IN THE HOUSE OF LORDS

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL, CIVIL DIVISION (ENGLAND)

B E T W E E N:-

(1) YASIN SEPET

(2) ERDEM BULBUL

Appellants

- v -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

CASE FOR THE INTERVENER

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1. **Introduction**

1.1 In these joined cases, the Appellants sought recognition in the United Kingdom of their status as refugees within the meaning of the *1951 Convention relating to the Status of Refugees* and the *1967 Protocol relating to the Status of Refugees* (hereinafter "the 1951 Convention"), because of their opposition to service in the armed forces of Turkey. The Appellants are Alevi Kurds who object to the use of the Turkish armed forces in operations conducted inside Turkey against Turkish Kurds. The appellants' claim was not based on objection to all forms of military service, but on a political objection based on disagreement with their country of nationality as to the use of the army in acts against fellow Kurds.

1.2 The appeals were dismissed by the statutory appellate authorities on a number of grounds, but before the Court of Appeal the more radical submission was advanced by the Respondent Secretary of State that political or conscientious objection to military service for whatever reason could not found a claim to refugee status, because there was no internationally recognised right to conscientious objection, and that such a right was a necessary foundation for the grant of political asylum.

App Pt I at 72-139

1.3 The Intervener was invited by the Court of Appeal to make submissions to it, initially in writing and subsequently orally. In the light of the division of opinion within the Court of Appeal, the difference of opinion between the Court of Appeal and some earlier decisions of the Immigration Appeal

Tribunal, and the implications of the restrictive approach of the majority for the development of international standards on asylum law, the Intervener sought and was granted permission to intervene in proceedings before Your Lordships' House, to explain the foundations of its position on conscientious objection as a basis for recognition of refugee status and to address its concerns at the characterisation of refugee status found in the decision of the majority of the Court of Appeal.

2 The Issues

2.1 The Intervener submits that, in their bare essentials, these appeals raise two distinct issues on which it seeks to give assistance:

i. Whether the threat of prosecution and imprisonment of an individual for refusing to undertake military service may ever, in itself, be sufficient to require the grant of refugee status under the 1951 Convention and -- if so -- when. This issue encompasses Issues 1 and 2 as defined in the Statement of Facts and Issues.

ii. Whether it is a necessary requirement for the recognition of refugee status that the applicant is in fear of a persecutor who is specifically motivated in his actions by the applicant's race, religion, nationality, membership of a particular social group or political opinion. This is Issue 3 as defined in the Statement of Facts and Issues.

2.2 The Intervener will not seek to address Issue 4 as defined in the Statement of Facts and Issues, which is solely concerned with the appropriate relief to be granted to the Appellants. The Intervener does not make submissions on

the facts of the case, nor indeed on whether the consequences of refusal to serve in the Turkish armed service were sufficiently serious and/or persistent to amount to persecution.

Summary outline

2.3 The Intervener seeks to develop before Your Lordships submissions based on the following principles: -

i. The institution of asylum preceded the development of human rights law and the universal codification of human rights norms and standards. It is not, therefore, preconditioned by the existence of an enumerated human right.

ii. Historically, the institution of asylum focused upon the international protection needs of the individual because of a rupture with his/her country of origin. The definition of a refugee in the 1951 Convention was designed to embrace, strengthen and broaden this practice.

iii. Reference to human rights in the preamble to the 1951 Convention and the subsequent commentaries and case law were not designed to restrict the meaning of "refugee". They were rather designed to complement then-existing concepts of international protection, in accordance with developing norms and standards at a time when the international elaboration and codification of human rights were in their infancy.

iv. A State party to the 1951 Convention is both entitled and obliged to apply and develop the refugee concept (whether in the judicial or legislative branch of government) in accordance with the 1951 Convention's overarching humanitarian purpose. On the other hand, a State party is not entitled to restrict or derogate from that concept in a manner that frustrates the object and purpose of the 1951 Convention.

v. The 1951 Convention focuses upon the predicament of the individual who has a well-founded fear of persecution on grounds specified therein, rather than the motives of the persecutor itself. There is accordingly no requirement on the part of the applicant to establish subjective motivation on prohibited grounds by an individual agent of persecution. Such an interpretation would be at odds with established understandings regarding the proper scope of entitlement to international protection under the 1951 Convention.

vi. For similar reasons, a requirement of proof of discrimination for a 1951 Convention reason is not a precondition of refugee status. There is a single test, of which "for reasons of race (etc.)" forms an integral part, but the definition is to be taken as a whole, in that it is designed to demonstrate the kind of situations to which

the asylum State is obliged to direct its concerns when assessing applications for refugee status.

vii. Commentators and national case law both play a role in giving coherence and meaning to the refugee concept, but neither can set rigid rules not contained in the text or intentions of the 1951 Convention itself that would narrow its scope or render more difficult or illusory its task of delivering international protection to refugees.

2.4 In these written observations, the Intervener will:

i. examine the history of the institution of asylum in respect of refusal to perform military service with a view to discerning the context for the purpose of interpretation of the 1951 Convention in this regard;

ii. submit that such historical analysis reveals that refusal to perform military service under certain circumstances was regarded as a political crime that both precluded extradition or return to the prosecuting State, and founded the grant of asylum;

iii. further suggest that this practice is now buttressed by international recognition of, at the very least, an emerging right to conscientious objection to compulsory military service, which right has sufficiently crystallised as a norm to be germane to supporting or aiding the task of interpreting and applying the 1951 Convention;

iv. submit that State practice and developing international norms are relevant supplementary sources for judicial interpretation of the 1951 Convention, and that a hard international consensus is not required before account can be taken of such matters; and

v. submit that the Court of Appeal was right to reject the respondent's submission on a requirement of 1951 Convention motivation by the persecutor.

3 **Issue 1 : Refusal to Perform Military Service**

(a) The approach before the Court of Appeal

App Pt I at 78-79, paras 19 and 20

3.1 In the Court of Appeal, this issue was addressed solely on the basis that the answer to this issue would be in the affirmative if it could be established that there was an internationally (or at least regionally) recognised international human right to conscientious objection.

3.2 The Intervener's submissions in the proceedings before the Court of Appeal were accurately summarised by Laws LJ thus:

App Pt I at 79, para. 20

> "[counsel for UNHCR] … indicated that UNHCR had for a long time recognised an emerging human right to conscientious objection which, he said, had 'sufficiently crystallised' to form a basis for Convention protection."

3.3 While maintaining that position, it is the Intervener's submission before Your Lordships' House that the parties below (and, as a result, the Court of Appeal) erred in approaching these appeals solely from the point of view that in order to qualify as a refugee it was necessary to establish that the refusal to serve was in the exercise of a right to conscientious

objection established in international human rights law. Although some commentators tend to equate persecution with the discriminatory denial of core human rights, it should be appreciated that the institution of asylum existed long before the elaboration of international human rights law generally or, *a priori*, the recognition of a human right to conscientious objection. This is a powerful indication that equating persecution solely with the discriminatory denial of core human rights does not adequately capture the breadth of factors that engage entitlement to international protection under the 1951 Convention regime. Such an approach would lead to a restriction of the ambit of the 1951 Convention's refugee definition in a manner not consistent with the 1951 Convention's object and purpose.

3.4 The 1951 Convention was designed to both reflect and expand on State practice in the area of asylum going back to well before the adoption of either the 1951 Convention or any international human rights convention. The third holding of the preamble to the 1951 Convention states:

> "Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement".

3.5 It is now trite law that in interpreting the 1951 Convention in the light of its object and purpose as a humanitarian instrument, it must be treated as a living instrument to be interpreted in light of present day conditions: see Sedley J (as he then was) in *R v. Immigration Appeal Tribunal and Secretary of State for the Home Department, Ex parte Shah* [1997] Imm.A.R. 145; see also *R v Secretary of State for the Home Department*

ex parte Shah (HL) [1999] 2 AC 629 at 639D (as per Lord Steyn)[1].

3.6 The 1951 Convention is not limited to construing persecution on the basis of violations of norms of international human rights law. Indeed, in 1951, the codification under the auspices of the United Nations of international human rights law in binding treaties had not yet begun. The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR") was in its infancy. The scope and extent of the rights acknowledged in the Universal Declaration of Human Rights ("UDHR") and the subsequent texts adopted to develop and give effect to its aims are always in transition and such rights may still be subject to national variation and practices.

3.7 Against this background, in the view and experience of the Intervener, the concept of "persecution" therefore needs to be flexible, adaptable and sufficiently open to accommodate ever-changing forms of ill-treatment, serious harm, and threats thereof. Severe discrimination or the cumulative effect of various measures not in themselves amounting to persecution, either alone or in combination with other adverse factors, can give rise to a well-founded fear of persecution, or, phrased differently, make life in the country of origin so intolerable from many perspectives for the individual concerned that the only way out of the predicament is to seek international protection under the 1951 Convention.

[1] For the development of living instrument jurisprudence in human rights instruments see the approach taken by the European Court of Human Rights in e.g. *Goodwin v United Kingdom* (2002) 35 EHRR 18 at para. 74.

b) State practice with respect to political asylum before 1951

3.8 Before the elaboration of the definition of "refugee" in the 1951 Convention, State practice in the area of asylum was reflected in the principle that political offenders were not returned to their country of origin under extradition obligations. In the case of political asylum, refuge was a prior obligation affording an exemption to extradition obligations for common crimes[2]. Return was precluded where the subject fled as a result of penal measures threatened that sought to enforce the political duties as between subject and State (as opposed to common crimes).

3.9 In particular it is submitted that political or religious objection to service in the armed forces of the State of one's nationality has historically embraced one example of a political dispute between subject and State that enabled the disaffected subject to flee abroad and seek protection from another State. This is one reason why extradition law has made exceptions for rendition that would enforce the military laws of another State.

3.10 Refusal to perform duties of military service would thus have been regarded as a political offence outside the scope of extradition obligations. Where flight from punishment for such refusal of military service was prompted by religious or political convictions rather than merely personal considerations such as cowardice or social inconvenience, such a person came within the scope of political asylum.

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[2] See Oppenheim *International Law the Law of Peace* (9th Edition), Vol. 1 para. 421, quoted at para. 3.18 below.

3.11 Consequently it is the Intervener's case that those who object to (enforced) participation in the activities of a State's army for genuine reasons of conscience and/or political opinion have always enjoyed and continue to enjoy an entitlement to seek international protection under the regime now enshrined in the 1951 Convention.

3.12 As a result, the Intervener's submission is that it is not necessary as a matter of law to establish the existence (and breach) of an internationally recognised human right in order to qualify as a refugee under the 1951 Convention. While punishment in breach of such an internationally recognised human right will almost inevitably amount to persecution, not all persecution will inevitably amount to or be the consequence of breach of such a right.

3.13 Thus it is inconceivable that a Huguenot who fled Catholic France in the seventeenth century because of an unwillingness to serve in the royal army in the suppression of his co-religionists would have been denied asylum because of the absence of a universally or even a nationally recognised right to conscientious objection. This is because the law and practice of political asylum protected those who might receive punishment for political offences.

3.14 To take the most obvious example of the lack of congruence between the scope of asylum and the scope of individual rights and freedoms (or, in today's context, human rights law), there is the classic nineteenth century case of a political refugee who was a leader of a failed political revolt for independence or constitutional freedom. As far as the State of flight was

concerned, such people were criminals fleeing justice for sedition, treason and similar political offences. As far as the State of refuge is concerned, such people were facing political persecution in the form of *prosecution*, the classic form of State ill treatment. In respect of the asylum it offered to Marx or Mazzini, it would have made no sense for the United Kingdom to have asked whether there was an internationally recognised individual right to sedition or incite rebellion, and to have conditioned the grant of political asylum on the answer to such a question.

3.15 The Intervener therefore submits that a refusal to serve in the armed forces of the State for reasons of conscience or political disagreement with the fact of such service has always been a proper foundation of the tradition of asylum, whether the objection is general in scope or relevant only in a particular political context (such as civil war, suppression of co-religionists or participation in unjust wars). It is not necessary to distinguish between absolute or relative conscientious objection. As Lord Justice Waller observed in the Court of Appeal, the distinction between the two is unreal and a matter of degree or particular expressions of conscience. Historically, whether for reasons of political dissent or religious dissent, flight, desertion or refusal to serve were all manifestations of a dissent conceived of as broadly political by the State of asylum.

(c) Evidence of previous state practice

3.16 The historical context of the institution of asylum is most authoritatively described by Atle Grahl-Madsen in Volume II of his book *The Status of Refugees in International Law*[3] at §163. He notes that:

> "The custom of granting asylum may be traced a long way back. Already in the Antiquity (sic) there was a well-established tradition of asylum. `Internal asylum´ was given in holy places, and `external asylum´ in kingdoms, republics and free cities. These practices, which were not always unopposed, were partly a reflection of respect for the deity and the church, and partly a consequence of territorial sovereignty. The custom was continued throughout the Middle Ages. But soon thereafter the Monarchs of Europe set out to suppress the institution of internal asylum. Territorial asylum on the other hand, gained new significance when Europe, as a result of the Reformation, was divided into kingdoms, principalities, and free cities of different religious persuasions.
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> … the ancient writers, the founders of international law, stressed the right of the supplicants, i.e. those who suffered from undeserved enmity in their home country, to be allowed permanent residence in another country."[4]

3.17 Grahl-Madsen then sets out a number of milestones in the history of the institution of asylum:

i) The Edict of Potsdam of 29 October 1685 by which Friedrich Wilhelm, the Great Elector and Marquis of Brandenburg responded to the Edict of Nantes issued by Louis XIV. Under this edict "his brethren of the faith were given every facility for establishing themselves in his territories."

ii) The English Act for Naturalizing Foreign Protestants 1708 (7 Anne c. 5);

iii) The French Revolution, which

[3] Grahl-Madsen, *The Status of Refugees in International Law (Volume II),* A. W. Sijthoff, Leiden, 1972.

[4] pp. 7-8.

> "… gave the practice of granting asylum a new dimension. Up to that time the dynasties of Europe were fairly well established. They gave asylum to persons with whom they sympathised, above all to religious persecutes, but they often stuck together when it came to the question of bringing rebels, traitors, and other political offenders to justice. But the French Revolution, which followed only a few years after the American Revolution, changed that. From that time onwards, the Old World was divided not only into Catholic and Protestant realms, but also into Kingdoms and Republics, which, at that time, were diametrically opposite political conception. The aristocratic refugees from France were to be followed by untold legions of political asylum-seekers from many countries and of the most diverse political outlooks."

3.18 This significance of the French Revolution is also acknowledged by the learned authors of Oppenheim's *International Law (9th edition)*, Volume 1, para. 421, who, under the heading "Principle of non-extradition of political criminals", note that

> "Before the French Revolution the term 'political crime' was unknown in both the theory and the practice of international law, and the principle of non-extradition of political criminals was likewise non-existent. It was entirely due to the French Revolution that matters gradually underwent a change. During the nineteenth century the principle of non-extradition of political criminals was gradually adopted. It is due to the firm attitude of the United Kingdom, Switzerland, Belgium, France and the United States that the principle has become general. Its existence is a necessary condition for an effective concept of political asylum." (emphasis added)

3.19 Grahl-Madsen continues his history by noting that:

> "The new situation very soon became reflected in municipal law as well as in the practice of States."

and gives the following examples:

i) Article 120 of the French Constitution of 1793, which "provided asylum to foreigners exiled from their home country 'for the cause of liberty'";

ii) United Kingdom practice ("as a matter of course") to accept French aristocrats fleeing from the Revolution;

iii) The speech in Parliament by Sir James Mackintosh on 1 March 1815, triggered by the surrender of Spanish political fugitives by the Governor of Gibraltar, in which he "proclaimed the principle that no nation ought to refuse asylum to political fugitives";

iv) The declaration, to the same effect, made by the Foreign Secretary, Viscount Castlereagh, in 1816;

v) The decision of the successor to Viscount Castlereagh, George Canning, to refuse the extradition of certain political offenders to Russia;

vi) The decision of the French government in 1831 "neither to grant nor to request the extradition of any offender of any description whatsoever", which led the French government to denounce its extradition treaty with Switzerland. This policy was, however, soon reviewed and, as a result, the extradition treaty was amended to exclude "crimes contre la sûreté de l'Etat" from extradition;

vii) The Belgian *Loi sur les extraditions* of 1833. This Act restricted the powers of the Government to extradite persons wanted by other States. Article 6 of that Act expressly excluded from extradition those wanted for political crimes[5];

viii) The Franco-Belgian Extradition Treaty of 1834, which included the same clause;

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[5] "Il sera expressément stipulé, que l'étranger ne pourra être poursuivi ou puni pour aucun délit politique antérieur à l'extradition ni pour aucun fait connexe à un semblable délit."

ix) On 25 July 1848, the non-extradition for political offences was proclaimed as a basic principle of the Swiss federal law;

x) The Netherlands Aliens Act of 13 August 1849, which only allowed extradition of a number of listed offences, which excluded any political offences.

3.20 Further confirmation of the position under English law can be gleaned from *inter alia* a letter from Lord Palmerston to the British Ministers in St. Petersburg and Vienna, written in 1849, in which he states:

> "If, in modern times, there is a law that has been scrupulously observed by all other independent states, this law is the non-extradition of political refugees. Every independent government which grants extradition, without being obliged by the stipulations of an international convention, will be regarded with reason, by the rest of the world, as an object of shameful stigma."[6]

3.21 This "firmly established" State practice was recognised by the *Institut de Droit International*

i) In Article 13 of its *Résolutions d'Oxford* of 9 September 1880:

> "L'extradition ne peut avoir lieu pour faits politiques."

ii) In Article 16 of its International Rules in the Admission and Expulsion of Aliens, adopted in Geneva on 9 September 1892.

3.22 This state practice has also been reflected from the very beginning in international agreements and arrangements for the protection of refugees, such as:

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[6] As quoted in Manuel R García-Mora, *International Law and Asylum as a Human Right* (1956), at p. 74.

i) The 1928 League of Nations Arrangements relating to the legal status of Russian and Armenian refugees[7]. The refugees from Russia, for whom these arrangements were put in place, included *inter alia* "military deserters";[8]

ii) The Convention relating to the International Status of Refugees of 28 October 1933[9]; and

iii) The International Refugee Organisation ("IRO").

3.23 In relation to the position of deserters and those otherwise resisting military service, the traditional attitude of the US authorities was described in 1891 by John Bassett Moore[10] thus:

> "Desertion from the army is not treated as an offence for which extradition can be demanded, unless under an express conventional obligation. Many nations which are most liberal in granting extradition, with or without treaty, uniformly decline to recognise such desertion as coming within the purview of the system."

3.24 This was also the position under French law.[11]

3.25 The English Court of Criminal Appeal, in *R v Zausmer*[12], on an appeal against sentence, quashed the recommendation for expulsion against the defendant as, on his return, he would be punished for desertion (though

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7 89 LoNTS No. 2005.

8 Jackson, *The Refugee Concept in Group Situations*, 1999, at p. 12.

9 159 LoNTS 199.

10 *A Treatise on Extradition and Interstate Rendition*, Volume I, p. 621.

11 A Billot, *Traité de l'Extradition*, 1874, p. 94-95 wherein the author concludes:
"enfin la désertion a souvent un rapport intime avec des faits politiques dont elle ne peut être isolée et qui d'après une regle universellement adoptée, ne donnent pas lieu à extradition".

12 (1911) 7 Crim App R41, cited in Morgenstern, *The Right of Asylum*, BYIL (1948) Vol. 26 at 346.

not with the death penalty as had been asserted).

d) Practice of international bodies with respect to the protection of refugees

3.26 In the context of the international protection of refugees, the IRO was the immediate predecessor of the UNHCR and, as a result, its practice should be considered in some more detail.

3.27 Under its Constitution, the IRO definition of refugees was not as general as that included in the 1951 Convention but was limited to:

> "(a) victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war, or of the quisling or similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not;
>
> (b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not;
>
> (c) persons who were considered 'refugees' before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion."

Where, at least in relation to categories (a) and (c), they have expressed valid objections to repatriation:

> "The following shall be considered as valid objections:
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> (i) Persecution, or fear based on reasonable grounds of persecution because of race, religion, nationality or political opinions, provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations;
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> (ii) objections of a political nature judged by the Organisation to be 'valid', as contemplated in paragraph 8(a) of the report of the Third Committee of the General Assembly as adopted by the Assembly on 12 February 1946;
>
> (iii) in the case of persons falling within the category mentioned in section A, paragraphs 1(a) and 1(c) compelling family reasons arising out of the previous persecution, or, compelling reasons of infirmity of illness." (Section C(1))

3.28 In its Manual for Eligibility Officers, the IRO provided further clarification of those who qualified as refugees of concern to the Organisation. Chapter II

("General Problems") of the Manual contains a sub-chapter F headed "deserters":

> "Desertion being under no circumstances an extraditable offence, it becomes relevant under the IRO Constitution to the extent which it provides evidence of valid objections to repatriation, under Part I Section C of Annex I to the Constitution. Fear of punishment by itself is not a valid objection and thus desertion merely from dislike of the rigours of military life will not provide grounds for valid objection. On the other hand a deserter will almost certainly be liable for punishment for his desertion, and this fact should not blind the Eligibility Officer to an otherwise valid objection. The fact of desertion may moreover be good evidence of a valid objection on political grounds (unwillingness to fight for opposed regime); desertion may also be evidence of a conscientious objection to fighting, and be thus an element substantiating a fear of persecution on religious grounds."[13]

3.29 In Chapter VI ("Persons who will not be the concern of the Organisation"), which include "war criminals, quislings and traitors", the Manual again confirms that:

> "… mere desertion from the forces is not treason".[14]

and, under the category of "ordinary criminals who are extraditable by treaty":

> "Desertion is not an extraditable offence; neither are political offences."[15]

e) The present link between extradition and refugee practice

3.30 Outside the arena of international human rights instruments, the extradition exception for political offences continues to be generally recognised, subject to provisions relating to terrorism[16]. The broad

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13 Manual, para. 34.

14 para. 14.

15 para. 34.

16 See Kalin and Kunzli, Article 1 F(b): Freedom Fighters Terrorist and the Notion of Serious Non Political Crimes (2000) IJRL Vol 12 Special Supplementary Issue p. 47.

concept of those who are privileged from extradition because of the political character of the offence, may be said generally to include, as a sub-category, military offences, such as desertion, and (politically motivated) objection to military service. The Swiss commentator Kalin [17] suggests that "absolute or purely political offences which generally give rise to refusal of extradition are direct assaults on the integrity and security of the state or interferences with elections or ballots".

3.31 In fact, under the European Convention on Extradition 1957[18], military offences constitute a separate category of non-extraditable offences. Articles 3(1), (2) and 4 of the European Convention on Extradition provide:

> "Article 3 – Political offences[19]
>
> 1. Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.
>
> 2. The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these

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[17] Footnote 16 above at p. 65.

[18] ETS No. 24.

[19] The term "political" in political offences was interpreted by Viscount Radcliffe in *R v Governor of Brixton Prison ex parte Schtraks* [1964] AC 556 at 591 as indicating that "… the requesting state is after him for reasons other than the enforcement of criminal law in its ordinary, what I may call common or international, aspect." Lord Reid in that case also confirmed that "the provisions of section 3 of the Act of 1870 are clearly intended to give effect to the principle that there should in this country be asylum for political refugees, and I do not think that it is possible, or that the Act evinces any intention to define the circumstances in which an offence can properly be held to be of a political character" (p. 584).
In relation to the difficulty in fixing a definition of the term "political offence", Viscount Radcliffe notes at p. 589 that: "no definition has yet emerged or by now is ever likely to. Indeed it has come to be regarded as something of an advantage that there is to be no definition."

reasons[20].

…

Article 4 – Military offences

Extradition for offences under military law which are not offences under ordinary criminal law is excluded from the application of this Convention."

3.32 By way of example, under Turkish law, those refusing to perform military service are due to be punished in accordance with the Military Penal Code.[21]

3.33 Although the precise scope of military offence and its status as a political offence within the extradition concept are uncertain at its boundaries, it certainly embraces desertion. There is a substantial history of State practice of not repatriating deserters who surrendered to the belligerent power during the course of hostilities[22]. Desertion could thus, in the case of ideological motivation, found a claim to asylum[23]. It would be illogical to recognise a difference between desertion and a refusal to respond to call up for military service. Indeed the latter may be the best evidence of a

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[20] This clause is obviously the closest to a mirror image of Article 1A(2) of the 1951 Convention and therefore begs the same questions, i.e. are the applicants being prosecuted (prejudiced) on account of their race, religion, nationality or political opinion.

[21] See the Expert report from a Turkish lawyer, Ibrahim Cetintas, dated 12 June 1998 and the Amnesty International document entitled *Turkey – Osman Murat Ulke – conscientious objector jailed*, dated April 1997. For the information of their Lordships' House, the UN Working Group on Arbitrary Detention, on 2 December 1999, adopted an Opinion on the continued detention of Mr Ülke (UN doc E/CN.4/2001/14/Add.1 at pages 53 to 55) and Mr Ülke's application to the European Court of Human Rights, complaining *inter alia* of a violation of Article 9, is currently pending before that Court.

[22] LB Shapiro, Repatriation of Deserters (1952) BYIL Vol. 29 at 310. This constituted an exception to the duty to repatriate prisoners of war at the conclusion of hostilities.

[23] *Ibid* p. 318 for Russian practice of excluding those who had embraced the Christian faith in the course of capture.

consistent and principled opposition to such service.

3.34 This connection between the non-extradition for political offences and the right of asylum as a refugee is also reflected in Article 14 of UDHR (see below para 3.56) and the 1951 Convention, and in particular in Article 1F(b) thereof:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:…
>
> b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; …"

and the UNHCR Statute, para. 7(d) of which provides:

> "Provided that the competence of the High Commissioner as defined in paragraph 6 above shall not extend to a person:…
>
> (d) In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition…."

3.35 As Lord Lloyd of Berwick acknowledged in his judgment in *T v Immigration Officer* [1996] AC 742:

> "There is no English authority on the meaning of 'non-political crime' in the Geneva Convention. But it was common ground that the words must bear the same meaning as they do in extradition law. Indeed it appears from the *travaux préparatoires* that the framers of the Convention had extradition law in mind when drafting the Convention, and intended to make use of the same concept, although the application of the concept would, of course, be for a different purpose." [at page 778F]

3.36 Lord Mustill described the different purpose in his judgment in *T* thus:

> "A substantial point of difference between extradition and asylum is that where the former is in issue the political nature of the offence is an exception to a general duty to return the fugitive, whereas in relation to asylum there is a general duty *not* to perform a *refoulement* unless the crime is non-political." [at p. 773D to E]

3.37 It is clear from the limited case law on the "political offence" exception in extradition that the exception may apply even though the offence for which extradition is sought is one of general application under the ordinary

criminal law. In the case of *In re Castioni* [1891] QB 149, in which the applicant had been charged with the murder of a member of the State Council of Tiziano, extradition was rejected on the basis of the "political offence" exception because his crime was "incidental to, and formed part of, political disturbances" (*per* Hawkins J at p. 166). In *R v Governor of Brixton Prison ex parte Kolczynski* [1955] 1 QB 540, which concerned seven Polish trawler men who seized their vessel and sought refuge in the UK, the Polish request for extradition for assault, malicious damage and revolt on the high seas was rejected on the basis of the "political offence" exception.

3.38 Furthermore, this is also supported by the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (hereinafter "the Handbook"), which has been held to reflect:

> "international understanding of the Convention obligations, as worked out in practice, based on the knowledge accumulated by the High Commissioner's Office … derived *inter alia* from the practice of states in regard to the determination of refugee status, exchanges of views between the office and the competent authorities of the contracting states and the literature devoted to the subject…"[24].

3.39 The Handbook contains the following definition of non-political crimes:

> "In determining whether an offence is "non-political" or is, on the contrary, a "political" crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is

[24] *R v Secretary of State for the Home Department ex parte Robinson* [1998] QB 929 at 938 (*per* Lord Woolf MR).

also more difficult to accept if it involves acts of an atrocious nature." (para. 152)

3.40 It is not the Intervener's submission that this historical material requires the definition of "refugee" within the meaning of the 1951 Convention to be restricted to cases of political asylum and flight for political offences. Rather this material informs as to the background to the 1951 Convention and its breadth of practice. As the third holding of the Preamble[25] makes clear, the 1951 Convention was designed to consolidate and extend the protection provided prior to its adoption.

3.41 It is also in this context that as long ago as 1966 (long before any developing human rights jurisprudence from international bodies) Grahl-Madsen, having reviewed international jurisprudence and writings, could assert with confidence that:

> "The term 'reasons of religion' covers persecution on a variety of different grounds notably….(4) religiously motivated acts or omissions (e.g. refusal to do military service)." (p218)

3.42 After reviewing German and French jurisprudence that did not recognise draft evasion as a sufficient basis for refugee status, but also permitted political or religious motivation in refusing such demands as a possible basis for asylum (p231-238), he continued:

> "It cannot be seen that there is any valid reason for distinguishing between such actions as active resistance at home and political activities in exile, on the one hand; and evasion of military duties, unauthorised departure and absence, application for asylum or refugeehood, &c., on the other hand. To be sure, desertion and draft evasion are punishable

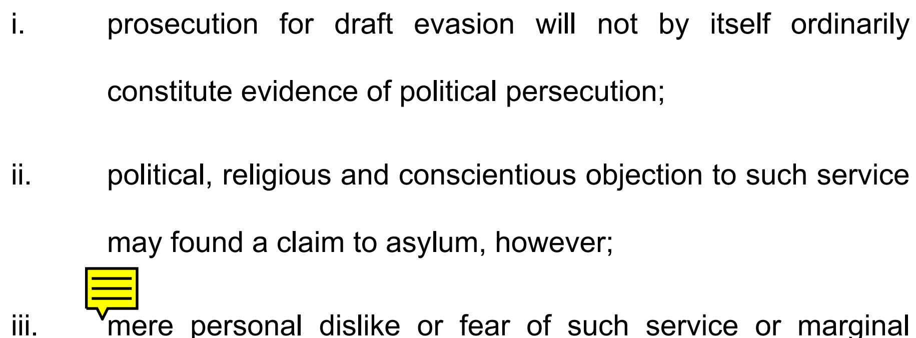
[25] Set out at para. 3.4 above; see also the Report of the Ad Hoc Committee on Statelessness and related Problems to the UN General Assembly of 17 February 1950 (UN document E/1618, E/AC.32/5) cited by the US courts in *Cardoza-Fonseca* 107 S.Ct at 1216 and *Dwomoh v Sava* 696 F.Supp 970 at p. 976, paras 15 and 16.

offences in most countries; but so is espionage, sabotage, and other subversive activities, only even more so. If a person fearing punishment for politically motivated sabotage actions may claim refugee status, it seems illogical that a person liable to punishment for much less serious acts such as evasion of military service or unauthorised departure from the home country, shall be denied the benefits of the Convention, although his acts, too, were politically motivated." (§96, pp. 249-250)

"To take a practical example: Let us presume that we are faced with three deserters or draft evaders. One has refused to do military service because he does not want to lend his support to a regime which he considers oppressive. Another has deserted the armed forces of a government which exercises – in his opinion unjustly – control over the territory where he belongs. The third has evaded the draft because he does not sympathise with the alliance politics of his government (e.g. membership in NATO). As we have seen above, the two former may qualify as refugees. With respect to the third one, there is probably consensus to the effect that he may not invoke the Convention. What is the distinction between these cases? In the two former cases the person's political opinion is one which rejects the existing political system in his home country or home territory. In the latter case there is no such total rejection. Moreover, before and after his military service 'the third man' would be free to try and swing public opinion in his home country his way, without fear of reprisals." (§96, pp. 250-251)[26]

App Pt 1 at 75-76, para 11

3.43 It was against this background that the UNHCR published its Handbook in 1979 at the request of Contracting States to assist in the identification and implementation of State practice in this field. The relevant paragraphs dealing with military service are 167 to 173 and were quoted by the Court of Appeal. In summary these paragraphs indicate: -



i. prosecution for draft evasion will not by itself ordinarily constitute evidence of political persecution;

ii. political, religious and conscientious objection to such service may found a claim to asylum, however;

iii. mere personal dislike or fear of such service or marginal

[26] Grahl-Madsen, *The Status of Refugees in International Law (Volume I)*, A. W. Sijthoff, Leiden, 1966.

disagreements with the government justification for particular military action will not suffice;

iv. genuine religious or political objections to performance of the service may suffice, and such objections are to be seen in the light of developing State practice offering civilian alternatives to service;

v. other bases for establishing a well-founded fear of persecution may be discriminatory treatment, excessive and disproportionate punishment, or where the conflict or its methods of promotion have been the subject of specific or general international condemnation.

3.44 It should be noted that Lord Justice Parker at para 143 of the Judgment may have been misled by the date of the edition of the Handbook to which he referred concluding that the text itself had been revised in 1992. This was merely a re-issue of the 1979 text. As noted by Lord Justice Waller at paragraph 194 (xxii) of the Court of Appeal judgment, the Intervener's position was later re-stated.

App Pt 1 at 113, para 143

App Pt 1 at 129, para 194 (xxii)

3.45 Additional considerations have been developed in the light of experience since 1979 and these can be reflected *inter alia* in the following documents:-

i) The *amicus* submissions in the case of *Canas-Segovia*; (noted in the Court of Appeal);

ii) A document entitled "Deserters and Persons avoiding Military Service originating from the Federal Republic of Yugoslavia in Countries of

Asylum: Relevant Considerations", issued on 1 October 1999; and

iii) UNHCR has refined its position, in respect of refusal to perform military service, and its 2001 Position Paper includes the following:

> "…whether the service which would be required could not reasonably be expected to be performed by the individual because of his or her specific individual circumstances, relating to genuine beliefs or convictions of a religious, political, humanitarian or philosophical nature, or, for instance, in the case of internal conflict of an ethnic nature, on account of ethnic background…"[27]

3.46 Another commentator, Richard Plender in his *International Migration Law* (2nd Edition, 1988), drew specific attention to the decision of the Immigration Appeal Tribunal in the case of *Church*[28] where the applicant had conscientious objections to the particular policies pursued by the armed forces. He concludes:

> "It is arguable that ...a nexus is established where the conscript refused to serve in the armed forces on the ground that he objects in good faith to the policies being implemented by them".[29]

3.47 The *Church* case is of significance as it concerned objection to internal use of military force in South Africa during the apartheid era. Use of the armed forces against fellow citizens in times of internal conflict acutely highlights questions of political objection to participation in such a military force (whether the objector is actually posted to the combat zone or not).

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27 UNHCR, "The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees", Refugee Survey Quarterly, Vol. 20, No. 3 (2001), at p. 83.

28 TH/69153/80 (2288), determination of 5 April 1982.

29 The Intervener notes that the views of Professors Hathaway and Goodwin Gill were well documented before the Court of Appeal.

3.48 The present cases also concern objection to use of the military against fellow members of an ethnic and religious community. It thus fits within a long tradition of those fleeing punishment for non-extraditable political offences on the basis of genuine political convictions opposed to military service.

3.49 The Intervener submits that in the 23 years since the Handbook was published, State practice has not precluded the grant of asylum in such cases on the basis that any claim based on draft evasion is merely an application of the ordinary criminal law. Rather, State practice in the area of asylum has recognised that refusal to serve may well be an act of conscience or political expression that founds obligations of international protection. This is a sufficient basis for including draft evaders within the potential ambit of the refugee definition, irrespective of whether there is recognised human right to resist military service in certain circumstances.

(f) The human rights background

3.50 Further, or in the alternative, the Intervener submits that a right of conscientious objection to military service whether on political or religious grounds is now sufficiently recognised as a human right by regional and international human rights bodies and States parties to provide additional support to a proper interpretation of the refugee definition of the 1951 Convention. The preceding discussion shows that the institution of asylum has enjoyed many centuries of progressive development, and that it has historically found its expression in the practice of States, particularly in the context of extradition. In contrast with the long established history of the

institution of asylum, the emergence of human rights law and its development are relatively recent events. This underscores the Intervener's principal argument that the scope of international refugee protection, in both its historical and modern forms, is not necessarily coterminous with the current scope of human rights law.

3.51 The European Court of Human Rights for long did not develop a body of case law that granted individuals a right to refuse military service, and Article 4 of ECHR did not characterise military service or civilian equivalents as slavery or forced labour within the meaning of that Article[30]. It is recalled that ECHR emerged in the aftermath of the Second World War, when conscription was resorted to by democratic States for their defence in times of war and national emergency.

3.52 The fact that military service under the laws of a Member State of the Council of Europe could not be characterised as slavery or forced labour, does not mean that persons objecting to military service in armies engaged in conflict on religious and ethnic lines could not be entitled to international refugee protection on the basis that they were expressing political or religious convictions in their countries of origin.

3.53 The Intervener submits that it is inappropriate to abstract the early case law of the European Commission on cases arising before it and apply that reasoning to the institution of asylum. The fact that there was no express

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[30] See Howard Gilbert "The Slow Development of the Right to Conscientious Objection to Military Service under the European Convention on Human Rights" [2001] EHRLR 554 where the author criticises the absence of a methodological approach by the European Court to the question of whether Article 9 embraces a right to manifest religious beliefs and whether particular restrictions are justified.

ECHR right to conscientious objection to military service might simply have meant that in the context of the legislative choices made by the founding parties to the Council of Europe particular expressions of religious or political opinion by refusal to perform military service were held not to violate Article 9 of the ECHR. Such cases arose under democratic regimes governed by the rule of law and the principle of plurality. The context is important, as what is a justified and proportionate restriction of the right to manifest a conscientious belief may be very different from country to country. The Commission have never had to consider a case of political objection to service in an army engaged in internal activities in suppressing an ethnic rebellion by members of the objector's community. It is now plain at least from the review of the materials before the Court of Appeal that prosecution for objection to military service *may* constitute a form of restriction of manifestation of conscience and as such would have to be justified in the particular circumstances of the case.

3.54 A State granting international refugee protection in accordance with the 1951 Convention is not however passing a judgment on the laws and practices of other sovereign States[31]. Asylum is not an interference with internal affairs but an assessment of whether overall the applicant has a well-founded fear of persecution and is therefore in need of international protection.

[31] In the fifth paragraph of the Preamble to the 1951 Convention, the High Contracting Parties "[express] the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States".

3.55 The approach of the majority of the Court of Appeal, which would preclude conscientious objection forming such a right unless there has been universal acceptance and recognition of that right, would have an unduly restrictive effect on asylum law and emerging norms of grounds for protection.

3.56 The UDHR is generally considered to be the first modern statement of international human rights, although it is not legally binding. In Article 14, UDHR recognised the intimate connection between the right to seek asylum and the non-extradition for political offences:

> "1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

3.57 The first legally binding regional human rights instrument was the ECHR, adopted in 1950, i.e. at a time when the 1951 Convention was already being negotiated. The first universal and legally binding international human rights instruments were the International Covenant on Civil and Political Rights (hereinafter "ICCPR") and the International Covenant on Economic, Social and Cultural Rights (not cited hereinafter), both adopted in 1966.

3.58 Unlike the agreements and arrangements concerning the status of refugees, these international human rights instruments were not, primarily, concerned with regulating the responsibilities of one State against the nationals of another, but rather with the responsibilities of one State against its own citizens and other persons already within its jurisdiction.

They were not, at least until the supervisory mechanisms found otherwise, so much concerned with the removal, deportation or extradition of aliens. The decision of the European Court of Human Rights in *Soering*, which, at least in the context of the ECHR, confirmed the so-called extra-territorial reach of the 1951 Convention, was not decided until 1989[32].

3.59 In light of these considerations it is perfectly understandable why both the ECHR and ICCPR exclude compulsory military service from the definition of "compulsory labour"[33]. To do otherwise would have resulted in a collective abolition of military service, something at that time clearly not envisaged by the international community and, more importantly, not required by international law.

3.60 The decision not to abolish compulsory military service by failing to include it in the definition of "compulsory labour", however, cannot be determinative of the position of an alien in a State other than his own where he is seeking protection from punishment for draft evasion. In so far as the decision to refuse to participate in the compulsory military service is an expression of a political opinion or a religious or moral conviction (and is likely to be perceived as such) it is to be regarded as an aspect of human rights in the field of freedom of thought, conscience and religion.

3.61 This is increasingly being recognised by international human rights monitoring bodies, such as the UN Human Rights Committee, the European Court and Commission of Human Rights and others. Lord

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32 Judgment of 7 July 1989, (1989) 11 E.H.R.R. 439.

33 Article 4(3)(b) of the European Convention of Human Rights and Article 8(3)(c)(ii) of the ICCPR.

Justice Waller in the Court of Appeal judgment helpfully analyses the slow chronological development of recognition of a right to conscientious objection albeit subject to proportionate restrictions in the case law of the ECHR[34].

App Pt 1 at 127-133, paras 194 and 195

3.62 By contrast with the ECHR, in 1993, the Human Rights Committee reversed its position by means of General Comment 22 (48), which interprets Article 18, ICCPR, on the right to freedom of thought, conscience and religion:

> "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..... 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 service."[35]

3.63 Although such General Comments are not themselves binding on States, they are generally considered as authoritative interpretations of the Covenant's provisions. The Committee's consideration of individual complaints indicated that it was changing from its original rejection of a right to conscientious objection, although no decision on this precise point had been taken. Military service, with its express call to participate in the killing of fellow human beings, is clearly something of great intensity and a possible source of political dissent that is capable of leading to persecution; far greater than, for the sake of argument, a general

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[34] See also Gilbert. footnote 30 above.

[35] para. 11.

obligation to pay taxes, however much the taxpayer might object to the matters on which it was spent.

3.64 The Committee has in fact made clear that providing for conscientious objectors only on religious grounds is not acceptable: for example, in its Concluding Observations on Ukraine:

> "The Committee notes with concern the information given by the State party that conscientious objection to military service is accepted only in regard to objections for religious reasons and only with regard to certain religions, which appear in an official list. The Committee is concerned that this limitation is incompatible with articles 18 and 26 of the Covenant. The State party should widen the grounds for conscientious objection in law so that they apply, without discrimination, to all religious beliefs and other convictions, and that any alternative service required for conscientious objectors be performed in a non-discriminatory manner."[36]

3.65 UN General Assembly resolution 33/165 of 20 December 1978 was adopted (without a vote) in response to the then situation in South Africa, but is stated in general terms. In it, the UN General Assembly recognised the right of all persons to refuse service in military or police forces used to enforce apartheid, and called upon Member States to grant asylum or safe transit to another State, in the spirit of the Declaration on Territorial Asylum, to persons compelled to leave their country of nationality solely because of a conscientious objection to assisting in the enforcement of apartheid through service in military or police forces. This Resolution was in fact drafted and adopted with a view to giving quasi-refugee status to those fleeing South Africa because of their objection to service in the

[36] CCPR/CO/73/UKR of 12 November 2001, para. 20; similarly re. Kyrgyzstan (CCPR/CO/69/KGZ. of 24 July 2000, para. 18).

South African armed forces, and ironically was thus a recognition of a partial (political) form of objection - usually the most contentious form - even before the UN had recognised the general (pacifist) form of conscientious objection to military service[37].

3.66 This is certainly evidence that a distinction between absolute and partial objection is not meaningful in the context of international refugee protection and that the partial objection does not have to enter the refugee regime on the back of a universally accepted right of absolute conscientious objection.[38] Further, the Resolution demonstrates that reasons of conscience were not just concerned with how States fought controversial wars, but why it was fighting a war at all and whom it was fighting against.

3.67 However, in terms of recognition of conscientious objection, the UN Commission on Human Rights has been the most active body. The issue of conscientious objection has been on its agenda since 1971. Following the adoption of General Assembly resolution 33/165, the Commission requested the Sub-Commission to study the question. The so-called Eide/Mubanga-Chipoya study was completed in 1983. In resolution 1987/18 the Commission appealed to States to recognise a right to

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[37] See also the Church decision noted above paras. 3.46 and 3.47.

[38] So-called partial conscientious objectors have been recognised as refugees in the United Kingdom and in other jurisdictions: *Adan v Secretary of State for the Home Department,* [1997] 1 W.L.R. 1107; *Zolfaghakhani v Minister for Employment and Immigration,* [1993] 3 FC 540 (Federal Court of Canada); *Ciric v Minister for Employment and Immigration,* [1994] 2 FC 65 (Federal Court of Canada); *Israelian v Minister for Immigration and Multicultural Affairs,* [1998] FCA 447 (Federal Court of Australia); *Mehenni v Minister for Immigration and Multicultural Affairs,* [1999] FCA 789, para. 15-16 (Federal Court of Australia).

conscientious objection based upon "profound convictions arising from religious, ethical, moral or similar motives." Two years later, resolution 1989/59 expressly recognised the right of everyone to have conscientious objection to military service "as a legitimate exercise of the right to freedom of thought, conscience and religion" as laid down in Article 18 of UDHR and Article 18 of ICCPR. Resolutions 1993/84 and 1995/83 were subsequently adopted without a vote, culminating in resolution 1998/77.[39]

3.68 Again resolution 1998/77 recognises that conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives and draws attention to the right of everyone to have conscientious objections to military service as a legitimate exercise of the right to freedom of thought, conscience and religion.

3.69 The exhortatory nature of this and similar Resolutions does not deprive it of relevance as an aid to the interpretation of "persecution" in the 1951 Convention. No one single text is decisive, but the plethora of texts complements the historical practice of States in granting political asylum and recent State practice in line with the Handbook in decisions made under the 1951 Convention, where conscientious objection to military service has long been a possible basis for recognition of refugee status on 1951 Convention grounds.

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[39] At the same time, Resolution 1989/59 has been used by the Commission's Special Rapporteur on Freedom of Religion (previously "on Religious Intolerance") as the basis for his comments to States on the subject of conscientious objection and alternative service.

3.70 The Intervener cannot comment on Lord Justice Laws' concerns regarding which organ of the State is responsible for the interpretation of the 1951 Convention and for the meaning of the term "refugee". If it is relevant for the national executive to take account of it in formulating its guidelines on the meaning of "refugee", or for the national legislature when enacting a definition of "refugee", then it is equally admissible as an aid to construction where the law requires the national judge to perform the task of adjudication and application.

3.71 The Intervener notes that the above international principles have been acknowledged and applied in other common law jurisdictions. In a recent unreported judgment of the Federal Court of Australia, *Erduran v Minister for Immigration and Multicultural Affairs* (27th June 2002),Gray J reviewed Australian jurisprudence on draft evasion and political asylum and concluded at para 28:

> "It therefore appears that, when an issue of refusal to undergo compulsory military service arises, it is necessary to look further than the question whether the law relating to that military service is a law of general application. It is first necessary to make a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service. If it does, it may be the case that the conscientious objection arises from a political opinion or from a religious conviction. It may be that the conscientious objection is itself to be regarded as a form of political opinion. Even the absence of a political or religious basis for a conscientious objection to military service might not conclude the inquiry. The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason. It is well established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution

> for a Convention reason. See *Wang v Minister for Immigration & Multicultural Affairs* [2000] FCA 1599 (2000) 105 FCR 548 at [65] per Merkel J. Forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason."

3.72 In summary, the Intervener submits that the law and practice on human rights has redirected itself away from focusing on the legitimacy of military service or its alternatives as an acceptable requirement of legislative policy to a more general recognition of the right to manifestation of conscience within the broadest meaning of the term at a regional and universal level.

3.73 The question is not, therefore, whether military service is internationally condemned as unlawful *per se*, but whether the manifestation of genuinely held beliefs and convictions requires recognition by the international community.

3.74 It would not be consistent with the general rules for progressive interpretation of the 1951 Convention for these developments to be ignored by national courts engaged in interpreting the law.

(g) A regional approach

3.75 The Intervener respectfully agrees with the United Kingdom authorities cited by Lord Justice Laws that in searching for the meaning of terms within the 1951 Convention, the judicial body is concerned with the proper international meaning of the term rather than a reading that is based on purely domestic considerations.

App Pt 1 at 88-89

3.76 The proper international law meaning, however, is not to be ascertained by looking for purely empirical evidence of universal consensus. Rather it

is to be identified by asking principled questions of the conduct and situation of the person whose case is under consideration, and arriving at a proper international meaning by reference to the international rules of construction. These are contained in Articles 31, 32 and 33 of the *1969 Vienna Convention on the Law of Treaties* (reflecting rules of customary international law), *i.e.* the object and purpose of the 1951 Convention as expressed in the Preamble, State practice, and applying a "living instrument" approach to emerging norms of human rights protection.

3.77 Indeed the case of *Adan and Aitsegur*,[40] to which Lord Justice Laws referred in his judgment in the Court of Appeal, rather demonstrates that the proper international meaning of the 1951 Convention may require by application of these principles a certain approach to the meaning of the 1951 Convention even though there is no international consensus as to such an approach, indeed a division even with Europe where there is a greater harmony of constitutional tradition and jurisprudential principles. [41]

3.78 State practice may indeed lead to incremental development and application of ill-defined rights inherent within the concept of human rights and proclaimed by UDHR that may not yet have received universal endorsement. On the other hand, it is not open to a State or a group of States to defeat the object and purpose of a treaty by imposing -- without international consensus in the form of an amendment -- a restrictive

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[40] [2001] 2 AC 477.

[41] Indeed the Intervener notes that Laws LJ has recently concluded in *R (Yogathas and Thangarasa) v Secretary of State for the Home Department* [2001] EWCA Civ 1611 at para. 54 that he was wrong at para. 49 of his judgment in *Sepet and Bulbul* to suggest that the distinction between differences of application and interpretation was a fragile one.

interpretation of its terms.

3.79 The Court of Appeal judgment cited the material which demonstrates the emerging political acceptance of such a right within the Council of Europe. Such developments have moved from resolutions of the Parliamentary Assembly of the Council of Europe and the emerging case law of the European Commission in the *Thlimmenos v Greece* case[42] into an acceptance by the States of the European Union of a right of conscientious objection.

3.80 The clearest indication of advances in State practice throughout the European Union, is the Charter of Fundamental Rights and Freedoms adopted in December 2000. The Preamble to the Charter recognises "it is necessary to strengthen the protection of fundamental rights in the light of changes in society" and proclaims the rights already recognised in the Union. Amongst these rights is the right to conscientious objection as an aspect of freedom of thought, religion and conscience.[43] The right is to be exercised in accordance with national laws. This is not a statement of aspiration or exhortation, but rather of existing constitutional fact for a broad body of States, all parties to the 1951 Convention.

3.81 The Intervener recognises that the European Union cannot unilaterally alter the terms and meaning of a treaty to which many States outside the European Union are party. Where regional developments in the implementation and application of the 1951 Convention are consistent

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[42] (2001) 31 E.H.R.R. 15 at p. 411.

[43] Article 10 (2) of the Charter.

with internationally recognised principles, and amplify the understanding of the refugee definition, then such developments are relevant to interpretation of terms where much is still left to the judgment of national authorities, executive and judicial.

3.82 In the present case, the recognition of a right to conscientious objection is contrary neither to the UDHR, nor to the object and purpose of the 1951 Convention, nor to the object and purpose of ICCPR. Rather it is an expression of the evolving principles of such living instruments and as such constitutes evidence of evolving State practice that is a permissible basis for the interpretation of the 1951 Convention.

3.83 Even if it were the case that the crystallisation of the right had only taken place inside the European Union, which for reasons given above is not the case, that would not prevent a State party to the 1951 Convention and a Member State of the Union from drawing inspiration from these norms in the interpretation of the 1951 Convention. Any other approach would be unduly restrictive and prevent the development of a "living instrument" approach to this broad humanitarian instrument.

4 Motivation (Issue 2)

4.1 The Intervener strongly supports the Court of Appeal's rejection of the Secretary of State's case that an applicant cannot qualify for refugee status under the 1951 Convention unless it can be established that the persecutor is specifically motivated by that applicant's political opinions or religious beliefs. The Intervener takes this position both as a matter of principle and because such a rule would have a severely debilitating effect

on the development and application of the 1951 Convention. As is clear from the historical analysis, both refugee law and human rights law are not primarily concerned with the conduct of States *per se* but with the protection of individuals from persecution or violation of their rights. Neither specifies conduct by State officials that is prohibited or provides a sanction against such conduct,[44] although both define the rights of the individual against the State and are clearly designed to provide protection for those individuals who suffer as a result of State action. Unlike in the context of proceedings e.g. for misfeasance in a public office, their focus is therefore not directed primarily to the conduct of the State or an individual official but to the impact of State action (or inaction) on the individual claimant.

4.2 As a result, the focus of the drafters of the refugee definition in the 1951 Convention was directed to defining the category of individuals coming within its remit by consolidating and enlarging the protection previously provided to individuals by international law. In fact, the absence of specific discussion about the words "for reasons of" in the *travaux préparatoires* and the early commentators, indicates that in employing this phrase, the drafters of the 1951 Convention sought to do no more than provide a factual nexus between the persecution suffered and one of the enumerated 1951 Convention grounds; it was to form part of a single test and not to become the subject of separate analysis.

4.3 For this reason, it is inappropriate and potentially dangerous to seek to

[44] Just as with the concept of extra-territorial effect of human rights treaties, the concept of positive obligations imposed by human rights treaties is a relatively new, judge-made, concept.

import into the definition of a refugee, via “for reasons of”, notions from other areas of the law which would impose an additional and restrictive requirement on a claimant; namely to have to establish the motivation of the State or State official for the persecutory actions or the failure to protect an individual from the actions of others. Such an additional requirement would restrict the protection offered by the 1951 Convention in a way not contemplated by its drafters and contrary to its very object and purpose.

4.4 This extra requirement would significantly increase the evidentiary burden borne by the asylum applicant and would thus run contrary to well-established understandings about procedural standards. For well-established reasons, the standard of proof of demonstrating that a fear is well founded is a low one: *R v Home Secretary ex parte Sivakumaran* [1988] AC 958; *Kariharan v Secretary of State for the Home Department* [2002] EWCA Civ 1102; and paragraphs 195 to 205 of the Handbook. To expect an applicant to establish the “motivation” of the persecutor before s/he can qualify for refugee status unacceptably increases the difficulties imposed upon the applicant to make good his/her claim.

4.5 Again, it is clear from the historical analysis of both the antecedents of the 1951 Convention and the developments in international human rights law, that neither pre-condition was (nor is) required. By way of example, it is clear as a matter of international human rights law that an intention to humiliate is relevant but not essential for treatment to be inhuman or degrading and therefore contrary to e.g. Article 3 of the European

Convention of Human Rights.[45] This applies equally in the context of the 1951 Convention: whilst motivation is evidence of a nexus with a 1951 Convention reason it is not a pre-requisite for it.

4.6 To provide an example, the purpose of legislation may be expressed in uncontroversial terms, such as promoting racial harmony; nevertheless, it may have the effect of discriminating against members of minorities to an extent that would amount to persecution. However, looking for the "intent" of the legislator would not have produced any evidence of persecution while an assessment of the objective situation, independent of the intention of the legislator, did produce such evidence.

4.7 The High Court of Australia reached this exact conclusion in *Chen Shi Hai v The Minister for Immigration and Multicultural Affairs* [2000] HCA 19, finding that the application of such a law had amounted to persecution. As per Gleeson CJ, Gaudron, Gummow and Hayne JJ:

> "33. As already indicated, the Tribunal based its conclusion that the adverse treatment the appellant is likely to receive in China is for a reason other than his being a 'black child´ on its view that the Chinese authorities were not motivated by 'enmity´ or 'malignity´. Where discriminatory conduct is motivated by 'enmity´ or 'malignity´ towards people of a particular race, religion, nationality, political opinion or people of a particular social group, that will usually facilitate its identification as persecution for a Convention reason. But that does not mean that, in the absence of 'enmity´ or 'malignity´, that conduct does not amount to persecution for a Convention reason. It is enough that the reason for the persecution is found in one or more of the five attributes listed in the Convention.
>
> ...
>
> 35. Persecution can proceed from reasons other than 'enmity´ and 'malignity´. Indeed, from the perspective of those responsible for discriminatory treatment, it may result from the highest of motives, including an intention to benefit those who are its victims. And the same

[45] See *Peers v Greece* (2001) 33 E.H.R.R. 51 at para. 74 and *Kalashnikov v Russia* (judgment of 15 July 2002) at para. 95.

> is true of conduct that amounts to persecution for a Convention reason. Accordingly French J was correct to hold, as did the Full Court, that the Tribunal erred in finding that, because the different treatment which the appellant was likely to receive was not motivated by ‘enmity´ or ‘malignity´, that treatment was for a reason other than his being a ‘black child´.”

As per Kirby J: discussing the need for “enmity” or “malignity” in order to establish “persecution”:

> “No doubt such concepts may be present in persecution in particular cases. But they are not necessary or essential.
>
> ...
>
> ... as the primary judge noted, ‘[p]ersecution may be carried off coolly, efficiently and with no element of personal animus directed at its object. There are too many historical examples of the inhuman indifference of which governments are sometimes capable in the pursuit of persecutory policies to so narrow the concept’ in this way. I also agree with the primary judge that the attribution of subjective emotions such as ‘enmity´ and ‘malignity´ to governments and institutions accused of persecution ‘risks a fictitious personification of the abstract and the impersonal´. Some of the most fearsome persecutions of people on the grounds of race, sex, religion, sexuality and otherwise have been performed by people who considered that they were doing their victims a favour. Persecution is often banal. Thirdly, as R D Nicholson J pointed out in the Full Court, there is a special reason in the context of the Convention to refrain from importing concepts of personal motivation as essential to the context. By definition, the Convention will ordinarily be invoked in a foreign country where an enquiry into the motives and feelings of the alleged ‘persecutors´ will be extremely difficult or impossible to perform. Not least is this so in relation to an infant refugee from outside the country of its nationality and as yet unknown to that country’s authorities who are accused of likely future persecution if the child were to be returned to that country.”

(Paras 61 to 64).

4.8 As Kirby J rightly states, “motivation” or “intent” is even more difficult to establish where the persecution that is feared is in the future.

4.9 The position expressed by the High Court in *Chen Shi Hai* was accepted as “correct statements of Convention law” by the Court of Appeal in *Omoruyi v*

Secretary of State for the Home Department [2001] Imm AR 175.

4.10 Where the claimant fears persecution at the hands of a State agent such as a police officer, it will be difficult in practice to demonstrate what motivation might lie behind future acts of ill treatment: personal spite, sadistic personality, a desire to extract needed information or particular animus based on the racial or other relevant characteristics of the claimant. It is sufficient in law if there is a real risk that the persecution is for reasons specified in the 1951 Convention. There is thus a single composite question to be posed[46].

4.11 A requirement to prove the intent of the persecutor completely undermines any argument based on indirect discrimination and prevents any claim of persecution based upon the application of a law of general application. As is well understood in the context of the United Kingdom's domestic anti-discrimination legislation, it is inherent in the concept of indirect discrimination that the individual enforcing the law (of general application) is motivated by the citizens' duty to comply with the law, in particular a law of general application which, for the vast majority of the individuals affected, is lawful, necessary and proportionate. It is almost always impossible to prove that the authority enforcing such a law is motivated by anything but the interest of the public. The only exception to this is where the authorities discriminate between different groups in the severity of the punishment meted out for failure to comply with a law of general application.

[46] *Ravichandran v Secretary of State* [1996] Imm AR 97; see also Dyson in LJ in *R (Sivakumar) v IAT* [2002] INLR 310 at para. 30 to 32.

4.12 In the Court of Appeal, the Secretary of State sought to draw further support for his position from the judgment of the Court of Appeal in *Adan v Secretary of State*, the decision of the Federal Court of Canada in *Zolfagharkani v Minister of Employment and Immigration* [1993] 3 FC 540 and the decision of the US Supreme Court in *INS v Elias-Zacarias* 502 US 478.

4.13 It is respectfully submitted that the passage in *Adan* relied upon does not reflect the views of the Court in that case but rather describes a submission made by counsel for the applicant in that case, which Hutchinson LJ found "unattractive" (p. 1126H).

4.14 In relation to the judgment of the Federal Court in *Zolfagharkani*, it is respectfully submitted that this case does not provide any support for the proposition put forward by the Secretary of State. Even though MacGuigan JA, giving the only judgment of the court, accepted that "intent" may be relevant he did not accept that evidence of intent was determinative of the issue. He set out a number of general propositions, of which the first was that:

> "The statutory definition of Convention refugee makes the intent *(or any principal effect)* of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution." (emphasis added)

4.15 As Laws LJ rightly held, in so far as the decision of the US Supreme Court in *INS v Elias-Zacarias* supports the submission that proof of persecutory "motivation" is a necessary prerequisite to establishing persecution for a 1951 Convention reason, this is explained by the fact that:

App Pt I at 100, para 92

> "… the context can I think be seen to be such that the only potential engine of discrimination on the facts was the persecutor's motive. But if that were not so, I should with great deference but no hesitation reject out of hand the view that the autonomous, international meaning of the Convention involves the proposition that the whole sense of 'for reasons of …' has a single reference, namely the motive of the putative persecutor. No authority binds this court so to hold, and to do so would confine the scope of the Convention protection in a straightjacket so tight as to mock the words in the recital to which I have already referred: 'the widest possible exercise of these fundamental rights and freedoms'."

4.16 The Intervener respectfully agrees with this statement and, in so far as that was necessary, would urge this House to confirm the conclusion reached by the Court of Appeal (on this issue); and the High Court of Australia in *Chen Shi Hai*.

5 **Conclusions**

5.1 For the reasons set out in the preceding paragraphs of this case the Intervener therefore invites Your Lordships to determine the issues in this appeal in accordance with the above mentioned observations and principles because:-

i) the definition of refugee status under the 1951 Convention is a broad humanitarian one, to be flexibly applied in accordance with the language and purpose of the Convention;

ii) such a definition is not be limited to cases of discriminatory denial of core human rights, particularly as such universal human rights were not identified or enumerated at the time the Convention was adopted;

iii) such a definition should not in principle be narrower than pre existing state practice before 1951 where political asylum was

granted to deserters and political objectors to military service of other states, or to contemporary extradition practice where requests for return for political or military offences are not generally accepted;

iv) it is not necessary for a human right to have crystallised to the point where it is universally accepted before it can assist in the definition of refugee within the meaning of the 1951 Convention;

v) a right of political or conscientious objection to compulsory military service has sufficiently developed to be of assistance to the definition of refugee in the 1951 Convention;

vi) such a right has certainly developed within the European Union, and judicial interpretation of the 1951 Convention can take such developments into account;

vii) proof of the motivation of the individual persecutor is not necessary in order to establish a well founded fear of persecution for a reason recognised by the 1951 Convention.

Nicholas Blake QC

Tim Eicke

8th January 2003