Case No: C/2777 & C/2000/2794

Neutral Citation Number: [2001] EWCA Civ 681

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE
IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 11th May 2001

B e f o r e :

LORD JUSTICE WALLER
LORD JUSTICE LAWS
and
LORD JUSTICE JONATHAN PARKER

- -

(1) YASIN SEPET **Appellants**
(2) ERDEM BULBUL
- v -
SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

(UNHCR INTERVENING)

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Ian Macdonald QC, Nadine Finch and Rick Scannell (instructed by **Deighton Guedalla** (First Appellant - Sepet) and **Birnberg Peirce & Partners** (Second Appellant - Bulbul) for the Appellants)
John Howell QC and Mark Shaw (instructed by **The Treasury Solicitors** for the Respondent)
Tim Eicke (instructed by Wesley Gryk, for the **United Nations High Commissioners for Refugees)**

- -

Judgment
As Approved by the Court

LORD JUSTICE LAWS:

INTRODUCTORY

1 These appeals are brought against a determination of the Immigration Appeal Tribunal ("the IAT") promulgated on 23 May 2000 and now reported at [2000] IAR 445. By that decision the IAT, chaired by its President, Collins J, dismissed the appellants' appeals against decisions of the same Special Adjudicator, who had in each case dismissed the appellant's appeal to him against the Secretary of State's refusal of asylum. Collins J himself gave permission to appeal to this court on 16 June 2000, stating that the decision of the IAT **"was intended to settle the right approach to Turkish military service/draft dodgers"**, and that the matter should be considered by the Court of Appeal. At paragraph 3 of the determination itself the IAT had said:

> **"Although these are not starred cases because the President is sitting with only one legally qualified Chairman, they are intended to give guidance on the questions raised and should be followed in preference to any other tribunal decisions which touch on these issues. This decision should therefore be regarded as authoritative and should be regarded as binding on all Adjudicators and Tribunal Chairman."**

2 Both appellants are Kurds from Turkey. Mr Sepet arrived in the United Kingdom on 10 October 1990 and claimed asylum immediately. It was refused by the Secretary of State on 29 September 1993. The effective determination of the Special Adjudicator in Mr Sepet's case was not promulgated until 19 February 1998, after hearings on 3 October 1997 and 28 November 1997. Unfortunately this was the third time the case had gone before a Special Adjudicator: two previous appeals had been allowed by the IAT, and on each occasion the matter was remitted for a fresh hearing. Ultimately leave to appeal against the Special Adjudicator's decision was granted on 17 April 1998.

3 Mr Bulbul is said to have arrived in the United Kingdom on 29 April 1996. He claimed asylum on 7 May 1996, which was refused on 11 July 1996. His appeal to the Special Adjudicator was dismissed by a decision promulgated on 9 March 1998. The IAT's refusal of permission to appeal from that decision was quashed in the High Court, and so leave to appeal to the IAT was at length given in Mr Bulbul's case also.

THE FACTS

Mr Bulbul

4 The Special Adjudicator found that Mr Bulbul is an Alevi Kurd with nationalist views. He accepted part of his evidence but not the whole of it. He considered that Mr Bulbul had exaggerated and embellished his claim for asylum. He found that Mr Bulbul had failed to establish that there was a reasonable likelihood

that he would be persecuted on account of his previous political activities, which had been at a very low level, if he were required to return to Turkey.

5 In relation to Mr Bulbul's objection to doing military service, the Special Adjudicator found that **"his reasons relate to his general antipathy towards the policy of the Turkish Government to oppose self determination for the Kurdish people"**. Mr Bulbul did not claim that he would refuse to serve in the military under all circumstances; the Special Adjudicator found that **"his fear is that he might be sent to the operational area and be required to take military action, possibly involving atrocities and abuse of human rights, against his own people. I do not consider that his objection is therefore one of moral conviction but rather that it stems from his political views"**. The Special Adjudicator entertained **"serious doubts as to whether** [Mr Bulbul] **has any objections other than one of political disagreement"**. But in any event he was not satisfied that, if he did serve, Mr Bulbul would be **"associated with acts that offend the basic rules of human conduct"**. Although the Special Adjudicator found that people of Kurdish origin sometimes suffer discrimination and taunts during military service at the hands of their Turkish compatriots, he was not satisfied that this would amount to persecution.

6 The Special Adjudicator found that Mr Bulbul would be liable to be apprehended on his return to Turkey, and face a charge carrying a sentence of between six months and three years imprisonment if found guilty if he continued to refuse to undertake military service. There was no suggestion that Kurds are treated more harshly than others under the penal code. While there is no provision for civilian alternatives to military service, the Special Adjudicator found that such a sentence could not be considered as either excessive or disproportionate.

Mr Sepet

7 The Special Adjudicator found that Mr Sepet was not a generally reliable witness. He had at best embellished and at worst fabricated certain important parts of his evidence. He found that Mr Sepet had engaged in some low level leftist and opposition politics before he left Turkey in October 1990. But he was not satisfied that the Turkish authorities would have any interest in him on account of any past activities, or that he might be tortured as a political detainee on his return. He concluded that Mr Sepet did not have a genuine fear of persecution when he left Turkey on the basis of his political record. He was not satisfied that there was a serious likelihood of his being persecuted for leftist activities if returned to Turkey.

8 The Special Adjudicator was prepared to accept that Mr Sepet would still be liable for conscription on his return to Turkey. Mr Sepet did not claim that he would refuse to serve in the military in all circumstances: the Special Adjudicator found that **"his objections stem from his political opposition to the present Turkish Government and from his determination not to be involved on behalf of the Turkish Army in atrocities which he claims he might be required to participate in, especially against his own people in the Kurdish Areas… Whilst I largely discount his somewhat effusive embrace of human rights, I accept that his reluctance to do his** [military service] **does stem from his genuine political opinions"**. He found, however, that Mr Sepet had failed to demonstrate **"that his**

conscription into the Turkish army would involve him in being required to engage in military actions which have been condemned by the international community as contrary to the basic rules of human conduct".

9 The Special Adjudicator also found in Mr Sepet's case that the prison sentence which Mr Sepet might face was not so excessive or disproportionate as to amount to persecution. Accordingly, Mr Sepet had failed to satisfy him that there was a serious possibility that he would be persecuted on account of his political opinions if he had to return to Turkey.

THE CONVENTION AND THE UNHCR HANDBOOK

10 It is convenient before proceeding further to set out the material provisions of the 1951 Geneva Convention on the Status of Refugees ("the Convention"). The second recital is in these terms:

> **"Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms"**.

Then Article 1A defines a "refugee" as

> **"any person who:**
> **... ....**
> **(2) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;..."**

In view of one aspect of the case which I will discuss in due course, I should also set out Art. 1F:

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

11 In addition I should also at this stage refer to the material provisions of the Handbook on Procedures and Criteria for Determining Refugee Status ("the Handbook"). It was published in 1979 by the United Nations High Commissioner for

Refugees ("UNHCR"), and has been re-edited from time to time, most recently I think in 1992. Its status, or at any rate its legitimate utility in the resolution of questions concerning the application and interpretation of the Convention, has from time to time been the subject of comment in the decided cases. It is not, with respect, necessary to refer to the texts in question since, as I understand it, it is generally (and plainly rightly) accepted that while the Handbook is not authoritative, and certainly not a source of law, it offers useful guidance in relation to the Convention. Chapter V, title B is headed **"Deserters and Persons Avoiding Military Service"**. It is in these terms:

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

punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

172. Refusal to perform military service may also be based on religious convictions...

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

THE DECISION OF THE IAT

12 An important dimension of the determination of the IAT is the distinction, which the IAT was at pains to emphasise, between "absolute" and "partial" conscientious objectors. Paragraph 50:

"There will be individuals who can demonstrate a deeply held and genuine belief that any form of military service would be against their genuine political, religious or moral convictions, or to valid reasons of conscience, sufficient to bring them within paragraph 170. We will refer to them as absolute conscientious objectors."

Then paragraphs 57 - 60:

"57. Those who are not absolute conscientious objectors but nevertheless have some degree of objection to military service may, for convenience, be referred to as partial objectors... The word 'conscientious' is best avoided in this context. It would be inappropriate to describe some types of objection as conscientious.

58. There is a tension between an individual's rights and his duties to the State. This tension requires a different balancing exercise in the case of partial objectors.

59. If an individual does not satisfy the tests to which we will refer he cannot qualify <u>solely</u> on the basis of the sort of partial objection which states, in frequently heard examples, 'I would be prepared to fight for a Kurdish state', 'I am not prepared to kill Kurdish people' or 'I am not prepared to for the Turkish state against Kurdish people'. Each of these

examples could be a genuine political religious or moral conviction or a valid reason of conscience but would not be an acceptable reason and could not be relied on to the extent that it differentiated between those against whom the individual would be prepared to fight on ethnic grounds. A conviction which dictates that an individual would be prepared to kill those of different ethnicity is not an acceptable conviction. It is as unacceptable to say that one would not kill people of a particular race, party or religion as to say that one would kill people of another race, party or religion...

60. Partial objections to military service that do not involve unacceptable discrimination may be part of valid reasons for avoiding military service. For example it is not difficult to imagine an objector with a deeply held conviction against killing children and non-combatants or an objector who would refuse to engage in killing prisoners or torture...

13 The "tests", foreshadowed in paragraph 59, by which the IAT considers that a claim to asylum by a "partial" conscientious objector should in effect be decided are then set out. Paragraphs 61, 62, 67:

"61. ...the first question should be to establish exactly what type of military service or military action is objected to and why... The claim of an individual who cannot establish a reasonable likelihood of some deeply held conviction, which is itself non-discriminatory, will fail at this stage.

62. The second test should be to establish whether the armed services in which the individual would have to serve are engaged in a 'type of military action condemned by the international community as contrary to basic rules of human conduct' (paragraph 171 of the Handbook)...

67. The third test is to establish whether an individual is likely to have to perform military service in a way that would involve taking or being closely involved in actions offending the basic rules of human conduct..."

14 Adopting the approach outlined in these paragraphs, the IAT found, first, that neither appellant was an "absolute" conscientious objector (paragraph 75: before this court, that is uncontentious). Secondly, in paragraph 87:

"On a close examination of the appellants' beliefs, and viewing them against the country conditions, we find that they do not amount to deeply held convictions. In any event we find that the appellants have not established a reasonable likelihood that they will have to perform military service in a way that would breach their convictions (or beliefs). They fail both on the subjective test of whether their beliefs will be infringed and the objective test in relation to the nature of the military service they are likely to have to perform."

THE PROPER SCOPE OF THE APPEALS

15 These appeals have been treated, at any rate in the course of argument, as an appropriate vehicle for decision by this court of great questions. Mr Howell QC for the Secretary of State has submitted (and I shall come to it) that in principle no right to asylum under the Convention can arise by reason only of the claimant's conscientious objection to military service, whether absolute or partial, and from his fear of punishment for refusal of the draft. I think we have to consider whether it is necessary or appropriate in the circumstances of these appeals to embark upon so large a debate.

16 The IAT effectively assumed that an absolute objector might have a claim; the contrary was not, I think, then contended by the Secretary of State. We do not therefore have the benefit of any considered reasoning by the IAT upon the question. That was also the position in *Zaitz* [2000] INLR 346, a decision of this court to which I will refer further in due course. In that case the court declined to embark upon the issue whether threat of punishment for conscientious objection *per se* might give rise to a good asylum claim, and a distinct reason why the court so held was the lack of a considered judgment on the issue from the specialist tribunal below. Moreover, it is nowadays trite that generally speaking asylum claims cannot be considered in a vacuum, or a space occupied only by legal principles: the particular facts are always very important. It might be thought that the only real question in these cases is whether the IAT's conclusion, expressed in paragraph 87 of the determination which I have set out, can be sustained on the evidence.

17 But that approach would not, I think, encapsulate the real question or questions arising on these appeals. The IAT laid no ground for any departure from the findings of fact made by the Special Adjudicator; and notwithstanding the first sentence of paragraph 87 (which I think is somewhat puzzling), does not express any such departure. On the Adjudicator's findings, such reasons as he held were entertained by the appellants for refusing the draft were, so far as I can see, found by him to be perfectly genuine; albeit he was far from accepting the whole of the evidence of either of them. Accordingly these appeals unavoidably engage the question whether the IAT's approach to *partial* conscientious objection was correct in principle. If it was not, the appellants might have a case on the facts as found by the Adjudicator, depending on this court's view of the correct legal position. But an appreciation of the question, in what circumstances and subject to what conditions might a partial objector show a good case for refugee status, involves the issue whether *absolute* objection might ground an asylum claim. If it cannot, then the possibility of a claim based on partial objection may be fatally undermined; at least it is necessary to examine whether that is so.

18 In these circumstances it is in my judgment necessary to confront and resolve the full reach of the arguments that have been addressed to us.

THE ISSUES IN OUTLINE

19 The core of the appellants' principal case (Mr Sepet has two subsidiary points) may I think be summarised in these following propositions.

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

20 In (i) I have used the expression "internationally recognised" so as to beg no questions at this stage in relation to what emerged in the course of the hearing as a major dispute of principle between the parties. In essence Mr Macdonald QC for Mr Bulbul, whose arguments were adopted by Mr Scannell for Mr Sepet, submitted that international practice, various resolutions of international bodies and other materials issued by them, and the views of academic legal experts in the field together constituted a sufficient basis for this court to conclude that there exists a fundamental right of conscientious objection which justifies or (I think he would say) requires this court to hold that proposition (i) is made out. In that case, Mr Macdonald would submit that there remains but a short step to propositions (ii) and (iii). Mr Macdonald's position was in principle supported by UNHCR, who put in a skeleton argument and who at our invitation was represented by Mr Eicke of counsel on the last day of the hearing. Mr Eicke made no submissions as to the facts of these cases, but 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.

21 Mr Howell contests this position root and branch. His case is that if the court is to condemn an act of punishment, which is lawful in the territory where it is imposed and not itself disproportionate or discriminatory, as amounting to persecution within the meaning of the Convention, nothing less than a settled rule of international law will suffice as justification of such a course; and there is none. Nothing in the materials relied on by Mr Macdonald amounts to anything more than aspiration or exhortation. Accordingly, proposition (i) is false; there is therefore no basis for proposition (ii) (or (iii)). He submits further that even if punishment of a conscientious objector for draft evasion should fall to be regarded as persecution, still it would not be persecution *for a Convention reason* if the punishing authority were actuated by nothing more than the conscript's evasion of the draft. The words in Article 1A(2) **"for reasons of race, religion** [etc]**"** focus on the putative *persecutor's* state of mind, not that of the potential victim. So unless the punishment in question is directed against the conscript because he is a conscientious objector, and not *merely*

because he is a draft evader, it cannot be persecution for a Convention reason and so cannot generate a good claim to asylum. Moreover, even if the conscript were targeted because he is a conscientious objector, there would still be no Convention reason unless conscientious objection could be said to constitute an implied political stance. The Convention reasons do not include conscientious objection on their face. And Mr Howell would say that the appellants' case on the facts cannot help them: an objection to fighting fellow Kurds can have no greater force than an absolute pacifist objection to the draft (and may have less).

22 In my judgment these rival contentions raise issues of some depth, not least relating to the proper role of the court (as opposed to the executive and legislative branches of government) in addressing asylum claims of this kind. I will first set out the relevant international materials, without comment at this stage. It is convenient to start with the academic contributions, since Mr Macdonald deployed them in some measure to encapsulate his case.

THE ACADEMIC MATERIALS

23 Mr Macdonald referred to the works of two well known and distinguished academic writers on the subject of refugee status, namely Professor Hathaway of the Osgoode Hall Law School at York University in Canada and Professor Goodwin-Gill of Oxford. In *The Law of Refugee Status (* Butterworths) Professor Hathaway says this:

> **"The right to conscientious objection is an emerging part of international human rights law, based on the notion that 'freedom of belief cannot be truly recognised as a basic human right if people are compelled to act in ways that absolutely contradict and violate their core beliefs'. Drawing on this right to freedom of thought, conscience, and religion contained in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the United Nations Commission on Human Rights has expressly recognised the right to conscientious objection as 'a legitimate exercise of the freedom of thought, conscience and religion', and appealed to States to provide for alternative service of a civilian and non-combative nature. This view is shared within the Council of Europe, where the right to an alternative to military service is recognised for persons who express compelling reasons of conscience against bearing arms. Thus, insofar as a state fails to make provision for the accommodation of conscientious objectors, a principled claim to refugee status may be established."** (pp. 182-183)
>
> **"In sum, claims which involve failure to perform military service, while not routinely within the scope of the Convention definition, may nonetheless lead to a recognition of refugee status in three circumstances... Third, the failure to recognise the legitimacy of conscientious objection and to provide for an appropriate and proportionate non-combative alternative, may in and of itself constitute a sufficient threat to human rights to ground a claim to refugee status based on implied political opinion."** (p. 185)

24 In *The Refugee in International Law* (Second Edition, Clarendon Press) Professor Goodwin-Gill says this:

> **"No international human rights instrument yet recognises the right of conscientious objection to military service, even though the right to freedom of conscience is almost universally endorsed... The international community nevertheless appears to be moving towards acceptance of a right of conscientious objection, particularly as a result of the standard-setting activities of United Nations and regional bodies. Military service and objection thereto, seen from the point of view of the State, are also issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of State authority; it is a political act… While the State has a justifiable interest in the maintenance of its own defence, the measures taken to that end should at least be 'reasonably necessary in a democratic society'; specifically, there ought to exist a reasonable relationship of proportionality between the end and the means. The element of proportionality is especially important in this context of competing interests, where the right in question has not yet been generally accepted by States as falling within the corpus of fundamental human rights…**
>
> **States are free to recognize conscientious objection in itself as a sufficient ground upon which to base recognition of refugee status."** (pp. 55-59)

25 Professor Goodwin-Gill has additionally provided an expert's report (strictly speaking in Sepet's case), dated 18 December 2000. I set out these following passages:

> **"10. A person who refuses to do military service for reasons of conscience may be a refugee within the meaning of the Convention, if he or she has a well-founded fear of persecution, and even if the penalty feared results from application of the law…**
>
> **47. Although the right of conscientious objection to military service is not included as such** [sc. in international human rights instruments]**…, international instruments leave open the possibility that failure effectively to take account of the individual's conscientious beliefs may violate his or her human rights.**
>
> **58. Whereas in 1979 the Office of** [UNHCR] **was somewhat hesitant in its assessment of human rights developments ('in the light of these developments, *it would be open* to Contracting States to grant refugee status to persons who object to performing military service for genuine reasons of conscience': UNHCR *Handbook*, para. 173; emphasis supplied), twenty-one years later the right to conscientious objection to military service is now implicit in the general freedom.**

Conclusions

147. Taking account of developments in international human rights law, including State practice, it is the view of the writer that States parties to the 1951 Convention…, having found a credible, sincerely and deeply held opposition to military service, either general or partial, ought to recognize such objection *in itself* as a sufficient ground upon which to base recognition of refugee status. In this sense, the value attached to the fundamental right to freedom of conscience implies that any measures having as their object *to compel* the individual *to act* contrary to sincerely held belief, or any punishment, such as deprivation of liberty, imposed to that end, amounts to persecution within the meaning of the 1951 Convention.

148. Even if this position were not accepted in its entirety, this writer is nevertheless of the view that, by way of customary international law and by voluntarily subscribing to regional and universal human rights treaties, States have bound themselves to ensure special protection to the individual's freedom of conscience. In resolving any 'collision' of interests, this means that standards of reasonableness and proportionality must be applied to the circumstances of each case in which the individual is led, by reason of his or her conscience, to adopt a position in opposition to the government."

THE TREATIES

26 Mr Macdonald accepted that there is at the present time no extant regional or international treaty or covenant which in terms guarantees the right to conscientious objection to military service. But he relies on a number of well known treaty measures which (as I understand the argument) are said to play their part in an evolutionary process, such that taking them with other materials, including the academic contributions, this court should now conclude that a right of conscientious objection has been sufficiently recognised on the international plane to justify a claim to asylum in cases such as these.

(i) The European Convention on Human Rights and Fundamental Freedoms ("ECHR")

27 The ECHR entered into force on 3 September 1953. At the present time there are over forty States parties to the ECHR. Here are the relevant provisions:

"Article 4

...

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term 'forced or compulsory labour' shall not include:

...
(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service...

Article 9

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

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order health or morals, or for the protection of the rights and freedoms of others."

(ii) The International Covenant on Civil and Political Rights (1966) ("ICCPR")

28 The ICCPR entered into force on 23 March 1976. I do not believe we have up-to-date information as to the number of States parties, but in 1992 (when the third edition of Professor Brownlie's *Basic Documents on Human Rights* was published by the Clarendon Press) it was 95. The relevant provisions are Articles 8 and 18. Art. 8(3)(a) is in terms identical to Art. 4(2) of ECHR. Art. 8(3)(c)(ii) provides that the term 'forced or compulsory labour' shall not include **"[a]ny service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors"**. In effect this is equivalent to ECHR Art. 4(3)(b).

29 Art. 18 is the analogue of ECHR Art. 9. The words are not identical, but I do not think that the differences matter.

(iii) The American Convention on Human Rights (1969) ("ACHR")

30 This Convention was signed on 22 November 1969 by twelve States in central and South America, and by 1992 had been ratified by 23 States. Art. 6 is the analogue of ECHR Art. 4; specifically, Art. 6(3)(b) is the mirror of ECHR Art. 4(3)(b). Art. 12 is the analogue of ECHR Art. 9.

THE UNITED NATIONS MATERIALS

31 The Commission on Human Rights is a permanent body constituted by United Nations representatives or appointees whose task, as I understand it, is to examine issues relating to human rights as they arise across the globe. From time to time the Commission passes resolutions. Mr Macdonald referred first to Resolution 1989/59 (adopted without a vote on 8 March 1989), titled **"Conscientious Objection to**

Military Service". The recitals refer to international texts (including ICCPR) recognising the freedom of thought, conscience and religion. Paragraph 1 of the resolution itself recognises conscientious objection as a **"legitimate exercise"** of such rights. I should set out paragraphs 2 and 3:

> **"2.** [The Commission] **Appeals to States to enact legislation and to take measures aimed at exemption from military service on the basis of a genuinely held conscientious objection to armed service;**
>
> **3. Recommends to States with a system of compulsory military service, where such provision has not already been made, that they introduce for conscientious objectors various forms of alternative service which are compatible with the reasons for conscientious objection, bearing in mind the experience of some States in this respect and that they refrain from subjecting such persons to imprisonment"**.

32 There is then a Commission resolution of 1993 **"concerning conscientious objection to military service"**. The recitals note the previous resolution 1989/59, and the fact that some States provide for non-combatant or civilian service as an alternative. Then paragraph 1 is effectively the same as paragraph 1 of 1989/59. Paragraph 3 appeals to States, **"if they have not already done so"**, to enact legislation and take measures in the same terms as exhorted in paragraph 2 of 1989/59.

33 The latest Commission resolution (so far as anyone's researches have disclosed) is 1998/77, adopted without a vote on 22 April 1998. Its terms are similar to those of the earlier resolutions, but I should single out paragraph 7:

> **"**[The Commission] **Encourages States, subject to the circumstances of the individual case meeting the other requirements of the definition of a refugee as set out in the 1951 Convention…, to consider granting asylum to those conscientious objectors compelled to leave their country of origin because they fear persecution owing to their refusal to perform military service when there is no provision, or no adequate provision, for conscientious objection to military service"**.

34 There is a further United Nations body, the Human Rights Committee, which was established to supervise the implementation of ICCPR by the Contracting States. On 20 July 1993 it adopted **"General comment No 22 (48) (art. 18)"**, pursuant to Article 40 paragraph 4 ICCPR. The subject-matter was Art. 18 ICCPR. Paragraph 3 draws attention to an important distinction: **"Article 18 distinguishes the freedom of thought, conscience, religion, or belief from the freedom to manifest religion or belief."** Then paragraph 11:

> **"Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military**

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

THE EUROPEAN MATERIALS (OTHER THAN ECHR)

35 The Council of Europe, which is the parent body of the ECHR, has produced certain materials to which we were referred. There is first Resolution 337(1967) **"on the right of conscientious objection"**, adopted in 1967. This is a resolution of the Assembly of the Council, which I understand to be a plenary body of representatives. The recital refers to Art. 9 ECHR, and then it is declared by paragraph 1:

"Persons liable to conscription for military service who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives, refuse to perform armed service shall enjoy a personal right to be released from the obligation to perform such service."

Paragraph 2 states that the right is to be derived logically from Art. 9 ECHR. This resolution was accompanied, or perhaps shortly followed, by Recommendation 478(1967) **"on the right of conscientious objection"**, by paragraph 2 of which the Assembly

"Recommends the Committee of Ministers

(a) to instruct the Committee of Experts on Human Rights to formulate proposals to give effect to the principles laid down by the Assembly in its Resolution 337 by means of a Convention or a recommendation to Governments so that the right of conscientious objection may be firmly implanted in all member States of the Council of Europe;

(b) to invite member States to bring their national legislation as closely as possible into line with the principles adopted by the Consultative Assembly."

36 Ten years later, by Recommendation 816(1977) paragraph 4 the Assembly

"Recommends that the Committee of Ministers:

(a) urge the governments of member states, in so far as they have not already done so, to bring their legislation into line with the principles adopted by the Assembly;

(b) introduce the right of conscientious objection to military service into the European Convention on Human Rights."

The "principles" referred to in paragraph 4(a) are set out in an Appendix, in which paragraphs 1 and 2 replicate paragraphs 1 and 2 of Resolution 337(1967).

37 Next in time comes a document to which we were referred by Mr Howell. This is the **"Joint Position of 4 March 1996 defined by the Council** [of the European Union] **on the harmonized application of the definition of 'refugee'** [in the Convention]**"**. The recitals include the following:

"This joint position is adopted within the limits of the constitutional powers of the Governments of the Member States; it shall not bind the legislative authorities or affect decisions of the judicial authorities of the Member States."

Art. 10 paragraph 1 provides:

"The fear of punishment for conscientious objection, absence without leave or desertion is investigated on an individual basis. It should in itself be insufficient to justify recognition of refugee status..."

The remaining paragraphs describe cases where asylum may be granted, as for example where the conditions of military service themselves constitute persecution.

38 Mr Macdonald next referred to a resolution of the European Parliament **"on respect for human rights in the European Union"**, adopted in 1997. By paragraph 37 the Parliament

"Reaffirms that conscientious objection to military service, to the production and distribution of certain materials, to certain specific medical practices and to certain forms of scientific and military research is a fundamental constituent of the freedom of thought, conscience and religion; calls on Member States that fail to protect that right to guarantee it; urges in addition the removal of all forms of discrimination between European citizens on the grounds of military service".

(Paragraph 39 welcomed a Greek government initiative to introduce alternative public service for conscientious objectors. It seems that Greece was the last Member State of the European Union to do so, by a law of 5 June 1997 which came into force in 1998.)

39 There is a later resolution of the European Parliament, **"on the Annual Report on International Human Rights and European Union Human Rights Policy, 1999"**. By paragraph 68 the Parliament

> **"Calls in particular on the Council and on EU Member States to grant asylum rights or refugee status to conscientious objectors and deserters from countries where the right to conscientious objection is not recognised and/or where military forces are practising violations of human rights or contravening international law"**.

40 Next under this head Mr Macdonald produced in reply further recent materials from the Council of Europe, relating to applications made to join the Council by the Russian Federation, Armenia, and Azerbaijan. In each case the Parliamentary Assembly of the Council produced an Opinion, on 25 January 1996 in the case of Russia and on 28 June 2000 for Armenia and Azerbaijan. In each case the Assembly accepted an undertaking or stated intention by the applying State to adopt a law providing for an alternative to military service.

41 Mr Macdonald's last reference in point of time was to the European Charter of Fundamental Rights, proclaimed at Nice in December 2000. Art. 10(1) provides for the right to freedom of thought, conscience and religion. Art. 10(2):

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

(There is an accompanying document stating the source of the rights which the Charter specifies. Against Art. 10(2) it gives **"national constitutional traditions"**.) The Nice Conference anticipated future consideration of the status of the Charter, a matter plainly left open at Nice itself. Mr Macdonald referred also to certain evidence about the Charter, or prospective Charter, taken before the House of Lords European Union Committee on 5 April 2000. With respect I need not, I think, go into that. I may also notice here Mr Macdonald's reference to Art. 6(2) of the Treaty on European Union, which enjoined the Union to respect fundamental rights as guaranteed by ECHR and as resulting from the constitutional traditions common to the Member States.

THE PRACTICE OF STATES

42 International practice was put forward by Mr Macdonald as a further factor said to assist in the establishment of a recognised right of conscientious objection. The factual position, so far as it is known to the court, may be stated shortly. Of the States parties to the Council of Europe, of which I think there are now 41 and which of course include all the Member States of the European Union, only three decline to recognise a right of conscientious objection: Albania, Turkey, and the Former Yugoslav Republic of Macedonia. Not all, of course, maintain a system of compulsory military service in any event.

43 Worldwide, however, the picture is quite different. Mr Macdonald showed us a survey, collated I understand from research material produced by a body called

"War Resisters International". This was admitted without objection and there is no suggestion that the facts which the survey states, so far as they go, are inaccurately recorded. It lists some 107 countries in all parts of the globe. Then information is set out under four heads: (1) whether the right to conscientious objection is recognised; (2) whether there is conscription; (3) whether there is alternative service for objectors; (4) whether professional soldiers (presumably, who come to entertain a conscientious objection) may be discharged. In quite a number of cases one or other head of information is not available. But there are 34 negative returns under the first heading, and under the same heading 29 returns stating "no known provision". I need not set out the results under the other heads. There are over 130 States parties to the Convention, though I should say that their identity is not married up with the countries listed in this survey.

THE VIENNA CONVENTION ON THE LAW OF TREATIES (1969)

44 Given Mr Macdonald's deployment of the international materials to which I have referred, it is useful to recall the terms of Art. 31 of the Vienna Convention. It is common ground that this sets out the correct approach to the task of interpreting a measure such as the 1951 Convention.

> **"Article 31 General rule of interpretation**
>
> **1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.**
>
> **2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:**
>
> > **(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;**
> >
> > **(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.**
>
> **3. There shall be taken into account, together with the context:**
>
> > **(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;**
> > **(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;**
> > **(c) any relevant rules of international law applicable in the relations between the parties.**
>
> **4. A special meaning shall be given to a term if it is established that the parties so intended."**

JURISPRUDENCE RELATING TO THE CONVENTION: GENERAL

45 In order to engage with the competing arguments in the case it is helpful next to review some of the learning in which the Convention has been discussed, both generally and with regard to conscientious objection to military service. I will first take two recent decisions of their Lordships' House in which the speeches contain passages which are, with respect, of great utility as to the general approach to be taken to the Convention.

46 *Horvath* [2000] 3 WLR 379 concerned a Roma citizen of Slovakia who claimed to fear persecution in Slovakia by "skinheads". So their Lordships had to consider the notion of persecution by "non-State agents", as have courts in other cases. Lord Hope of Craighead said this:

> **"It seems to me that the Convention purpose which is of paramount importance for a solution of the problems raised by the present case is that which is to be found in the principle of surrogacy. The general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community...**
> **This purpose has a direct bearing on the meaning that is to be given to the word 'persecution' for the purposes of the Convention. As professor James C. Hathaway in *The Law of Refugee Status* (1991), p. 112 has explained, 'persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community.'** (383B-F)

Then at 385H-386C:

> **"It is important to note throughout that the humanitarian purposes of the Convention are limited by the tests set out in the article** [sc. Art. 1A(2)]**. As Dawson J observed in *A v Minister for Immigration and Ethnic Affairs* [1998] INLR 1, 18** [in the High Court of Australia]**:**
>
> > **'No matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention. And by incorporating the five Convention reasons the Convention plainly contemplates that there will even be persons fearing persecution who will not be able to gain asylum as refugees.'**
>
> **He went on, at p. 19:**
>
> > **'No doubt many of those limits in the present context spring from the well-accepted fact that international refugee law was meant to serve as a 'substitute' for national protection where the latter was not provided due to discrimination against persons on grounds of their civil and political status. It would therefore be wrong to**

depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them.'

47 *Adan & Aitseguer* [2001] 1 AER 593 involved a question whether there might legitimately exist different interpretations, respectively entertained by different States parties, of Art. 1A(2) of the Convention. Like *Horvath* the case concerned putative persecution by non-State agents, as regards which France and Germany adopted a different approach from that taken by the United Kingdom. Lord Steyn said this at 603j-604c:

> **"It is necessary to determine the autonomous meaning of the relevant treaty provision. This principle is part of the very alphabet of customary international law. Thus the Court of Justice of the European Communities has explained how concepts in the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968... must be given an autonomous meaning in accordance with the objectives and system of the convention... Closer to the context of the Geneva Convention are human rights conventions where the principle requiring an autonomous interpretation of convention concepts ensures that its guarantees are not undermined by unilateral state actions. Thus the European Court of Human Rights has on a number of occasions explained that concepts of the** [ECHR] **must be given an autonomous meaning, eg concepts such as 'civil right' and 'criminal charge'."**

Then Lord Steyn set out Art. 31 of the Vienna Convention, and proceeded as follows (605a-c):

> **"It follows that, as in the case of other multilateral treaties, the Geneva Convention must be given an independent meaning derivable from the sources mentioned in arts 31 and 32 of the Vienna Convention and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. If there is disagreement on the meaning of the Geneva Convention, it can be resolved by the International Court of Justice (art 38 of the Geneva Convention). It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notion of its national legal culture, for the true autonomous and international meaning of the treaty. And there can be only one true meaning."**

Lords Slynn, Hutton and Hobhouse delivered speeches concurring in the result. Lord Slynn's speech includes a passage (597j-598b) which with great deference is to like effect as the passages I have cited from Lord Steyn. Lord Hobhouse agreed expressly with the substance of what Lord Steyn had said (615b). Lord Hutton's speech is to somewhat different effect. Lord Scott agreed with Lord Steyn and Lord Hobhouse.

48 From these authorities it is possible to draw out two linked propositions which in their turn will cast light on the issues in this appeal. The first is that the Convention looks to a common standard as to the sense to be attributed to "persecution". The second is that only those categories of persecution which meet the limiting tests of Art. 1A(2) qualify for the purpose of assessing asylum claims.

49 The need for a common standard, or uniform approach, to the sense to be given to "persecution" is implied (1) by the theory of surrogacy (*Horvath*) and (2) by the requirement to find the Convention's autonomous meaning (*Adan & Aitseguer*). As regards (1), what is contemplated is that the international community will protect A against X, if A's home State Y will not or cannot do so; but this is an ideal that cannot even be articulated unless X has the same potential content wherever on the globe Y is to be found. As regards (2), the Convention's possession of an autonomous meaning entails the conclusion that what may count as persecution in one State may in like circumstances count as persecution in any other. In light of the reasoning in *Adan & Aitseguer* upon this aspect of the Convention, the distinction between the Convention's *interpretation* and its *application* which I had sought to draw in the Court of Appeal's judgment in the same case ([1999] 3 WLR 1274, 1293D-1295A), becomes, at least, very fragile. The common standard is also entirely in line with the approach taken in the extract from Professor Hathaway's work cited by Lord Hope.

50 The second proposition drawn from the decisions of their Lordships' House, that only those categories of persecution which meet the limiting tests of Art. 1A(2) qualify for the purpose of assessing asylum claims, serves in a sense to underline the first, the common standard. Just as the common standard for persecution is an objective standard, so the list of Convention reasons establishes an objective set of types of discrimination; the threat (**"well-founded fear"**) of persecution for any of them engages the Convention's protection.

51 There is of course much further jurisprudence, not least relevant to Mr Howell's argument that the words in Article 1A(2) **"for reasons of race, religion** [etc]**"** focus on the putative persecutor's state of mind, and not that of the potential victim; but I shall postpone consideration of those cases for the moment. In light of the general approach to persecution within the meaning of the Convention taken from *Horvath* and *Adan & Aitseguer*, it is most useful next to look at authority specifically concerned with conscientious objectors.

JURISPRUDENCE RELATING TO THE CONVENTION: CONSCIENTIOUS OBJECTION

52 Mr Macdonald urged upon us the IAT decision in *Foughali*, notified on 2 May 2000. In that case the Tribunal acknowledged **"that under international law a state has the right to require of its citizens that they perform military service"**. However there were **"four recognised exceptions"**, such that a good asylum claim might arise in a case where any one of them applied. The exceptions were described thus (paragraph 9 of the determination):

> **"(a) persecution due to the conditions of life in the military service in question;**
>
> **(b) persecution due to the repugnant nature of military duty likely to be performed;**
>
> **(c) persecution due solely to principled objections (ie genuine political, religious or moral convictions, or to valid reasons of conscience (para 170, 1979 UNHCR Handbook));**
>
> **(d) persecution due to likely disproportionate punishment."**

Dealing with what the IAT advanced as exception (c), it was stated in paragraph 14:

> **"Prior to the recent Court of Appeal judgment in the case of Zaitz v SSHD judgment of 28 January 2000, there was considerable doubt that UK case law accepted conscientious objection as a distinct exception in its own right."**

Then at the end of paragraph 15:

> **"... the test cannot be restricted to objections based on conscience. To do so would be to overlook the fact that moral, political and religious beliefs can also give rise to genuine objections. Accordingly, the Tribunal prefers to describe this exception in terms of 'principled objections'.**

53 The appellants' joint skeleton argument laid much emphasis on this notion of "principled objection". But as an idea, I am afraid I think it is obscure and unhelpful. The contrast drawn in the passage from paragraph 15 of the Tribunal's reasoning in *Foughali*, which I have just set out, between (a) conscientious objections and (b) moral, political or religious objections goes nowhere: since every instance of (b) is also an instance of (a), there is in truth no distinction between the two. And the term "principled" is left undefined. I think it is susceptible only of two possible meanings: (1) "sincere"; (2) "sincere and justifiable". However if (1) is the attributed meaning, then a principled objection might be based upon racist, fascist or other extremist beliefs of the coarsest kind, provided only they are genuinely held. If it is (2), who decides what is "justifiable"? Presumably the court or tribunal which decides the claim. But in that case the test is as long or short as the Chancellor's foot, which we are supposed to have left behind a long time ago. I have not gained much assistance from the decision in *Foughali*.

54 In *Zaitz* [2000] INLR 346 the appellant was a Polish draft-evader. His asylum claim was upheld by the Special Adjudicator, who found that he was a "genuine pacifist". The IAT allowed the Secretary of State's appeal. This court allowed the appellant's appeal against the determination of the IAT. It is unnecessary to go into the details, for it is entirely plain that the availability *in principle* of an asylum claim to a conscientious objector was an axiom or premise of the debates before the Adjudicator and the IAT; counsel for the Secretary of State by a respondent's notice sought to assert that punishment for evading the draft in a democratic State in

peacetime was not legally capable of founding a claim to refugee status. As I have said (paragraph 16), this court declined to allow the point to be argued, partly because there was no considered judgment on the issue from the specialist tribunal below (see per Buxton LJ at p. 355, paragraph 30).

55 I would make only these observations about the case of *Zaitz*. First, while it is true that the availability *in principle* of an asylum claim to a conscientious objector was a premise of the result arrived at on the facts, this court did not distinctly hold that such a claim is available. The most that can be said is that the court did not of its own motion deny the possibility of such a claim; and the Secretary of State must have been content for the matter to be argued before the Adjudicator and the IAT on the basis on which it was argued there. This latter point might have assumed centre-stage importance if there were a question whether the Secretary of State for his part had adopted a settled approach, case by case, to the effect that a conscientious objector might as such claim asylum (on proof, of course, of the necessary facts). Had that been so, there might have been scope for argument whether it would now be fair to allow the Secretary of State to take a position at variance with that approach. Mr Macdonald indicated his understanding that there have been other cases before the appellate authorities in which the Secretary of State has not argued that a conscientious objector cannot as such be a potential candidate for the Convention's protection. Indeed in this very case it seems clear that before the IAT (where the Secretary of State was represented by very competent counsel) no such point was taken. But in the result the appellants took no point as to fairness or legitimate expectation, and in my judgment they were right not to do so: we have nothing like the kind of evidence that would be required to make it good. I should say that in so concluding I have not ignored Mr Scannell's reference to the case of *Altun*, in his further written submissions in reply. It is to be noted that the IAT in *Foughali* (paragraph 14: I have set out the passage) observed that before *Zaitz* there was doubt in the UK case law upon the question whether conscientious objection could give rise to a claim. (In the same passage, as will have been seen, they treated *Zaitz* as establishing that it could; with respect, for reasons I have given I think they were wrong to do so.)

56 In the result there is my judgment nothing to inhibit the Secretary of State from taking the position which he now seeks to take before us. It is common ground that we are not, by any principle of the law of precedent, obliged to accept conscientious objection as a possible ground of asylum on the footing that it was accepted as such for the purposes of the appeal in *Zaitz*: see *Ex p. Ku* [1995] QB 364, 373F-374D per Hobhouse LJ.

57 It is convenient next to refer to a case from the United States, upon which both Mr Eicke and counsel for the appellants placed reliance, and which was directly concerned with the recognition (or otherwise) of conscientious objection for the purposes of the Convention. In *Canas-Segovia* (1990) 902 F.2d 717 the US 9th Circuit Court of Appeals had to consider a petition for review from the Board of Immigration Appeals in which the petitioners were Jehovah's Witnesses who had refused the compulsory draft in El Salvador on conscientious religious grounds, and fled to the United States. UNHCR had put in a substantial written amicus brief, which Mr Eicke produced for us. The court held that the UNHCR Handbook

"unambiguously supports" the petitioners' claims. Dealing generally with paragraphs 167 - 174 of the Handbook the court said:

> **"When read in toto, this entire section emphasizes that refusal to perform military service on account of genuine reasons of conscience may be a basis for refugee status."**

Paragraph 172 is then set out, and was found to support the claims. As regards paragraph 173 the court said:

> **"Nor do we find persuasive the BIA's** [Board of Immigration Appeals] **conclusion that Handbook paragraph 173 mandates that this issue be left to the legislation of individual governments rather than being a question of legal rights under the Protocol** [in effect, under the Convention]**. Paragraph 173 simply suggests that the granting of refugee status to conscientious objectors is all the more reasonable in light of the growing trend in international law of recognition of conscientious objector status. Thus, it too supports the Canases' claims.**
>
> **... We hold that punishment of a conscientious objector for refusal to comply with a policy of mandatory conscription may amount to persecution within the meaning of the INA** [in effect, the Convention: as I understand it the Immigration and Nationality Act imported the Convention text into the law of the United States]**, if the refusal is based upon genuine political, religious or moral convictions, or other genuine reasons of conscience."**

58 And so the petitioners were successful. The court expressed its reasoning in their favour both in terms of religious persecution, and persecution for an imputed political opinion. But the decision was quashed by the Supreme Court (112 S.Ct. 1152), and remanded for further consideration. We have not seen a report of the Supreme Court's decision, but it is clear from the text of the Court of Appeals' reconsideration of the case in 1992 that the order to quash was made following the reasoning of the Supreme Court in another case, decided since the first *Canas-Segovia* judgment: *Elias-Zacarias* (1992) 502 US 478. *Elias-Zacarias* is one of the authorities relied on by Mr Howell in support of his argument that even if punishment of a conscientious objector for draft evasion should fall to be regarded as persecution, still it would not be persecution *for a Convention reason* unless the punishment in question is directed against the conscript *because* he is a conscientious objector, and not merely because he is a draft evader. I shall come to this argument in due course.

59 In the second judgment in *Canas-Segovia* the Court of Appeals accepted that **"[i]n light of *Elias-Zacarias*'s adoption of a motive requirement, Canas-Segovia can no longer prove religious persecution."** However:

> **"Imputed political opinion is still a valid basis for relief after *Elias-Zacarias*. The Court made clear that evidence of motive is required, but imputed political opinion, by definition, includes an element of motive... We held in the original opinion that the Canas-Segovias were entitled to**

relief based on the theory of imputed political opinion. Nothing in *Elias-Zacarias* changes our analysis."

60 Now it is time to take stock.

THE FIRST ISSUE: DOES PUNISHMENT FOR DRAFT EVASION BY AN "ABSOLUTE" CONSCIENTIOUS OBJECTOR AMOUNT TO PERSECUTION?

61 In describing this as the first issue, I should for clarity's sake explain what I do *not* intend to include. Thus I am not here dealing with Mr Howell's argument that the putative persecutor must be subjectively actuated by the Convention reason in question, before his actions can amount to persecution which qualifies the claimant for asylum within the Convention. I must address that separately, as I must the case of the "partial" objector. Next I should emphasise that it is plain (indeed uncontentious) that there are circumstances in which a conscientious objector may rightly claim that punishment for draft evasion would amount to persecution: where the military service to which he is called involves acts, with which he may be associated, which are contrary to basic rules of human conduct; where the conditions of military service are themselves so harsh as to amount to persecution on the facts; where the punishment in question is disproportionately harsh or severe. I am here addressing the case where none of these additional factors is present.

62 In most species of litigation, at least the nature of the court's task is clear. There may be a question of fact, which turns on one's appreciation of the evidence. There may be a question of law, which turns on one's appreciation of established legal principles. Even if in the court's judgment a principle may fall to be developed or modified, at least the judge knows where he is on the map. But in this case, the nature of the judicial task is itself elusive. We have to consider what in terms of legal analysis is involved in the very question, whether punishment for draft evasion by a conscientious objector may amount to persecution for the purposes of the Convention. In trying to chart a principled course over such a sea I think it is particularly important to have in mind the two propositions which as it seems to me are vouchsafed by authority of their Lordships' House, and which I have set out at paragraph 48: (1) the Convention looks to a common standard as to the sense to be attributed to "persecution". (2) Only those categories of persecution which meet the limiting tests of Art. 1A(2) qualify for the purpose of assessing asylum claims.

63 There are some classes of case in which the threatened conduct is of such a kind that it is universally condemned, by national and international law, and always constitutes persecution: torture, rape (though of course it is not necessarily persecution for a Convention reason). In those instances, the question whether or not there is persecution is straightforwardly a matter of fact. But it is not always so; and *Kagema* [1997] IAR 137 (relied on by Mr Macdonald in reply) is no authority that it is. There are other classes of case in which the threatened conduct is by no means necessarily unjustified at the bar of law or opinion: imprisonment is a plain instance (where its length is not disproportionate and its conditions are not barbarous). In such a case some further factor is required to turn the treatment in question into persecution. Torture is absolutely persecutory; imprisonment only conditionally so.

64 What is the further factor that may turn imprisonment into persecution? It can only be that the claimant is liable to be imprisoned for a Convention reason. There can be no other way in to the regime of Convention protection. In this case, then, the existence of a Convention reason is what *defines* the treatment as persecutory.

65 See where this leads. The putative act of persecution - imprisonment - is only such if it is inflicted for a Convention reason. (I leave aside all the uncontentious possibilities: that the military service involves acts or conditions which are barbarous, or that the punishment for draft evasion is barbarous or disproportionate). It is the why and wherefore of the punishment's infliction that alone can transform the imprisonment suffered into persecution. But then it must constitute persecution according to the Convention's common standard, within and according to the autonomous international meaning of the Convention.

66 This, as it seems to me, is the effect of the House of Lords' jurisprudence to which I have referred. I think it is also a reflection of a further truth, which is to do with the very nature of adjudication. However wide the canvas facing the judge's brush, the image he makes has to be firmly based on some conception of objective principle which is recognised as a legitimate source of law. In his dissenting opinion in *The South West Africa Cases* [1966] ICJ 1, Judge Tanaka said (paragraphs 49 and 50):

> **"Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only insofar as they are given a sufficient expression in legal form. Law exists, it is said to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered. Humanitarian considerations may constitute the inspirational basis for rules of law... Such considerations do not, however, in themselves amount to rules of law."**

The lawyer's search for objective principle is unlike the politician's practical search for social or national wellbeing, or the moralist's abstract search for ideal goodness (if, nowadays, that is what he looks for). For each of these, the end of his search may sometimes be found within himself; and none the worse for that. But for the lawyer, the judge, it never can be so. He may develop the law, and in doing it, he may add something that is his own. But in this, he is to be conservative and imaginative at the same time. His starting-point is always in the corpus of received law. He may hope to shape and renew it so that current conditions are better served, but he must always build on what has gone before. And he must not add so much of himself, or of the parochial wisdom of his own time, that the foundations of established law cannot sustain it. Acceptance of this restraint is a defining characteristic of the common law. But it is also a condition of the common law's formidable power of self-renewal, its power to provide an apt jurisprudence from the then to the now, and into the future.

67 Now see what we are asked in this present case to say. Conscientious objection to military service - at least "absolute" conscientious objection, with which I am presently dealing - is claimed to be a fundamental right grounded in, or flowing from, the more general rights of freedom of thought, conscience and religion. The objector's deeply held conviction is viewed as a key element. The reasoning which supports this position runs as follows. If I entertain a deep and genuine moral conviction that the bearing of arms is wrong, then I should be excused from doing so. If I am not excused, and am then punished for my refusal to comply, my punishment becomes persecution. However this appears to prove too much: if I should be excused the draft because of my deep and genuine objection to bearing arms, why should I not likewise be excused participation in *any* activity which my national law requires of me, but which fills me with moral revulsion? But that would render every legal measure, which imposes a compulsory requirement of action or inaction on the individual's part, subject to the moral assent of every citizen. Neither Mr Macdonald QC nor Mr Scannell espouses so obviously unreal a position.

68 It may be replied that there is something special about a requirement of military service, bearing arms, the possibility of having to kill or maim another. That is *so* grave a matter that a conscientious objection to it ought to be respected. This might at once be a sufficient answer, if compulsory military service were generally condemned by accepted principles of international law. However that is by no means the position. All the texts we have seen - not least the UNHCR Handbook - assert, or at the least do not deny, that there is *no* objection to the draft as such. But if military conscription is not condemned *per se* by international law, then what, in reason, distinguishes it from any other activity which might be enjoined by law but is likewise not so condemned? Why, in any such case, should the State not be required to excuse compliance, if the citizen objects to it with sufficient genuine depth of feeling?

69 An activity, which may be required of the citizen by the law of his State, is either one which is condemned by international law, or it is not. If it is so condemned, then, subject to other issues with which I am not presently dealing, the citizen who refuses to undertake it and is punished for his refusal would be entitled to assert that his punishment constitutes persecution. But if the activity in question is not thus internationally condemned, then if it happens to be compulsory military service, there is no reason on the face of it why the law of the Convention should insist on any special allowance being made so that objectors are excused. It is not without more an answer to say, the military draft is different - under its rule the conscript may have to kill people. *That* may be a reason to invoke international condemnation of the draft. But to take a position to the effect that the draft is *not* condemned, yet the State's refusal to excuse conscientious objectors (or offer a civilian alternative) *is* condemned, is incoherent.

70 Incoherent it is, *unless* there is spelt out and accepted a value judgment which recognises this logic but turns conscientious objection into a special case. Such a value judgment would be to the effect that in the case of conscientious objection, because what the conscript may be required to do is so grave, the claims of the State must give way to the claims of the individual conscience. No matter that the claims of the State are in all other respects entirely legitimate. No matter, either, how

pressing are the claims of the State in light of local conditions. There is an ethical imperative, and it has a louder voice.

71 That, I assume, is the very position taken or implied in all the texts, relied on by Mr Macdonald, which exhort the enactment of laws excusing the draft to conscientious objectors. However if one asks what is its basis in principle, the answer returned in the texts consists only in an appeal to the general right of free thought, conscience and religion. But *that* right (which is plainly established and runs through all the international materials) to use a phrase I have tired already, proves too much. It would on the face of it justify excusal from participation in *any* activity which fills the citizen with moral revulsion, though his revulsion is based upon racist, fascist or other extremist beliefs of the coarsest kind, provided only that his belief is sincerely held; this recalls what I have said in connection with the *Foughali* case (paragraph 53 above). To isolate and justify the particular proposition that conscientious objection should excuse compliance with the generally applicable law of compulsory military service, something more than an appeal to freedom of thought and conscience is required. In my view, that may only consist in a judgment that in this special context, the admittedly legitimate interests of the State should take second place to the conscience of the individual.

72 But I think that the acceptance of this priority is particularly in the nature of a political decision. I do not attempt a definition of what is "political", but its flavour (for my purposes) may be caught in this. The balance here between legal duty and private conscience touches the question, what may the State demand of its citizens; and it does so in a context where the State's very function of protecting its people from internal or external threats - sometimes thought to be the first duty of governments - is or may be immediately involved. It might reasonably be thought that the striking of such a balance, at least in a democracy, is for the legislative and executive arms of government, and not for the judiciary.

73 I make it clear, I am here saying nothing about the particular position in Turkey. If this court holds that imprisonment of conscientious objectors for draft evasion is of itself persecution, it so holds as regards all States parties to the Convention; it would be laying down a rule that all such States parties which fail to respect conscientious objection either by excusing the conscript or providing a non-combatant alternative are to be condemned as acting in breach of international law.

74 These considerations demonstrate to my mind that it would be quite wrong for the court to accede to Mr Macdonald's argument unless it is supported, as I put it earlier, by some objective principle which is recognised as a legitimate source of law, and so recognised now; in particular unless - and in this case it is the same thing - the autonomous international meaning of the Convention, its common standard (ascertained by the tools of the Vienna Convention), is shown to acknowledge that the right of conscientious objection may in principle engage the limited scope of Art. 1A(2), so as to be supported by the grant of asylum if it is locally denied. So far as the judgment we are asked to make proceeds without dependence upon any generally established legal principle touching the relationship between citizen and State, it casts objective law adrift. It expresses only a free-standing moral perception, or at best an aspiration shared by many: albeit they include responsible bodies within the United

Nations, the Council of Europe, and the European Union. But for reasons I have given such an aspiration cannot on its own bear the weight of judge-made law: certainly not in a context such as this.

75 Mr Macdonald accepted in terms that the right of conscientious objection is not at present guaranteed by the ECHR, nor indeed (as I understood him) by the ICCPR or the ACHR. He was plainly right to do so. Moreover I would accept Mr Howell's submission that the other international materials, which I have set out or summarised and will not now repeat, do not purport to define or describe a settled rule of international law which requires conscientious objectors to be allowed to decline compulsory military service. Indeed, in large measure they proceed on the premise that there is at present no such rule. They are at most exhortatory. In my judgment the fact that international institutions desire or commend the acceptance of conscientious objection as a legal right, potentially giving rise to asylum if it is not respected, cannot in principle justify a national court in holding that the right exists so that all States parties to the Convention who do not observe it are, at any rate in that court's eye, to be condemned at the bar of international law.

76 In this context I have in mind Mr Howell's submission based on ECHR Art. 4(2) and (3)(b) taken with Art. 9, to the effect that the ECHR text shows that there was no intention to establish conscientious objection as a Convention right; if anything, the reverse. That seems to me to be correct. Mr Howell referred also to decisions of the Commission at Strasbourg (*X v Austria*, 1973, No. 5591/72, and *A v Switzerland*, 1984, No. 10640/83) and other materials showing that for its part the Commission has distinctly declined to hold that conscientious objection is a right guaranteed by ECHR. Given its treatment at paragraph 45 of the judgment of my Lord Waller LJ, I have looked with care at the further case of *Thlimmenos* (No. 34369/97), which is examined in detail in the judgment of my Lord Jonathan Parker LJ. For the reasons he gives I do not consider that it assists the appellants. While it is certainly possible to find observations in the Commission's Report in that case to the effect that the applicant's conviction for refusing the draft amounted to an interference with a right to manifest his religion (paragraph 45 last sentence), it is important to recognise that the applicant's real complaint related to the authorities' later refusal to appoint him a chartered accountant, and that in that context he had been the subject of discrimination contrary to Art. 14. That was the complaint upheld by the Commission: paragraph 50, and to make it good there was no requirement that a free-standing breach of Art. 9 be established: see the Court's judgment, paragraph 40. And for its part the Court in *Thlimmenos* stated (paragraph 43):

> **"... the Court... does not find it necessary to examine whether the applicant's initial conviction and the authorities' subsequent refusal to appoint him amounted to interference with his rights under Article 9 # 1. In particular, the Court does not have to address, in the present case, the question whether, notwithstanding the wording of Article 4 # 3(b), the imposition of such sanctions on conscientious objectors to compulsory military service may in itself infringe the right to freedom of thought, conscience and religion guaranteed by Article 9 # 1."**

In my judgment the most that can be said of *Thlimmenos* is that the conception of conscientious objection as a right arising under ECHR Art. 9(1) might live to fight another day; it is not established by the Strasbourg jurisprudence to date.

77 As regards State practice, as opposed to the international texts, I am clear that there is no established practice such as to found a rule of customary international law for the protection of conscientious objectors. I have already referred (paragraphs 42 and 43) to the materials before us which describe the practice of States. There is plainly no general consensus as a matter of fact (I accept that a *universal* practice need not be shown). Moreover, Mr Howell in my judgment correctly submitted that a rule of customary international law arises only if two conditions are fulfilled: (1) it is shown that there exists a settled and general practice of States to the effect in question; (2) in following the practice, the States entertain a perception that it conforms to or is required by their legal obligations (*opinio juris*). To make these propositions good Mr Howell showed us passages from the works of distinguished legal scholars in the field of public international law. With respect I need not set them out. There is no dispute as to the principles. In my judgment, neither of the two conditions is on the evidence made out before us, nor was it before the IAT.

78 No doubt the decisions of national courts may contribute to State practice for the purpose of ascertaining the content of customary international law. But absent other material fulfilling the two conditions I have just discussed, there is no body of case-law sufficient on its own to bear the necessary weight. *Canas-Segovia* in the United States, along with *Foughali* in this jurisdiction (and the IAT decision in the present cases), cannot do so.

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

80 None of this means that the position of conscientious objectors, or the autonomous meaning of the Convention, is stuck where it stands today. States' *governments* are of course free to treat conscientious objectors as refugees. That, I think, is what is commended by the last sentence of paragraph 173 of the Handbook, Professor Goodwin-Gill's comment **"States are free to recognize conscientious objection in itself as a sufficient ground upon which to base recognition of refugee status"**, the texts of the UN Commission resolutions (**"Appeals... Recommends... Encourages..."**) and of the Humans Rights Committee (**"The Committee invites States..."**). The Council of Europe and the European Parliament have used similar language, and I have set out the relevant passages.

81 A government, but not a court, may respond to these appeals simply because it agrees with them. And it goes without saying that new treaty law may be made which would, of course, take its place within the corpus of international law for the purpose of the Convention's interpretation in accordance with the Vienna Convention.

THE SECOND ISSUE*: *"PARTIAL" CONSCIENTIOUS OBJECTORS

82 If I am right as to absolute conscientious objection, what space can remain for partial objection as a potential avenue to refugee status? Now, I have not so far discussed the question whether conscientious objection may be said to constitute an implied political stance, for the purpose of the categories of Convention reasons in Art. 1A(2). As regards an absolute objector moved by a purely pacifist conviction, I have some difficulty with this idea, supported though it is by Hathaway and Goodwin-Gill. I should have thought that the pacifist's outlook falls more naturally to be described as a matter of personal morality than a distinct political position, whether express or implied. But it is certainly a matter of *belief*; and, of course, it is sometimes a matter of religious belief. However if the secular pacifist is not to be treated as expressing an implied political opinion, his position will not fall within any of the Art. 1A(2) categories ("particular social group" would, I think, be unpromising), unlike the religious pacifist; and for that reason he cannot be a candidate for Convention protection - whatever one makes of all I have otherwise said about absolute conscientious objection. In those circumstances, despite the difficulty I feel, the better view may well be that the Convention should be read sufficiently broadly to place secular pacifism and religious pacifism on the same footing for the purposes of Art. 1A(2); and the means of doing so would be to attribute a political quality to secular pacifism. Such a view would, I think, be supported by the reference in the Convention's recitals to **"the widest possible exercise of these fundamental rights and freedoms"**, and by authority such as *Zolfagharkhani* [1993] 3 CF 540, 550. It is certainly supported in this court by Hutchison LJ in *Adan* [1997] 1 WLR 1107, 1127E-F, and by the reasoning of the Federal Court of Australia in *V v Minister of Immigration* [1999] FCA 428, paragraph 33, relied on by Mr Macdonald in reply.

83 But if that is wrong, and secular pacifism is not to be treated as a political position, then at least in the case of the *partial* objector a clearly political basis for his objection will usually - perhaps in the great majority of cases - at once be found. Take these very instances. The Special Adjudicator said of Mr Bulbul **"I do not consider that his objection is therefore one of moral conviction but rather that it stems from his political views"**. In Mr Sepet's case, **"I accept that his reluctance to do his** [military service] **does stem from his genuine political opinions"**.

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

85 If that is right, it is the end of these cases. But there is a further difficulty with partial objections, which engages the reasoning of the IAT and which I should briefly discuss. I have already referred (paragraphs 53 and 71) to the possibility of a man's genuinely holding racist, fascist or other extremist beliefs of the coarsest kind. Such beliefs may constitute the whole basis of his politics. Faced with the draft he may object to killing whites or heterosexuals. One can conjure all manner of instances, some more florid, and one hopes less probable, than others. But if objection to the draft on political grounds may bring the objector within the Convention frame, does not the fascist have as good a claim as the liberal? What legal basis can there be for

distinguishing between base and decent political opinion? Art. 1F (which I have set out) will provide a route in some cases, but not in all. Art. 1F only excludes persons who have committed certain classes of crimes or acts. It says nothing about beliefs or convictions, "principled" or otherwise.

86 If, contrary to my own conclusions, the present state of the law may require the grant of refugee status to a partial, political objector as such, it is by no means clear to me that a distinction should be made between base and decent political opinion. We cannot understand, let alone practise, the difficult ethics of pluralist democracy without accepting that the right of free thought applies to all thought: stupid, wise, repulsive or benign. There are, of course, proper limits to its practice or exercise. If a person's acts bring him within Art. 1F, that is the end of any asylum claim he may advance. But refusing the draft plainly does not attract 1F, whatever the man's beliefs. And he may have done nothing to further those beliefs, other than profess them.

87 The IAT in the present case sought to deal with this aspect of the matter by holding that the partial objector must show (amongst other things) that his objection is "non-discriminatory": paragraphs 59, 60, 61. This leads the IAT into drawing a distinction between "acceptable" and "unacceptable" political convictions: see paragraph 59. Perhaps the words **"*valid* reasons of conscience"** (my emphasis) at the end of paragraph 170 of the Handbook offer some support for such an approach. But to my mind it is a difficult and dangerous path for any court to tread. Generally a court has no more authority than anyone else to make value-judgments about the virtues and vices of particular political opinions and for it to do so threatens to undermine its own impartiality and independence, or at least the perception of it. It is all very well to say there can be no difficulty with extreme cases. Anyone may excoriate the extremist; but the approach taken by the IAT may invite consideration of less extreme cases, consideration of the margin between what is and what is not acceptable. I cannot think that the IAT should be doing any such thing. These problems to my mind amount to an additional reason for holding, as I have done, that in the present state of the law partial conscientious objectors as such are no more candidates for Convention protection than are absolute objectors.

***THE THIRD ISSUE*: "FOR REASONS OF..."**

88 Given the weight and learning of counsel's arguments on this aspect, and its general importance, I think we should deal with it, although it is moot if what I have said so far is right. I can do no better than introduce the issue by reference to a passage from Mr Howell's skeleton argument. He submitted (paragraph 13) that

> **"[t]he claimant's religion or opinions may be the reason why he is exposed to 'persecution'. But an individual is not persecuted by reason of them (and is thus not a refugee) unless they are what motivate his persecutor to persecute him or the state to deny him protection against the actions of others: *Omoruyi v Secretary of State for the Home Department* [[2001] IAR 175]. Generally, as the Supreme Court in Canada has stated, 'the examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is**

determinative in inciting the persecution': *Ward v Canada* [1993] 2 SCR 689 at p747. Similarly the High Court in Australia has stated that 'not every form of discriminatory or persecutory behaviour is covered by the Convention definition of 'refugee'. It covers only conduct undertaken for reasons specified in the Convention': see *Chen Shi Hai v the Minister for Immigration* [2000] HCA 19 per Gleeson CJ and Gaudron, Gummow and Hayne JJ at paragraphs 25, 34-36. Similarly as McHugh J put it in *Minister for Immigration v Ibrahim* [2000] HCA 55 at paragraph 102, 'the Convention requires the Tribunal to ascertain the motivation for the allegedly persecutory conduct which an applicant for refugee status fears'. Thus, for example, a person may be persecuted by reason of political opinion if he is persecuted by reason of what his persecutor takes to be his political opinion, even if he does not in fact hold any such opinion. Similarly a person will not be persecuted by reason of political opinion if the reason why his persecutor persecutes him or the state denies him protection is not his political opinion but some other reason. Thus, whatever an individual's reasons for refusing military service on behalf of his country of nationality, he will not be persecuted for a 'Convention reason' if his government is indifferent to his motives and is concerned simply with securing his military service or punishing his refusal to serve. It cannot simply be assumed that a person who refuses to serve because of his political or religious beliefs is punished by reason of those beliefs: see *INS v Elias-Zacarias* 502 US 478; *Zolfagharkani v the Minister of Employment and Immigration* [1993] 3 FC 540 at p549j-550e; *Adan v the Secretary of State* [1997] 1 WLR 1107 at p1126-7 (in the context of membership of a social group). Nor are those who are punished for failure to comply with a legitimate requirement of a state when they have an objection of 'principle' of some description to it 'a particular social group' (as the Appellants now seek to suggest) nor does it follow that they are punished in any such case by reason of their membership of any such group."

89 The submission is a formidable one, but I am clear that it is wrong. It confuses what is *meant* in Art. 1A(2) by the words **"for reasons of race, religion** [etc]**"** with one of the modes of *proving* that the words apply. I may illustrate the distinction by reference to *Omoruyi* [2001] IAR 175, on which Mr Howell relies as binding authority of this court for the proposition that an individual is not persecuted by reason of any of the matters listed in Art. 1A(2) unless that is what motivates his persecutor to persecute him. In that case the appellant, a Nigerian, had refused to release the body of his deceased father for ritual burial by a Nigerian secret society called the Ogboni. His refusal had been based on his own Christian beliefs. He feared that if he were returned to Nigeria he would be killed by the Ogboni in retaliation. His appeal was lost. Simon Brown LJ (giving the first judgment, with which my Lord Waller LJ and Forbes J agreed without adding reasoning of their own) recorded the submission for the Secretary of State thus (paragraph 10):

"Mr Underwood's argument... is that discrimination is an essential feature of persecution for a Convention reason and that this requires the persecutor to be motivated by the reason in question, here religion... [H]e

must establish that the Ogboni are intent on harming him because he is a Christian and not merely because he crossed them. And this... the appellant cannot do... There is no reason to suppose that the Ogboni would not be equally intent upon harming anyone else who crossed them..."

90 Mr Howell founds in particular on paragraphs 24 and 26 of Simon Brown LJ's judgment:

> **"24. Nothing in these comments** [viz. certain observations by Professor Goodwin-Gill] **to my mind provides a sufficient basis for holding that some element of conscious discrimination against the victim based on a Convention reason is not a necessary ingredient of Convention persecution. And nothing short of such a holding would, I believe, be sufficient for the success of the present appeal...**
>
> **26. In short, this case fails not for want of enmity or malignity on the part of the Ogboni (these feelings, we must assume, were present in abundance), but rather because that motivation (that hostility and intent to harm) was in no realistic sense discriminatory against the appellant on account of his Christianity but rather stemmed from his refusal to comply with their demands."**

91 It is true that the first sentence of paragraph 24 refers to "some element of *conscious* discrimination" (my emphasis) which is then seemingly treated as a general requirement of Convention persecution. But it is clear to me that that is not the judgment's *ratio decidendi*. The *ratio* was that on the facts no discrimination against the appellant, based on a Convention reason, could be made out unless it was shown that the Ogboni would single out the appellant on account of his Christianity; and that could not be shown, since it appeared that the Ogboni would treat anyone who flouted their demands in the same way. In my judgment, with respect, this court in *Omoruyi* plainly accepted that the essence of the Art. 1A(2) list of Convention reasons was to provide that Convention protection should run where a claimant was faced with the prospect of persecution as a victim of discrimination. Not any discrimination; discrimination only on one (or more) of the Convention grounds. That is particularly clear, I think, from paragraphs 20 and 21 of Simon Brown LJ's judgment which cites the decision of the High Court of Australia in *Chen Shi Hai* [2000] HCA 19.

92 And in truth, this is the thread that runs through the reasoning in all the decisions of the higher courts, to which we have been referred, which have addressed the interpretation of Art. 1A(2). The point is well exemplified by the very citations from *Chen Shi Hai* set out by Simon Brown LJ in *Omoruyi*. The decision of their Lordships' House in *Nagarajan* [1999] IRLR 572 (cited in Mr Macdonald's further written reply), though arising in an entirely different context, provides a useful comparison. So far as other common law authorities (such as *Elias-Zacarias* in the United States Supreme Court, *Ibrahim* and *A v Minister for Immigration* [1998] INLR 1 both in the High Court of Australia) in terms use the language of motive or motivation, 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 Convention protection in a straitjacket 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"**.

93 The question is always whether the asylum claimant faces discrimination on a Convention ground. There will be, are, cases where that is made out by reference to the persecutor's motives. There will be, are, others where his motive matters not. If, contrary to my view, the law contemplates in principle the grant of asylum to conscientious objectors, it will be a question of fact in every case whether in truth the claimant is the subject of discrimination on account of his beliefs. Proof that the State targets conscientious objectors for unfavourable treatment, or imposes disproportionate punishment upon them, may suffice and in such instances the State's motives are plainly an element. In *Ravichandran* [1996] IAR 97 Simon Brown LJ said this at 109:

> **"In my judgment, the issue whether a person or group of people have a 'well-founded fear... of being persecuted for [Convention] reasons'... raises a single composite question. It is, as it seems to me, unhelpful and potentially misleading to try to reach separate conclusions as to whether certain conduct amounts to persecution, and as to what reasons underlie it. Rather the question whether someone is at risk of persecution for a Convention reason should be looked at in the round and all the relevant circumstances brought into account."**

This approach may with respect be said to be somewhat rough and ready, and it will not always be appropriate. Rightly or wrongly I have found it necessary to seek more intricate solutions in this case. But I think the passage is helpful and valuable, in showing that at the end the decision-maker is concerned to arrive at an overall judgment on the evidence in the case. He will have in mind that discriminatory treatment is at the core of what he is looking for.

THE FOURTH ISSUE: SEPET - THE 'INCE' POINT

94 This is one of two free-standing points taken by Mr Scannell on behalf of Mr Sepet. *Ince* was a decision of the IAT (23 July 1998: appeal no. HX/79415/95) in which they referred to

> **"... abundant material before us upon which to conclude that sadly those such as the appellant** [who was a Turkish Kurd] **who might reasonably be suspected of what the Turkish authorities would regard as 'separatist sympathies' can expect to be treated more severely in custody... It is not so much the length of his sentence with which we are concerned... it is the type of treatment which the appellant is reasonably likely to receive whilst serving that sentence which concerns us. We envisage that**

treatment would be very harsh indeed and would on any view amount to persecution." (pp. 20-21)

95 No such argument was discretely advanced on Mr Sepet's behalf before the Special Adjudicator. The point was taken before the IAT, as the written arguments below demonstrate, but was dismissed in summary form (paragraph 90) on the footing that the Special Adjudicator was entitled to reject Mr Sepet's case on the basis on which he did so.

96 I do not see how that conclusion can sensibly be impugned on the evidence adduced in the particular case, and the Special Adjudicator's perfectly reasonable treatment of it.

THE FIFTH ISSUE: SEPET - THE 'MISTAKEN BELIEF' POINT

97 As I understand Mr Scannell's argument upon this further discrete point, it is to the effect that Mr Sepet reasonably believed that compliance with the draft would associate him with the commission of atrocities; accordingly he should be treated as having a well-founded fear of just such an association.

98 I have already set out (paragraph 8) the Special Adjudicator's unchallenged finding that Mr Sepet had failed to demonstrate **"that his conscription into the Turkish army would involve him in being required to engage in military actions which have been condemned by the international community as contrary to the basic rules of human conduct"**. In light of that finding, it is plain to me that Mr Scannell's submission proceeds upon a legal error. Mr Sepet had to show, not merely that he reasonably feared being required to engage in such condemned actions, but that there was more than a fanciful chance that such a fear would eventuate in fact; but that is contradicted by the Adjudicator's finding.

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99 I would dismiss these appeals. In concluding the case, I would just add this further observation, which does not bear on the merits of these cases. In paragraph 1 I cited the observations made by the IAT at paragraph 3 of their determination, which contains a reference to "starred" cases. Such cases are, as I understand it, singled out by the President of the IAT as involving some general point of law or principle in the expectation that the decision will thereafter be followed by Adjudicators and the IAT itself. I have spoken about this with Collins J in my capacity as supervising Lord Justice in relation to immigration cases, and I should make plain my clear view that (a) Adjudicators should regard themselves as bound by starred decisions of the IAT, and (b) the IAT should itself follow an earlier starred decision unless it is satisfied that the decision is clearly wrong.

LORD JUSTICE JONATHAN PARKER:

100 I agree that these appeals must be dismissed. However, since my Lords have reached differing conclusions on the fundamental question whether conscientious objection to compulsory military service can, without more, found an asylum claim under Article 1A(2) of the 1951 Geneva Convention Relating to the Status of Refugees ("the Convention"), I must give my reasons for concluding, in agreement with Laws LJ, that the answer to that question is No.

The general approach to the interpretation of the Convention

101 My starting-point in identifying the general approach to the interpretation of the Convention is the 1969 Vienna Convention on the Law of Treaties ("the Vienna Convention"). Article 31.1 of the Vienna Convention provides that:

> "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

102 Article 31.2 provides that the "context" for this purpose includes the preamble to the treaty and any agreement relating to the treaty and made between the parties to it.

103 Article 31.3 is in the following terms:

> "There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties."

104 In *ex p. Adan* [2001] 1 All ER 593, it was contended by the Secretary of State that individual States might legitimately adopt their own interpretation of the Convention. The House of Lords rejected that contention. Lord Slynn of Hadley said (at p.597j):

> "Just as the courts must seek to give a "Community" meaning to words in the EC Treaty ... so the Secretary of State and the courts must in the absence of a ruling by the International Court of Justice or uniform state practice arrive at their interpretation on the basis of the Geneva Convention as a whole read in the light of any relevant rules of international law, including the Vienna Convention.... The Secretary of State and the courts of the United Kingdom have to decide what this phrase in this treaty means. *They cannot simply adopt a list of permissible or legitimate or possible or reasonable meanings and accept that any one of those when applied would be in compliance with the Geneva Convention.*" (My italics.)

105 In the course of his speech in *Adan*, Lord Steyn said this (at p.603j):

> "It is necessary to determine the autonomous meaning of the relevant treaty provision. This principle is part of the very alphabet of customary international law. Thus the Court of Justice of the European Communities has explained how concepts in the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 .... must be given an autonomous meaning in accordance with the objectives and system of the Convention. .... Closer to the context of the Geneva Convention are human rights conventions where the principle requiring an autonomous interpretation of convention concepts ensures that its guarantees are not undermined by unilateral state actions. Thus the European Court of Human Rights has on a number of occasions explained that concepts of the [European Convention on Human Rights] must be given an autonomous meaning..."

106 After referring to Article 31 of the Vienna Convention, Lord Steyn continued (at p.605a):

> "It follows that, as in the case of other multilateral treaties, the Geneva Convention must be given an independent meaning derivable from the sources mentioned in Articles 31 and 32 of the Vienna Convention and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty."

107 This, however, is plainly not to be taken as a recipe for a legalistic interpretation of the Convention. In *ex p. Shah* [1999] 2 AC 629, 646, Lord Steyn quoted with approval the following passage from the judgment of Sedley J at first instance referring to the complexity of the factual issue which arose in that case:

> "Its adjudication is not a conventional lawyer's exercise of applying a legal litmus test to ascertain facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose."

108 To the same general effect is another passage from the judgment of Sedley J in *ex p. Shah* ([1997] Imm.A.R. 145, 152) in which he referred to the Convention as having been:

> ".... adopted for by civilised countries for a humanitarian end which is constant in motive but mutable in form."

See also the Australian case of *Wang v. Minister for Immigration and Multicultural Affairs* [2000] FCA 1599, where Merkel J said (at paragraph 73 of his judgment):

> "Although primacy is to be given to the written text of the Convention, the context, object and purpose of the Convention is also to be considered...

> More specifically, Kirby J ... observed that the term "refugee" in the Convention: "is, in turn, to be understood as written against the background of international human rights law..."".

109 In summary, therefore, I take the basic position to be that whilst the court should adopt a purposive approach to the interpretation of the Article 1A(2) of the Convention, paying due regard to its humanitarian object, it may not in so doing depart from the single autonomous meaning of the written text. The Convention has been described as a "living instrument"; a description which no doubt reflects the mutability of form referred to by Sedley J in the passage quoted above. At the same time, it seems to me that care must be taken not to use that description as a purported justification for departing from the true meaning of the relevant treaty provision, and thereby inevitably changing the nature or scope of the obligation imposed by that provision.

Article 1A(2) of the Convention

110 Article 1A(2) of the Convention defines a "refugee" for the purposes of the Convention as any person who:

> "*.... owing to a 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." (My italics.)

For present purposes, only italicised part of the above definition is relevant.

111 In addressing the question whether a conscientious objector to compulsory military service who would face punishment for a refusal to perform such service is a "refugee" within Article 1A(2), it is first necessary to put on one side a number of special factors. In the first place, it is to be assumed that the law which imposes the requirement for military service is of general application (that is to say, is not discriminatory according to its terms). Secondly, it is to be assumed that the punishment for refusal to obey that law is not disproportionate or otherwise in itself unlawful under international law. Thirdly, it is to be assumed that the military service which would be required of the applicant is not in itself objectionable under international law. The stark question which then emerges is whether punishing a conscientious objector for refusing to undertake military service constitutes persecution for a Convention reason.

"Conscientious objector"

112 As Professor Goodwin-Gill points out in his Report, whilst some individuals may conscientiously object to all forms of military service, the conscientious objections of others may be focused on a specific issue or issues. Yet all such objections are, by definition, founded in conscientious belief (whether political,

religious or moral), which belief is in turn manifested in a refusal to undertake compulsory military service. It seems to me, therefore, that the fundamental distinction which the IAT sought to draw in this case between "absolute" and "partial" conscientious objectors is logically flawed. I accept Mr Macdonald QC's submission that the underlying rationale for international protection of conscientious objectors - if there is one - must be the same whether the objection is "absolute" or "partial".

".... fear of being persecuted..."

113 Crucial to the present question is the meaning of the word "persecuted" in Article 1A(2). Consistently with Lord Steyn's observations in *Adan* (above), the concept of persecution for the purposes of Article 1A(2) - that is to say the single autonomous meaning of the word "persecuted" – cannot itself be mutable: as a matter of interpretation it must in my judgment remain constant, subject only to any agreement (express or implied) by the States parties to the Convention or to any rule of international law requiring a change in its meaning (see Article 31.3 of the Vienna Convention). That is not to say, however, that as time passes and conditions change factual situations may not come to be regarded as amounting to persecution which would not previously have been so regarded. In that sense and to that extent, certainly, the Convention can justifiably be described as a "living instrument"; but that characteristic of the Convention does not involve or require any change in the meaning of its provisions. Still less can it be for the courts of a contracting State to change the meaning of Article 1A(2); that must be a matter for its legislature, in agreement with the legislatures of the other contracting parties. Nor, as I see it, can it be the role of the courts in interpreting the Convention to act as a kind of judicial barometer, responsive to every passing change in the climate of international opinion. In my view legal obligations (including treaty obligations) should not be subjected to such a variable and unpredictable process of interpretation where that can legitimately be avoided. So far as the Convention is concerned, I can see no reason to depart from what I may call an orthodox approach to its interpretation. By that I mean that the function of the courts in interpreting the Convention is, as I see it, no more and no less than to apply it to the facts of the particular case in a purposive and flexible way, paying due regard to its humanitarian objectives, and in accordance with its true single meaning.

114 It is in this context, therefore, that I address the question whether punishment of a conscientious objector for refusing to undertake compulsory military service is "persecution" within the meaning of Article 1A(2).

115 In *Horvath* [2000] 3 WLR 379, a case involving alleged persecution by non-state agents, Lord Hope of Craighead said this (at p.383B):

> "It seems to me that the Convention purpose which is of paramount importance for a solution of the problems raised by the present case is that which is to be found in the principle of surrogacy. The general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community ... This purpose has a direct bearing

on the meaning that is to be given to the word "persecution" for the purposes of the Convention. As Professor James C. Hathaway in *The Law of Refugee Status* ... has explained: "Persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community.""

116 It is common ground that a State has the duty to protect its citizens, and may for that purpose to introduce a law of compulsory military service. It follows that the citizens of that State, absent conscientious objection, cannot be said to be persecuted simply by reason of the fact that a refusal to obey that law would result in punishment (so much, indeed, is expressly accepted in Article 4(3)(b) of the European Convention on Human Rights, to which I return below) At the same time, I accept the appellants' proposition that a law of general application may nevertheless be discriminatory in its application.

117 The relevant question, however, is whether a right of conscientious objection to compulsory conscription is (to use Professor Hathaway's words, quoted by Lord Hope in *Horvath* (above)) a "core entitlement" which is recognised by the international community.

118 In my judgment the materials to which we have been referred in the course of this appeal do not establish that a right of conscientious objection to military service is a core entitlement which is recognised by the international community: rather, they seem to me to confirm that, as matters stand, it is not. I refer hereafter to some of the principal materials which were put before us in this connection.

119 I refer first to the three the human rights treaties to which our attention was directed in the course of argument: that is to say, the European Convention on Human Rights and Fundamental Freedoms ("the ECHR"), the International Covenant on Civil and Political Rights ("the ICCPR"), and the American Convention on Human Rights ("the ACHR").

The ECHR

120 The relevant Articles of the ECHR for present purposes are Articles 4, 9 and 14. Article 4 of the ECHR is in the following terms (so far as material):

"1. ....

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

(a) ....

(b) any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) ....

(d) ....”

121 Article 9 provides as follows:

> “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others in public or private, to manifest his religion or belief, in worship, teaching, practice or observance.
>
> 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

122 Article 14 provides as follows:

> “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

123 As I read Article 4.3(b), a requirement to perform military service does not in itself constitute a breach of the Article, *even in the case of a conscientious objector*. If that interpretation of Article 4.3(b) is correct, I find it hard to see how it can be contended that such a case nevertheless involves a breach of Article 9. It is to be noted that whereas the right to freedom of thought and belief under Article 9.1 is unlimited, the right to *manifest* one’s thoughts and beliefs may be subject to various categories of limitations set out in Article 9.2, including limitations which are “prescribed by law and are necessary in a democratic society in the interests of public safety”. Reading Article 4.3(b) and Article 9.2 together, the conclusion seems to me to be that a requirement that a conscientious objector perform military service, with the associated imposition of punishment should the conscientious objector refuse to do so, does not involve a breach of Article 9.

124 In *Thlimmenos v. Greece* (Application no. 34369/97), a decision of the European Court of Human Rights (“the Strasbourg court”) dated 6 April 2000, the applicant, a Greek national, had been refused admission to the profession of chartered accountant in Greece on account of a conviction some five years earlier for insubordination in that he had refused to undertake military service because he was a Jehovah’s Witness, and as such was bound in conscience so to refuse. At the material time, Greece did not provide any civilian alternative to military service for conscientious objectors. The Greek domestic courts rejected the applicant’s appeal against the authorities’ refusal to admit him to the profession of chartered accountant on the footing that their refusal was not related to his religious beliefs but to the fact that he had been convicted of a felony, and that Greek law excluded those convicted of a felony from admission to the profession of chartered accountant.

125 The applicant complained to the European Commission of Human Rights ("the Commission"). It is material to note that his complaint to the Commission (and subsequently to the Strasbourg court) was not about his initial conviction: rather, his complaint was that the law excluding those convicted of a felony from the profession of chartered accountant was discriminatory in that it did not distinguish between those convicted on account of their religious beliefs and those convicted on other grounds (see paragraph 33 of the Strasbourg court's judgment). On that basis, it was contended by the applicant that the authorities' refusal to admit him to the profession of chartered accountant was a breach of Article 9, alternatively of Article 14 of the ECHR taken in conjunction with Article 9. In its Report dated 4 December 1998, the Commission (by a majority of 22 to 6) concluded that the authorities' refusal to admit the applicant to the profession of chartered accountant was discriminatory, and in breach of Article 14 taken in conjunction with Article 9. In the printed copy of the Report which has been provided to us, the conclusion is expressed in terms of "a violation of Article 9 taken in conjunction with Article 14 of the Convention", but I would respectfully suggest that this is a mistranscription, and that it is clear from the earlier reasoning in the Report (and from the references to the Report in the subsequent judgment of the Strasbourg court) that the breach found by the majority of the Commission was of Article 14, taken in conjunction with Article 9.

126 In paragraph 41 of the Report the majority address the meaning and effect of Article 14, saying this:

> "The Commission also recalls that Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, the application of Article 14 does not presuppose a breach of one or more of such provisions and to this extent it is autonomous. For Article 14 to become applicable it suffices that the facts of a case *fall within the ambit of* another substantive provision of the Convention or its Protocols. ..... For the purposes of Article 14, a difference in treatment is discriminatory if it has no reasonable or objectionable justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the aims employed and the aim sought to be realised ...." (My italics.)

127 The distinction between a case which breaches Article 9 and one which merely "falls within the ambit of" Article 9 is an important one for present purposes. As will be seen from paragraph 46 of the Report (quoted below), the majority of the Commission expressly left open the question whether the case involved any breach of Article 9. In the view of the majority (the correctness of which view was subsequently confirmed by the Strasbourg court) it was sufficient to bring Article 14 into play that the case should "fall within the ambit of" Article 9.

128 Paragraph 46 of the Report reads as follows:

> "The Commission has previously considered that a sentence passed for refusal to perform military service cannot constitute in itself a breach of Article 9 of the Convention.... However, in the present case the Commission is not called

upon to examine whether the applicant's original conviction was justified under the second paragraph of Article 9. In any event, the Commission could not conduct such an examination since the applicant was convicted in 1983 and Greece has recognised the competence of the Commission to receive individual applications in relation to acts, decisions, facts or events subsequent to 19 November 1985. Moreover, the application was submitted more than 6 months after the applicant's final conviction."

129 Thus, as I understand the position, the majority of the Commission concluded that the applicant's conviction "amounted to an interference with his right to manifest his religion" (and the case accordingly "fell within the ambit of" Article 9, thereby engaging Article 14) but that the Commission was not competent to decide whether the conviction could be justified under the second paragraph of the Article (i.e. whether the conviction amounted to a *breach* of Article 9).

130. After noting that the conviction led to the further consequences that the authorities had refused the applicant admission to the profession of chartered accountant and that the Greek court had upheld that refusal (in a judgment which the majority regarded as being itself an interference with the applicant's right to manifest his religion), the Report continues:

> "48. Moreover, the Commission considers that, *independently of whether the applicant's original conviction could be justified in a democratic society or not*, its further consequences were disproportionate given the lack of any relationship between the offence committed by the applicant and the profession of a chartered accountant. The Commission also considers that the drafters of the rules governing access to the chartered accountants' profession could have reasonably foreseen that it would be impossible for most male Jehovah's Witnesses to be appointed to such a post.
>
> 49. The Commission considers that the right not be discriminated [against] in the enjoyment of the rights guaranteed by the Convention is not violated only when States treat differently persons in analogous situations without providing an objective and reasonable justification. It is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are different.
>
> 50. In the circumstances of this case, the Commission finds no objective and reasonable justification for the failures of the drafters of the rules governing access to the profession of chartered accountants to treat differently persons convicted for refusing to serve in the armed forces on religious grounds from persons convicted of other felonies. By failing to introduce such a distinction, i.e. by failing to introduce an exception to the rule barring from the profession of chartered accountants persons who have been convicted of felonies, the drafters of the rules violated the applicant's right not to be discriminated [against] in the enjoyment of his right to manifest his religion." (My italics.)

131 Accordingly, the Commission (by a majority) concluded that the authorities' refusal to admit the applicant to the profession of chartered accountant amounted to a breach of "Article 9 taken in conjunction with Article 14" – which, in context, I take to mean Article 14 taken in conjunction with Article 9. This interpretation is, I think, further confirmed by the fact that the majority went on to say (in paragraph 52 of the Report) that in the light of their conclusion it was not necessary to examine "whether there has also been a violation of Article 9 on its own".

132 In a "Partially Dissenting Opinion", six members of the Commission agreed with the majority that the authorities' refusal to admit the applicant to the profession of chartered accountant conviction constituted an interference with his freedom to manifest his religion, but went on to express the view that such an interference could not be justified under the second paragraph of Article 9, since there was no good reason "justifying the exclusion of Jehovah's Witnesses who have refused to perform military service from practice as Chartered Accountants". Accordingly the view of the minority was that the refusal to admit the applicant to the profession was a breach of Article 9. The final two paragraphs of the Opinion read as follows:

> "9. In these circumstances, we consider that the applicant's exclusion from the profession of Chartered Accountants by reason of his conviction in 1983 went further than was required to achieve a proper balance between the interests involved and cannot be regarded as proportionate to the aims being pursued. Even making due allowances for a State's "margin of appreciation" ... the sanction complained of was not "necessary in a democratic society" as required by paragraph 2 of Article 9.
>
> 10. Accordingly we prefer to find a violation of Article 9 taken by itself. In our view it is appropriate first to examine the matter under Article 9 and only then under Article 14. In this respect we do not agree with the approach taken in the Report or the reasoning leading to a violation of Article 14 in conjunction with Article 9. Our conclusion of a violation of Article 9 renders it unnecessary to examine whether there has also been a violation of Article 14."

133 As to the conviction itself, the minority said (in paragraph 4 of the Opinion):

> "..... we consider that the freedom to "manifest ... in observance" the well-known religious conviction of Jehovah's Witnesses be refraining from personal military service is a freedom which attracts the guarantees of Article 9 para.1, *subject to the provisions of Article 9 para.2*. The situation can be distinguished from one in which the actions of individuals do not actually express the belief concerned .... and from a situation concerning an obligation which has no specific conscientious implications in itself, such as a general tax obligation....." (My italics.)

134 It is therefore to be noted that, like the majority, the minority did not address the question whether the conviction (as opposed to the applicant's exclusion from the profession of chartered accountant) was justified under Article 9.2.

135 The case was subsequently referred by the Commission to the Strasbourg court, sitting as a Grand Chamber of 17 judges. The judgment of the Strasbourg court was delivered on 6 April 2000. After referring to the views of the Commission, the Strasbourg court noted that the applicant's complaint was directed not at the distinction which the rules governing access to the profession of chartered accountant made between convicted persons and others, but rather at the fact that in the application of the relevant law no distinction was made between those convicted of offences committed exclusively because of their religious beliefs and those convicted of other offences. The judgment continues:

> "42. ..... In essence, the applicant's argument amounts to saying that he is discriminated against in the exercise of his freedom of religion, as guaranteed by Article 9 of the Convention, in that he was treated like any other person convicted of a felony, although his own conviction resulted from the very exercise of this freedom. Seen in this perspective, the Court accepts that the "set of facts" complained of by the applicant – his being treated as a person convicted of a felony for the purpose of an appointment to a chartered accountant's post despite the fact that the offence for which he had been convicted was prompted by his religious beliefs – "falls within the ambit of a Convention provision", namely Article 9.
>
> 43. *In order to reach this conclusion, the Court, as opposed to the Commission, does not find it necessary to examine whether the applicant's initial conviction and the authorities' subsequent refusal to appoint him amounted to interference with his rights under Article 9 para 1. In particular, the Court does not have to address, in the present case, the question whether, notwithstanding the wording of Article 4 para 3(b), the imposition of such sanctions on conscientious objectors to compulsory military service may in itself infringe the right to freedom of thought, conscience and religion guaranteed by Article 9 para 1.*" (My italics.)

136 The Strasbourg court went on to conclude that Article 14 applied to the case "in conjunction with Article 9 thereof" (paragraph 45); that the applicant's exclusion from the profession of chartered accountant represented a further sanction on the applicant which was "disproportionate"; and that "there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony" (paragraph 47). It accordingly concluded (paragraph 49) that:

> ".... there has been a violation of Article 14 of the Convention taken in conjunction with Article 9".

137 The Strasbourg court then turned to the applicant's argument (accepted by the Commission, both by the majority and the minority – see above) that both his initial conviction and the authorities' subsequent refusal to admit him to the profession of chartered accountant constituted interferences with his right to manifest his religious

beliefs under Article 9 of the Convention, but concluded that it was not necessary to address that issue. Paragraph 53 of the judgment reads as follows:

> "The Court considers that, since it has found a breach of Article 14 of the Convention taken in conjunction with Article 9 and for the reasons set out in paragraph 43 above, it is not necessary also to consider whether there has been a violation of Article 9 taken on its own."

138 It is, in my judgment, of significance in the present context that in concluding that the case "fell within the ambit of" Article 9, so as to bring Article 14 into play, the Strasbourg court did not find it necessary to address the question whether the conviction (or for that matter the subsequent exclusion from the profession of chartered accountant) was an "interference" with the applicant's right to manifest his religion, which required to be justified under Article 9.2: that was a question which the court expressly left open (see paragraph 43). It was, it seems, enough in itself to bring the case "within the ambit of" Article 9 (and thus act as a trigger for Article 14) that what was complained of by the applicant was "his being treated as a person convicted of a felony for the purposes of an appointment to a chartered accountant's post despite the fact that the offence for which he had been convicted was prompted by his religious beliefs" (see paragraph 42 of the judgment, quoted above). In other words, it was his exclusion from the profession, rather than the initial conviction, which sufficed to bring Article 14 into play.

139 If I have analysed *Thlimmenos* correctly, it seems to me to provide no support at all for the appellants' case. Both the Commission and the Strasbourg court expressly left open the question whether a conviction for refusing to undertake military service on religious grounds was justifiable under Article 9.2; indeed the Strasbourg court left open the prior question whether such a conviction was an interference with the applicant's Article 9 rights which required such justification. And so far as Article 14 is concerned, the entire focus of the applicant's complaint was on the rules for admission to the profession of chartered accountant which, as the Strasbourg court held, unjustifiably discriminated against Jehovah's Witnesses who had been convicted for refusing to undertake military service by treating them in the same way as other persons convicted of felonies.

140 It follows, in my judgment, that the ECHR provides no support for the proposition that a right of conscientious objection to compulsory military service is recognised by the international community as a core entitlement, such that punishment for refusal to perform such service would amount to persecution within the meaning of Article 1A(2) of the Convention.

The ICCPR and the ACHR

141 The same considerations apply, in my judgment, to the ICCPR and the ACHR, each of which contains provisions closely corresponding to Articles 4 and 9 of the ECHR.

The UNHCR Handbook (first published 1979; last re-edited 1992)

142 I turn next to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("the Handbook"). Although the Handbook is not strictly an authoritative text, is nevertheless widely accepted as providing valuable guidance in relation to the determination of refugee status under the Convention. Chapter V of the Handbook is entitled "Special Cases", and section B of that chapter is headed "Deserters and persons avoiding military service". Section B contains the following paragraphs:

> "167 In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition [sc. in Article 1A(2)]. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.
>
> 168 A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.
>
> 169 A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has a well-founded fear of persecution on these grounds above and beyond the punishment for desertion.
>
> 170 There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.
>
> 171 Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

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

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

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

143 It seems to me to be implicit in those paragraphs that there is (or, more accurately, there was when those paragraphs were last re-edited in 1992) no international recognition of a right to refuse to perform military service on grounds of conscientious objection, without more. Paragraph 171, with its reference to military action which is "condemned by the international community as contrary to basic rules of human conduct", seems to me to be plainly inconsistent with the existence of such a right. To the same effect, in my judgment, is the statement in the concluding sentence of paragraph 173 that it is "open" to contracting states to grant refugee status to conscientious objectors. As it seems to me, the Handbook is there recognising that contracting states have a choice whether to do so – a position which is inconsistent with their being *obliged* to do so under the Convention.

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Other European material

144 We were also referred to certain other European material, including resolutions and recommendations of the Council of Europe and resolutions of the European Parliament calling on member states recognise a right of conscientious objection. Once again, however, it seems to me that the tenor of these

recommendations and resolutions is essentially aspirational and, as Laws LJ has said, at most exhortatory. Had they been directed at the recognition and protection of *existing* rights they would, as it seems to me, have been framed in very different terms.

English authorities

145 In my view the appellants' interpretation of, and reliance on, the decision of the Court of Appeal in *Zaitz* [2000] INLR 346 is misplaced. In the course of his judgment in *Zaitz* Buxton LJ made it clear that the Court of Appeal was not willing to rule on the issue whether conscientious objection to military service is in itself a sufficient ground for a claim to refugee status, since that issue had not been raised before the special adjudicator or before the IAT.

146 Nor, in my judgment, does the decision of the IAT in *Foughali* (00/TH/01513) take the matter very much further. True it is that the IAT refers to "persecution due solely to principled objections" as one of four specific exceptions to the right of a state to require of its citizens that they undertake military service, but there was no issue in that case as to a right of conscientious objection (the applicant in that case did not object to military service as such), and the stated exception was not subjected to any detailed analysis.

Canas-Segovia (1990) 902 F.2d 717

147 The decision of the US 9th Circuit Court of Appeals in *Canas-Segovia* represents, in my view, the high point of the appellants' case as to the existence of a right of conscientious objection.

148 In *Canas-Segovia* two brothers, both citizens of El Salvador and both Jehovah's Witnesses, sought asylum in the United States pursuant to the provisions of the United States Refugee Act 1980, which defines refugee status in substantially the same terms as Article 1A(2) of the Convention. The primary ground of their claim was that forcible conscription in El Salvador in violation of their religious beliefs amounted to religious persecution. The UNHCR submitted a detailed and substantial amicus curiae brief to the court, in the course of which it urged the court:

> ".... to assess the petitioners' claims in light of the emerging human rights norm obliging States to accommodate individuals' sincere objections to military service on the basis of conscience, including religious and political belief",

and:

> ".... to adopt a framework of standards within which the refugee status of conscientious objectors may appropriately be determined."

The brief concluded as follows:

> "The essential position of the UNHCR may be simply stated: especially where there is no provision for alternative service, the imposition of significant sanctions for refusing to perform military service based on conscience, including sincere religious or moral objections, may be considered persecution within the meaning of the 1951 Convention and the 1967 Protocol."

The court concluded that the paragraphs of the Handbook quoted earlier in this judgment, when read *in toto*, emphasised that refusal to perform military service on account of genuine reasons of conscience may be a basis for refugee status, and it went on to hold that:

> "[a] conscientious objector is one whose actions are governed by conscience, and persecution arises whenever that conscience is overcome by force or punishment meted out for the refusal to betray it."

The decision was quashed on appeal and a rehearing directed, but the decision on the rehearing differed from the original decision only in that the motivation was held to be political rather than religious.

149 As is evident from my own observations concerning the relevant paragraphs of the Handbook, the US court in *Canas-Segovia* took a very different view to mine as to the import of those paragraphs so far as a right of conscientious objection is concerned, and in so far as the decision was based on those paragraphs I would respectfully have to disagree with it. But what is of significance for present purposes is that the court appears to have accepted the invitation of the UNHCR to recognise a right of conscientious objection as an "emerging human rights norm".

150 In the context of the proper interpretation of the Convention there is, in my judgment, an important difference between on the one hand recognising an emerging human rights norm and on the other hand taking account of a core entitlement which is recognised by the international community. The former seems to me to involve the *creation* of a right, whereas the latter involves recognition of an *existing* right as part of the context in which the Convention is to be interpreted. In my judgment, for reasons given earlier, it is not part of the process of interpreting the Convention to elevate emerging human rights norms into established rights. As I see it, that is a matter for the governments and legislatures of the States parties to the Convention; not for the courts.

Professor Goodwin-Gill's Report

151 Professor Goodwin-Gill starts from the uncontroversial position that the object and purpose of the Convention is to provide protection for those who are victims of, or who have reason to fear, persecution. He then goes on to argue, by reference to various manifestations of "persecution" as recognised in judicial decisions both in this jurisdiction and elsewhere and by reference to the various materials on which the appellants rely in this appeal, that the fundamental elements which determine whether a conscientious objector is entitled to Convention protection are "*the sincerity of the*

conviction which sets him or her in opposition to their government, and the *risk* of treatment amounting to persecution, by reason of such objection" (see ibid. para 19).

Professor Goodwin-Gill's central thesis is summarised in paragraph 10 of his Report, under the heading "Summary of Argument" as follows:

> "A person who refuses to do military service for reasons of conscience may be a refugee within the meaning of the Convention, if he or she has a well-founded fear of persecution, and even if the penalty feared results from application of the law. Laws of general application can be instruments of persecution. The refusal to do military service, however motivated, can be a political act, reflecting an essentially political opinion regarding the permissible limits of State authority. A conscientious objector may also be a refugee if he or she objects to participating in a particular conflict, or to being conscripted, or taking part in a particular type of military action."

I can accept without difficulty much of what Professor Goodwin-Gill says in his Report. Thus, I can accept that human rights law attaches special significance to the individual's freedom of opinion and freedom of conscience (para 46); that international human rights instruments leave open the possibility that failure effectively to take account of the individual's conscientious beliefs *may* violate his or her human rights (para 48); that the right to freedom of conscience under Article 9.1 of the ECHR, in contrast to the right to manifest one's religion or beliefs (see Article 9.2), is absolute and open to no derogation or limitation (para 51); and that laws of general application can be instruments of persecution (para 67).

152 Further, I agree that (as Professor Goodwin-Gill says in para 81 of his Report):

> "It cannot be doubted that to oblige a person to commit, or be accessory to, or participate in (1) crimes under international law, (2) offences against international humanitarian law, or (3) serious violations of human rights or others, is in itself incompatible with that person's basic human right to respect for dignity, integrity and identity."

However, I cannot agree with Professor Goodwin-Gill when he goes on to say (in paragraph 81):

> "However, the overarching principle is that of conscientious objection, rather than the risk of participating in unlawful acts."

Apart from *Canas-Segovia* (above), none of the cases to which we have been referred goes so far as to state so wide a proposition. On the contrary, the cases involving the special factors to which Professor Goodwin-Gill refers suggest to me that absent such special factors there could have been no claim to refugee status.

Moreover, Professor Goodwin-Gill seems to me to beg the question when he says (in para 87):

> "..... a genuine conviction, including disagreement with government, may constitute a sufficient reason for refugee status if the "conviction" or "belief" is seen or punished as political, *or if it is so deeply held that any penalty necessarily violates the individual's freedom of conscience*." (My italics.)

Nor can I agree with Professor Goodwin-Gill when, referring to the decision of this court in *Zaitz* (above), he says (in para 84):

> "It has now been decided that the fact of liability to military service can *itself* constitute persecution, particularly for an individual possessing deep convictions." (My italics.)

As pointed out earlier, the court in *Zaitz* would not allow the Secretary of State to argue that a claim to refugee status cannot be founded on conscientious objection alone, since the point had not been taken either before the special adjudicator or before the IAT.

153 In my judgment, as I indicated earlier, a consideration of all the materials to which we were referred leads me to the conclusion that a right of conscientious objection is not, as matters stand, a core entitlement recognised by the international community and accordingly is not sufficient in itself to found a claim to refugee status under Article 1A(2) of the Convention.

154 In summary, my conclusion on this issue is that if it be thought desirable that a right of conscientious objection to military service should be sufficient in itself to found a claim to refugee status, it is for the legislatures of the States parties to the Convention to achieve that result through legislation, and not for the courts of a contracting State to achieve it through a process of "interpretation". As Lord Slynn of Hadley pointed out in the passage from his speech in *Adan* which I quoted at the start of this judgment, the courts of the United Kingdom cannot change the meaning of the Convention, however desirable the change might be thought to be. As I see it, for the reasons which I have given, that is in substance what the appellants are inviting this court to do in this case.

> "... *by reason of* [a Convention reason]"

In the light of my conclusion on the main issue, the Secretary of State's alternative argument, namely that an applicant for refugee status cannot be said to be persecuted by reason of his opinions or beliefs unless they are what motivate his persecutor to persecute him, does not arise. However, since the point is an important one I should perhaps say that I agree that the argument should be rejected for the reasons given by Laws LJ.

The "Ince" point and the "Mistaken belief" point

155 On these points too I agree with the reasoning and conclusions of Laws LJ.

LORD JUSTICE WALLER:

156 I gratefully adopt the introduction and the factual background set out in the judgment of Laws LJ. I have however formed a different view as to whether a person who would be punished for refusing to perform military service, when the refusal is based on genuine reasons of conscience, should be recognised as a refugee. Although this point does not directly arise in this case, since it was fully argued and of importance I have set out my reasons for the conclusion that I have formed.

Section 8 of the Asylum and Immigration Appeals Act 1993 (the provision in force at the date of the Tribunal's decision) provides:

> "(1) A person who is refused leave to enter the United Kingdom under the 1971 Act may appeal against the refusal to a special adjudicator on the ground that his removal in consequence of the refusal would be contrary to the United Kingdom's obligations under the Convention."
> . . . . . .
> (6) "Contrary to the Convention" means contrary to the United Kingdom's obligations under the Refugee Convention."

Paragraph 334 of the Immigration Rules provides: [HC 395]

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

157 The starting point accordingly has to be whether the appellants or either of them are refugees as defined by Article 1A(2) of the 1951 Geneva Convention as amended by the 1967 Protocol (the Convention). That term shall apply to any person who:

> "owing to a 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."
>
> Thus what the appellants had to establish was the following:

(a) that they fear persecution in Turkey;

(b) that such persecution is by reason of one of the Convention reasons,

(c) that such fear is well founded.

158 The Convention reason relied on in this case is political opinion, possibly express or implied. That as a Convention reason may need distinguishing from other Convention reasons considered in other cases. The question whether the political opinion or implied political opinion is "protected" by the Convention, is closely linked with the question whether there has been "persecution" for reasons of it. This is not surprising since ultimately the question whether there is a well founded fear of persecution for reasons of a Convention reason, has to be considered as one single composite question (see Simon Brown LJ in *Ravichandaran* [1996] Imm A.R. 60 at 78), but in the instance where "political opinion" is the Convention reason it is even more clearly so.

159 Questions of causation and whether for example prosecution is persecution for reasons of a Convention reason, also depend on the Convention reason which is being relied on. I will illustrate what I mean. Whereas it is clear that the persecution feared cannot be used to define a particular social group where that is the Convention reason relied on (see Lord Hope's speech in *R v SSHD ex parte Shah* [1999] 2 AC 629 at 656), it is recognised that it may not be necessary to identify persons as having a particular political opinion prior to the taking of action by a government which may give rise both to the reason for holding the political opinion and the act of persecution for reasons thereof. On one reading of the Convention political opinion might simply be concerned with situations in which people had a certain political view e.g. they were a communist or they did not agree and had already actively or expressly protested against government policy. The Convention protected those persons if they were "persecuted" for being communists, or for protesting. But it has been recognised that the Convention should also protect persons, at least in relation to some matters where that person is being punished and thus persecuted, simply because he challenges the government's entitlement to take a certain course of action. The challenge may come about, and usually will, simply by virtue of a refusal to obey that government's demands. Professor Hathaway's *The Law of Refugee Status* says at page 154 in a passage approved in The Federal Court of Australia in *V v Minister for Immigration & Multicultural Affairs* [1999] FCA 428:- "Essentially any action which is perceived to be a challenge to governmental authority is therefore appropriately considered to be the expression of a political opinion." In that case a statement of Davies J in a previous Australian case was approved – "it is enough that a person holds (or is believed to hold) views antithetic to instruments of government, and is persecuted for that reason. It is not necessary that the person be a member of a political party or other public organisation or that the person's opposition to the instruments of government be a matter of public knowledge." Thus it is that a person's challenge to his state's right to do something to him is construed as an implied political opinion of that person.

160 It is perhaps also important to stress that an implied political opinion of this kind is only likely to arise in cases of direct action by government. It will not arise in situations where the would-be refugee is relying on a failure by the government to intervene to stop the activities of non-state agents as was the situation in for example *Omoruyi v SSHD* [2001] 1AR 175 and *INS v Elias-Zacharias* 502 US 478 (US Supreme Court) authorities to which I shall have to return. That point is important when one comes to consider causal nexus or motivation. If what is being relied on is an implied political opinion by reference to conduct of a government which is being challenged, i.e. if what is being alleged as being persecution is the very fact that the government is operating a law which it is not entitled to operate so far as the challenger of the law is concerned, the causal nexus will in my view be supplied without any examination of "motive".

161 Furthermore as was said in *Chen Shi Hai v The Minister for Immigration and Multicultural Affairs* [2000] HCA 19 (13 April 2000) High Court of Australia at paragraph 21 "… To say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily." The challenge to a law may be because although it is of general application, it does operate more harshly on the challenger having regard to the personal situation of the challenger.

162 It is fundamental to the appellants' case that they fear persecution by the authorities in Turkey for reasons of their "political opinion". Where the political opinion is implied by virtue of a challenge to the state's right to impose something on the challenger, in order to assess whether prosecution is persecution it is important to analyse what political opinion is to be implied. One aspect of this appeal which is not very satisfactory is that the Secretary of State has chosen to argue a fundamental point that conscientious objection per se should not be recognised as a fundamental human right when the appellants' objection to military service is on narrower grounds. He has done that because he considers that the greater will include the lesser. He may be right about that but I am not sure that precisely the same considerations do apply to both what can be termed absolute conscientious objectors and partial objectors. Furthermore the factual situation that exists in each case will be extremely important in deciding whether a genuine fear of persecution has been shown to exist.

163 The case having been argued in the way it has, it seems to me that in considering the position of absolute conscientious objectors, one must assume they would be conscripted and forced to bear arms but will refuse to accept conscription on the basis of a genuine reason of conscience against bearing arms. One must also assume that they will then be prosecuted. I stress that is not this case, but to test the proposition one must assume it to be so. In relation to "absolute conscientious objectors" the submission must be that when they refuse conscription on that basis, they are impliedly expressing the political opinion that their government should not be allowed to call them up and/or that their government should have laws which allow conscientious objectors to be recognised e.g. by being allowed to perform some public service that does not require the bearing of arms. I should perhaps stress that it

is possible to envisage a situation in which a citizen does accept the call up, but seeks to protest that there should be laws allowing for the recognition of conscientious objection. Prosecution for doing the latter would seem to be clear persecution on the ground of political opinion. The question we have to consider relates to a challenge to the state's law which allows conscription of a conscientious objector by a refusal to obey that law.

164 In the case of partial objectors the political opinion express or implied could be rather different. It will depend on the circumstances of individual cases. In this case the political opinions relied on could be summarised as one or other of the following: (1) the opinion that the policy of Turkish Government is wrong in so far as it opposes self determination for the Kurdish people; (2) the opinion that opposes the policy which allows the army to attack the Kurds, (3) the opinion which opposes a policy which calls up into the army Kurds to fight Kurds; and (4) the political opinion that opposes a policy which allows atrocities to be perpetrated by the Turkish Army on the Kurds.

165 The implied political opinions of the absolute conscientious objector and the partial conscientious objector accordingly can be said to be different in this case, and different considerations may apply depending whether one is dealing with one or the other.

166 The Handbook on Procedures and Criteria for Determining Refugee Status paragraphs 170 ,171 172 and 173 provide:- ..

> "170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.
>
> 171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.
>
> 172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

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

167 The first thing to note from those paragraphs is that they support the view so far expressed that "implied political opinion" should be recognised as a Convention reason. The paragraphs are not dealing with religious convictions; they are dealing with conscientious objections, and unless recognition is given to the concept of implied political opinion and persecution by virtue of that implied political opinion, there is no other basis of meeting the requirements of Article 1 of the Convention. Those paragraphs would also suggest that even if every challenge to a government might be construed as an implied political opinion, not every such implied political opinion will be protected by the Convention. Close scrutiny thus needs to be given to what opinion is being implied. If the opinion being implied flows from a challenge by way of refusal to conform to a law, and the only element of persecution relied on is the normal punishment which anyone will have to suffer for breaking that law, then for the Convention ever to engage, the implied opinion must, as it seems to me, involve an assertion that a government is doing something it is not entitled to do. That will involve establishing either a rule of international law prohibiting the law in question, or establishing that the state in question is failing to recognise a prime human right as recognised internationally.

168 In the instant case the evidence would suggest that the Turkish law relating to conscription is a law of universal application. At least in the case of Bulbul, there is no suggestion that the punishment is any severer on him as a person who objects to military service on conscientious reasons, than would be imposed on any person resisting call-up. It has been argued by Mr Howell QC that in the result, because the punishment is the same for all, persecution can never be established. That, as it seems to me, is simply not so. It is true that in *Canas-Segovia* in the 9th Circuit Court of Appeals when the case returned, the court did not base their decision on their being persecution simply on the basis that the applicant would receive the normal punishment for persons refusing to join up. They found that he would be tortured because of his views. But in my view the position is as set out in *Chen Shii Hai* at paragraph 21 already quoted. A law of general application may operate more harshly on some than others, and a law of conscription which forces persons to take part in military action contrary to their genuine conscientious beliefs would seem to me to operate more harshly on such persons, than those simply seeking to avoid the draft.

169 Thus if the appellants were to be able to demonstrate that conscientious objection was a core entitlement, and one that should be recognised by the laws of Turkey, then it seems to me that the laws as they are at present would impact illegitimately and more harshly on conscientious objectors. I would suggest also that the logic of the Secretary of State's position in this case when dealing with persons that might be required to fight in a war where the basic rules of human conduct are being broken supports that view. It cannot be necessary in a case where the state is forcing a person to do something which it is not entitled to do, that persecution via punishment will only be established if the punishment is harsher than on persons about whom that is not true.

170 We on this appeal have to consider both absolute conscientious objection, as well as partial conscientious objection. As already indicated I am not convinced that the political opinion being implied in each case is the same or thus that the answer to both will necessarily be the same. I intend to examine each separately and in a little more detail.

Absolute objection

171 The Secretary of State has been anxious to establish in relation to someone who has a genuine conscientious objection to bearing arms and who comes from a state which has no legislation that recognises a genuine conscientious objector, that such a person is not a refugee. He submits that this issue has not been decided in our courts before and in particular that it was not decided by the Court of Appeal in *Zaitz v SSHD* [2000] INLR 346. There has been some misunderstanding amongst commentators and even by the Immigration Appeal Tribunal in for example *Foughali* (00/TH/01513) 2.6.00, IAT, when considering the position since *Zaitz* about what was decided in *Zaitz*. But it is clear that this point was certainly not decided in that case and so much was conceded by Mr MacDonald QC and Mr Scannell and was thus common ground before us.

172 The argument of the Secretary of State put simply is as follows: (a) A conscientious objector is not impliedly expressing a political opinion possibly at all or at least which attracts the protection of the Convention, when resisting being called-up by a state that does not recognise conscientious objectors; (b) that objector is not being persecuted, when he or she is prosecuted for refusing to answer the call-up under legislation that does not recognise a right to be a conscientious objector; alternatively (c) the objector is not being persecuted "for reasons of" a political opinion because that state is not motivated to prosecute simply because the objector to the draft is a conscientious objector; anyone refusing would be prosecuted; (d) the starting point for the appellants would in any event have to be some rule of international law requiring states to recognise conscientious objection and they have not established that rule.

173 I have used the phrase in relation to political opinion "or one which attracts the protection of the Convention" for reasons which may already be apparent. It has to be recognised that there can be shades of political opinion in relation to some of which prosecution would not amount to persecution and in relation to some of which action by authorities would amount to persecution. It is not difficult to identify

circumstances in which a person would seem to be entitled to be recognised as a refugee because that person can demonstrate that the well founded fear of persecution is by reason of an impliedly expressed political opinion; and to identify others where someone should not be so recognised. The Secretary of State for example recognises that a person who is required to serve in the military where the military contravenes the basic rules of human conduct will, (subject possibly to an argument on motivation to which I will turn and which in my view is clearly misconceived), be likely to be able to establish that he is a refugee. It seems to me that the Court of Appeal decisions in *Adan and others v SSHD* [1997] 1 WLR 1107, particularly the passages in the judgment of Hutchison LJ at 1127E-H with which passages Simon Brown and Thorpe LJJs agreed, and the Court of Appeal decision in *R v SSHD ex parte Altun* CA Transcript 28 January 2000, would make it impossible for Mr Howell to contend otherwise.

174 But if that is so, the only basis would seem to be persecution by reason of implied "political opinion". That was the basis of the Court of Appeal's decision in *Adan,* and I cannot identify any other Convention reason which provides a basis. The likelihood is that such a person has simply refused to serve in which event if the Convention is to recognise him as a refugee that could only be on the basis that such prosecution as he would be subjected to would amount to persecution by reason of an implied political opinion. Furthermore the fact that the Secretary of State demonstrated that the state concerned punished all persons who refused to be called-up in exactly the same way both during the periods when it was not fighting a war in a way that contravened the basic rules of human conduct, as when it was fighting such a war, and whether or not the challenge was on the basis that the fundamental rules were being breached, could not, as it seems to me, be an answer to the question whether there was persecution. Simply forcing someone to take part in a war where the basic rules were not adhered to, or punishing him if he did not, would be sufficient to constitute persecution.

175 But not all prosecutions for impliedly expressed political opinions will lead to the conclusion that a person is being persecuted. It may be that a refusal to obey a law can be construed as impliedly stating a political opinion, but not all refusal to obey all laws will give rise to Convention rights. Thus a thief, as suggested in argument, might be said to be impliedly expressing a political opinion that he opposed the authorities attitude to thieving, but prosecution of thieves could not conceivably be persecution.

176 What then identifies an impliedly expressed opinion which leads to the conclusion that there is persecution when the state prosecutes for holding it? The answer has to be found by reference to some recognised international standard. The implied opinion has to be a challenge of the right of the state to enforce a law. I say to enforce a law because it seems to me that in a world where attitudes change there may be circumstances in which a state has a law which cannot strictly be said to be contrary to some obligation under international law but where its attitude to enforcement may be the critical factor. *Sahm Jain v SSHD* [2000] 1NLR 71 in the Court of Appeal was concerned with homosexuals, and the law in India is an example of such a situation. What this court recognised was first that what may be regarded as prosecution and not persecution in one period may become to be regarded as

persecution in a later period. The case secondly recognised that it is clearly desirable that the international community moves with a degree of consensus otherwise burdens will be imposed on the states with the more liberal approach. It is interesting to see thirdly the question posed was whether criminalisation of homosexual activity in private (the subject in that case) was no longer regarded "by the international community at large as acceptable."

177 Professor Hathaway in *The Law of Refugee Status* (1991) says in a passage quoted with approval by Lord Hope in *Horvath v Home Secretary* [2000] 3 W.L.R.379 at 383F "persecution is most appropriately defined as the sustained systematic failure of state protection in relation to one of the core entitlements which has been recognised by the international community." Such core entitlements as so recognised may be found by reference either to obligations under international law (obligations between states), or by reference to the human rights of individuals, for example pursuant to the Conventions on Human Rights, or as recognised by the international community at large.

178 As already indicated Mr Howell accepted that persons punished for refusing to serve in the military where that service would require contravention of the basic rules of human conduct would be being persecuted within the meaning of that word in Article 1. Mr Howell did however make some attempt to suggest that that persecution would not necessarily be by reason of a Convention reason, and although what I have already said indicates my view, I should deal with the point. This argument was addressed to the motivation of the state, but if anything it demonstrated that his point on motivation could not go as far as he was suggesting. The cases he relied on were not cases concerned with implied political opinion. In *Omoruyi* (supra) the court was considering the attitude of the Ogboni and whether there was discrimination by reason of religion by the Ogboni; in *Chen Shi Hai* (supra) the question being considered was whether "black children" were a social group. In *INS v Elias Zacharias* 502 US 478 (US Supreme Court) the Supreme Court was again concerned with discrimination on account of religion. The distinction between those Convention reasons and imputed political opinion was recognised in the 9th Circuit Court of Appeals in *Canas-Segovia* when the court said "The court made clear [i.e. the Supreme court in *Elias Zacharias*] that evidence of motive is required, but imputed political opinion, by definition, includes an element of motive."

179 I should say that I do recognise a distinction between "imputed" and "implied" political opinion, and recognise that there is more force in the view that "imputed opinion" carries with it an element of motive. "Imputed" means the state "imputes" an opinion which the person may not in fact hold, and since the theory involves the state acting on what it "imputes" the element of motive is clear. But "implied" means construing the actions of the person as stating an opinion. The element of motive is not so clear, but it is nevertheless there since the challenge to the state on the basis that the state is not entitled to force for example conscientious objectors into the military, and the state's action in prosecuting such a person are directly linked.

180 The main purpose of the Convention is to enable the person who is unprotected by his/her own state to turn for protection to the international community, and to suggest that such a person would be required to do more than establish that

he/she would be prosecuted if he/she refused to take part in military activities which fell below the basic rules of human conduct, would be to render the Convention powerless in achieving its objectives.

181 The importance of this point is this. If such a person is to be recognised as a refugee, that can only be by the following route. First, (leaving on one side a religious motive) it has to be on the basis of an implied political opinion. There is no other Convention reason. Second, the fact that a country prosecutes all persons for refusing the call-up and always has done, should not be an answer to the claim of those persons who are objecting on a basis recognised by the international community as being contrary to a core human right or international law, that they are being persecuted.

182 Motivation in the direct field is dealt with by Professor Goodwin-Gill in *The Refugee in International Law 2nd Edition* (1996) (Tab 21 of his bundle) page 50. For the reasons he gives there legislation may be discriminatory or infringe a basic human right without the state being motivated so to do. The lack of motivation would not deprive the would-be refugee of being able to establish persecution by reason of a Convention reason.

183 In my view Simon Brown LJ (in the judgment with which I agreed) in *Omoruyi* when he used the word "conscious" in the context of that case was not suggesting that in all cases "deliberate intention" on the part of the state had to be established. I would furthermore go further than the 9th Circuit Court of Appeals in New York may be said to have gone in *Canas-Segovia* and say that it is not necessary to show some ill-treatment of such persons beyond the punishment inflicted on ordinary draft-dodgers in order to establish persecution and persecution by reason of implied political opinion.

184 Thus if it were established, either as a matter of international law that states were in breach of an international obligation in failing to have legislation that recognised the right of the conscientious objector, or if it was established that there was internationally recognised as a core entitlement a human right to be a conscientious objector, then certain consequences would seem to me to follow. If a would-be refugee came from a state that did not recognise conscientious objectors, and it was established that he/she was a genuine conscientious objector and that he/she would be punished in that state for refusing to be drafted, I would conclude: (1) the objector would be expressing an implied political opinion in so far as he/she was refusing to be called up on the basis of a genuine conscientious objection; (2) that such prosecution of a genuine conscientious objector as was established as likely to take place would be persecution because the law would impact on him/her more harshly because of his views; (3) that that persecution would be for reasons of political opinion; and (4).thus that such a person had a well founded fear of being persecuted for reasons of a political opinion which that person was entitled to have protected by the Convention.

185 The real point on this aspect of the case comes down thus to considering the legitimacy or otherwise of a law which does not recognise the right of a conscientious objector. That involves consideration of two possibilities. Whether under

international law Turkey is obliged to have legislation recognising conscientious objectors or whether at the least the right to be a conscientious objector is considered by the international community at large, or a sufficient portion of them, as a core right that should be recognised by Turkey.

186 Mr Howell submits that there is a conclusive answer to these questions. He submits that it is the obligation and the right of a state to protect its nationals; that a state is entitled to take all legitimate steps i.e. steps not contrary to international law to enable it to perform that obligation; that those legitimate steps include conscription; that punishment for refusing to be conscripted will not be persecution unless the state is acting unlawfully; and that there is no rule of international law requiring states to recognise conscientious objectors. Indeed (and this is his most significant point) he points to Article 4(3)(b) of the ECHR, and the equivalents in other Conventions which he submits recognise that states may not recognise conscientious objectors.

187 Mr Howell accepts that there is emerging a view that conscientious objectors should be recognised in the various international organisations to which Mr MacDonald and Mr Scannell drew our attention, but he submits there is nothing which has brought about a crystallisation of that view so as to lead to the conclusion that states are now bound to recognise conscientious objection as a human right. He drew our attention to various Opinions of the European Commission of Human Rights to support this view. Before citing from those Opinions I ought to set out in full certain Articles of the Convention on Human Rights, namely Articles 3, 4, 9 and 14.

> "Article 3 *Prohibition of torture*
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> Article 4 *Prohibition of slavery and forced labour*
>
> 1 No one shall be held in slavery or servitude.
> 2 No one shall be required to perform forced or compulsory labour.
>
> 3 For the purpose of this article the term 'forced or compulsory labour' shall not include:
>
> (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
>
> (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
>
> (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

Article 9 *Freedom of thought, conscience and religion*

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

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 14 *Prohibition of discrimination*

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

188 The Opinions of the Commission relied on by Mr Howell were the following:- *Grandrath v Federal Republic of Germany* (1967) 10 YB 626. The Commission had to consider the position of a Jehovah's Witness in Germany who would be required to perform civilian service in place of military service. The Jehovah's Witness challenged that position of the authorities on the basis that it was an infringement of Article 9 of the Convention. The majority relied on Article 4(3)(b) as demonstrating that the high contracting states had the right to impose civilian service on conscientious objectors as a substitute for military service. In a minority opinion reliance on Article 4(3)(b) was suggested to be unnecessary. Reliance was placed on Article 9(2) which permitted "such limitations as are prescribed by law and are necessary in a democratic society" to certain specified purposes, among which is "protection of public order". The minority view was that under this limitation the states are allowed to require their citizens to perform compulsory military service and it is a matter within the discretion of the states whether or not to exempt conscientious objectors from military service.

189 *X v Austria* (decision of 2 April 1973). In this case the Commission went further. The applicant was convicted and given a suspended sentence for having refused to serve compulsory military service claiming that as a Roman Catholic it was impossible for him to serve as an armed combatant. The Commission again relying on Article 4(3)(b) stated "this provision clearly shows that by including words 'in countries where they are recognised' . . . a choice is left to the high contracting parties to the Convention whether or not to recognise conscientious objectors and, if so recognised, to provide some substitute service for them."

190 *A v Switzerland* (1984) 38 DR 219. The view expressed by the Commission in this case followed its earlier rulings.

191 *Autio v Finland* (1991) 72 DR 245. In this case the Commission also followed its earlier opinions holding that Article 9 of the Convention did not give conscientious objectors the right to be exempted from substitute civilian service. The Commission further held that it was not a breach of Article 14 of the Convention, in conjunction with Article 9, to make the period of substitute civilian service for conscientious objectors longer than that of the military service that it replaced. The view of the Commission was that the Convention did not guarantee any right to conscientious objection as such.

192 Thus, submitted Mr Howell there is no recognised right to be a conscientious objector; there is no question of it being a breach of Article 9 to force someone who is a conscientious objector to do military service; and there is no question of there being discrimination against conscientious objectors if they are punished in the same way as non-conscientious objectors in breach of Article 14. He further submitted that by virtue of the recognition of the right of a state to choose whether to recognise conscientious objectors coupled with the right of a state to conscript so as to protect its citizens, it cannot be "inhuman conduct" under Article 3 to insist on a conscientious objector taking part in military activity which will involve that person killing people although his conscience would not let him do so.

193 Mr MacDonald and Mr Scannell submitted that it was not necessary to decide whether a rule of international law existed. They submitted that the question was whether a human right to be a conscientious objector had now been established as generally recognised by the international community at large. They submitted rightly that when interpreting the Convention it is legitimate to pay regard not only to context but also any subsequent practice. Thus for example in *Robinson* [1997] Imm A.R. 568 (tab 10) this court recognised the Handbook on Procedures and Criteria for Determining Refugee Status helpful as a guide to interpretation, and that Joint Position papers of the European Union were also helpful as a guide to a contemporary understanding of the obligations created by the Convention. They accordingly referred us to numerous Opinions and Resolutions of various international institutions. They did not suggest that the Conventions on Human Rights recognised conscientious objection as such, but they showed us the various instances where they said that the right to conscientious objection had been recognised as a basic right which nations should recognise. Indeed, (although they suggested it was unnecessary to go this far), they submitted that it was in fact now a rule of international law, or a rule of local European international law, that states did recognise the right to be a conscientious objector.

194 I have found it helpful, albeit it has made this judgment over lengthy, to set out all the references which we were shown and which I have been able to identify from the material before us in chronological sequence. From that history a clear evolution emerges. I have included for convenience in this history references to partial as well as absolute objections. A reference to "Goodwin-Gill" unless otherwise stated is to his book and "fn" denotes footnotes in his book.

> (i) Individual countries such as United Kingdom, Australia and United States of America had recognised in relation to their own citizens conscientious objectors during both the Great War and the Second World War.

In the United Kingdom the basis was gradually accepted as including partial objectors if the partial resulted from an "objection so deeply held that it became a matter of inner conviction as to right and wrong." (paragraph 36 Opinion of Goodwin-Gill)

(ii) 1948 Universal Declaration of Human Rights; this Declaration contained no express recognition of the right to be a conscientious objector, but nor did it contain the equivalent of Article 4(3)(b) in the ECHR from which might be spelt out the right of a state not to recognise the same. Article 18 recognised the right of conscience.

(iii) 1950 European Convention on Human Rights. By its preamble it states that the Convention was brought into being to give effect to the 1948 Convention. Article 9(1) and (2) and Article 4(3)(b) are the important provisions and have already been quoted.

(iv) 1966 International Covenant on Civil and Political Rights. This Covenant had the equivalent to Article 4(3)(b) of the ECHR in its Article 8(3)(c)(ii), and the equivalent to Article 9 in Article 18.

(v) 1967 Resolution of the Council of Europe. It declared "having regard to Article 9" of the ECHR as a "Basic Principle" "1. Persons liable to conscription for military service who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives shall enjoy a personal right to be released from the obligation to perform such service. 2. This right shall be regarded as deriving from the fundamental rights of the individual in democratic rule of law States which are guaranteed by Article 9…."

(vi) 1967 *Grandrath* Opinion of Commission. (see above)

(vii) 1969 American Convention on Human Rights also contained equivalent to Article 4(3)(b) in Article 6(3)(b), and equivalent to Article 9 in Article 12.

(viii) 2nd April 1973 *Austria* Opinion of Commission. (see above)

(ix) 1976 United Kingdom Immigration Appeal Tribunal found, on the basis of the law as it then was in Greece, that punishment of conscientious objectors was persecution, but also found it was not for reasons of religion or political opinion; immediate cause was refusal to obey the law of the land; political or religious beliefs were secondary; also found non-discriminatory since all persons with similar religious beliefs and "indeed persons with no religious beliefs were treated the same way." (Goodwin-Gill page 54)

(x) 1977 Parliamentary Assembly of EEC Recommendation that the right of conscientious objection be regarded as a human right. It urged governments to bring their legislation into line i.e. to allow for the right of a conscientious objector to perform non-military activity.

(xi) January 1979 Handbook; the last sentence of paragraph 173 states "In the light of these developments it would be open to Contracting States to grant refugee status to persons who object to perform military service for genuine reasons of conscience."
(xii) 1981 African Charter By Article 8 freedom of conscience was guaranteed, and this Charter contained no equivalent to Article 4(3)(b) of the ECHR.

(xiii) 1981 *Marek Musial* (1981) 38 N.R. 55 (F.C.A.) Federal Court of Appeal Canada. The majority ignore conscientious objection but Chief Justice Thurlow in minority on that point recognised the same. (Hathaway page 183)

(xiv) 1983 UN document E/CN.4/Sub 2 *Conscientious Objection to Military Service* (Goodwin–Gill fn 94). The United Nations Human Rights Committee expressed the view that a right of conscientious objection "can be derived from Article 18 [of ICCP 1966], inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognised by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs."
(xv) 1984 *A v Switzerland* Opinion of Commission. (see above)
(xvi) 1987 European Committee of Ministers recommendation. This is referred to in fn 94 of Goodwin-Gill.

(xvii) 1987 1st December Immigration Appeal Board decision in Canada cited with approval Chief Justice Thurlow's judgment in *Marek Musial* (see *Ahmad Ahmaddy* Dec 1st 1987 Hathaway page 184).

(xviii) 1987 Fawcett J (fn 93 in Goodwin-Gill) commenting on Article 4(3)(b) of ECHR said "this implies that such conscientious objection is an exercise of conscience under Article 9, but that the state may restrict it by allowing no exemption from military service, if it is necessary for the public safety."

(xix) 1988 Council of Europe Report emphasised the centrality of "compelling reasons of conscience." (Goodwin-Gill page 57)

(xx) December 1988 UN Document *Role of Youth in the Promotion and Protection of Human Rights including the Question of Conscientious Objection to Military Service* (Goodwin-Gill fn 94). It is this title which is changed later. (see below)

(xxi) 8th March 1989 Commission on Human Rights adopted the following: "Recognising that conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religion and similar motives.

1. Recognises the right of everyone to have conscientious objections to military service as a legitimate exercise of the right of freedom of

thought, conscience and religion as laid down in Article 18. [of UDHR and ICCP]

2. Appeals to States to enact legislation and to take measures aimed at exemption from military service on the basis of genuinely held conscientious objection to armed service."

(xxii) 1989 Brief for UNCHR submitted in *Canas-Segovia v United States Immigration and Naturalization Service:*

> "A refusal to bear arms however motivated reflects an essentially political opinion regarding the permissible limits of state authority; this is not a political opinion that needs to be inferred, let alone imputed to the individual. It is the objective reality that results from the act of faith; and it is that element of conviction (hence the importance of credibility and sincerity of belief) which serves to separate out others whose motivations may be purely self-regarding." . . . "States are free to recognise conscientious objection in itself as a sufficient ground on which to base recognition of refugee status. In this sense, they are free to attribute such value to the fundamental right to freedom of conscience that any measures have having as their object to compel the individual to act contrary to sincerely held religious belief, or any punishment, such as deprivation of liberty, imposed to that end, amounts to persecution within the meaning of the 1951 Convention regardless of its duration.
> Alternatively in short of such position of principle, international law requires that in the context of the determination of claims to refugee status an accommodation be found between the competing state and individual interests, based on standards of reasonableness and proportionality. This approach is unexceptionally applicable with respect to a variety of claims to a well-founded fear of persecution." . . ."The essential position of the UNHCR may be simply stated: especially where there is no provision for alternative service, the imposition of significant sanctions for refusing to perform military service based on conscience, including sincere religious or moral objections, may be considered persecution within the meaning of the 1951 Convention and the 1967 Protocol."

(xxiii) 24 April 1990 decision of United States Court of Appeals Ninth Circuit in *Canas-Segovia* 902 F.2d 717. That court accepted in large measure the submissions in the Brief of the UNCHR and concluded that conscientious objectors who face punishment as a result of their refusal to perform military service will establish persecution if the refusal is based on genuine political, religious, or moral or other genuine reasons of conscience; it concluded that the BIA [the Immigration Tribunal] were wrong to require "proof of intent or motive"; it concluded that the *Canas-Segovias* would suffer persecution for religious beliefs. It also concluded that the religious beliefs placed the *Canas-Segovias* in a position of political neutrality, and that political neutrality was

no less an expression of political opinion; and concluded that the *Canas-Segovias* demonstrated persecution because they would suffer extra judicial sanctions e.g. torture. But it would seem the court also accepted that they would suffer disproportionate punishment as compared with non conscientious objectors simply because of their fundamental beliefs.

(xxiv) 1991 *Autio v Finland* Opinion of Commission (see above). Concerned with alternative to military service.

(xxv) 1991 Professor Hathaway in *The Law of Refugee Status* said at page 182 "The right to conscientious objection is an emerging part of international human rights law, based on the notion that freedom of belief cannot be truly recognised as a basic human right if people are compelled to act in ways that absolutely contradict and violate their core beliefs." This passage was relied on by Cullen J in the Canadian case *Ciric v Minister of Employment and Immigration* [1994] 2 C.F. 65 at 76). Professor Hathaway after further examination of the way matters had been recognised also concluded perhaps more firmly at 185 "…. the failure to recognise the legitimacy of conscientious objection, and to provide for an appropriate and proportional non-combative alternative, may in and of itself constitute a sufficient threat to human rights to ground a claim to refugee status based on implied political opinion."

(xxvi) 22 January 1992 *INS v Elias Zacharias* 502 US 478. A decision of Supreme Court in the United States concerned with a person being forced to join guerrilla forces. It held that the United States statute made motive critical, and that a person claiming refugee status had to demonstrate by some evidence that persecution by guerrillas was because of his political opinion as opposed simply to his wish not to fight with them.
(xxvii) 13th April 1992 Immigration and Refugee Board of Canada in *Ciric* recognised absolute conscientious objection, but dismissed the claim to partial objection in that instance objection to Serbs being asked to fight Serbs.

(xxviii) 10th July 1992 *Canas-Segovia* having been remanded by Supreme Court for reconsideration following Supreme Court decision in *Zacharias,* reversed previous finding on religion but upheld view on political opinion.

(xxix) 8th March 1993 Commission on Human rights again drew attention to the right of everyone to have conscientious objection to military service and again "Appeals to States if they have not already done so to enact legislation...."

(xxx) 13 Dec 1993 Cullen J in *Ciric* (supra) did not appear to disapprove of Board's recognition of absolute right, but overruled Board on partial basis on grounds that the war in which Ciric was being asked to fight was internationally condemned, and he would face death if returned and refused to serve.

(xxxi) 10 June 1994 Parliamentary Assembly of the Council of Europe referred in fn 94 of Goodwin-Gill.

(xxxii) January 1995 Secretary of State in the United Kingdom refused *Zaitz* claim but recognised prime human right. (see paragraph 5 Buxton LJ in *Zaitz* page 348 tab 3).

(xxxiii) 1995 The Commission of Human Rights clarified that religious, ethical, or similar motives may be a basis for conscientious objection (page 9 of *Foughali* 2.6.00 Immigration Appeal Tribunal tab 2 of authorities). In addition the agenda item which was on the agenda every two years at this stage dropped the more general "youth etc" referring to conscientious objection alone.

(xxxiv) 1995 Australian Senate Report appeared to recognise the individual's right not to be compelled by law to act contrary to a conscientiously held position in such a way that this would "fundamentally impair his sense of integrity as a human being." (fn 97 in Goodwin-Gill)

(xxxv) 25 January 1996 Parliamentary Assembly's Opinion on Russian membership of the Council of Europe accepts undertaking "to adopt a law on alternative military service". [nb. No reference to European standards at this stage]

(xxxvi) March 1996 Joint Position of Member States of European Union, not to bind members or judicial authorities of states. Recognised that refugee status "may" be granted in cases of punishment of conscientious objectors.

(xxxvii) 28th October 1997 in the United Kingdom no submission made to adjudicator on behalf of Secretary of State in *Zaitz* that view of Professor Hathaway not right.
(xxxviii) The *Zaitz* ruling was taken to the IAT on a date I cannot discern, but again no point taken that Professor Hathaway's view was wrong.

(xxxix) 1997 Greece changed the law to allow for recognition of conscientious objection. [So far as Members of the Council of Europe are concerned, only Turkey, Macedonia and Albania did not have laws recognising conscientious objectors].

(xxxx) 2 April 1998 The Commission of Human Rights in accordance with its practice to examine the matter every two years adopted a resolution without a vote recalling the previous resolutions in which it "recognised the right of everyone to have conscientious objection to military service as a legitimate exercise to freedom of thought, conscience and religion, …". Also recognised "the requirement not to discriminate between conscientious objectors on the basis of the nature of their particular beliefs." The resolution also referred to Article 14 of the Universal Declaration of Human Rights encouraging states to offer asylum to "conscientious objectors compelled to leave their countries of origin because they fear persecution owing to their refusal to perform military

service where there is no provision or adequate provision for conscientious objection to military service…".

(xxxxi) October 1998 Professor Goodwin-Gill published *The Refugee in International Law* and there stated "The International Community nevertheless appears to be moving towards acceptance of a right of conscientious objection, particularly as a result of the standard setting activities of United Nations and regional bodies." He then referred in fn 94 to various of the UN and European bodies details of which I hope I have included in the foregoing.
(xxxxii) 4th December 1998 in *Thlimmenos v Greece* Opinion of European Commission of Human Rights. The case was actually concerned with an applicant who had refused to do military service in Greece on the grounds that he was a Jehovah's Witness, had been prosecuted and convicted and was then being denied the right to be a chartered accountant on the basis of the conviction. Whether his original punishment for refusing military service infringed his rights was not thus really in issue. But the majority express the following views in paragraphs 45 and 46.

> "45. The Commission cannot ignore the fact that the applicant refused to serve in the armed forces because of his religious beliefs. Moreover, the Commission notes that the applicant never refused to comply with his general civic duties. At the time of the applicant's conviction the possibility of alternative service did not exist in Greece. As a result, Jehovah's Witnesses were faced with the choice of either serving in the armed forces or being convicted. In these circumstances, the Commission considers that the applicant's conviction amounted to an interference with his right to manifest his religion.
>
> 46. The Commission has previously considered that a sentence passed for refusal to perform military service cannot constitute in itself a breach of Article 9 of the Convention (No. 10640/83, Dec. 9.5.84, D.R. 38, p. 219). However, in the present case the Commission is not called upon to examine whether the applicant's original conviction was justified under the second paragraph of Article 9. In any event, the Commission could not conduct such an examination since the applicant was convicted in 1983 and Greece has recognised the competence of the Commission to receive individual applications in relation to acts, decisions, facts or events subsequent to 19 November 1985. Moreover, the application was submitted more than 6 months after the applicant's final conviction."

195 They thus find that Article 9 would have been infringed unless Article 9(2) justified the state having a law on the grounds of that being necessary in a democratic society. But they find it unnecessary to express a view on whether Article 9 (2) does apply. They find that whether or not the original conviction could be justified, its further consequences in relation to its effect on the ability to become a chartered

accountant were disproportionate. They found that "by failing to introduce an exception to the rule barring from the profession of chartered accountants persons who have been convicted of felony, the drafters of the rules violated the applicant's right not to be discriminated in the enjoyment of his right to manifest his religion". The partially dissenting opinion of six members was also of the view that the original conviction was a breach of Article 9(1), commenting on the way matters have moved on since the Opinions previously expressed by the Commission. The inference I would draw is that they were also of the view that Article 9(2) would not justify non-recognition of conscientious objectors, but they limit their express conclusion to the view that the refusal to appoint the applicant an accountant on the grounds of his conviction was a breach of Article 9(1) and that that breach was not justified by Article 9(2). They thus held there was a breach of Article 9 without the necessity of considering Article 14. The concurring view of Mr Alkema supported both opinions suggesting they were not mutually exclusive.

(xxxxiii) 28 February 2000. In *Zaitz* the Secretary of State sought to raise by a respondent's notice the fundamental point taken before us. He was not allowed to do so and that is the reason why *Zaitz* cannot be said to be binding authority for the proposition that the core right to be a conscientious objector has been established by this court.

(xxxxiv) 6 April 2000. The court in *Thlimmenos* found a breach of Article 14 in conjunction with Article 9 and ruled that it did not need to consider the Article 9 point so far as the original conviction was concerned. It said "in order to reach this conclusion, the court, as opposed to the Commission, does not find it necessary to examine whether the applicant's initial conviction and the authorities' subsequent refusal to appoint him, amounted to interference with his rights under Article 9(1). In particular, the court does not have to address, in the present case, the question whether, notwithstanding the wording of Article 4(3)(b), the imposition of such sanctions on conscientious objectors to compulsory military service may in itself infringe the right to freedom of thought, conscience and religion guaranteed by Article 9(2)". (See paragraph 43).

(xxxxv) 2nd May 2000. *Foughali* based on *Zaitz* recognised "principled objections." If some concession was being made on the basis of *Zaitz*, then that was wrong. But once again it is right to note that the Secretary of State was not taking the fundamental point, or so it would seem.

(xxxxvi) 28 June 2000. Opinion of Parliamentary Assembly on Applications of Armenia and Azerbaijan to join Council of Europe. It accepted commitments in relation to human rights to introduce laws respecting conscientious objectors in accordance with "European standards"; the undertakings also included an undertaking to free immediately "all conscientious objectors presently serving prison terms or serving in disciplinary battalions allowing them instead to perform non-armed military service or alternative civilian service once the law had changed.

196 When Mr MacDonald and Mr Scannell opened the appeal not all the above material was shown to us. Indeed Mr Howell was on strong ground in submitting that very little beyond encouragement to states to recognise conscientious objectors, could be spelt out of the references to which we were taken. There was nothing for example to refute the views expressed by the Commission in reliance on Article 4(3)(b) in the Opinions of the Commission referred to in paragraphs 36 to 39 above. Indeed Mr MacDonald in opening the appeal could, in the light of those views, only submit that he did not want to abandon the possibility of reliance on Article 9 but did not put forward any positive case by reference to that Article. He did not suggest that he could place any reliance on Article 3 or Article 14. His case was that in some way a separate human right recognising the right to be a conscientious objector had by the present day manifested itself even without the assistance of Article 9.

197 Matters however were taken significantly forward when Mr Eicke, representing the United Nations High Commission for Refugees, came to address us and when Mr MacDonald and Mr Scannell came to reply. Mr Eicke showed us the amicus brief submitted on behalf of his clients in the *Canas-Segovia* case, and referred us to the *Canas-Segovia* decisions. The 9th Circuit Court of Appeals in large measure appeared to accept that the right to be a conscientious objector had emerged. That was so in its first decision and the second decision only reversed the first so far as motivation was concerned in the context of the Convention reason being religion. But it recognised "imputed" political opinion as a Convention reason and held that imputed opinion included an element of motive. There is a distinction between imputed and implied, but on causation I have already addressed the position (see paragraph 177 above).

198 Mr Eicke also showed us the recent ruling of the Commission in *Thlimmenos* which showed that the previous rulings were under serious review. The previous opinions had followed the line that Article 4(3)(b) demonstrated that there was no breach of Article 9 at all if a state conscripted a conscientious objector. The Commission, both the majority and the minority as I read their views, would no longer accept that view. They seemed to follow the view of Fawcett J. To conscript a conscientious objector would in their view infringe Article 9(1) subject to Article 9(2) which subjected the right "to such limitations as are prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order ….. or for the protection of the rights and freedoms of others." It is true Article 9(2) was not explored by the Commission so far as the original conviction was concerned, either by the majority or by the minority. It is further true that the court "as opposed to the Commission" did not find it necessary to examine whether the applicant's initial conviction and the authorities' subsequent refusal to appoint him amounted to interference with his rights under Article 9(1). But it seems to me that the opinion of the Commission, that the original conviction would have infringed Article 9(1), deserves great respect and is consistent with the emergence of conscient ious objection as a fundamental right protected by Article 9(1) subject to Article 9(2). If faced with the question whether Article 9(2) would justify non-recognition of conscientious objection, I simply say that the concerted views expressed over the years would certainly suggest that there is a consensus that in normal times in any event it is not necessary in the interests of public safety for a state to have laws which compel conscientious objectors to serve in the military.

199 Mr MacDonald and Mr Scannell supported Mr Eicke's submissions, but also showed us what seem to me to be further important Opinions which recognise at the very least "European Standards". Oppenheims International Law page 30 shows that a practice that is not general but limited to a number of states … "may constitute a customary rule of law but of particular rather than general application."

200 I do not think that one needs to examine whether there is now a rule of international law which compels states to have legislation of a particular kind. But it seems to me that the stage has been reached whereby it is recognised generally internationally, and in particular by those states who are members of the Council of Europe, that conscientious objection is a core entitlement. It is a breach of Article 9(1) to force a person to take part in military action contrary to his/her conscience, not justified in normal times by Article 9(2). This entitlement has been recognised in the Untied States and in the courts of Canada. It has in my view in reality been recognised by the European Commission on Human Rights, contrary to the views it previously expressed, and it has now been recognised as a European Standard. The very fact that certain cases have been fought by the Secretary of State on the basis that such a core entitlement exists, is some evidence that such core entitlement is now internationally recognised, and should be recognised by our courts.

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

Partial objection

202 It is fair to say that Mr Howell did not pursue with great vigour the distinction between partial and absolute conscientious objection. He may be right, but different considerations do in my view apply and should be addressed. In testing whether there should be a distinction it seems to me important to go back to the question of the implied political opinion, and to the facts of the particular case. In the case of absolute conscientious objection the assumption is first that the person can establish that he/she has an absolute objection to bearing arms from a genuine belief owing to his/her conscience. The implied political opinion challenges the state's policy of forcing such an objector to take part in military operations contrary to his/her conscience, and the state's policy of not recognising the right to have that conscientious belief. In the case of someone who establishes that the military takes part in activities contrary to the basic rules of humanity, and that he/she is being punished for refusal to join that military, again the would-be refugee's implied political opinion relates to challenging the government's right to take part in such activities or to insist on him/her taking part in such activities.

203 In these appeals we are dealing with an objection to fighting on the basis of the four possible opinions previously set out; (1) objection to the Government policy of resisting self determination for Kurds; (2) the objection of the army attacking the Kurds; (3) the objection to calling up Kurds to fight Kurds; and (4) objection to being forced to take part in atrocities allegedly being perpetrated by the army. I accept of course that to try and compartmentalise these views does not reflect the reality. But it is necessary so to do in my view in order to test the position.
First if there was a risk of being required to join an army "perpetrating atrocities", although in one sense this a conscientious objection, it succeeds because, as accepted, a person cannot be forced to fight where the basic rules of human conduct are being disobeyed. If the Turkish Government had been condemned as violating international law in relation to its resistance to self-government so far as the Kurds were concerned, or in its use of the army to impose its will on the Kurds, that would also provide a basis for recognition of refugee status without resort to conscientious objection in the sense of a genuine deep held belief of conscience. For the reasons given by Laws LJ the appellants cannot succeed on any of these bases.

204 What then is left is whether an objection based simply on Kurds being made to fight Kurds should be recognised as a conscientious objection.

205 There is nothing in the paragraphs of the Handbook to give support to the view that simply because someone objects to fighting someone from his/her same ethnic background that he/she has any claim to being recognised as a refugee. The emphasis is on "reasons of conscience". In the history which I have sought to spell out one sees that the United Kingdom accepted the "partial objection" provided it was based on "an objection so deeply held that it became a matter of conscience". It will be seen that the Immigration Board in Canada would have rejected the application if it was based simply on an objection to Serbs fighting Serbs. No material would support the view that it has become recognised that states should simply not require persons of the same ethnic background to fight others of that background.

206 Paragraph 10 of the document issued by the UNHCR relating to Yugoslavia, quoted in the submissions on behalf of the UNHCR in this case, put the matter in this way:-

> "Even if the military action in which the person is required to participate is generally conducted within the limits prescribed by the laws of wars, he/she may be regarded as a conscientious objector and, hence, qualify as a refugee, if he/she can establish that his/her moral, religious or political objections to participating in such action are so genuine, serious and profound that it would be morally wrong to require him/her to participate in such action. One case that may fall under this description is that of a member of an ethnic minority who, in a situation of internal conflict, may be required to participate in military action against his/her own ethnic community."

207 Those sentences thus, whilst recognising the possibility of a member of an ethnic minority being required to participate in military action against his/her own ethnic community falling within the definition for conscientious objector, only does

so if that person could demonstrate such a profound belief that it would be "morally wrong" to require that person to serve in the military. Thus there is nothing that supports the view that anything other than being pressed into doing something that it would be morally wrong to require will qualify. In truth, to qualify as a partial conscientious objector the implied political opinion will not be limited simply to disagreeing with government policy, of for example Kurds being asked to fight against Kurds, but to the government's non-recognition of a genuine conscientious objector. The political opinion which would be implied would be the same as for the absolute conscientious objector an assertion that there is an infringement of Article 9(1) insofar as the state fails to give effect to the basic human right conferred by that Article.

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

209 In this case it seems to me that the Adjudicator and the Immigration Tribunal assessment that the refusal would not be through some deep-rooted feeling of conscience, is unassailable.

210 As regards the "Ince Point" and the "Mistaken Belief Point" dealt with by Laws LJ from paragraphs 93-97 of his judgment, I agree with those paragraphs.

211 I thus agree that these appeals should be dismissed.

ORDER: Appeals dismissed; detailed public funded costs assessment for both appellants in relation to hearing before this court; permission to appeal to the House of Lords refused.

(Order does not form part of approved Judgment)