derive, as it plainly does, from article 9 of the ECHR, paragraph 2 is said to derive from national constitutional traditions. The applicants' difficulty is that national laws and national constitutional traditions may, or may not, recognise a right of conscientious objection; in any event, the Treaty of Nice expressly acknowledged that the status of the Charter of Fundamental Rights was a matter to be addressed thereafter.

16. Lastly, in this context I would refer to a draft directive of the Council of the European Union (15068/02) (28 November 2002) on minimum standards for the qualification of third country nationals as refugees. Since the draft may be amended, and may never be adopted, it must be received with caution. But since it is seeking to harmonise member states' interpretation of the requirements of article 1A(2) of the 1951 Convention, and since (although provisional) it represents the most recent statement on this subject which the House has seen, it seems to me to deserve attention. Chapter III concerns the qualification for being a refugee and article 11 (entitled "Acts of persecution") provides:

"1. Acts considered as persecution within the meaning of article 1A of the Geneva Convention must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in sub-paragraph (a).

2. Acts of persecution, which can be qualified as such in accordance with paragraph 1, can inter alia take the form of:

. . .

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in article 14, paragraph 2;"

Article 14 is entitled "Exclusion" and provides in paragraph 2:

"2. A third country national . . . is excluded from being a refugee where there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting

of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and articles 1 and 2 of the Charter of the United Nations."

This statement plainly affords a narrower ground for claiming asylum than some of the statements quoted above. It may be thought too narrow and may no doubt be widened in the course of negotiation. But it makes it hard for the applicants to show that there is clear international recognition of the right for which they contend, at any rate as of now. This temporal limitation is important, since international opinion is dynamic and the House cannot do more than give effect to what it understands to be the current position.

17. It is necessary to consider whether the applicants' contention finds compelling support in the decided cases. There are undoubtedly authorities on which they can properly rely, notably *Canas-Segovia v Immigration and Naturalization Service* (1990) 902 F 2d 717; *Canas-Segovia v Immigration and Naturalization Service* (1992) 970 F 2d 599 and *Erduran v Minister for Immigration and Multicultural Affairs* [2002] FCA 814. But the first of these decisions is in my opinion open to the criticism made of it by Jonathan Parker LJ in paragraphs 147-150 of his judgment, and the second does not sit altogether comfortably with the decision of the majority of the High Court of Australia in *Minister for Immigration and Multicultural Affairs v Yusuf and Israelian* [2001] HCA 30. They can scarcely be said to constitute a settled body of judicial opinion. Against them must be set a line of decisions of the European Commission on Human Rights which have, at least until recently, held the right asserted by the applicants to be excluded by article 4(3)(b) of the ECHR: *Grandrath v Federal Republic of Germany* Application No 2299/64, (1965) 8 YB 324 and (1967) 10 YB 626; *X v Austria* Application No 5591/72, (1973) 43 CD 161; *A v Switzerland* Application No 10640/83, (1984) 38 DR 219; *Johansen v Norway* Application No 10600/83, (1985) 44 DR 155; *Autio v Finland* Application No 17086/90, (1991) 72 DR 245; *Heudens v Belgium* Application No 24630/94, (unreported) 22 May 1995. The applicants drew support from the dissent of one Commission member in *Tsirlis and Kouloumpas v Greece* (1997) 25 EHRR 198, 224-226, a dissent which was repeated and elaborated, with a greater body of support, in the Report of the Commission adopted on 4 December 1998 in the case of *Thlimmenos v Greece* Application No 34369/97, (unreported), at pp 13-14, paras 3-4. This dissenting view was not however adopted by the court when the case came before it: (2000) 31 EHRR 411. Whether the imposition of sanctions on conscientious objectors to compulsory military service might, notwithstanding article 4(3)(b) of the ECHR, infringe the right to freedom of thought, conscience and religion guaranteed by article 9(1) was a point which the court expressly left open at pp 424-426, paras 43 and 53 of its judgment. I am in respectful agreement with the detailed analysis of this authority made by Jonathan Parker LJ in paragraphs 124-139 of his judgment. While, therefore, there are indications of changed thinking among a minority of members of the European Commission, there is as yet no authority to support the applicants' contention.

18. It is not in my opinion necessary to explore the circumstances in which the practice of states may give rise to a right commanding international recognition, since the evidence before the House does not disclose a uniformity of practice. It is no doubt true that the dependence of modern warfare on sophisticated weaponry and technological skill has lessened the need for mass armies and so diminished the dependence of some states on conscription. Thus in Europe several states currently have no conscription, and of those that do the great majority recognise a right of conscientious objection. But figures based on a 1998 report by War Registers International show a somewhat different picture world-wide. Of 180 states surveyed, some form of conscription was found to exist in 95. In 52 of those 95 states the right of conscientious objection was found not to be recognised at all. In a further 7 of those 95 states there was no known provision governing a right of conscientious objection. In the remaining 36 states the right of conscientious objection appeared to be recognised to some extent. It could not, currently, be said that there is de facto observance of anything approaching a uniform rule.

19. In the course of his judgment, in paragraphs 23-24, Laws LJ quoted the works of two respected authorities on refugee law, Professor Hathaway, *The Law of Refugee Status*, (1991) and Professor Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996). It is unnecessary to repeat his citations, also relied on before the House. It is however noteworthy that Professor Hathaway, at p 182, describes the right to conscientious objection as "an emerging part of international human rights law" and Professor Goodwin-Gill observes, at p 55, that "The international community nevertheless appears to be moving towards acceptance of a right of conscientious objection . . .". Both, in short, discern movement towards recognition of a right, but neither suggests it has yet been achieved. In a report prepared for the appeal of the first applicant, it is true, Professor Goodwin-Gill went a little further (see the judgment of Laws LJ, paragraph 25); but even then he suggests what states ought to do, and suggests that

recognition of a right of conscientious objection ought to derive from the protection given to freedom of conscience by customary international law and universal human rights treaties. The problem, to my mind, is that the treaties have treated compulsory military service as an exception from the forced labour prohibition without making any other provision, and I do not think there is, as yet, a new consensus.

20. On the main issue to which this opinion has so far been addressed, the Court of Appeal was divided. Of absolute conscientious objectors Laws LJ concluded, in paragraph 79:

> "In the result, I would hold that there is no material to establish a presently extant legal rule or principle which vouchsafes a right of absolute conscientious objection, such that where it is not respected, a good case to refugee status under the Convention may arise. No such putative rule or principle is to be found in the Convention's international autonomous meaning or common standard."

Turning to partial conscientious objectors, in paragraph 84, he reached a similar conclusion:

> "It is plain, however, that no matter how clear the political basis for a partial objection may be, there is in such a case no more of an international underpinning, by treaty or customary law, to quicken the objector's claim into a legal right than in the case of the absolute objector. In my judgment, therefore, such a claim is stillborn for all the reasons I have already given."

Jonathan Parker LJ, in paragraph 100, shared his view. Waller LJ took a view more favourable in principle to the applicants. Of absolute objectors he said, in paragraph 201:

> "Thus if someone can show that he/she is a genuine conscientious objector, that he/she is to be conscripted into a military in a state that simply does not recognise the possibility of such conscientious belief, and that he/she will be prosecuted as a result, in my view he/she will have established a well founded fear of persecution for a Convention reason. That however does not dispose of the appeals before us."

His opinion, at paragraph 208, in the case of partial objectors was similar:

> "In my view thus a partial objector *may* be able to show a deep-seated conscientious reason why he/she should not be conscripted by reference to the fact that he/she will be required to take part in a war against his/her own ethnic community, and may show an infringement of article 9(1), but it takes more than mere disagreement with a policy that allows Kurds to be conscripted to fight Kurds to establish that position."

Thus although there was agreement on the outcome, there was disagreement on the intervening steps. Despite my genuine respect for the care and thoroughness with which Waller LJ has put forward his conclusions, and with a measure of reluctance since they may well reflect the international consensus of tomorrow, I feel compelled to accept the view of the Court of Appeal majority on the state of the law today as revealed by the abundant materials before us. That conclusion is fatal to the success of these appeals, which I would accordingly dismiss.

21. This conclusion makes it strictly unnecessary to determine a further issue raised by the respondent Secretary of State, but since the House heard full argument and the issue is one of great practical importance I think it desirable to express an opinion. It was argued that, in deciding whether an asylum applicant had been or would be persecuted for Convention reasons, "the examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution: *Ward v Attorney General of Canada* [1993] 2 SCR 689, 747." Support for this approach is found in *Immigration and Naturalization Service v Elias-Zacarias* (1992) 502 US 478, a decision very strongly criticised by Professor Hathaway ("The Causal Nexus in International Refugee Law" (2002) 23 *Michigan Journal of International Law* 207). The Court of Appeal unanimously rejected this argument (paragraphs 92, 154 and 182) and some of the authorities point towards a more objective approach: *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, 304, 313, paras 33 and 65; *Refugee Appeal No 72635/01* of the New Zealand Refugee Status Appeals Authority, (unreported) 6 September 2002, paragraphs 167-173.

22. I would express the test somewhat differently from the Court of Appeal in this case. In his judgment in *Sivakumar v Secretary of State for the Home Department* [2001] EWCA Civ 1196; [2002] INLR 310, 317, para 23, Dyson LJ stated:

> "It is necessary for the person who is considering the claim for asylum to assess carefully the real reason for the persecution."

This seems to me to be a clear, simple and workmanlike test which gives effect to the 1951 Convention provided that it is understood that the reason is the reason which operates in the mind of the persecutor and not the reason which the victim believes to be the reason for the persecution, and that there may be more than one real reason. The application of the test calls for the exercise of an objective judgment. Decision-makers are not concerned (subject to a qualification mentioned below) to explore the motives or purposes of those who have committed or may commit

acts of persecution, nor the belief of the victim as to those motives or purposes. Having made the best assessment possible of all the facts and circumstances, they must label or categorise the reason for the persecution. The qualification mentioned is that where the reason for the persecution is or may be the imputation by the persecutors of a particular belief or opinion (or, for that matter, the attribution of a racial origin or nationality or membership of a particular social group) one is concerned not with the correctness of the matter imputed or attributed but with the belief of the persecutor: the real reason for the persecution of a victim may be the persecutor's belief that he holds extreme political opinions or adheres to a particular faith even if in truth the victim does not hold those opinions or belong to that faith. I take this approach to reflect that put forward by McHugh J in *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55 at paragraph 102:

> "In this case, among the questions which the tribunal should have asked were (a) what harm does the applicant fear on his return to Somalia? (b) is that fear well-founded? (c) *why* will the applicant be subjected to that harm? and (d) if the answer to (c) is 'because of his membership of a particular social group', would the harm constitute persecution for the purpose of the Convention?"

Treatment is not persecutory if it is treatment meted out to all and is not discriminatory: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 258, per McHugh J. The question held to be appropriate in the field of racial discrimination in *Qureshi v Victoria University of Manchester* [2001] ICR 863 at 874, suitably adapted to the particular case, is in my view apt in this context also:

> "Were racial grounds an effective cause of the difference in treatment?"

23. However difficult the application of the test to the facts of particular cases, I do not think that the test to be applied should itself be problematical. The decision-maker will begin by considering the reason in the mind of the persecutor for inflicting the persecutory treatment. That reason would, in this case, be the applicants' refusal to serve in the army. But the decision-maker does not stop there. He asks if that is the real reason, or whether there is some other effective reason. The victims' belief that the treatment is inflicted because of their political opinions is beside the point unless the decision-maker concludes that the holding of such opinions was the, or a, real reason for the persecutory treatment. On the facts here, that would not be a tenable view, since it is clear that anyone refusing to serve would be treated in the same way, whatever his personal grounds for refusing.

LORD STEYN

My Lords,

24. I have had the privilege of reading the opinion of Lord Bingham of Cornhill. I am in complete agreement with it. For the reasons he has given I would also dismiss the appeals.

LORD HOFFMANN

My Lords,

25. The applicants are Kurdish Turks who came to this country at the ages of 19 and 18 respectively. They were shortly to become liable under Turkish law to military service. On arrival in the United Kingdom they claimed asylum on various grounds, of which the only one now relied upon is a fear that if returned to Turkey they would be prosecuted for refusing to enlist. They claim that their refusal was on the ground of their deeply held political objections to the policies of the then Turkish government towards the Kurdish minority. This, they say, was sufficient to entitle them to asylum because punishment for refusing military service on such grounds would be persecution for reasons of their political opinions within the meaning of the Convention relating to the Status of Refugees ("the Refugee Convention").

26. I emphasise that the case is put simply on the basis that they would be liable to punishment for refusing to perform military service. This is because of two important findings of fact by the special adjudicator which are now not challenged and which form part of the agreed statement of facts. The first is that the penalty for draft evasion (a prison sentence of 6 months to 3 years) is not disproportionate or excessive. The second is that there is no reasonable likelihood that the applicants would have been required to engage in military action contrary to basic rules of human conduct, whether against Kurds or anyone else.

27. The Secretary of State says that in these circumstances there is nothing wrong or unusual in Turkey having compulsory military service and suitable penalties for disobedience. If the applicants refuse to serve, the state is entitled to punish them, not for their political opinions but for failing to enlist. Their political opinions may be the reason why they refuse to serve but they are not the reason why they will be punished. They are free to hold whatever opinions they please about Turkish policy towards the Kurds as long as they report for duty. Putting the same point in a different way, imposing a punishment for failing to comply with a universal obligation of this kind is not persecution.

28. Mr Nicol QC, who appeared for the applicants, says that it is not so simple. Treating some group of people in the same way as everyone else may be persecuting them if their group has a right to be treated differently. For example, in *Thlimmenos v Greece* (2000) 31 EHRR 411 the appellant was refused appointment as a chartered accountant pursuant to a general law which disqualified anyone who had been convicted of felony. The applicant's felony had been a refusal to do military service on the ground of his religious convictions as a Jehovah's Witness. The European Court of Human Rights held, at p 424, that the disqualification infringed the anti-discrimination provisions of article 14 of the European Convention on Human Rights ("ECHR") because it failed to treat his felony, committed because of his religious principles, differently from ordinary felonies:

> "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

29. The right guaranteed under the Convention in respect of which there had been discrimination was the freedom of religion guaranteed by article 9. The court found that failure to treat the applicant differently had no objective justification. The conviction had no relevance to his suitability as an accountant and he had already been punished by a prison sentence for his refusal to do military service.

30. *Thlimmenos's* case therefore supports the proposition that, at any rate for the purposes of article 14, a law of general application may have a discriminatory effect if it contains no exceptions for people who have a right to be treated differently. But I note in passing that the court, while holding that Thlimmenos had a right to be treated differently in respect of qualification as an accountant, expressed no view on the point which arises in this case, namely whether he would have had a right to be treated differently in respect of his obligation to perform military service. That would have required an altogether different assessment of objective justification.

31. I shall consider later whether this principle of discrimination by failing to treat different cases differently can be fitted into the language of the Refugee Convention. Accepting for the moment that it can, I pass on to the next stage in Mr Nicol's argument, which is to show that it applies to laws imposing a general obligation to do military service. The question here is whether people who object to such service on conscientious religious or political grounds have a human right to be excused.

32. Mr Nicol accepts that ordinarily a conscientious religious or political objection is not a reason for being entitled to treat oneself as absolved from the laws of the state. In many Western countries, including the United Kingdom, civil disobedience is an honourable tradition which goes back to Antigone. It may be vindicated by history - think of the suffragettes - but often what makes it honourable and demonstrates the strength of conviction is willingness to accept the punishment. (That is not to agree with Socrates that it would necessarily be dishonourable to try to avoid punishment). The standard moral position is summarised by Ronald Dworkin in *Taking Rights Seriously* (1977), at pp 186-187:

> "In a democracy, or at least a democracy that in principle respects individual rights, each citizen has a general moral duty to obey all the laws, even though he would like some of them changed. He owes that duty to his fellow citizens, who obey laws that they do not like, to his benefit. But this general duty cannot be an absolute duty, because even a society that is in principle just may produce unjust laws and policies, and a man has duties other than his duties to the state. A man must honour his duties to his God and to his conscience, and if these conflict with his duty to the state, then he is entitled, in the end, to do what he judges to be right. If he decides that he must break the law, however, then he must submit to the judgment and punishment that the state imposes, in recognition of the fact that his duty to his fellow citizens was overwhelmed but not extinguished by his religious or moral obligations."

33. This suggests that while the demonstrator or objector cannot be morally condemned, and may indeed be praised, for following the dictates of his conscience, it is not necessarily unjust for the state to punish him in the same way as any other person who breaks the law. It will of course be different if the law itself is unjust. The injustice of the law will carry over into its enforcement. But if the law is not otherwise unjust, as conscription is accepted in principle to be, then it does not follow that because his objection is conscientious, the state is not entitled to punish him. He has his reasons and the state, in the interests of its citizens generally, has different reasons. Both might be right.

34. That is certainly the view we would take of someone who, for example, refused to pay part of his taxes because he felt he could not conscientiously contribute to military expenditure, or insisted on chaining herself to a JCB because she thought it was morally offensive to destroy beautiful countryside to build a new motorway. As judges we would respect their views but might feel it necessary to punish them all the same. Whether we did so or not would be largely a pragmatic question. We would take into account their moral views but would not accept an unqualified moral duty to give way to them. On the contrary we might feel that although we sympathised and even shared the same opinions, we had to give greater weight to the need to enforce the law. In deciding whether or not to impose punishment, the most important consideration would be whether it would do more harm than good. This means that the objector has no right not to be punished. It is a matter for the state (including the judges) to decide on utilitarian grounds whether to do so or not. As Ronald Dworkin said in *A Matter of Principle* (1985), at p 114: "Utilitarianism may be a poor general theory of justice, but it states an excellent necessary condition for a just punishment."

35. Mr Nicol was, I think, inclined to accept these principles as correct for most forms of civil disobedience. Conscientious objection to a law is not enough to make punishment unjust. It is not a reason why the objector has a right to be treated differently. But he said that military service was different. An obligation to kill people was something which the state could not justly impose upon anyone who had a deeply held objection to doing so.

36. The difficulty about this argument is that it is accepted that in general the state does have the right to impose upon its citizens an obligation to kill people in war. It would of course be different if they were being asked to commit war crimes; in such a case, anyone could legitimately object. But ordinary army service, though demanding and often inconvenient, sometimes unpleasant and occasionally dangerous, is in many countries (and was in many more, including the United Kingdom) part of the citizen's ordinary duty.

37. Mr Nicol did not offer a rational ground for distinguishing between objection to military service and objection to other laws. One might feel intuitively that some such ground might be constructed around the notion of the sanctity of life, although I am not sure that even that could be described as rational. In any event, it would not have served Mr Nicol's purpose because it does not form the basis of these applicants' objections. They would have no objection to fighting in a war for a Turkish (or Kurdish) government of the right political complexion. He appealed instead to the practice of nations and the opinions of jurists, which he says support the proposition that conscientious objection to military service on any religious or political ground should be recognised.

38. The question in this appeal is the meaning of the term "refugee" in the Refugee Convention. That in turn raises the question of what is meant by "persecuted". Mr Nicol says that if people are subjected to punishment which would be regarded as discriminatory by reference to their fundamental human rights, they are being persecuted. If those fundamental rights relate to their religious beliefs or political opinions, then they are being persecuted for reasons of those beliefs or opinions. My Lords, I have not attempted to examine all aspects of these propositions but for present purposes I am content to accept them. I shall therefore consider whether punishing conscientious objectors is an infringement of their fundamental human rights to freedom of conscience and opinion.

39. How does one establish the scope of fundamental human rights for the purposes of an international convention such as the Refugee Convention? Many state parties to the Convention are also parties to human rights conventions, such as the ECHR and the International Covenant on Civil and Political Rights ("ICCPR"). Mr Nicol says that the current state of human rights as expressed in those and other similar conventions is the best guide to their content for the purposes of the Refugee Convention.

40. Mr Howell QC, who appeared for the Secretary of State, said that the question was whether a right of conscientious objection had become part of customary international law. For that purpose there had to have been a general and consistent practice of states which was recognised as conforming to a legal obligation: see *Oppenheim's*

International Law, vol 1, 9th ed (1992) (ed Jennings and Watts), pp 27-31. There was plainly no such settled practice relating to conscientious objection. There are many countries, of which I shall mention some in a moment, which do not recognise it.

41. I do not think it is possible to apply the rules for the development of rules of international law concerning the relations of states with each other (for example, as to how boundaries should be drawn) to the fundamental human rights of citizens against the state. There are unhappily many fundamental human rights which would fail such a test of state practice and the Refugee Convention is itself a recognition of this fact. In my opinion a different approach is needed. Fundamental human rights are the minimum rights which a state ought to concede to its citizens. For the purpose of deciding what these minimum rights are, international instruments are important even if many state parties in practice disregard them. (The African Charter on Human and People's Rights, adopted in 1981, is perhaps a conspicuous example). But the instruments show recognition that such rights *ought* to exist. The delinquent states do not normally deny this; they usually pretend that they comply. Equally, the fact that many states openly deny this existence of a human right is not necessarily a reason for saying that it does not exist. One may think, so much the worse for them. But state practice is nevertheless important because it is difficult to assert the existence of a universal fundamental human right disavowed by many states which take human rights seriously.

42. As I have said, there are many countries which do not, or did not until relatively recently, recognise any form of conscientious objection. Those that do are not agreed on the grounds upon which it should be allowed. The Rapporteur of the Committee on Legal Affairs and Human Rights of the Council of Europe reported on 4 May 2001 on "Exercise of the right of conscientious objection to military service in Council of Europe member states" (Doc 8809 revised), paragraph 24:

> "Grounds for exemption from military service range from a very limited list of reasons to a very broad interpretation of the concept of conscience."

43. In the United Kingdom, for example, some forms of conscientious objection were recognised in both World Wars; the practice of the tribunals which decided claims to conscientious objector status does not appear to have been uniform. Likewise in the United States conscientious objection is recognised, but the statutory grounds are more specific: the objection must be to all war and not merely to the particular war for which one is being conscripted. This ruled out people who did not object to serving in defence of their country but thought that the Vietnam War, for example, was immoral. In France conscientious objection was not recognised until 1963, after the end of the Algerian War, and in Germany it was recognised in the new 1949 constitution after the end of the Second World War, when the German Army was in abeyance. On the other hand, in many countries there is conscription and no conscientious objection.

44. What conclusions can one draw from these mixed data? It seems to me that even in Europe and the United States, the recognition of conscientious objection, sometimes as a prelude to the abolition of conscription, does not demonstrate any recognition of a principle that conscientious objectors have a moral right to be treated differently. On the contrary, I think that practice supports Dworkin's view that recognition of the strength of the objector's religious, moral or political feelings is only part of a complex judgment that includes the pragmatic question as to whether compelling conscientious objectors to enlist or suffer punishment will do more harm than good. Among the other relevant factors are the following: first, martyrs attract sympathy, particularly if they suffer on religious grounds in a country which takes religion seriously; secondly, unwilling soldiers may not be very effective; thirdly, they tend to be articulate people who may spread their views in the ranks; fourthly, modern military technology requires highly trained specialists and not masses of unskilled men.

45. I pass then from state practice to the opinions of jurists. There seems little doubt that the framers of the ICCPR and the ECHR did not think that the Conventions conferred a right to conscientious objection. That is shown by the provisions of article 8(c)(ii) of the ICCPR and article 4(3)(b) of the ECHR which speak, in a different context, of countries "where conscientious objection is recognised". That clearly indicates that the framers thought there might be state parties to the Convention in which conscientious objection was not recognised. Of course that is not by any means conclusive. The framers of the post-Civil War amendments to the constitution of the United States did not think that they were inconsistent with segregation, but the courts in the mid-twentieth century decided that they were. The broad concepts of human rights do not change in meaning: "respect for...private life" always means the area of personal autonomy which the state must concede to the individual, but each generation of judges must give its own content to such concepts. They may think that the framers of the instrument were wrong in their assumptions

or that the extent of the area of personal autonomy has changed with changes in the values of society: *Goodwin v United Kingdom* (2002) 35 EHRR 447. Perhaps even more important, there may be changes in what is perceived to be the appropriate balance between one human right (e.g. respect for private life) and another (e.g. freedom of expression by newspapers) or the extent to which a human right needs to be qualified in the interests of good government or on other utilitarian grounds.

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. So the question is whether that is no longer the right view to take.

47. The changes in the nature of warfare which I mentioned earlier do not seem to me a reason for recognising an international human right to conscientious objection. They only strengthen the pragmatic reasons, in countries which have high technology armies but still have conscription, for not punishing conscientious objection. But that is a matter of policy, not principle. It is no reason for saying that a country which needs a citizen army to defend itself is obliged to put the conscience of a conscript before the needs of national defence and, perhaps as important, the principle of equality of sacrifice among citizens.

48. The notion that there is such a human right seems to be of recent origin. In *LTK v Finland* (1985) 94 ILR 396 the UN Human Rights Committee established under the ICCPR said flatly that "the Covenant does not provide for the right to conscientious objection". But in 1993 the committee issued "General Comment 22" on 30 July 1993 in which it tentatively changed its mind and said:

> "Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of states have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief."

49. There are two observations to be made. First, the fact that (a) people claim a right to conscientious objection under article 18 and (b) a growing number of states concede a right to conscientious objection, does not by any means demonstrate that they recognise that such a right exists under article 18. It may show no more than that their military requirements make it sensible to tolerate some form of conscientious objection. Secondly, the statement that an obligation to use lethal force may "seriously conflict with freedom of conscience etc" does not even attempt to explain why such an obligation should be distinguished from other legal obligations which may similarly conflict.

50. The European Court of Human Rights has never found it necessary to decide whether article 9 (the equivalent of article 18 of the ICCPR) entails a right of conscientious objection but the Commission has considered the matter several times. On all the occasions when it considered that it was necessary to decide the point, it has said that article 9 does not: see, for example, *Autio v Finland* Application No 17086/90, (1991) 72 DR 245 referring to earlier cases. In *Tsirlis and Kouloumpas v Greece* (1997) 25 EHRR 198, 224 there was a single dissent from Mrs Liddy, who distinguished cases in which the action does not "actually express the belief concerned" (like chaining oneself to the railings outside Parliament) or "has no specific conscientious implications in itself" (like paying tax). I find it hard to see the principle upon which these distinctions are made: they appear to involve questions of degree. There is no reason why a religion should not require one to chain oneself to railings, not pay tax or fight a holy war and to say that such beliefs would be irrational or contrary to the public interest would seem to me to miss the point. However, Mrs Liddy gained five more votes for a similar dissent in *Thlimmenos v Greece* Application 34369/97, 4 December 1998, and there the matter stands.

51. Finally there is the recently adopted Charter of Fundamental Rights of the European Union (2000/C 364/01) which provides in article 10(2) that "[t]he right to conscientious objection is recognised, in accordance with the

national laws governing the exercise of this right". The reference to national laws enabled the European institutions which proclaimed the Charter (the legal status of which is still undecided) to avoid defining the nature of the right but this makes it difficult to provide a coherent theory as to why the right should exist. Is it based upon particular respect for a religious or philosophical belief in the sanctity of life? In that case, it should be confined to objections, as in the United States, to all wars and perhaps only to combatant roles in the forces. Or is it more broadly based on political objection to particular operations? In that case, how should it be distinguished from other aspects of government policy? It is difficult to escape the conclusion that this provision was adopted because all the member states either had no conscription or did not foresee a situation in which it would be necessary to force deeply unwilling recruits into their armed forces.

52. If one turns to consider what the European Union considers would amount to a violation of fundamental rights by other nations, a different story emerges. On 4 March 1996 the Council adopted, pursuant to the "Third Pillar" provisions of article K.3 of the Maastricht Treaty, a joint position on the interpretation of the Refugee Convention (OJ 1996 L 63-2). Point 10 said that fear of punishment for conscientious objection should in itself be insufficient to justify recognition of refugee status. It might however amount to persecution if the punishment was discriminatory, if the conditions under which service had to be performed amounted in themselves to persecution or if they would require the applicant to commit war crimes or the like. A similar position is adopted in the current draft of a Council Directive on refugees which was approved at the Justice and Home Affairs Council on 28 November 2002 (15068/02). These documents suggest that the European Union does not accept that a failure to recognise conscientious objection is a discriminatory breach of the fundamental human rights of the objectors.

53. In my opinion, therefore, the applicants have not made out their case for saying that there exists a core human right to refuse military service on conscientious grounds which entails that punishment of persons who hold such views is necessarily discriminatory treatment. The existence of such a right is not supported by either a moral imperative or international practice.

54. This conclusion makes it unnecessary to decide whether Mr Nicol is right in saying that, for the purposes of the Refugee Convention, to apply a general law imposing significant punishment on people who have a human right to be treated differently because of their conscientious opinions amounts to persecution on the grounds that they hold those opinions, or whether, as the Secretary of State says, it is a complete answer that the Turkish authorities are not concerned with their political opinions but only with their refusal to enlist. My present inclination is to agree with Laws LJ that it would be inconsistent to say that a general conscription law which did not make an exception for conscientious objectors was an infringement of their fundamental human rights but that punishing conscientious objectors under such a law was not persecution for reasons of their opinions. The bizarre case of *Omoruyi v Secretary of State for the Home Department* [2001] Imm AR 175 was different. Mr Omoruyi was not claiming that by virtue of his Christianity he had a human right to be treated differently from other Nigerians in being allowed to bury his father's body. Everyone had such a right. He was claiming that having to comply with the demands of a criminal gang was harder on him because he was a Christian. Whether or not that was the case, it did not mean that the reason why he was subjected to the demand or not excepted from the demand had anything to do with his religion.

55. I would therefore dismiss the appeal.

LORD HUTTON

My Lords,

56. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I am in full agreement with it and for the reasons which he gives I, too, would dismiss these appeals.

LORD RODGER OF EARLSFERRY

My Lords,

57. My noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann have explained that, until now, with only minor exceptions the relevant bodies have been unwilling to affirm the existence in international law of a right to object to military service on grounds of conscience. Those bodies have preferred, at most, to commend to states that they should recognise such a right within their domestic legal order. The reluctance to go further doubtless reflects the real difficulty of identifying the scope of any right that all states would have to recognise, whatever their circumstances. It is not obvious, for example, that the recognition in peacetime of a right to exemption from military service on grounds of conscience raises precisely the same issues as the recognition of such a right by a state which is fighting for its very survival, which, lacking more sophisticated weapons, requires all the manpower it can muster and which may not be in a position to scrutinise applications for exemption. The dilemma of the conscientious objector asserting a right to exemption in an hour of national peril is correspondingly the more exquisite.

58. The applicants do not object to performing military service in all circumstances. This only makes defining the scope of the right which they assert more problematical. In *Gillette v United States* (1970) 401 US 437, in a powerful opinion delivered at the height of the controversy over the selective draft for military service in Vietnam, Marshall J analysed the particular difficulties of recognising anything short of an absolute objection to military service. He drew attention to the inevitable competition between the values of conscientious objection and of equality of sacrifice, a competition that has to be resolved while bearing in mind that in practice an extensive right of conscientious objection will tend to be asserted by the educated and articulate rather than by the less fortunate members of society. States with different histories, different social mixes and different political, cultural, religious or philosophical values may legitimately differ as to how such a sensitive issue should be determined. It is hardly surprising therefore that no universal solution which all must follow has so far been identified. In these circumstances, for the reasons given by Lord Bingham of Cornhill and Lord Hoffmann I agree that the House cannot recognise the supposed core human right for which the applicants contend. The appeals must accordingly be dismissed.