VB (Desertion-Chechnya War-Hamilton) Russia CG [2003] UKIAT 00020

IMMIGRATION APPEAL TRIBUNAL

Date heard: 1 October 2002
Date notified:……..…04/07/03

Before: -

DR H H STOREY (CHAIRMAN)
MR J BARNES
MR M L JAMES

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. In this appeal, taking account of certain problems that have arisen, we seek 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 also to resolve an apparent difference of view in previous Tribunal decisions dealing with the issue of "international condemnation" (*Foughali* and *Krotov*).

2. The appellant, a national of Russia, has appealed with leave of the Tribunal against a determination of Adjudicator, Mr R L Walker, dismissing the appeal against the decision of the Secretary of State giving directions for removal having refused asylum. Ms T Ahmed of Counsel instructed by Riaz & Co Solicitors appeared for the appellant. Ms C Cooper and at the resumed hearing on 29 May 2003, Miss K Evans, appeared for the respondent. The resumed hearing was convened in order to afford the parties the opportunity to make submissions in the light of the House of Lords judgment in *Sepet & Bulbul* and recent Strasbourg case law on prison conditions.

3. The Tribunal has decided to dismiss this appeal.

4. The basis of the appellant`s claim was that he had been in the Russian military and had trained as a communications specialist. He had deserted the army when he was informed he would be posted to Chechnya. He considered that the armed conflict there was internationally condemned and that punishment he would receive as a military deserter would be unduly harsh and disproportionate.

5. The adjudicator found the appellant credible. Whilst finding he had given no ideological basis to explain his unwillingness to do military service, he accepted that his opposition to the policies of the Russian government vis a vis Chechnya rendered him a “partial objector”. However, he did not think this proved the appellant`s case since the objective evidence did not show that the war in Chechnya was condemned by the international community as being contrary to the basic rules of human conduct. And since the appellant “would simply be imprisoned as a deserter” for (up to) 7 years, he did not consider the punishment disproportionate or attributable to a Convention reason.

6. The grounds as amplified by Ms Ahmed contended that the adjudicator’s treatment of the military service issue was flawed in several respects. As the appellant would be known to be opposed to fighting in Chechnya, it was likely the authorities would impose oppressive conditions of military service on him. As regards the relevance of the appellant`s objections to participating in the war in Chechnya, Ms Ahmed argued that the authorities` knowledge of these would result in a greater level of hostility towards him than otherwise. As regards the nature of the military conflict in Chechnya in which the appellant would very likely have to participate, he was wrong to find that it had not been internationally condemned. Concerning the issue of the likely punishment, the appellant would face for evading and refusing to perform military service, Ms Ahmed asked the Tribunal to recognise that the issue was not simply what penalty the appellant would receive – up to 7 years imprisonment - but what conditions the appellant would face whilst in detention (pre- and post- trial). The Amnesty International and Human Rights Watch materials indicated he would face a real risk of ill treatment during detention. In this regard Ms Ahmed again asked the Tribunal to conclude that the appellant would not be treated the same as other persons detained for refusing to perform military service, since the authorities would know that he had conscientious objections to the war in Chechnya. The stance he had taken would mean he would be seen as holding a political opinion averse to that of the government.

7. At the resumed hearing Ms Ahmed urged us to find that since the latest country materials indicated that the conflict in Chechnya continued to be marked by serious human rights abuses which had been criticised by a number of international sources, we should treat the conflict as internationally condemned. As regards the issue of likely punishment, she pointed out that the latest materials continued to show grave concern about the severity of prison conditions. She urged us to infer a real risk of discriminatory treatment of the appellant from the fact that on the one hand he was a deserter and on

the other hand the authorities would know he objected to the war in Chechnya.

8. Before proceeding further it is important to restate the general principles to be applied to claims in which military service is said to give rise to persecution**.** The Tribunal had previously set out general principles that should apply in *Foughali* (00/TH/0513) and in *Sepet and Bulbul*. But in its judgment in *Sepet and Bulbul* the Court of Appeal did not agree with the Tribunal in identifying, as one of four exceptions to the general rule, objections to military service based on the ground of conscientious objection on its own. In their speeches of 20 March 2003 the House of Lords agreed with the Court of Appeal.

9. However, the decision of both the Court of Appeal and the House of Lords to focus largely on the issue of conscientious objection as a ground on its own has led to some uncertainty on the part of adjudicators as to the shape and contents of the proper framework for analysing military service cases. There has been uncertainty as to what grounds of exception remain to the normal rule that objection to military service does not give rise to a real risk of persecution; uncertainty as to whether or to what extent conscientious objection remains a prerequisite to any claim based on these remaining exceptions; and uncertainty as to when it will be correct to identify a Convention ground (such as political opinion) in military service cases.

10. In the House of Lords Lord Bingham of Cornhill summarised matters as follows:

> "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… But the applicants cannot, on the facts as found, bring themselves within any of these categories" (para 8).

11. At paragraphs 8 and 14 he refers to European Union texts. Lord Hoffman refers in passing at his paragraph 26 to the exception relating to being required to "engage in military action contrary to basic rules of human conduct".

12. Lord Hoffman too refers to European Union texts at paragraph 52.

13. What is clear from these limited references is that their lordships saw the main issue they had to decide as being whether conscientious objection on its own could give rise to claim to refugee status and so did not wish to say anything further about remaining limited grounds of exception other than to affirm that they did exist.

14. In order to restate the relevant general principles, our start-point has to be the more specific treatment afforded by Laws LJ at paragraph 61 of the Court of Appeal (majority) judgment in *Sepet and Bulbul*. In this paragraph 61 Laws LJ said:

> "In describing this as the first issue [i.e. the issue of does punishment for draft evasion by an "absolute" conscientious objector amount to persecution] 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"* (emphasis added).

15. We take from this and others parts of the judgment that the majority of the Court of Appeal, although rejecting one of the (four) grounds of exception identified by the Tribunal in *Foughali,* saw as uncontentious the existence of the three other grounds of exception. In our view there is no material difference between Laws LJ`s and *Foughali*`s wording of these exceptions. But for the avoidance of doubt we shall follow Laws LJ`s wording. Thus they are:

(a) where the conditions of military service are themselves so harsh as to amount to persecution on the facts;
(b) where the military service to which a person is called involves acts, with which he may be associated which are contrary to basic rules of human conduct;
(c) where the punishment in question is disproportionately harsh or severe.

16. How do these three grounds fit into the overall framework?

17. Before we can answer this question we must first of all address the following difficulty. Although rejecting conscientious objection as a ground of exception in its own right, Laws LJ appeared to identify conscientious objection as a continuing prerequisite for a claimant to be able to bring himself within one of the three grounds of exception.

18. This is a difficulty because it requires ascertaining what Laws LJ took to be the meaning of the term conscientious objection. In *Foughali* the Tribunal

sought to base interpretation of this term on the notion of "principled objections", a notion which it saw as in turn based loosely on international human rights law concepts of freedom of expression, thought and conscience. At the Tribunal stage of the *Sepet and Bulbul* case, the Tribunal had taken perhaps even a narrower view of what constitutes conscientious objection, considering in particular that it could not include beliefs based on discriminatory notions. Laws, LJ in *Sepet and Bulbul*, by contrast, considered that both Tribunal decisions imposed too narrow a meaning and that a broader meaning should be adopted so that beliefs of all kinds, including even stupid, unattractive, repulsive beliefs based for example on racist or fascist opinions, could qualify so long as their practice and exercise did not bring a person within the Exclusion Clauses (Art 1F): see paragraph 86.

19. We deduce from this the following. Neither the Tribunal in these two cases nor the majority of the Court of Appeal in *Sepet and Bulbul* was prepared to make the test of conscience entirely subjective. But in practice the much broader notion accepted in *Sepet and Bulbul* means that it is now far easier than it was previously for a claimant to establish that he has conscientious objection to military service. Essentially all he need do is show that he has an objection based on conscience. The moral or ethical basis of such an objection is irrelevant so long as its exercise has not brought actions based on it within the scope of Art 1F.

20. However, several caveats are in order. Firstly, as we have already emphasised by reference to the judgments of the Court of Appeal and the House of Lords in *Sepet and Bulbul,* proving one is a conscientious objector on its own gets a claimant nowhere. It only assists his claim if he can link his objection to one of the three remaining grounds of exception: see above.

21. Secondly, although limiting the circumstances in which it will be relevant, the *Sepet and Bulbul* judgments leave intact the principle that an adjudicator must examine whether a claimant holds any objections he has to military service genuinely. It remains the case, to use the words of the Court of Appeal in *Adan and Lazarevic* [1997] INLR 251, relevant for an adjudicator to examine whether a claimant's beliefs are not "opportunistic or extraneous". To be satisfied a claimant holds such objections genuinely or sincerely, there must be objective proof to the relevant standard.

22. Thirdly, although it is correct to conduct analysis of whether a person has objections on the grounds of conscience as a first step in assessing a claim based on military service, the extent to which the contents of a person's objections are relevant in any particular case will vary from case to case. Any attempt to furnish a durable framework for approaching military service cases must encompass all possible situations that can arise. Thus there will be cases in which the state of a person`s objections or beliefs, genuine or otherwise, will be virtually, sometimes entirely, irrelevant, as when for example he faces inhuman and degrading conditions of military service. Such a person may still not be able to establish he qualifies as a refugee for want of a Refugee Convention ground, but he will be able to establish persecution.

(Even if such a person does not qualify under the Refugee Convention, he will qualify under Art 3 of the Human Rights Convention).

23. At the other end of the spectrum there will be cases where the need to test the genuineness or sincerity of a person's objection (in accordance with the approach set out at paragraph 174 of the UNHCR Handbook) remains quite central. The Tribunal in *Foughali* gave the example of the person who would be required to fight in an armed conflict contrary to international law but who himself has no ethical objections to killing civilians. His lack of ethical objections may be very relevant in deciding whether what he faces is a risk of persecution (in certain cases, in relation to past acts, there may also be an Art 1F issue). In respect of a person likely to face legally imposed punishment, the state and nature of his beliefs may be highly relevant if the nature of the punishment involved would offend against his basic religious beliefs. One example might be a strict Muslim who as part of a lengthy punishment would be required to eat pork.

24. So long as the wording of paragraph 174 of the 1979 UNHCR Handbook is read in the light of Laws LJ`s observations at paragraph 53 of *Sepet and Bulbul*, that paragraph remains in our view a sound summary of the factors to be taken into account in testing the sincerity of a person`s objections where these are material to the claim.

25. Fourthly, it must not be assumed that just because a person says he will face military service in one of the three exceptional situations identified earlier, there is a real risk he will in fact do so. As Laws LJ noted at paragraph 98 (in relation to a point raised by Mr Scannell regarding the issue of mistaken belief in the context of a person claiming he would have to fight in an internationally condemned conflict):

> "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" (emphasis added).

26. In our view this observation underlines the great need in military service cases for adjudicators to consider carefully whether the causal chain of events presaged by the claimant is in fact made out on the basis of real risk. The precise sequence of events said to arise will vary from case to case. Broadly speaking the sequence potentially encompasses: return; apprehension; classification as an evader or deserter; a decision whether to force a returnee to serve in the military; a decision whether to prosecute and or punish the returnee as an evader or deserter; imprisonment; imprisonment for a certain period and under certain conditions. But in the absence of satisfactory evidence, it cannot be assumed that just because one or two events will happen, the others will also happen. Adjudicators should be very careful not to make unwarranted assumptions about sequencing.

27. Finally, as already touched on, it remains that in order for a person to be able to establish he is a refugee on the grounds of his objections to performing military service in three limited situations, he must also show, in addition to a real risk of persecution, that he has a Refugee Convention ground. If want of a Refugee Convention ground is the only reason why his claim fails, then there will still be an Art 3 issue.

28. In relation to the Refugee Convention requirement to show a Convention ground, we may also derive from the Court of Appeal and House of Lords judgments in *Sepet and Bulbul* two other principles. One is that it is not necessary in order to show a Convention ground to demonstrate that the authorities have a subjective intent to persecute an individual for that reason (Lord Bingham of Cornhill, para 22). The other is that it cannot easily be assumed that a person who refuses to serve because of his political or religious beliefs is punished by reason of those beliefs. As Lord Bingham noted at paragraph 23,

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

29. In the light of the above the basic principles that should govern consideration of military service cases can be restated as follows:

> 1) In order to establish that military service gives rise to a real risk of persecution a claimant must first of all establish that he is a conscientious objector. However, he will usually be able to establish

that he is a conscientious objector quite easily. in establishing this, a moral and ethical basis to his objections may be irrelevant unless they are so extreme as to engage Art 1F considerations[1]. To what extent it is relevant whether a person's objections are genuinely held will depend on the nature of the particular case.

2) Assuming a person can establish conscientious objection in this very broad sense, he can only show there is a real risk of persecution where one or more additional factors obtain:

(a) where the conditions of military service are themselves so harsh as to amount to persecution on the facts;

(b) 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;

(c) where the punishment in question is disproportionately harsh or severe.

3) Even if a person on the basis of one of these additional factors can establish a real risk of persecution, he will not qualify as a refugee unless he can further demonstrate that the persecution is by reason of a Refugee Convention ground (race, religion, etc).

30. Whilst we consider the above framework should be used in military service cases, the facts of this case require us to clarify certain matters of detail relating to 2 (a), 2(b) and 2(c). What they add to the overall framework will be stated in our conclusions.

Application to the facts of this case

31. The adjudicator was prepared to accept that the appellant had deserted from the army. We see no reason to interfere with that finding or indeed any other of his findings of fact.

32. Accordingly we approach this case on the basis that upon return the appellant would come to the notice of the authorities and be classified as a deserter.

Conscientious objection

33. Albeit finding the appellant had no ideological basis for his unwillingness to do military service, the adjudicator was prepared to accept that his opposition to the policies of the Russian government vis a vis Chechyna rendered him a "partial objector". The adjudicator should have given clearer reasons why he reached this conclusion. It would have helped if he had examined the case in the way set out at paragraph 174 of the 1979

[1] The Tribunal has recently dealt with Art 1F cases in the starred determination of *Gurung* [2002] UKIAT 04870

Handbook. However, since he plainly considered the appellant held genuine objections to the war in Chechnya, we are prepared to accept that the appellant was thereby a conscientious objector in the very broad sense outlined earlier.

34. We next turn to consider whether the appellant should have been found to qualify as a refugee on the basis that his objection would expose him to a real risk of performing military service in one or more of the three exceptional situations already identified.

Conditions of military service

35. As already noted, the appellant contended that the adjudicator should have accepted that since the conditions he would face doing military service were oppressive, he should qualify as a refugee. We cannot accept this contention.

36. As regards conditions of military service generally, it is true that the April 2002 CIPU report at para 4.12 refers to "the army's notorious reputation for bullying, including torture and rape, particularly of new conscripts". Paragraph 4.14 notes that various abuses against military servicemen continued during 2001. It also mentions that degrading and substandard living conditions persist throughout the military. The Human Rights Watch Report 2003 and the Amnesty International Report 2003 highlight the incidence of severe abuses and make no mention of significant improvements. However, we agree with the Tribunal in *Foughali* (00/TH/0513) that for a claimant to qualify as a refugee on the basis of adverse conditions of life whilst in military service alone would require the existence of "highly unusual circumstances". As dismal a picture as these sources paint of life for Russian conscripts, they do not by reference to figures establish a consistent pattern of gross and systematic violations of the basic human rights of conscripts. In the context of establishing whether a real risk of persecution or treatment contrary to human rights would ensue for a person returning to face compulsory military service in Russia, we do not think that anything less than evidence of abuses on such a scale of severity suffices. We agree too with the Tribunal in *Krotov* [2002] UKIAT01325 that the evidence concerning such abuses does not establish that serious abuses of the human rights of conscripts are endemic throughout the army. Most of the examples of widespread torture and ill treatment in the armed forces come from particular units (the 72nd regiment, 42nd army division in particular). Furthermore, the objective country materials attach some significance to the fact that mechanisms have been set up in recent times to investigate allegations of abuse within the Military Procurator's Office and President Putin has identified military reform as one of his priorities.

37. The appellant also contended that the conditions of life in military service would be more difficult for him than for others because people would know he had objected to serving in Chechnya. However, from the objective country materials it is clear that unwillingness to serve in Chechnya is a widespread problem. There is no satisfactory evidence that the military authorities mete

out significantly worse treatment to deserters known to be Chechen refuseniks.

Actual participation in Chechnya

38. Before considering the remaining two grounds of exception, it is first of all necessary to decide whether there would indeed be a real risk of the appellant being required to participate in the armed conflict in Chechnya. Here the evidence is patchy. From the CIPU report we glean that only about 20% of liable conscripts are actually enlisted, while the remaining 80% are granted either postponement or exemption or have not responded to the call-up. However paragraph 4.9 of the April 2002 CIPU report notes that persons subjected to the draft are divided into two groups: draftees and reservists. Reservists consist of those who have completed the military academy or have completed their military service. As regards draftees, it states: "All draftees, after six months of serving in the army, can be sent to areas of armed conflict." At paragraph 4.10 this report further clarifies that while the Constitution provides for the right to alternative civilian service, few cases succeed in the courts and young men continue to risk imprisonment for refusing military service on conscientious grounds. Since in this case the evidence is that the appellant would be classified as a deserter, this information is of limited relevance. But as his evidence was that he was on his way to Chechnya when he deserted, we are prepared to accept that he would in fact run a real risk of being required (in addition to any punishment he might receive) to serve in Chechnya.

Military service leading to participation in armed conflict contrary to international law

39. As noted earlier, another of the appellant's contentions was that to return him to Russia where he would have to fight in Chechnya would expose him to a real risk of involvement in acts condemned by the international community. The adjudicator chose to pose the issue in terms of whether or not the conflict in Chechnya was internationally condemned.

40. In our view the adjudicator did not err by describing the issue in such terms: indeed it is used descriptively in this way by Lord Bingham of Cornhill in his speech in the House of Lords judgment. However, since the parties in this case sought to rely on the analytical interpretation placed on the term "international condemnation" as set out in the case of Krotov [2002] UKIAT 01325, it is salient that we seek to clarify this issue. *Krotov* disagreed with *Foughali* because it considered the main purport of paragraph 171 of the 1979 UNHCR Handbook which referred to "… military action condemned by the international community as contrary to basic rules of human conduct…" was to require a test of condemnation by the international community. It wrote:

> "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*".

41. It is clear from the judgments of the Court of Appeal and the House of Lords in *Sepet and Bulbul* that their lordships view the terms "internationally condemned" and being "contrary to the basic rules of human conduct" as interchangeable. However, since the parties in their submissions in this case have sought to rely on *Krotov*`s approach, we need to explain briefly why we decline to follow it on this particular issue. For one thing the determination in *Foughali* was one whose guidance was to be followed according to the President in the starred case of *Slimani* (01/TH/00092). For another, the only point on which the Court of Appeal (subsequently) disagreed with *Foughali* concerned its treatment of conscientious objection as an exception in its own right.

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. Firstly, 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 coexistence 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.

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.

49. However, to bring Tribunal case law fully up to date, we do need to make clearer than was done in *Foughali* what would be required for an appellant to show he faced a real risk of persecution as a result of having to participate in a particular armed conflict said to be contrary to international law. Plainly the test of real risk requires considerations of scale. It would not be met if the evidence was simply that in the course of this armed conflict there would be isolated incidents in breach of international law. Under international humanitarian law and international criminal law, of course, it is possible for even an isolated incident, e.g. the killing of an unarmed civilian, to give rise to a violation. But the test under the Refugee Convention would not be met because one could not say that a person having to participate in such a conflict faced a *real risk* of being implicated in incidents which were isolated in number and character. Nor would the test be met simply because objective country materials document a relatively limited number of incidents in which conscripts have been forced, for example, to massacre or kill unarmed civilians. The test is met, however, if the armed conflict in general is contrary

to international law. For that to happen there would have to be violations of the laws of war occurring on a widespread and systematic basis.

50. We are fortified in taking this view by the fact that the Refugee Convention was plainly not intended to impose responsibility on host states for the abuses which may be committed by combatants in the claimant`s country of origin. If the threshold of real risk was set lower, then it could be enough for a person to succeed under the Refugee Convention simply by showing that military service in his country can sometimes involve acts of impunity, even if in fact he himself stood only a remote chance of being involved in such acts.

51. Our analysis leads us to one further observation. Given some confusion has continued over the proper interpretation to be placed on paragraph 171 of the UNHCR Handbook, we consider that a useful clarificatory addition can be made to the wording of the second exception given earlier as follows (additional words in italics):

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> "(b) 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…*"

The conflict in Chechnya

52. Applying the international law-based test to the situation facing the appellant in this case, we have come to the following conclusions.

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? Despite our disagreement with certain of the observations made in *Krotov*, we entirely agree with its conclusion that the evidence did not establish that the current conflict in Chechnya had been condemned by any official international body, either in respect of aims or methods. That Tribunal correctly noted that, even though the UN Commission on Human Rights as noted in the Human Rights Watch report for 2002 expressed grave concern about human rights violations in Chechnya, it fell short of calling for an international commission of inquiry.

54. Evidence to hand since *Krotov* appears to point further in a direction away from international condemnation. According to an Amnesty International document dated 19 April 2002 the UN Commission on Human Rights in its 58th session narrowly voted against a resolution expressing concern at serious violations of human rights in Chechnya. The Human Rights Watch Report 2003 states that: "For the first time in three sessions, Russia escaped formal criticism of its conduct in Chechnya at the U.N. Commission on Human Rights. A resolution, brought to a vote when European-led negotiations about a consensus-based chairman's statement failed, was narrowly defeated."

55. Can it be said that, even if not internationally condemned, the conflict is Chechnya is nevertheless one involving its participants in acts contrary to

international law governing armed conflict? Here both the objective behind the actions of the Russian authorities and the methods in conducting this war are relevant. The Human Rights Watch Report 2003 and the Amnesty International Report 2003 report a continuation of serious human rights abuses and abuses of international humanitarian war on both sides of the conflict, noting a deterioration during the second half of 2002, the oppressive use by Russian security forces of *zachistki* (raids) being particularly highlighted. However whilst these and other reports identify a climate of impunity, none identify that the scale of abuses has become or is likely to become widespread and endemic.

56. Taken together with the lack of evidence that violations of international law governing armed conflict are endemic in Chechnya, the evidence of a lack of international condemnation is compelling. It leads us to conclude that the real prospect of having to perform military service in Chechnya would not expose this appellant to a well-founded fear of persecution on account of the repugnant nature of the armed conflict considered as a whole.

57. We would add that even had we found the armed conflict in Chechnya to be generally contrary to international law, we would not necessarily have concluded this appellant in consequence faced a real risk of persecution. That is not because we have doubted that he has genuine objections to it. It is rather because on his own account he was a communications specialist, not a front-line soldier. We would have had to be further satisfied either that he would have been required to do actual fighting or that his support role as a communications specialist to those in the front line would implicate him through a command structure in the commission of actions contrary to the laws of war. On his own evidence it was not reasonably likely he would be implicated in abuses of international law.

The issue of disproportionately harsh or severe punishment

58. This brings us to the appellant's final argument that his punishment would be persecutory because disproportionately severe. The adjudicator did not think it would be persecutory or contrary to Art 3. Were his conclusions sustainable?

59. As regards the likely imprisonment of the appellant for deserting, we need first of all to clarify the formal punishment and then consider the actual consequences. As regards the formal penalties, draft evasion is widespread and punishable by one to three years` imprisonment, five years in aggravated circumstances Military desertion is punishable by three to seven years` imprisonment, five to seven years or execution in wartime. There have been two amnesties covering deserters or draft evaders from the Chechen conflict but they were for a limited period.

60. There is some evidence to indicate that in practice evaders and deserters do not serve more than the minimum periods, but, even assuming they serve the maximum, we do not think the abovementioned periods of imprisonment are in themselves disproportionate, particularly given that the duty of Russian

citizens to perform military service is currently being enforced at a time when the Russian state faces significant problems of internal and external security.

61. Can it be said nevertheless that the prison conditions the appellant would face in the course of his punishment would in themselves amount to serious harm or treatment contrary to his human rights?

62. The country evidence regarding prison conditions is disturbing. Paragraphs 4.24 of the April 2002 CIPU report states that prison conditions remain extremely harsh and frequently life-threatening. Prisons remain extremely overcrowded, prisoners often suffer from inadequate medical care. Between 10,000 and 11,000 detainees and prisoners are believed to die each year in penitentiary facilities. The Amnesty International Report 2003 notes that prisons in Russia continue to be overcrowded and rife with infectious diseases. The Human Rights Watch Report 2003 states that:

> "Prisoners rights groups reported that the total number of inmates in Russian prisons and pre-trial detention facilities decreased, but that overcrowding, unsanitary conditions, and disease epidemics remained a severe problem. The AIDS Foundation East-West estimated that almost thirty-five thousand of Russia`s 950,000 inmates were living with HIV, a drastic rise from fifteen thousand in 2001."

63. However, the evidence falls short of identifying that persons detained in Russian prisons will routinely face conditions which are inhuman and degrading or otherwise amounting to serious harm.

64. During the course of our deliberations we invited the parties to address us on the significance for this case of a recent judgment of the European Court of Human Rights in the case of *Kalashnikov v Russia* (Application no. 47095/99, 15 October 2002). Miss Ahmed urged us to view it as further support for her position that the claimant would face a real risk of ill treatment upon return arising from a prison sentence imposed for desertion. Miss Evans asked us to confine it to its historical facts. Having considered the case, we see it as of limited relevance to the issue we have to decide. The applicant in this case complained inter alia that his conditions of detention in the Magadan detention facility IZ-47/1 between 1995 and 1999 was contrary to Art 3.

65. In the course of reiterating general principles underlying its case law on Art 3, the Court noted (as regards degrading treatment) that the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. It continued:

> "Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and

> that, given the practical demands of imprisonment, his health and well-being are adequately secure.
>
> When assessing conditions of detention, account has to be taken of the cumulative effect of those conditions, as well as the specific allegations made by the applicant (see *Dougoz v Greece*, no. 40907/98 para 46 ECHR 2001 – II). (paragraph 95)".

66. Applying these principles to the applicant`s case, the Court found that there had been severe overcrowding and unsanitary conditions having a detrimental effect on his health and well-being. It concluded that the conditions of detention, which the applicant had to endure for approximately 4 years and 10 months, must have caused him considerable mental suffering, diminishing his human dignity and arousing in him such feelings as to cause humiliation and debasement. It did, however, acknowledge evidence that conditions had since been the subject of some improvement at this particular prison. At paragraph 94 the Court noted:

> "It was acknowledged that, for economic reasons, conditions of detention in Russia were very unsatisfactory and fell below the requirements set for penitentiary establishments in other member States of the Council of Europe. However, the Government were doing their best to improve conditions of detention in Russia. .."

67. Our observations on this case are twofold. Firstly, although the case deals mainly with pre-trial detention facilities, it was accepted that conditions in other types of detention facilities were in general no better. Even so, the case did not proceed on the basis that conditions in all Russian prisons generally were contrary to Art 3, only that given widespread problems in such prisons an applicant would have less difficulty proving his case as to ill treatment in a particular prison than would an appellant facing imprisonment in a country where prison conditions were generally good. Secondly, and here we repeat in large part observations made earlier, this case involved an allegation concerning past treatment in prison and on which the European Court of Human Rights decided in October 2002. Whereas the task facing us is to assess whether if returned now the appellant would face a real risk of treatment which was persecutory or contrary to Art 3 as at June 2003. If there is no evidence that a claimant will face treatment worse than that accorded other (military) prisoners, he will not be able to succeed in showing he faces thereby a real risk of persecution or treatment contrary to his human rights unless the objective country materials disclose the existence of a consistent pattern of gross and systematic abuse of the human rights of (military) prisoners. We say this because the test under both the Refugee Convention and Art 3 of the Human Rights Convention is one of real, not remote, risk.

68. We consider therefore that in the absence of clear evidence to show that draft deserters returning to Russia routinely and systematically face conditions contrary to Art 3, the conclusion cannot be drawn that the claimant can make out his case either under the Refugee Convention or Art 3 of the ECHR.

69. In reaching this conclusion we have given consideration to Ms Ahmad`s contention that the appellant would face treatment worse than other prisoners because he would be known to have been a Chechen refusenik. However, given the very large numbers of Chechen refuseniks encountered by the Russian authorities, we do not think this appellant would be treated any different from them and there is no satisfactory evidence to show that refusenik detainees are treated worse than other persons detained for draft evasion or desertion.

The issue of Convention ground

70. Since we have decided the adjudicator was correct to conclude that the appellant`s return to Russia where he faced punishment as a deserter would not expose him to a real risk of persecution or serious harm, it is not necessary for us to address the issue of whether such risk would be on account of a Convention ground. But in any event, following the House of Lords judgment, especially the speech of Lord Bingham of Cornhill at paragraph 23, we do not think that in this type of case a Refugee Convention grounds is easily discernible.

Summary of Conclusions

71. In the light of the judgments of the Court of Appeal and the House of Lords in *Sepet and Bulbul,* it is necessary for the Tribunal to restate the basic principles that should govern consideration of military service cases as follows:

> I) In order to establish that military service gives rise to a real risk of persecution a claimant must first of all establish that he is a conscientious objector. However, in establishing this, a moral and ethical basis to his objections may be irrelevant unless they are so extreme as to engage Art 1F considerations[2]. To what extent it is relevant whether a person's objections are genuinely held will depend on the nature of the particular case.
>
> II) Assuming a person can establish conscientious objection in this very broad sense, he can only show there is a real risk of persecution where one or more additional factors obtain:
>
> > (a) where the conditions of military service are themselves so harsh as to amount to persecution on the facts;
> >
> > (b) 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;

[2] The Tribunal has recently dealt with Art 1F cases in the starred determination of *Gurung* [2002] UKIAT 04870, [2003] INLR 133.

(c) where the punishment in question is disproportionately harsh or severe.

III) Even if a person on the basis of one of these additional factors can establish a real risk of persecution, he will not qualify as a refugee unless he can further demonstrate that the persecution is by reason of a Refugee Convention ground (race, religion, etc).

IV) For a claimant to succeed under II (a), would require highly unusual circumstances.

V) For a claimant to succeed under II (b), he would need to show that the armed conflict in question was characterised by violations of the laws of war on a widespread and systematic basis *and* that he would be required to be an active participant in such violations.

VI) Where under II(c), as part of his punishment for draft evasion or desertion a claimant faces having to serve his sentence in poor prison conditions, he will not be able to succeed in showing he faces thereby a real risk of persecution or treatment contrary to his human rights unless the objective country materials disclose the existence of a consistent pattern of gross and systematic abuse of the human rights of (military) prisoners.

VII) The adjudicator was correct to conclude that the appellant in this case had failed to show that either the punishment he would receive as a deserter or the requirement that he perform military duties in Chechnya would give rise to a real risk of persecution or treatment contrary to his human rights.

72. For the above reasons this appeal is dismissed.

DR H H STOREY
VICE PRESIDENT