REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75995

AT AUCKLAND

Before:	S Murphy (Member)
Counsel for the Appellant:	Appellant represented himself
Appearing for the Department of Labour:	No Appearance
Date of Hearing:	13 February 2007
Date of Decision:	31 October 2007

DECISION

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[1] This is an appeal against the decision of a refugee status officer of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a national of Israel.

INTRODUCTION

[2] The appellant has been summoned for military service in Israel and objects to performing it. The central issues in his case are whether his objection to serving in the Israeli Defence Forces ("IDF") brings him within the ambit of the Refugee Convention ("the Convention").

THE APPELLANT'S CASE

[3] The appellant was born in Ukraine, in the former Soviet Union. His mother is half Jewish.

[4] He was baptised into the Russian Orthodox Church in 1990 or 1991. After the fall of communism, his family started finding life in the Ukraine difficult so

decided to move to Israel in 1993. His maternal grandparents had emigrated there three years earlier. Prior to moving to Israel, the family obtained Israeli citizenship.

[5] In Israel, the appellant was thought of as being Jewish, on account of his maternal lineage.

[6] The appellant attended primary and secondary school in Israel. He was mistreated at primary school by the other students because he was Russian, although this decreased over the years as he learned Hebrew. He attended a year of high school in 1996 and faced no difficulties there.

[7] In 1998 the family decided to move to Canada. Their motivations for doing so were mixed. In part they moved due to the violence and fighting in Israel. Other reasons were that a family member was planning on moving there, and because they did not want the appellant to have to perform military service. The appellant travelled on his mother's passport.

[8] The family lived in Canada for two and a half years, during which time they applied for refugee status principally on the ground that they were discriminated against in Israel due to their Russian origin. Their application was declined. The appellant attended high school while in Canada.

[9] In 1998 the appellant's parents' Ukrainian passports were about to expire. The appellant's father attended the Ukrainian embassy to extend the passport but was advised that they could not do so without renouncing their Israeli citizenship, as Ukraine does not recognise dual citizenship. The parents did not wish to renounce their Israeli citizenship so the passports lapsed.

[10] In 1998, the appellant received a telephone call from his grandmother in Israel saying that he had received a letter from the IDF asking him to report for check ups. Upon the appellant's advice, the grandmother telephoned the IDF and advised them that the appellant was resident in Canada.

[11] In October 2000, the family returned to Israel and the appellant continued his high schooling, completing it in 2002.

[12] The appellant did not have any interaction with the government about his military service obligations until 2002. Conscious that it was only a matter of time before the IDF military office would contact him about the requirement that he perform military service, the appellant, on the advice of his mother, went in person

to the military recruitment office. There he informed the IDF official that he objected to performing military service because he did not like killing. The official who dealt with him took notes but did not comment. Shortly after this he received a letter advising him that an appointment had been made for him to visit a psychiatrist for an assessment. Upon attending the appointment the psychiatrist questioned him about his reasons for not wanting to serve in the military, and appeared to be trying to convince him to join, telling him that he himself had killed people.

[13] The appellant was subsequently sent a letter advising him that he had achieved a score of 97% for his psychiatric assessment and that he was to report for service on 24 March 2003. He was also sent a pamphlet about the various units in the IDF and a form via which he could request to serve in a particular unit or area. The appellant was only given the option of serving in units that were engaged in active combat. He understands that this was because he had achieved the top score of 97% in his assessment for fitness for service, and persons with such scores were automatically assigned to active combat. The appellant did not respond to the letter as he did not wish to serve in any of the units.

[14] After the appellant was called up the family decided that he should come to New Zealand to avoid the service. Prior to leaving for New Zealand the appellant telephoned the military office and advised that he wished to visit relatives in New Zealand prior to conscription. He assured them that he would return to Israel before 24 March 2003 and they did not seek to prevent his departure. It was common practice for recruits to go overseas before joining the military.

[15] On 27 February 2003 he departed Israel and travelled to New Zealand where he was granted a temporary permit.

[16] On 24 March 2003, the day the appellant was required to report for duty, a military official telephoned the appellant's mother asking where the appellant was. The appellant's mother advised the official that the appellant was overseas and she did not know when he would be returning. The official said that he should return to Israel and that the military would be waiting for him. Two weeks later she received another call from a different official, again asking for the appellant. She repeated her advice that the appellant was overseas for an unspecified period.

[17] In April 2003, the appellant's father came to New Zealand to join the appellant and obtained a work permit. He had lived in Germany and Canada respectively since his relationship with the appellant's mother had ended in 2001. After four months he returned to Canada to marry a Canadian woman.

[18] In April 2003 the appellant obtained a two year student permit, and proceeded to work in a variety of casual jobs. He went on a month long holiday in Fiji in the month his student permit was to expire, and was granted a three month visitor's permit upon his return.

[19] In approximately May 2003 another military official telephoned the family in Israel, this time speaking with the appellant's younger brother. The appellant's brother advised the official that the appellant was still overseas.

[20] On 14 July 2005, more than two years after arriving in New Zealand, the appellant applied for refugee status. He was interviewed by the Refugee Status Branch on 24 August 2005 and 27 January 2006, and a decision declining his claim was delivered on 28 November 2006.

[21] On appeal, the appellant says that a risk of discrimination in Israel due to his Russian origin does not form part of his claim, and that his claim is based solely on his conscientious objection to performing military in the IDF in Israel.

[22] The appellant was raised to be a pacifist largely due to the experience of his grandparents in the Holocaust. He condemns war and all other forms of violence such as capital punishment and the smacking of children. He would prefer to be jailed than perform military service.

[23] The appellant submitted a certified translation of a letter dated 2 December 2005 from the IDF in support of his claim.

<u>THE ISSUES</u>

[24] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

> "... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such

> events, is unable or, owing to such fear, is unwilling to return to it."

[25] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

[26] The appellant's account is accepted. The Authority accepts that he would be conscripted into the IDF if returned to Israel.

Country information on military service

[27] All Israeli citizens and permanent residents are liable for military service, which is usually three years in duration. Women can claim exemption from military service on grounds of conscience under arts 39(c) and 40 of the Defence Service Law. Legislation does not permit exemption for men on conscientious grounds. "Alternative civilian service" was in the past legally available to women conscientious objectors only, but this process was never used and is now effectively defunct. There is no alternative military service for men, although on occasion individual commanders may organise for conscientious objectors to undertake unarmed service. War Registers' International *Refusing to Bear Arms: A worldwide Survey of Conscription and Conscientious Objection to Military Service: Israel* (1998-2001).

[28] Under Israeli law failure to fulfil a duty imposed by the National Defence Service law is punishable by up to two years' imprisonment and attempting to evade military service is punishable by up to five years' imprisonment; War Registers' International *Refusing to Bear Arms: A worldwide Survey of Conscription and Conscientious Objection to Military Service: Israel* (1998-2001).

Conscientious objectors in refugee law

[29] The Authority has consistently taken the position that objection to performing military service is not grounds for refugee status. This is subject to two

exceptions. The first relates to Convention based discrimination: where conscription is conducted on discriminatory grounds, or punishment for evasion is applied disproportionately the Convention may be engaged. The second exception, articulated comprehensively in *Refugee Appeal 75378* (19 October 2005), is where a person objects on grounds of conscience to performance of military service, where there is a real chance that such service will require that person's involvement in war crimes. The appellant was unrepresented on his appeal, and did not raise any legal arguments before the Authority. However his counsel submitted to the Refugee Status Branch, on the basis of *Refugee Appeal No 75378* that, it would be persecutory for this appellant to serve in the IDF because the IDF violates the laws of war.

[30] *Refugee Appeal No 75378* develops and consolidates earlier jurisprudence which focused on conscientious objection in the context of military action "condemned by the international community as contrary to basic rules of human conduct" (see Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR, January 1988, para 171; *Refugee Appeal No 71219* (14 October 1999). *Refugee Appeal No 75378* frames the issues for consideration as centring on Article 18 of the International Covenant on Civil and Political Rights ("ICCPR"). Article 18(1) provides a right to manifest a belief, subject to various limitations prescribed in Article 18(3). The Authority in *Refugee Appeal No 75378* held that "state policy requiring compulsory military service can, in principle, amount to the pursuit of an aim deemed legitimate by Article 18(3)", but that "any legitimate aim the state may have in conscripting persons for participation in armed conflict, does not extend to forcing participation in conduct that amounts to breaches of the laws of war". It further held that the imposition of a term of imprisonment for refusal to participate in such a conflict undermines human dignity in a key way and is appropriately classified as "being persecuted".

The nature of the appellant's objection to military service

[31] The first question for consideration is whether the appellant's views regarding military service are appropriately categorised as a "belief" under Article 18 of the ICCPR. *Refugee Appeal No 75378* provides as follows:

> "To be potentially within the ambit of Article 18, any objection must, however, be one that can be appropriately categorised as a belief, if it is to be capable of being relied on by the individual to ward off a requirement of state that they perform military service against their will. Objections arising from matters amounting to personal inconvenience would not qualify. While the individual concerned has the right under Article 18(1) to privately think he/she should not be obligated to serve

> because of matters of inconvenience, this cannot be sensibly described as a belief. "Belief", in this sense, transcends mere point of view and rather describes a state of mind that is fundamental to the identity of the individual as a human being."

[32] The Authority accepts that the appellant has demonstrated that he has a dislike of killing and violence that is fundamental to his identity as a human being and that amounts to a "belief" at international law. In making this finding we have taken into account his evidence that he advised the Israeli authorities that he was a pacifist, and his evidence to the Refugee Status Branch and the Authority as to the nature and source of his pacifism.

Does the appellant face a real chance of being persecuted upon his return to Israel?

[33] In the event that the appellant is returned to Israel there is a real chance that he will either be prosecuted under the National Defence Service law and sentenced to a term of imprisonment for his failure to attend his call up to military service or required to perform military service.

[34] The Authority has previously considered the nature of the actions of the Israeli military in the context of a conscientious objector claim. In *Refugee Appeal No 2026* (30 March 1995) the Authority considered the question of the Israeli actions in the occupied territories under the test that preceded that of *Refugee Appeal No 75378* (19 October 1995), namely whether the military action was condemned by the international community as contrary to the basic rules of human conduct. In that case the Authority followed the decision of the Canadian Immigration and Refugee Board decision H (MI) (Re) U92-06311. That case held that, despite reports of human rights violations, the Israeli presence in the Occupied Territories was not a military action condemned by the international community as contrary to the basic rules of human conduct.

[35] The related question for consideration in this case is whether, once he is compelled to undertake military service, there is a real chance of the appellant being engaged in activity which amounts to, or renders him complicit in, war crimes. Evidence that elements of the Israeli military sometimes commit war crimes is, in itself, insufficient grounds upon which to grant refugee status. There must be a pattern of systemic and ongoing war crimes such as to demonstrate that an ordinary solider has a real chance of being required to commit or be complicit in such abuses.

Country information on actions of military

[36] The counsel who represented the appellant before the Refugee Status Branch in 2005 cited reports by Amnesty International and Human Rights Watch which referred to the killing of Palestinian civilians, Israel's settlement activity, excessive destruction of property, obstruction of medical assistance and targeting of medical personnel, torture and the use of Palestinians as human shields. She also referred to a report by Amnesty International which found that Israel's processes for investigating human rights violations by the military were inadequate and that "most members of the Israeli army and security forces continued to enjoy impunity."

[37] The material cited by counsel before the Refugee Status Branch indicates that war crimes are indeed committed from time to time by members of the IDF, but falls short of demonstrating that the IDF has such a propensity to commit war crimes as to result in a real chance of the appellant himself being forced to commit them whilst undertaking military service.

[38] The reports cited by counsel make the following allegations that the IDF has committed war crimes.

Settlement activities

[39] The Human Rights Watch letter dated 11 April 2005 to President Bush refers to Israel's continuing settlement activity being a violation of international humanitarian law, and in particular Article 49(6) of the Fourth Geneva Convention. It is not clear from the material cited by counsel what involvement, if any, the military have with the settlements, and therefore whether the appellant would, through his involvement in the military, be required to be involved or complicit in settlement activity. Significantly, it is also noted that very soon after the letter cited by counsel was written, Israel started pulling out its occupying forces and settlers from the Gaza strip, completing the process in September 2005.

Other war crimes

[40] The second excerpt cited by counsel that referred to the commission of war crimes was the 2005 country report by Amnesty International *Israel and the Occupied Territories* which refers to "certain" abuses committed by the IDF constituting crimes against humanity or war crimes "including unlawful killings,

extensive and wanton destruction of property, obstruction of medical assistance and targeting of medical personnel, torture and the use of Palestinians as "human shields". Each of the specific matters cited by Amnesty International as amounting to war crimes is discussed below, as well as updated information on these matters contained in section G (Use of excessive force and other abuses in Internal and External Conflicts) of the 2006 United States Department of State Report.

Unlawful killings and destruction of property

[41] The 2005 Amnesty International Country Report refers to "unlawful killings" and "extensive and wanton destruction of property" as being among the "certain abuses" committed by the IDF that constitute war crimes. That report appears to distinguish between "unlawful killings" and those amounting to war crimes, indicating that only certain of the killings amounted to war crimes. A further Amnesty International report cited by counsel entitled *Israel and the Occupied Territories: The place of the fence/wall in international law* (19 February 2004), refers to the Israeli army having killed 2,300 unarmed civilians including more than 400 children since September 2000, referring to these as "abuses" rather than war crimes.

[42] The Human Rights Watch letter cited also refers to the killing of unarmed Palestinians as a result of reckless shooting and shelling, and a subsequent Human Rights Watch Report *Country Summary: Israel/Occupied Territories* (January 2005) refers to attacks in Palestinian areas over the course of 2004 (which were notably most intense and extensive in the now demilitarised Gaza strip) which failed to demonstrate that the attackers had used all feasible measures to avoid or minimize harm to civilians and their property. Human Rights Watch, like Amnesty International, does not appear to be suggesting that the killings and destruction of property necessarily amount to war crimes: in contrast to other matters referred to in each report, they are not described as such.

[43] The 2006 United States Department of State report refers to the killing of at least 660 Palestinians in the West Bank, Gaza and Israel during military and police operations in the 2005 year. It reports that the IDF claimed that the majority of Palestinians killed were armed fighters or persons engaged in planning or carrying out violence against Israeli citizens and military targets. According to a group called B'tselem at least 322 of those killed did not take part in the hostilities at the time they were killed.

[44] In the absence of any apparent suggestion that the attacks were intentionally directed at civilian personnel and property, the key international humanitarian law provisions that these matters potentially engage would appear to be those contained in Articles 8(2)(a)(iv) and 8(2)(b)(viii) of the Rome Statute of the International Criminal Court. These provisions respectively proscribe:

> "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" (Article 8(2)(a)(iv); and
>
> "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" (Article 8(2)(b)(viii).

[45] In order for either of these provisions to be breached, an assessment must be made of the relative merits of the particular military objective of the attack and a balancing exercise undertaken. While it is possible that some of the killings referred to may breach the relevant provisions, there is insufficient basis upon which to conclude that the killings of civilians and destruction of property referred to in the reports evidence any sustained pattern of the commission of acts amounting to war crimes.

Obstruction of medical assistance and targeting of medical personnel

[46] The Amnesty International report refers to the "obstruction of medical assistance and targeting of medical personnel". To the extent that such attacks were intentional, they would potentially engage Article 8(2)(b)(ii), 8(2)(b)(iii) and 8(2)(b)(ix) of the Rome Statute of the International Criminal Court. In the absence of further material, however, it cannot be determined whether these evidence breaches of the relevant provisions.

[47] The Amnesty International report does not give any figure for the number of such attacks. The United States Department of State *Country Reports on Human Rights Practices for 2006: Israel and the Occupied Territories* (6 March 2007) indicates such attacks are infrequent, referring to Israeli forces having "occasionally fired upon" medical personnel and ambulances during 2006.

Torture

[48] Torture committed by army personnel would breach Article 2(a)(iv) of the Rome Statute. Only the Amnesty International report suggested that torture as a war crime had been committed by Israel. The United States Department of State

Country Reports on Human Rights Practices for 2006: Israel and the Occupied Territories (6 March 2007), however, also refers to a number of instances of torture having occurred at the hands of the Israeli government, including certain instances of torture at the hands of IDF soldiers, namely the blindfolding, beating and threatening of two Palestinian men in February, and incidents of beatings and abuse by IDF soldiers in the West bank area of the Ramin Plain. The report states that torture is outlawed under Israeli law and that investigations are underway with regard to eight of the incidents of alleged torture at the hands of the IDF in the Ramin Plain, as well as two 2005 cases.

The use of Palestinians as Human Shields

[49] The use of human shields potentially engages Article 8(2)(b)(xxiii) of the Rome Statute of the International Criminal Court. Again, the material submitted by counsel does not elaborate on the nature and extent of such incidents. The 2007 the United States Department of State report refers to further such incidents, but notes that such use is in violation of both Israeli law and policy, as articulated in High Court rulings in 2002 and 2005 and an IDF Chief of Staff order in 2005. It appears that, at worst, there are occasional isolated instances of soldiers or military units making use of a “human shield” – a frequency well below the required pattern of systemic and ongoing war crimes and expressly not authorised by the IDF.

Is there a real chance of the appellant being compelled to be involved in violations of the laws of war?

[50] The material submitted by counsel and the recent material considered by the Authority demonstrates that violations of the laws of war do occur at the hands of the IDF. However, the evidence does not establish a sustained pattern of war crimes such as to demonstrate that there is a real chance that an ordinary soldier in the position of the appellant would be required to be involved in war crimes.

[51] It is not possible to ascertain with any certainty from the country information before the Authority the level of the military hierarchy at which the violations of international humanitarian law are initiated. However it is likely that at least some of the violations that have been documented occur due to the reckless or miscreant actions of renegade ordinary soldiers. In other words not all such actions would occur as a result of superior orders. Accordingly, the appellant’s own conscience would render him much less likely than the average soldier to be

a perpetrator of war crimes. Furthermore, certain of the war crimes committed by the IDF are clear violations of Israeli law, namely torture and the use of human shields. Accordingly it seems that the appellant could legitimately object and appeal to a higher authority if ordered to commit such crimes.

[52] Section 129P(1)) of the Immigration Act 1987 provides that it is the responsibility of the claimant to establish the claim. We find that the appellant has not established that there is a real chance that he will required to commit or be complicit in violations of the laws of war if he serves in the Israeli military.

CONCLUSION

[53] For the reasons mentioned above, the Authority finds the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

“S Murphy”

S Murphy
Member