Case No: C1/2002/1537/IATRF

Neutral Citation No: [2004] EWCA Civ 69
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

Wednesday 11 February 2004

Before :

LORD JUSTICE POTTER
LORD JUSTICE RIX
and
LORD JUSTICE CARNWATH

- -

Between :

KROTOV	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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Mr Manjit S Gill QC and Mr Richard Alomo (instructed by **Messrs Bart-Williams & Co**) for the appellant
Mr Sean Wilken (instructed by **The Treasury Solicitor**) for the respondent

- -

Judgment

Lord Justice Potter:

1. This is an appeal from a decision of the Immigration Appeal Tribunal dated 2 May 2002, by which the Tribunal dismissed an appeal from the decision of an adjudicator (Mr D J Boyd QC) on 29 November 2001 dismissing an asylum and human rights appeal by Andrey Krotov, a citizen of the Russian Federation in respect of removal directions served upon him as an illegal entrant on 1 June 2001. The basis of the claim for asylum was that the appellant feared persecution because he had evaded military service in the Russian army. Having been called up, he had been sent for military training for three months and, in January 2000, was sent to Grozny to fight in the Chechen war. The following month he deserted, escaped and came to the United Kingdom via the Ukraine. By a refusal letter dated 15 May 2001, the Secretary of State refused the applicant's application for asylum on the grounds that his claim did not engage the *United Nations Convention relating to the Status of Refugees 1951 and Protocol of 1967* ("the Convention"), as the applicant had provided no ideological basis for his unwillingness to do military service. Upon appeal to the adjudicator against the dismissal of his asylum application and on the basis that his return to Russia would be an infringement of his rights under Articles 2, 3, 6 and 8 of the European Convention on Human Rights ("ECHR"), the adjudicator dismissed the appeal on both grounds.

2. So far as the asylum appeal was concerned, the reasons of the adjudicator appear clearly stated at paragraphs 23-25 of his decision as follows:

> "23. In his witness statement [the appellant] expressed his objections thus:
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> > "I did not want to fight in Chechnya as I have no reason to fight against Chechens and risk my life unnecessarily. My objection to war was therefore on the grounds of my moral conscience. Further I object to the war in Chechnya as one that is politically motivated and draw a distinction between a war that is not about the people as opposed to individual fight for power. I do not object to fighting for my country say, in the situation as in the Second World War as opposed to one in which I am required to be sent into action in Chechnya and kill innocent civilians and destroy property in a reprehensible manner."
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> 24. In oral evidence at the hearing he complained about poor conditions in the army and bullying and beatings. He did not object to performing military service when he first became eligible in 1996 because he did not then think he would be involved in the war in Chechnya, which had by then been in progress for two years.
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> 25. My assessment of the appellant's evidence is that while he objected to serving in Chechnya, he had no general objection to performing military service. (His witness statement contained some phrases indicative of a general objection to war, but my

> view is that it was only the one in Chechnya that he really objected to becoming involved in.) He does not qualify for refugee status since, according to my reading of his evidence, he has no genuine political, religious, moral or conscientious objection to military action in general. *He might nevertheless qualify if the Chechen war has been condemned by the international community as contrary to basic rules of human conduct, but there is no evidence that it ever has been condemned in this way*." (emphasis added)

3. So far as the appellant's human rights claim was concerned, the adjudicator stated:

> "27.My view of the evidence is that appellant would indeed be liable for a term of imprisonment were he to be prosecuted for desertion on his return. It seems unlikely that he would be executed in view of the absence of any mention in the reports of executions now taking place for desertion. The extra judicial executions of deserters during the period 1994 to 1996 have apparently long since ceased. It cannot be said that imprisonment for a maximum term of seven years for desertion during a war is disproportionate and there is no evidence that any punishment suffered by the appellant would be disproportionately severe for any Convention reason.
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> 28….
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> 29.In her skeleton argument Miss Bagral submitted that the appellant's rights under Articles 2, 3, 6 and 8 would be breached by his return. She referred in particular to conditions suffered by recruits in the army; the nature of the Chechen war; the existence of human rights abuses in Russia; and the ill-treatment to which the appellant would be subjected.
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> 30.While I accept that according to reports the human rights situation in Russia, the war in Chechnya and conditions in the army can be criticised, I am not satisfied that they are such as to render the appellant's return an infringement of any of his human rights."

4. The appellant obtained leave to appeal from the Immigration Appeal Tribunal on the grounds that it was arguable that "the Adjudicator's findings on the applicant's objections to performing military service are flawed".

5. Following a hearing on 22 April 2002, the Immigration Appeal Tribunal issued its determination on 2 May 2002. So far as is material for the present appeal, the Tribunal posed the following questions:

> "Does a particular war need to have been internationally condemned before an asylum seeker can succeed in a claim under the Refugee Convention on the basis of a partial objection to it? If yes, has the conflict in Chechnya been internationally condemned? If no, does it meet whatever is the appropriate test?"

6. In relation to the first question, the argument before the Tribunal, and before this court, centred upon the meaning and emphasis to be attributed to paragraph 171 of the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* ("the Handbook"), first published in 1979 and last re-edited in 1992. However, before referring to the relevant text it is convenient to set out the definition of a refugee for the purposes of the Convention. It appears in Article 1A(2) which defines a refugee as a 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." (emphasis added)

7. Chapter V section B of the Handbook states as follows under the heading "Deserters and Persons avoiding military service":

> "167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover whether military service is compulsory or not, desertion is invariably considered a criminal offence. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft evasion does not, on the other hand, exclude a person from being a refugee, and the person may be a refugee in addition to being a deserter or draft-evader.
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> 168. The 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 could 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 the 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*." (emphasis added)

8. It was not in dispute between the parties that, in the case of *Sepet and Bulbul v Secretary of State for the Home Department* [2001] EWCA Civ 681 [2001] INLR 376 the Court of Appeal held that there was no extant legal rule or principle derived from treaty or customary international law which vouchsafed a right of either 'absolute' or 'partial' conscientious objection, without more, which obliged adherents to the Convention to grant refugee status on the grounds that imprisonment in the country of origin would amount to persecution for a Convention reason. On the other hand, it was conceded by the Secretary of State and emphasised by the court (per Laws LJ at 402 para 61):

> "… 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 was 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."

see also per Parker LJ at 427 para 143.

9. It was and is the contention for the appellant that, on the basis of a large number of materials supplied to the Adjudicator and the Tribunal there was sufficient objective evidence of violations of the basic international law norms governing armed conflicts by the Russian army in the conflict in Chechnya to establish that participation by the appellant in military service in Chechnya would or might require him personally to engage in activities contrary to the basic rules of human conduct, whereby punishment for desertion in those circumstances would itself be properly regarded as persecution. In this connection it is submitted that to require that the type of military action conducted in Chechnya should be condemned by the international community, *in the sense of specific international condemnation of the Chechnyan conflict*, was an unmerited gloss upon paragraph 171 of the Handbook and upon the Convention which should not be imposed as an additional requirement.

10. In this respect, the appellant relied and relies upon the decision of the Immigration Appeal Tribunal in *Foughali v Secretary of State for the Home Department*, 2 June 2000 [00/TH/01513] in which the Tribunal stated:

> "28. The question whether a conflict is or is not internationally condemned may cast light on the Convention issue, but it is not the underlying issue. To make it so would be to interpolate into the text of the Refugee Convention definition of refugee an additional requirement of international condemnation. When assessing risk on the basis of serious human rights violations outside the context of military service cases, decision-makers do not hinge their decisions on whether or not these violations have also been internationally condemned, although such condemnation may be part of the evidence. It would be illogical to behave differently in relation to an overlapping field of public international law governed by the same fundamental norms and values.
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> 29. In the opinion of this Tribunal it would much improve the clarity of decision-making if issues as to whether or not a conflict is internationally condemned are raised only in the context of whether or not there exists sufficient objective evidence of violations of the basic rules of human conduct. International condemnation should not be treated as the underlying basis of exception (b).
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> [N.B. Exception (b) was earlier defined as "persecution due to the repugnant nature of military duty likely to be performed." – see paragraph 9 of the judgment].
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> …
>
> 33….Whilst this category may include participation in a war which is internationally condemned, its defining characteristic and hallmark is service in a military which breaches international standards (e.g. by engaging in "activities repugnant to basic rules of human conduct" such as the indiscriminate killing of innocent civilians (*Tamerioult*

> (10983)) or "uses methods routinely or without any effective control or attempt at control by the central authority which violates basic human rights, involve unfair treatment of prisoners or otherwise breach international legal standards for the attainment of peace and good order within the country (*Tallah* [1998] INLR 258). Thus, even if there is no war involved which is internationally condemned, persecution can arise if the claimant faces an obligation to serve as part of a brutal or vicious military which commits crimes against humanity …)"

11. In rejecting the appellant's appeal in this case, the Tribunal observed (at para 3) that, whereas in *Sepet and Bulbul* the Court of Appeal had referred to acts "contrary to basic rules of human conduct", nothing in that decision settled any argument as to whether the nature of the conflict had to be "internationally condemned". Referring to the phrase "condemned by the international community as contrary to basic rules of human conduct" in paragraph 171 of the Handbook, the Tribunal said as follows:

> "3. … Those words of the Handbook have stood for a very long time; although they do not have the force of law, they represent the nearest approach so far to an international code of refugee law, and there are sound reasons of international comity why the legitimacy of a particular campaign should not be passed on by either an individual asylum-seeker or an individual court, but left to the judgment of the international community. We regret we are unable to agree with the approach in *Foughali*.
>
> 4. There is nothing to show that the current conflict in Chechnya has been condemned by any official international body, either as to aims or methods. Probably the most authoritative body in this context is the UN Commission on Human Rights: while the Human Rights Watch Report for 2002 before us shows … that the UNCHR has for two years running expressed (no doubt rightly) "grave concern about human rights violations in Chechnya", notably it fell short of calling for an international commission of enquiry". That is well short of the international condemnation which in our view is required for the appellant to succeed on this point."

12. The Tribunal then went on to consider whether it had been shown that the conditions of military service were themselves "so harsh as to amount to persecution on the facts". It decided they were not. Having considered various materials placed before it, it concluded:

> "The CIPU report (para 6.6) is in general terms, and mainly relies on the sources we have already quoted. No doubt there is serious bullying in the Russian forces in Chechnya (as regrettably occurs even in much better-regulated armies); however, not only is there no indication of any Refugee Convention reason behind any selection of the victims, but

> there is nothing to show that service in those forces for any individual is likely to carry any real risk of ill-treatment either amounting to persecution or "inhuman or degrading treatment" contrary to Article 3."

13. The Tribunal then turned to the question whether the punishment for refusing active military service could be regarded as "disproportionately harsh or severe" so as to amount to persecution. It stated at paragraph 6:

> "… we agree with the view expressed by the Tribunal in *Foughali* that a substantial period of imprisonment (in that case 2-10 years, in this 3-7) cannot be regarded as disproportionate in itself for refusing active military service. It may well be argued that the more dangerous that may be, the more serious a deterrent is required. On the conditions of imprisonment, bad as they are, we see nothing to indicate that they are in any way discriminatorily applied to conscientious objectors. It follows that the appellant cannot succeed on this point under the Refugee Convention, for lack of a Convention reason."

14. Finally, the Tribunal rejected the Human Rights claim that to return the appellant to conditions of imprisonment in the Russian Federation would raise a real risk of torture or other degrading or inhuman treatment contrary to Article 3 of the ECHR. Accordingly the appeal was dismissed.

15. The Tribunal granted the appellant permission to appeal to this court limited to two grounds framed by the appellant in the following terms:

> "1. Paragraphs 3 & 4 of the Tribunal's decision – The approach in *Foughali* was implicitly approved by the Court of Appeal in *Sepet & Bulbul* at paragraphs 61-62. It is submitted proof of condemnation is not required and the phrase in paragraph 171 of the UNHCR Handbook indicates the need for evidence of the abhorrent nature of the military action. There was ample evidence of the abhorrent nature of the military action in Chechnya before the Tribunal. In the circumstances, the Tribunal was wrong to disagree with the approach in *Foughali*.
>
> 2. Further and/or in the alternative as the position stands, there are now two conflicting decisions of the Tribunal regarding the correct approach to be followed in cases involving persecution due to the repugnant nature of military duty likely to be performed. In the circumstances, the Court of Appeal needs to resolve which approach the court should follow. This is a matter of law and some importance."

16. On 16 January 2003 this court granted permission for the appellant to lodge supplemental grounds of appeal, which I shall treat as ground 3, namely:

> "The Tribunal erred in the findings which they made in para 4 of their determination. Those findings fail to take account of relevant evidence and are unreasonable. In particular,
>
> (a)The Tribunal erred in that it had regard only to condemnation by bodies such as the UNCHR (p.95-96). It failed to note the evidence of condemnation by various Non-Governmental Organisations which have an important voice in the international community (e.g. condemnation by Human Rights Watch, p.45 and p.87 ffg, Amnesty International, p.100-15, 109, and Physicians Against Torture p.124 para 16). The views of such bodies are important in assessing whether there has been international condemnation.
>
> (b)The Tribunal erred in that, even if it was right to have regard only to the evidence of state organisations, it failed to consider the rest of the evidence of condemnation by such organisations e.g. the Council of Europe, p.109, 124 para 16, United States, p.122 para 10 etc.
>
> (c)The Tribunal erred in that it failed to refer to any standard by which it was measuring condemnation or to make any adequate allowance for the fact that the international condemnation can occur in diplomatic language.
>
> (d)The Tribunal erred in that it failed to have regard to relevant information and, alternatively, reached an unreasonable conclusion in para 4 for which it gave extremely brief and inadequate reasons. (see generally, p.42-44, 50)."

17. In addition to an order setting aside the determination of the Tribunal, the appellant sought an order either remitting the case to the Tribunal for further consideration of the appellant's asylum claim or allowing the appeal in toto. At the hearing before us it was agreed between the parties that, if we were of the view that the Tribunal had misdirected itself under Ground 1, the appropriate course would be that of remission for reconsideration on the basis of all relevant material placed before the Tribunal.

18. Since the hearing before the Tribunal, the House of Lords has confirmed the decision of the majority of the Court of Appeal in *Sepet and Bulbul* [2003] UKHL 15, reported at [2003] 1 WLR 856. Their Lordships held that, as yet, there is no clear international consensus recognising a right to refuse to undertake military service on grounds of conscience and that this position applies both to 'absolute' and 'partial' conscientious objectors: see paragraph 20, per Lord Bingham of Cornhill, with whom Lord Steyn and Lord Hutton expressed full agreement and Lord Hoffmann and Lord Rodger of Earlsferry made concurring speeches.

19. However, Lord Bingham equally made clear at paragraph 8 that:

> "There is compelling support for the view that refugee status should be accorded to one who has refused to undertake

> compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment: see, for example, *Zolfagharkhani v Canada (Minister of Employment and Immigration)* [1993] 3 FC 540; *Ciric v Canada (Minister of Employment and Immigration)* [1994] 2 FC 65; *Canas-Segovia v Immigration and Naturalisation Service* (1990) 902 F dd 717; *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, paras 169, 171."

Lord Bingham did not proceed to examine the proposition stated more closely, because it was not in dispute that the applicants in *Sepet* could not, on the facts found below, bring themselves within any of those categories.

20. It is to be noted that Lord Bingham treated the grounds to which he referred as being separate rather than synonymous. He certainly did not suggest in the passage quoted that condemnation of a particular conflict by the international community was an essential or additional requirement where an applicant for asylum advanced the case that the relevant military service would or might require the appellant to commit atrocities or gross human rights abuses. Mr Gill naturally places heavy reliance upon that statement of the position.

21. In his submissions to this court, Mr Gill has invited us to uphold and approve the reasoning in *Foughali* and, in particular, to make clear that the Tribunal was in error insofar as it appears to have considered that international condemnation of a specific military action or campaign is a prerequisite to successful assertion by an applicant for asylum that punishment for his refusal to participate would amount to persecution for the purposes of the Convention. He submits that the observations of Laws LJ and Lord Bingham in *Sepet and Bulbul* are authoritative, in the sense that those observations were considered *dicta* in the context of a searching review of the right of asylum in cases of conscientious objection.

22. So far as the Tribunal's interpretation of the Handbook is concerned, Mr Gill submits that it represents a misreading of paragraph 171 which requires demonstration only that the international community condemns the *type* of military action with which the individual does not wish to be associated as being contrary to the basic rules of human conduct. He points out that international condemnation of a particular conflict, particularly one internal to the state concerned, may be made or withheld very much on the basis of political expediency and that the Convention, as a human rights instrument predicated on the requirement to provide surrogate protection for all within its scope, would be severely compromised by such an approach.

23. As to the Tribunal's view that its approach was based in sound reasons of international comity, Mr Gill submits that, in the context of application of the Convention, there is no relevant principle of comity which obliges a court to decline to decide issues thrown up by paragraph 171 of the Handbook. First, the 'comity'

justification proceeds on a misinterpretation of paragraph 171 as already described. Second, as pointed out by the Tribunal in *Foughali*, when assessing the risk of persecution on the basis of serious human rights violations outside the context of military cases, decision makers do not hinge their decisions on whether or not the human rights violations have been condemned by the international community. Third, Mr Gill relies on Article 3 of the *United Nations General Assembly's Declaration on Territorial Asylum 1977* which represented a decision to "reaffirm [that] the grant of territorial asylum is a peaceful and humanitarian act and shall not be regarded as an act unfriendly to any other state and shall be respected by states". Fourth, he relies upon the statement of Lord Hoffmann in a different context in *Shah and Islam* [1999] 2 AC 629 at 655e when he said of certain findings of discrimination against women in Pakistan:

> "They could not be ignored merely on the grounds that this would imply criticism of the legal or social arrangements in another country. The whole purpose of the Convention is to give protection to certain classes of people who have fled from countries in which their human rights have not been respected."

24. Fifth, Mr Gill submits that the approach in *Foughali* is supported in a number of academic works such as *The Law of Refugee Status: Hathaway* (1991) at pp.180-181 and *Law of Asylum in the United States: Anker* (3rd ed) 1999 at 226-228; is consistent with the approach adopted in other countries which have an established asylum jurisprudence, in particular the Canadian Court of Appeal in *Zolfagharkhani* and *Ciric* (see para 18 above) and by the courts of the United States in decisions such as *Barraza Rivera v INS* 913 F.2d 1443 (9th circuit CA) and *Ramos-Vasquez v INS* [1995] 57 F.3d 857, (9th circuit CA); and is consistent with paragraph 10 of the guidelines contained in the Joint Position Statement (96/196/JHA) issued by the Council of European Union on 4 March 1996.

25. Finally, Mr Gill relies upon a passage from the recent decision of the Immigration Appeals Tribunal in *B v Secretary of State for the Home Department* [2003] UKIAT 20 a case which, like this case, concerned a conscript in the Russian army who deserted when informed that he would be posted to Chechnya. In that case, the Tribunal prefaced its judgment by saying that it sought to clarify the approach to military service cases in the light of the Court of Appeal and House of Lords judgments in *Sepet and Bulbul* and to resolve the apparent difference of view expressed by the Tribunal in *Foughali* and *Krotov*.

26. It is convenient at this stage to set out paragraphs 42-48 of the judgment in *B v SSHD*, which, as it seems to me, accurately sets out the effect of paragraph 171 of the Handbook and the approach properly to be adopted in cases of this kind.

> "42. The Tribunal in *Krotov* also appears to have overlooked that UNHCR's current view of the test adumbrated in paragraph 171 is one which places the main focus on the fact that it must involve conduct contrary to international law (as opposed to condemnation by the international community). In the light of *Krotov*'s apparent call for a reversion to earlier

lines of authority, it is perhaps pertinent to reiterate the five main substantive reasons why the international law test is more sound.

43. To hinge the test on international condemnation would mean having to assess military service cases under the Refugee Convention on the basis of the vagaries of international politics, apt to vary depending on shifting alliances and whether other countries surveying the conflict take a particular view.

44. Secondly, a test based directly on international law is more consistent with the overall framework of the 1951 Refugee Convention, whose schema also contains at Art.1F Exclusion Clauses which are directly framed precisely on the basis of international law principles. The presence within the Refugee Convention of the Exclusion Clauses also demonstrates the fallacy behind *Krotov*'s belief that there were sound reasons of international comity why the legitimacy of a particular campaign should not be 'passed on' by an individual court. Art 1F requires such judgments to be passed and no point has ever been taken that it is beyond an individual court to establish involvement even in crimes at the level recognised by the international community through the Geneva Conventions of 1949 as the most heinous known to mankind.

45. Thirdly, the reference to "the basic rules of human conduct" has a distinct legal meaning within international law governing armed conflicts: see e.g. L C Green, *The Contemporary Law of Armed Conflict* (1996) p.16; C Greenwood, *Scope of Application of Humanitarian Law* in *Handbook of Humanitarian Law in Armed Conflicts*, C Dieter Fleck (ed) 1995. Used interchangeably with *ius cogens* the term has been identified to mean "principles that the legal conscience of mankind deem(s) absolutely essential to co-existence in the international community" (UN Conference on the Law of Treaties, Summary Records of the Plenary Meetings and of the Subcommittee of the Whole at 294: UN doc. A/CONF./39/11 (1969) (statement of Mr Suarez (Mexico).

46. Fourthly, to make the test other than one based on international law would be to subvert the underlying principles of interpretation set out by the House of Lords in *Horvath* [2000] 3 All ER 577, principles which seek to base interpretation of the Refugee Convention on fundamental norms and values drawn from international law sources, in particular international human rights law. As the Tribunal said in *Foughali*:

> "When assessing risk on the basis of serious human rights violations outside the context of military service cases, decision-makers do not hinge their decisions on

> whether or not these violations have also been internationally condemned, although such condemnation may be part of the evidence. It would be illogical to behave differently in relation to an overlapping field of public international law governed by the same fundamental norms and values."
>
> 47. Finally, a test based directly on international law is also required by the need to give the Refugee Convention a contemporary definition based on the very considerable developments in international humanitarian law since 1979. The recent EU texts discussed by their lordships in *Sepet and Bulbul* (paragraphs 14-16 of the speech of Lord Bingham of Cornhill) clearly reflect an attempt to build on these, by reference to the international law criteria contained in Art.1F.
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> 48. Thus whilst "international condemnation" is serviceable for descriptive purposes, it does not define the category. Strictly speaking international condemnation is only one indicator – albeit a highly relevant one – of whether the armed conflict involved is/would be contrary to international law."

27. As in the case of *Sepet and Bulbul*, the Secretary of State, who is represented in this appeal by Mr Wilken, does not dispute that there are some circumstances in which a conscientious objector may rightly claim that fear of punishment for draft evasion or desertion merits protection under the Convention. Nor does he challenge the three categories in which that may be so, as propounded by Laws LJ in *Sepet and Bulbul* (see paragraph 7 above). However, Mr Wilken rejects the approach, set out in *Foughali* and *B v SSHD* as quoted above, on the grounds that it involves problems of ascertainment, definition and application in relation to "generally accepted standards relating to basic rules of human conduct" and basic norms of international law, which problems are avoided by application of the test in *Krotov*, which simply requires the court to ascertain what states and other organs of the international community, such as the United Nations, have said about a particular conflict.

28. There are three points of broad principle advanced by Mr Wilken. First, he submits that adoption of the *Foughali* test requires the IAT (a) to comment on events internal to another sovereign state, (b) to consider the relevant norms of international law, and (c) to hold that the relevant events violate that law, when it is well established that an English court is generally unwilling to engage in such activities: see *Campaign for Nuclear Disarmament v Prime Minister of the United Kingdom* [2002] EWHC 2759 (QB) at paras 36-44 and 61. Second, he submits that, because the Convention is silent both on conscientious objection and norms of international law, the *Foughali* test inevitably requires implication into the Convention of such elements. Whilst such implication is possible, again the English courts are reluctant to take such a course: see *Brown v Stott* [2001] 2 WLR 817 at 835B-E per Lord Bingham of Cornhill. Third, Mr Wilken submits that the *Foughali* test is complex and liable to create uncertainty. Such complexity and uncertainty are unnecessary and unwelcome in the field of refugee protection.

29. In considering the rival submissions of the parties, I should say at once that, whereas Mr Wilken has made much before us of the differing nuances of expression employed in paragraph 171 of the Handbook and the recent jurisprudence as indicative of an undesirable vagueness surrounding the concept of a claim for asylum on the grounds of fear of persecution for refusal to participate in a repugnant war, I do not regard those differences as irreconcilable in respect of the test to be applied to the nature of the war or conflict to which objection is taken. In *Sepet and Bulbul*, Laws LJ simply adopted the wording of paragraph 171 (absent the reference to condemnation by the international community), namely military action involving acts "contrary to basic rules of human conduct". Lord Bingham on the other hand referred to "atrocities or gross human rights abuses". However, I do not doubt that both had in mind in this context conduct universally condemned by the international community, in the sense of crimes recognised by international law or at least gross and widespread violations of human rights. The Tribunal in *B v SSHD* propounded a test based upon paragraph 171 and an expansion of the words of Laws LJ as follows:

> "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 as defined by international law."

30. In this respect, there is a core of humanitarian norms generally accepted between nations as necessary and applicable to protect individuals in war or armed conflict and, in particular, civilians, the wounded and prisoners of war. They prohibit actions such as genocide, the deliberate killing and targeting of the civilian population, rape, torture, the execution and ill-treatment of prisoners and the taking of civilian hostages.

31. Such international acceptance and/or recognition is in my view manifest from inter alia the following international instruments and materials.

32. Common Article 3 to the four *Geneva Conventions of August 12 1949*, to which 191 States are party, provides:

> "In the case of armed conflict not of an international character occurring in a territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, should in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;"

33. Article 147 of Convention (IV) proscribes as "grave breaches":

> "Any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person … taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

34. *Additional Protocol II of the 1949 Geneva Convention relating to the Protection of Victims of Non-International Armed Conflicts (Adopted 1977)*, under the heading "Humane Treatment" under Article IV (Fundamental Guarantees) provides:

> "1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
>
> 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
>
> (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatments such as torture, mutilation or any form of corporal punishment;
>
> (b) Collective punishments;
>
> (c) Taking of hostages;
>
> (d) Acts of terrorism;
>
> (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assaults …"

156 States are parties to *Additional Protocol II*.

35. In the decision of the International Court of Justice *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar v U.S.) (Merits)* 1986 I.C.J. Report 14 at paras 218-220, the ICJ referred to and recognised the obligations of signatories to the Geneva Conventions in respect of the protections afforded thereunder as being in some respects a development, and in other respects no more than an expression, of "fundamental general principles of humanitarian law". It also stated:

> "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflict, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (*Corfu Channel, Merits, I.C.J. Reports 1949*, P.22; paragraph 215 above). …
>
> 220.The Court considers that there is an obligation on the United States Government in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to 'ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression."

36. These observations were reiterated and relied upon by the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 in *Prosecutor v Dusko Tadic*, 20 October 1995: see paras 93 and 98.

37. In my view, the crimes listed above, if committed on a systemic basis as an aspect of deliberate policy, or as a result of official indifference to the widespread actions of a brutal military, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate will constitute persecution within the ambit of the 1951 Convention.

38. It is in my view preferable to refer in this context to 'basic rules of human conduct' or 'humanitarian norms' rather than to 'abuse of human rights', at least unless accompanied by the epithet 'gross': cf. the observations of Lord Bingham quoted above. That is because human rights really concern rights enjoyed by all at all times, whereas humanitarian rules concern rights which protect individuals in armed conflicts. Most Conventions and other documents which provide for the protection of human rights (a) include a far wider variety of rights than the rights to protection from murder, torture and degradation internationally recognised as set out above; (b) in any

event, contain safeguards which exclude or modify the application of such rights in time of war and armed conflict: see generally the approach set out in Detter: *The Law of War* (2nd ed) at pp.160-163.

39. As pointed out in paragraph 35 of the judgment in *Foughali*, to propound the test in terms of actions contrary to international law or humanitarian law norms applicable in time of war or armed conflict, is consistent with the overall framework of the Convention which contains at Article 1F an exclusion clause to the Convention framed upon that basis:

> "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;"

It can well be argued that just as an applicant for asylum will not be accorded refugee status if he has committed international crimes as defined in (a), so he should not be denied refugee status if return to his home country would give him no choice other than to participate in the commission of such international crimes, contrary to his genuine convictions and true conscience. Such is the approach set out in the E.U. 1996 Joint Position of Council, paragraph 10 of which provides that, whereas conscientious objection should in itself be insufficient to justify refugee status:

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

40. My second observation in respect of the test propounded in *B v SSHD* is that I would substitute the words "in which he may be required to participate" for the words "with which he may be associated" as emphasising that the grounds should be limited to reasonable fear on the part of the objector that he will be personally involved in such acts, as opposed to a more generalised assertion of fear or opinion based on reported examples of individual excesses of the kind which almost inevitably occur in the course of armed conflict, but which are not such as to amount to the multiple commission of inhumane acts pursuant to or in furtherance of a state policy of authorisation or indifference.

41. I consider that the submissions of Mr Gill as to the proper reading of paragraph 171 of the Handbook and the error of the Tribunal in that respect, (as set out at paragraphs 22-25 above) are correct and that the reasoning set out in the paragraphs quoted from the decision in *Foughali* as confirmed in *B v SSHD* is to be preferred.

42. I do not regard Mr Wilken's points of principle as standing in the way of such a conclusion. First, it is in the very nature of adjudication upon asylum issues that the tribunals or courts concerned with them are, for the purposes of surrogate protection underlying the 1957 Convention, obliged to examine and adjudicate upon events internal to another state: (see: the 1977 *Territorial Asylum Declaration*; *Shah and Islam* per Lord Hoffmann, as quoted at paragraph 23 above; and *Horvath v Secretary of State for the Home Department* [2001] AC 489, per Lord Hope at 495C-E and 499G – 500D.

43. In dealing with such matters, the courts of this country are not purporting to exercise jurisdiction, whether territorial or international, over the national of another state in respect of an internationally recognised crime alleged against him, as in the case of General Pinochet, but are examining conditions existing and actions taking place abroad for the purpose of deciding the rights of asylum recognised and afforded in this country to refugees. While it may be that, in other areas of its jurisdiction, the English court is reluctant to adjudicate upon the nature or legality of actions taking place abroad, it does not shy away from doing so when such a process is an inevitable ingredient of the jurisdiction to be exercised.

44. It is true as a general rule that:

> "For the English court to pronounce upon the validity of a law of a foreign sovereign state within its own territory, so that the validity of that law became the *res* of the *res judicata* in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rules of comity." (per Diplock LJ in *Buck v Attorney General* [1965] Chancery 745, 770)

See also: *Campaign for Nuclear Disarmament v Prime Minister of the United Kingdom* [2002] EWHC 2759 (QB) at paras 38-40. Nevertheless, as acknowledged in that case (per Richards J at paragraph 61(iii)):

> "By way of exception to the basic rule, situations arise where the national courts have to adjudicate upon the interpretation of international treaties e.g. in determining private rights and obligations under domestic law and/or where statute requires decisions to be taken in accordance with an international treaty; and in human rights cases there may be a wider exception."

c.f. *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 ("Justiciability depends not on general principle, but on subject matter and suitability in the particular case": paragraph 85).

45. Second, while it must be acknowledged that the Convention itself is silent as to conscientious objection and the norms of international law, I consider that the terms of the Handbook and court decisions have recognised a point at which punishment for

objection to participation in a particular conflict on grounds of its legality may properly be regarded as establishing persecution for the purposes of the Convention.

46. The basis upon which they have done so is not by recognition of an internationally accepted right of (general or partial) conscientious objection (see *Sepet and Bulbul supra*) or by categorisation of such a stance as *ipso facto* protected under the express terms of the Convention, but by treating a genuine conscientious refusal to participate in a conflict in order to avoid participating in inhumane acts required as a matter of state policy or systemic practice, as amounting to an (implied or imputed) political opinion as to the limits of governmental authority, which thereby attracts the protection of the Convention: see *Hathaway* pp.152-156 and 180-182 and the extensive Canadian authority there cited; *Canas-Segovia v United States Immigration and Naturalization Service* (1990) 902F 2d 717; and per Waller LJ in *Sepet and Bulbul* at paras [159] [167] [173] [174] [179].

47. Finally, while it must also be acknowledged that the *Foughali* test which involves the consideration of evidence as to what is happening 'on the ground' in relation to the conflict concerned, is more complex than simply asking the question whether or not a specific conflict has been internationally condemned, I do not consider that to be a sufficient reason in itself why the test should be rejected.

48. Mr Wilken submits that a test based on so-called international humanitarian norms is undesirable because such norms are difficult of definition and it is inappropriate and undesirable for an English court or tribunal to attempt the task of formulating an appropriate working test other than that of international condemnation of a particular war or conflict. He submits that against the background that (a) all states have the power to compel citizens to fight both as a matter of domestic and international law (b) international law accepts that war is a derogation from the usual norms of civil society, (c) there is no international instrument which recognises the right of conscientious objection and (d) conscientious objection as such does not fall within the wording of the Refugee Convention, the court is attempting to spell out an exemption from a generally recognised power to compel citizens to fight. That being so, the exemption must be (i) sufficiently clear, certain and objective; (ii) compliant with international law (the Convention being an international instrument) and (iii) be readily recognisable in domestic law.

49. He objects that the *Foughali* test does not provide sufficient clarity or certainty as to the norms applicable and requires the court to engage in a subjective exercise of establishing whether or not the materials placed before it establish unjustified breaches of those norms on a sufficiently widespread basis to establish a Convention reason. By contrast, the test as proved by the Tribunal in this case (the "*Krotov* test") is certain, defers to that principle and is readily capable of documentary proof.

50. So far as compliance with international law is concerned, Mr Wilken accepts that the Handbook is an important guide to the interpretation of the Refugee Convention, but says that it is too uncertain and insufficient in itself to define the relevant norms of international humanitarian law by which to judge the repugnant nature of the relevant military conflict, short of its having been internationally condemned. He rejects what

he calls the assumption of "freestanding" norms of human conduct which can be recognised without reference to, or reliance upon, such international condemnation; he submits there is a fundamental difficulty in relation to establishing internationally accepted humanitarian norms in this field which he submits invalidates the reasoning of the Tribunal in both *Foughali* and *B v SSHD*.

51. As I have already indicated, while these objections have force, they should not in my view prevail over the necessity for the courts, in seeking to define and apply the working test in cases of this kind, to have regard to the realities of the particular conflict in which an applicant has refused to participate rather than to the specific question whether or not that conflict has yet been internationally condemned. If a court or tribunal is satisfied (a) that the level and nature of the conflict, and the attitude of the relevant governmental authority towards it, has reached a position where combatants are or may be required on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognised by the international community, (b) that they will be punished for refusing to do so and (c) that disapproval of such methods and fear of such punishment is the genuine reason motivating the refusal of an asylum seeker to serve in the relevant conflict, then it should find that a Convention ground has been established.

52. This does not in my view mean that, in every case of this type, adjudicators will be obliged to carry out an extensive review of the materials before them in order to reach a conclusion upon the nature and quality of the conflict concerned. It is (or certainly should be) the function of the Home Department to keep under review the conditions prevailing in 'hot spots' such as Chechnya in order to inform its decision in respect of an applicant relying upon those conditions as justifying his refusal to serve. So far as adjudicators are concerned, it will be appropriate for the Immigration Appeal Tribunal by "starred" decisions from time to time, triggered by the appeal of an applicant who relies upon up-to-date reports and other authoritative materials available as to the nature of the conflict concerned, to review such conditions and material for the purpose of providing guidance to adjudicators in subsequent cases.

53. So far as ground 3 of the appeal is concerned (see paragraph 15 above), as already indicated, the parties are agreed that, on the basis of the conclusion which I have reached, the matter should be remitted to the Tribunal for reconsideration of all the relevant material placed before it. In this respect it is not clear from the Tribunal's decision whether, in the light of the decision which it reached upon the principal point, it gave detailed consideration or appropriate weight to the wide spectrum of material placed before it, which included reports from various non-governmental organisations, the factual contents of which were relevant for the Tribunal to consider when coming to its conclusion whether the applicant's case has been established.

54. Accordingly, I would allow the appeal and remit the case to the Tribunal for rehearing in the light of this judgment.

Lord Justice Rix:

55. I agree, and gratefully adopt Lord Justice Potter's exposure of the materials relevant to this appeal as well as his reasons. Given the interest of the case, and the division of opinion which has occurred in decisions of the Immigration Appeal Tribunal, I would proffer three thoughts.

56. The first is to underline the importance in this context of some form of state or organisational responsibility for the conduct in question. It is not the mere occurrence of random acts of brutality, or of rape or murder, which in my opinion would qualify the conscientious objector for the surrogate protection of the asylum state under the Convention. Unfortunately, such random acts are too often an incident of warfare. There must be that systematic basis for the acts, either as a matter of deliberate policy or as a result of official indifference, referred to by Lord Justice Potter at paragraphs 37,40,46 and 51 above, to qualify the situation as one in which the objector is able to rely on international law norms to make good his claim for protection.

57. Secondly, I would emphasise, as indeed has Lord Justice Potter at paragraph 40 above, that the applicant should show that he was or would be required to participate in the condemned acts. Recent evidence has indicated that even in the midst of the horrors of the Nazi holocaust it was possible for soldiers with the agreement of their commanding officers to stand back from participation. In *B v SSHD* itself the Tribunal found that the applicant there, as a communications specialist, was on his own evidence not reasonably likely to be implicated in any abuses.

58. And thirdly, I would suggest that the difference between the two sides of the argument highlighted by this appeal is perhaps more one of appearance than of substance. As the Tribunal in *B v SSHD* itself pointed out (at para 41), their Lordships in *Sepet and Bulbul* appear to have viewed the terms "internationally condemned" and "contrary to the basic rules of human conduct" as interchangeable. While it is possible that in this area of international law the principles are more clear cut than elsewhere, nevertheless it is often indicated that domestic tribunals, when they are required to consider the relevance of international law, should look for clear breaches of clearly established rules: see *Oppenheimer v Cattermole* [1976] AC 249 at 278 and *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] AC 883 at paras 29/29. Whether or not therefore a particular conflict falls into the category of one where its combatants are required to participate in acts contrary to international law as a matter of systematic policy or indifference may well depend in a large degree on evidence of international condemnation, or the lack of it. This was itself recognised by the Tribunal in *B v SSHD*, for instance at para 53:

> "Given that the presence or absence of international condemnation is highly relevant evidence of whether an armed conflict is contrary to international law, can it be said that the conflict in Chechnya has been internationally condemned?"

59. The Tribunal said that the answer to that question was no, and proceeded to conclude quite briefly that the answer to the separate international law question fell in the same direction (at para 55). As must often be the case, the norms are set by international law, but the judgment as to whether those norms have been broken in any case will depend in large part on (a form of) international consensus.

Lord Justice Carnwath:

60. I agree with both judgments.

Order: Appeal allowed; the matter to be remitted to a differently constituted Immigration Appeal Tribunal; the Respondent do pay the appellant's costs, such costs to be the subject of a detailed assessment, if not agreed; detailed assessment of appellant's costs for Community Legal Services purposes.

(Order does not form part of the approved judgment)