Sepet & Bulbul (Conscientious objection: Convention reason?) Turkey * [2000] UKIAT 00003

IMMIGRATION APPEAL TRIBUNAL

Date of hearing: 6th and 7th April 2000
Date Determination notified: 18/5/2000

Before

The Honourable Mr Justice Collins (Chairman)
Mr. P. R. Moulden

Between

YASIN SEPET and ERDEM BULBUL

APPELLANTS

and

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

RESPONDENT

DETERMINATION AND REASONS

1. The appellants, YASIN SEPET and ERDEM BULBUL, are citizens of Turkey. Both are Kurds. They have been given leave to appeal against separate decisions of the same Special Adjudicator (Mr J. R. L. G. Varcoe CMG) dismissing their appeals against the decisions of the respondent. Yasin Sepet was refused leave to enter and also refused asylum under paragraph 180D of HC 725. The respondent gave directions for the removal of Erdem Bulbul from the United Kingdom and also refused him asylum under paragraph 338 of HC 395.

2. At the hearing before us Yasin Sepet was represented by Mr R. Scannell of Counsel instructed by Deighton Guedalla, Solicitors. Ms N. Finch of Counsel, instructed by B. N. Birnberg & Co, Solicitors, represented Erdem Bulbul. Mr R. Tam of Counsel, instructed by the Treasury Solicitor, appeared for the respondent.

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

4. Having prepared this determination we have seen the draft Tribunal

determination of Mr J. Fox and Dr H. H. Story in the appeal of **Naseradine Foughhall HX/87716/97**. We believe that there are no differences of principle between that determination and this. The determinations are compatible.

5. Immigration and appeal history

6. Yasin Sepet was born on 1st February 1971. He arrived in the United Kingdom on 11th October 1990 and claimed asylum immediately. The respondent's decision is dated 29th September 1993. Unfortunately, the appeal hearing before Mr Varcoe was the third time the appeal had come before a Special Adjudicator; two previous appeals having been allowed by the Tribunal and remitted for hearing de novo. The appeal was heard by the Special Adjudicator on 3rd October and 28th November 1997 and his determination promulgated on 19th February 1998. Leave to appeal was granted on 17th April 1998.

7. Erdem Bulbul was born on 25th August 1977. He is said to have arrived in the United Kingdom on 29th April 1996. He claimed asylum on 7th May 1996. The refusal letter is dated 8th July 1996 and the respondent's decision 11th July 1996. The appeal was heard by the Special Adjudicator on 11th February 1998 and promulgated on 9th March 1998. The Tribunal refused leave to appeal on 30th March 1998 but, following an application for judicial review, there was a consent order quashing the Tribunal decision and granting leave to appeal.

8. The hearings before the Special Adjudicator and his determinations -Yasin Sepet

9. The Special Adjudicator found that Yasin Sepet was an articulate, quick witted and politically conscious person with strong views. He believed parts of his claim but concluded that other parts had been either embellished or fabricated. He was not a generally reliable witness.

10. However, the Special Adjudicator accepted Yasin Sepet's account of events up to and including his second arrest in 1988. This account was that he was born in a village in the district of Golbasi in Adiyaman Province in Southeast Turkey. Whilst at school he was beaten and expelled for reading a leftist publication. He left school in 1985 and joined the leftist political youth group affiliated to the TKEP (Turkish Communist Service Party). He distributed leaflets and attended meetings of the Youth Wing, which sought to promote Kurdish rights. All his family and friends had leftist beliefs. He has a brother who came to the UK and is said to have been granted refugee status. The family experienced almost routine harassment and discrimination from the authorities. In 1986 a group of villagers were about to establish a local organisation. Soldiers came to Yasin Sepet's house and arrested him. They claimed that the group was to be a front for Communist propaganda. Yasin Sepet was taken to Golbasi, held for 33 days and ill-treated.

11. In 1988, whilst working as a peddler the gendarmes stopped and checked him for military service eligibility. He was 18 at the time, and not yet liable, but was arrested because he was found in possession of leftist magazines. He was detained for 31 days at the military police station and ill-treated. He claimed to have been stripped, beaten and forced to walk in a tub of hot water containing

salt and broken glass. The Special Adjudicator did not accept that he had been tortured in this way, although he accepted that he had been ill-treated. Furthermore, the Special Adjudicator, whilst finding that Yasin Sepet had been released, did not accept that it was on condition that he report to a police station once a week.

12. Yasin Sepet then went to Antalya where he got a job in a hotel. He claimed to have been detained in September 1989. He said the TKEP had instructed him to contact tourists so that the boats they used when travelling to nearby Greek islands could be used to smuggle out political activists. He also claimed to have helped potential escapers by harbouring them in the hotel where he worked. He claimed to have done this for six or seven months before the police came and arrested four people. The three others were released after 15 days but he was charged. After 20 days detention in Antalya he was taken to Adiyaman where he was held for a further 91 days at the police station. He was beaten and starved. He was released after his relatives bribed the prosecutor. Because of his vagueness and a number of important inconsistencies the Special Adjudicator did not accept Yasin Sepet's claims to political involvement, political activities, arrest or ill-treatment after he moved to Antalya.

13. After his release Yasin Sepet claimed to have returned to Antalya where he resumed the same job and his political activities. The police in Adiyaman learnt that the prosecutor had been bribed and put pressure on his father to tell them where he was. His father warned him and he fled to Ankara where he stayed for one day before leaving the country with his cousin. Having concluded that Yasin Sepet was not arrested in Antalya the Special Adjudicator went on to conclude that his account of subsequent events was untrue, except for the circumstances in which he obtained a passport and left the country.

14. In relation to military service the Special Adjudicator found that Yasin Sepet would have become liable for conscription when he reached his 20th birthday, in February 1991 and would still have been liable at the date of the determination. The Special Adjudicator's conclusions in relation to Yasin Sepet's beliefs were that "the appellant has not claimed to have a conscientious objection to serving his country or to donning a uniform. Rather his objections stem from his political opposition to the present Turkish government and from his determination not to be involved on behalf of the Turkish army in atrocities which he claims he might be required to participate in, especially against his own people in the Kurdish areas. He believes, and I accept, that this belief is genuine, that if he refuses to obey orders, he could himself be shot. I find that the appellant genuinely holds these views. Although I have doubts about his explanation in his additional statement that the issue of military service had not been pursued at his first appeal hearing because he had not been asked questions about it, I consider that his views are, from his perspective, entirely understandable in someone holding his political views, particularly when these are seen against the media reports of the violence and atrocities committed by both sides in the operational areas of southeast Turkey. In reaching this position on military service I have, of course, considered the possibility that the appellant has also falsified this part of his claim as, I believe he has done with some other parts of his account. However I rule this out after applying the lower standard of

proof."

15. The Special Adjudicator reached his conclusions in the light of his assessment of the likelihood of Yasin Sepet facing persecution on return to Turkey on account of his political activities or his objections to military service. He accepted that the authorities would be likely to check the record of any returning failed asylum seeker. Yasin Sepet had been arrested twice, in 1986 and 1988 on account of his low-level political activities on behalf of an anti-government and unlawful group affiliated to the TKEP. Even taking into account the claims that he would be worse off because of the wider involvement of his family in leftist and opposition politics and the fact that he had left the country using an improperly obtained passport the Special Adjudicator concluded that there was nothing in Yasin Sepet's previous history which would be reasonably likely to cause the Turkish authorities to persecute him. When he left the country he was of no interest to the authorities. At the worst leaving the country using a false passport would make him liable to prosecution for some comparatively minor offence. There was no evidence to indicate that punishment for this would be disproportionate or inhumane. It was not likely that he would be persecuted for leftist activities if he returned to Turkey.

16. In relation to the military service issue the Special Adjudicator found that Yasin Sepet might be charged with draft evasion and that further refusal to serve would almost certainly lead to further charges. He did not have an objection to military service based on conscience because of moral or religious beliefs. His objections were politically based. He could not bring himself within the provisions of paragraph 170 of the Handbook, which applied to those who were pure conscientious objectors. In relation to paragraph 169 of the Handbook the Special Adjudicator accepted that Yasin Sepet's objections to military service stemmed from his political opinions. As a result there was a Convention reason for his objections. However, under this paragraph, he needed to show that he would suffer disproportionately severe punishment on account of these political opinions. The Special Adjudicator concluded that a possible prison sentence of between six months and three years was not so excessive or disproportionate as to amount to persecution.

17. Finally, the Special Adjudicator considered the position under paragraph 171 the Handbook. He concluded that there were two separate questions to be addressed. Firstly, was it the nature of the whole conflict or simply the manner in which it was likely to be waged that was in issue? Secondly, what constituted condemnation by the international community. He answered the first question by concluding that he must decide whether the appellant's particular objections were well founded in the sense that there would be a reasonable likelihood of his being required to take part in the course of his military service in operations forming part of the conflict or campaign which had been and was regarded with such widespread opprobrium as to constitute international condemnation, although such condemnation did not have to have been expressly stated by any organ within the United Nations organisation.

18. The Special Adjudicator was prepared to assume that Yasin Sepet could at least be required to serve in a predominantly Kurdish area of the country. After

reviewing the evidence before him the Special Adjudicator concluded that there was no evidence that the Turkish army in particular engaged persistently in a pattern of oppression which would contravene the accepted norms of human behaviour in such a situation. There were horrific incidents but these were isolated. There was no evidence of clear international condemnation. Yasin Sepet had failed to demonstrate that his conscription into the Turkish army would involve him in being required to engage in military actions, which had been condemned by the international community as contrary to basic rules of human contact. His right to freedom of conscience was not likely to be compromised by being associated with acts that offended the basic rules of human conduct. The documentary evidence did not support his claim that there was a reasonable likelihood that he would be required, without the right of refusal, to engage in such offensive acts against people of his own Kurdish race.

19. The hearings before the Special Adjudicator and his determinations - Erdem Bulbul

20. The Special Adjudicator concluded that Erdem Bulbul had not given a truthful account of the extent of his political involvement and of the adverse interest taken in him by the Turkish authorities. It was accepted that he was an Alevi Kurd with Nationalist views and the belief that many of his Turkish compatriots wished to humiliate and destroy those of Kurdish origins. He came from a politically conscious Alevi Kurd family. None of his immediate family was particularly active but some of his more distant relatives were at least sympathetic to leftist organisations. Erdem Bulbul was involved at a low level in distributing leaflets on behalf of DK. He was detained for no more than 24 hours and questioned briefly by the authorities on two occasions. However, he was never directly of interest to the Turkish police on account his activities or his political opinions. Had he been of interest to the authorities they would have had no difficulty in arresting him at other times. The fact that he was not indicated that he was not regarded as a serious security threat. The Special Adjudicator did not believe that the authorities had tried to recruit him as an informer or that he was threatened with prison if he did not co-operate. On this basis he concluded that Erdem Bulbul had not demonstrated a reasonable likelihood that he would be persecuted on account of his previous political activities if he returned to Turkey.

21. In relation to military service the Special Adjudicator concluded that Erdem Bulbul's objections related to his general antipathy towards the policy of the Turkish government to oppose self-determination for the Kurdish people. His views were also influenced by the death of two of his friends during their military service. Not surprisingly the Special Adjudicator's assessment of the law and country conditions in relation to the military service issue is similar to that contained in his earlier determination relating to Yasin Sepet.

22. In relation to the position under paragraph 171 the Handbook he reached the same conclusions. Erdem Bulbul did not qualify for asylum under the guidelines contained in paragraph 171 of the Handbook. His right to freedom of conscience was not likely to be compromised by being associated with acts that offended the basic rules of human contact. He went on to say "it has to be remembered that

the appellant, like anyone else, is always able to refuse to carry out unlawful orders. I recognise that as a Kurd, this could be difficult for him, but I do not believe that such a right does not exist. The documentary evidence does not support the appellant's claim that there is a reasonable likelihood that he would be required, without the right of refusal, to engage in such offensive acts against people of his own Kurdish race".

23. Grounds of appeal

24. There are helpful summaries of the issues in both appeals in the skeleton arguments submitted by Mr Tam.

25. In addition to military service Yasin Sepet's appeal raises other issues. These are; whether the Special Adjudicator erred in his analysis of the consistency of parts of his evidence, whether the Special Adjudicator erred in ruling out the possibility of detention and torture on return to Turkey arising out of his previous detention and whether prosecution for the use of a false passport amounted to a purely political offence and therefore punishment automatically amounted to persecution.

26. There are two military service issues in Yasin Sepet's appeal. The first is whether the Special Adjudicator erred in rejecting an approach to possible persecution by compulsory military service which focused on the nature of the acts which were allegedly internationally condemned and in adopting an approach which looked more at whether the appellant would be required to form part of an internationally condemned campaign. The second is whether the Special Adjudicator separately erred in failing to follow the guidance in paragraph 170 of the United Nations High Commissioner for Refugees Handbook.

27. The issues in Erdem Bulbul's appeal relate only to military service. There are three. The first is whether the Special Adjudicator adopted an erroneous approach to the involvement of the concept of "international condemnation" in considering possible persecution in respect of compulsory military service (and if so, whether the correct approach would or might have resulted in a different finding). Secondly, whether the Special Adjudicator erred in finding that there was "no international condemnation". Thirdly, whether the Special Adjudicator erred in relying on the appellant's ability to refuse to carry out unlawful orders.

28. This appeal

29. We have had the benefit of skeleton arguments from Ms Finch, Mr Scannell and Mr Tam. At the hearing and following full and helpful submissions from Ms Finch and Mr Scannell and then from Mr Tam, we gave leave for Ms Finch and Mr Scannell to lodge written submissions in reply to Mr Tam's submissions and for Mr Tam to reply to any new matters which these might disclose. All these submissions have been received and considered. We received and considered substantial bundles of documents from all parties.

30. Ms Finch submits that if the military action with which Erdem Bulbul would be required to associate himself amounted to a type which was contrary to the basic

rules of human conduct then any punishment for draft evasion would amount to persecution and entitle him to refugee status. "Condemned by the international community" should not be construed in a narrow or technical sense and should make reference to international human rights charters. There was substantial formal international condemnation. Ms Finch listed a number of breaches of international law including the alleged use of chemical weapons, killing and decapitation of prisoners, treatment of non-combatants and forced evacuation of villages. Other Tribunals had concluded that conscripts would be called upon to take part in military action, which had been condemned by the international community. Erdem Bulbul would be persecuted because of his political opinions. There was no alternative service available in Turkey, which amounted to persecution. It was unreasonable or perverse to conclude that he could refuse to carry out unlawful order. The failure of the Turkish State to punish those who acted in breach of international law indicated that they did not consider such acts to be unlawful. Refusal to carry out such orders would lead to punishment for disobedience and amount to persecution.

31. There were an estimated 140,000 to 160,000 soldiers stationed in the southeast of Turkey, the majority of whom were conscripts. Kurds made up between 20% and 23% of the population of Turkey. Conscripts were allocated at random and there was doubt that the claimed 10% ceiling on Kurdish soldiers was in operation. In the alternative, the majority of Kurdish conscripts were being stationed in the southeast and the Army worked with the gendarmes, the village guards and the police in counter insurgency programmes.

32. Despite recent changes in Turkey following the arrest of Ocalan the security forces still continued to breach international law. In any event the evidential burden of proof that the circumstances of the feared persecution had ceased to exist fell on the respondent to show that it would be safe to return Erdem Bulbul to Turkey.

33. Mr Scannell's submissions in relation to Yasin Sepet and the non-military service issues add little to the grounds of appeal. In relation to the military service issue Mr Scannell submitted a skeleton argument. We do not propose to review these submissions in relation to "pure" conscientious objection because we, and the representatives for the parties, have reached similar conclusions. He submitted that Yasin Sepet was a "pure" conscientious objector. There was no legal right to conscientious objection in Turkey and substitute service was not available. He was at risk of losing his Turkish citizenship.

34. In relation to what Mr Scannell described as "partial conscientious objection" he submitted that a person who faced a risk of prosecution on account of his wish to disassociate himself from military action which was contrary to the basic rules of human conduct came within the Convention. The legitimacy of requiring the performance of military service which was otherwise inherent in the State's sovereignty was displaced by the fundamental illegitimacy of the type of action in which the State was involved and from which disassociation was sought. Any other approach would be inconsistent with the Convention because it would deny refugee recognition to somebody who had been required to commit acts which would lead to exclusion under Article 1F.

35. Mr Scannell's submissions in relation to the question of "international condemnation" have helped identify substantial areas of common ground. In relation to the degree of association required it was submitted that if a claimant were required to commit or be accessory to conduct contrary to basic rules of human conduct then that person would be entitled to protection. However, even if there was no risk of the claimant being in such a position, a proper interpretation of the Convention required protection to be given where the military was itself engaged in such conduct. In circumstances where the claimant sought disassociation from "illegal" military activity the mens rea of the claimant was either irrelevant or "non-exacting". By "non-exacting" we understood him to mean “not difficult to establish”.

36. If Yasin Sepet was not a "pure conscientious objector" then "partial conscientious objection would entitle him to refugee status where there was a reasonable likelihood that, if required to perform military service, he would be stationed in the south east and be required to commit or be accessory to grave human rights abuses. Even if not required personally to commit or be an accessory to such conduct he would come within paragraph 171 of the Handbook as someone who, by serving, was associated with condemned military action. Such association would arise wherever Yasin Sepet was stationed. In any event prohibited human rights abuses perpetrated by the military were not limited to the southeast.

37. On behalf of the respondent Mr Tam submitted that the issues in these appeals touched on situations in which a State might not properly enforce an obligation to perform military service against an individual, and the circumstances in which any attempt by the State to enforce that obligation might amount to persecution for a Convention reason.

38. One such situation was where an individual had a genuine total "moral objection" to any form of military service at all, in which case it was recognised that requiring that person to perform compulsory military service might in itself amount to persecution for a Convention reason. He suggested that the underlying theory in that situation was that, where such a view was genuinely held, it was impossible for the State to make proper allowance for such a view except by substituting some form of non-military service.

39. A more difficult situation was where the individual had a genuine political disagreement with particular military service, but the holding of such a view was not in itself sufficient to override the State's right to require military service.

40. Mr Tam suggested that the underlying theory in this situation was that the necessity for an individual to abide by obligations to the State reflecting political views to which the individual was opposed, was a necessary, concomitant of the individual's right to hold his own political views and to disagree with the State. However, there might be political views which were so fundamental to an individual that he should not be required to act contrary to them, and paragraph 171 of the Handbook identified one such situation, namely the political view that a particular type of military action should not be engaged in because it was

contrary to the basic rules of human conduct.

41. The Handbook was not a statute and should not be construed as such. There was no need for formal international condemnation and the focus should be on whether the individual was being required to associate himself with actions which offended the basic rules of human conduct. It would be going too far to regard any breach of any of the obligations imposed by the Declarations Covenants and Conventions listed in the UNHCR letter of 24th February 1997 as actions offending the basic rules of human contact. The focus should not simply be on whether the military action included any impermissible conduct, but whether the type of military action being carried out was itself impermissible. Mere membership of an armed force, parts of which had engaged in such military action, should not in itself be sufficient. What was required was that the individual should be personally involved in such military action, even if he was not expected personally to commit violations of human rights.

42. In accordance with our directions Ms Finch and Mr Scannell have both submitted written replies to Mr Tam's submissions at the hearing. These included points of emerging agreement, matters relating to actual international condemnation, the involvement of the Army in human rights abuses, the question of whether the situation had improved since the PKK cease-fire, penalties for draft evasion and further submissions directed to the particular circumstances of these appellants.

43. Also in accordance with our directions Mr Tam has submitted brief responses to the appellants' written replies.

44. Conclusions - the principles of the Military Service issue

45. In this appeal there is no substantial disagreement in relation to paragraphs 167,168 and 169 of the Handbook. The effect of these is that the requirement to perform compulsory military service is not in itself objectionable, and fear of prosecution and punishment for evading such a requirement of general application is not in itself fear of persecution for a Convention reason.

46. A fear of prosecution and punishment for evading such a requirement, when either the requirement or the punishment are imposed in a discriminatory manner, may amount to a fear of persecution for a Convention reason.

47. A fear of prosecution and punishment for evading such a requirement, when the evasion occurs as a result of dislike of military service or fear of combat, is not a fear of persecution for a Convention reason.

48. A State normally has the right to call upon its nationals to perform military service, and it is the concomitant obligation of an individual so to serve, even when such service may result in unpleasant or even fatal consequences which that individual would prefer to avoid. The state is therefore normally permitted to enforce that obligation by prosecution and punishment of those who have evaded the obligation.

49. The issues in this appeal involved paragraphs 169 to 174 of the Handbook and in particular paragraphs 170 and 171. The guidelines contained in the Handbook are authoritative and helpful. However, we agree with Mr Tam's submission that the Handbook is not a statute and should not be approached or construed as such.

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

51. The main emphasis in an assessment of whether an individual is an absolute conscientious objector should fall on the question whether his beliefs are deeply held and genuine. In this context some of the relevant factors will be the length of time during which the objector has held these beliefs, the circumstances in which they arose, where and when they have been expressed, and the extent to which the objector has persevered in these beliefs against adversity. Of the definitions which have been quoted to us we prefer the emphasis contained in the Resolution and Recommendation of the Council of Europe at pages 289 and 292 of the appellants' authorities bundle, which refers to "reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives."

52. Clearly the reason for the belief is important. It does not have to be a single reason. There may be an overlap and genuine reasons could include more than one element of political, religious or moral convictions, or valid reasons of conscience. However, political convictions, by their nature, are more likely to result in partial rather than absolute objection.

53. An absolute conscientious objector may have a valid reason for avoiding military service even if the forces in which he would have to serve are not involved in military action condemned by the international community as contrary to basic rules of human conduct and even if there is no question his having to perform military service in a way that would involve taking or being closely involved in actions offending the basic rules of human conduct.

54. An example of an absolute conscientious objector can be found in **Jakec Zaitz V Secretary of State for the Home Department [2000] 28th January CA (unreported)**. It is a useful example at or close to one end of the spectrum. He was found to have a sincere and moral objection to military service. He was a pacifist who considered military service to be anathema. There does not appear to have been any immediate likelihood of his having to fight. His country, Poland, had in place a system which permitted the possibility of alternative service, for example working in a hospital. There was a determination and appeal process involving several tiers. However, it was found that he had not received fair and unbiased hearings. His appeals failed and he was sentenced to nine months imprisonment. It was accepted that he had a well-founded fear of persecution for a Convention reason, namely his political opinions. In the circumstances of his case nine months imprisonment was held to be persecution. The question of whether the sentence was disproportionate did not arise.

However, it is clear that the penalty would have to be significant in order to amount to persecution. A small fine or conditional discharge would not suffice.

55. **Jakec Zaitz** demonstrates that an absolute conscientious objector who is denied an alternative service option can be a Convention refugee in circumstances where he is not likely to have to fight. This goes further than one possible interpretation of paragraph 170 of the Handbook where the phrase "participation in military action" particularly when juxtaposed with the phrase "military service" could be taken to imply a requirement to both serve and fight.

56. The recognition of absolute conscientious objectors in this way makes substantial inroads into the recognition contained in paragraph 167 of the Handbook that a State has the right to make military service compulsory and the penalties for evasion of military service and desertion do not normally amount to persecution. This development is referred to in paragraph 173. A State has the right to call upon its citizens to fight, even in an internal conflict. A State may require its citizens to fight against insurgents or terrorists even where those against whom the action is directed wholly or mainly belong to one ethnic group.

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

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

59. If an individual does not satisfy the tests to which we will refer he cannot qualify solely on the basis of the sort of partial objection which states, in frequently heard examples, "I would be prepared to fight for a Kurdish state", I am not prepared to kill Kurdish people" or "I am not prepared to fight for the Turkish state against Kurdish people". Each of these examples could be a genuine political religious or moral conviction or a valid reasons of conscience but would not be an acceptable reason and could not be relied on to the extent that it differentiated between those against whom the individual would be prepared to fight on ethnic grounds. A conviction which dictates that an individual would be prepared to kill those of different ethnicity is not an acceptable conviction. It is as unacceptable to say that one would not kill people of a particular race, party or religion as to say that one would kill people of another race, party or religion. However deeply held, and whatever the reasons for it, a conviction solely based on such discrimination cannot amount to a valid reason for avoiding military service.

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

scrutiny, particularly in circumstances where the objections involve elements of discrimination, which could be racial, political or religious.

61. Where an individual claims to be a partial objector to military service the first question should be to establish exactly what type of military service or military action is objected to and why. It may help to find out whether there are any and if so what circumstances in which the individual would be prepared to perform military service. The objections must arise as a result of a deeply held and genuine belief that this type of military service would be against the claimants genuine political, religious or moral convictions, or valid reasons of conscience. The claim of an individual who cannot establish a reasonable likelihood of some deeply held conviction, which is itself non-discriminatory, will fail at this stage.

62. The second test should be to establish whether the armed services in which the individual would have to serve are engaged in a "type of military action condemned by the international community as contrary to basic rules of human conduct" (paragraph 171 of the Handbook). The commonly used abbreviation of "an internationally condemned conflict", or the like is misleading because it ignores essential elements. One area of broad agreement between the parties relates to the interpretation of these words. We find that formal international condemnation is not essential, although the existence of such condemnation is clearly an important factor. The source, nature and extent of the condemnation will be relevant. There are likely to be cases where political bias or lack of objectivity taints such condemnation, particularly where it comes from participants in the conflict or their supporters.

63. In assessing whether the type of military action is contrary to the basic rules of human conduct we have found helpful guidance in Hathaway's list of the types of military conduct which are never permissible, namely military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war and non-defensive incursions into foreign territory. The Secretary of State has stated that he does not dissent from this list. If an applicant can establish the necessary deeply held convictions, demonstrate that the forces in which he would be required to serve are involved in such military conduct and that he would be associated with such conduct, he will be entitled to refugee status if he is likely to suffer a significant penalty on refusal to serve. He would also be entitled to refugee status if, with or without significant penalty, he were forced to perform such military service.

64. There is a proportionality between the extent to which the military action is condemned by the international community as contrary to the basic rules of human conduct and the ease with which an applicant will be able to establish that the requirement for him to serve contravenes his deeply held convictions. For example, it will be easier for an applicant to succeed in circumstances where the type of military action is contrary to Hathaway's list of the types of military conduct which are never permissible, even if he is required to perform non-combatant military service.

65. The letter from the representative of the United Nations High Commissioner for Refugees to Deighton Guedalla dated 24th February 1997 expresses the view

that "generally, international criticism will be attracted where a State has violated fundamental human rights of individuals or compromised the political independence and sovereignty of an innocent state in contravention of article 2 (4) of the UN Charter. The basic standards of civilised conduct of States are to be found in customary international law, the UN Charter (particularly as to the peaceful and friendly relations between states), the Universal Declaration of Human Rights, and the twin Human Rights Covenants as to the human rights of individuals, the Geneva Convention's and Protocols thereto (as to the responsibilities of combatants during international and non-international armed conflict), and particular Conventions such as the Genocide Convention and Torture Convention, which have universal application in any circumstances." We find that these are matters which need to be taken into account in assessing whether the military action is contrary to basic rules of human conduct. It is not an exhaustive list, but a useful guide.

66. Every conflict will involve different and fluctuating degrees of violation of human rights and international condemnation. It is a sad fact that there are likely to be few if any conflicts in which fundamental human rights of individuals are not violated at some stage. In these circumstances the second test needs to address not only the nature and frequency of the violations of human rights but the extent to which these are directed, encouraged or condoned by the authorities responsible for the combatants involved and what steps they have taken to prevent the occurrence or reoccurrence of such violations. Once again there will be a proportionality between the extent to which the military action is contrary to basic rules of human conduct and the ease with which an applicant will be able to establish that the requirement for him to serve contravenes his deeply held convictions

67. The third test is to establish whether an individual is likely to have to perform military service in a way that would involve taking or being closely involved in actions offending the basic rules of human conduct. Clearly, an individual would be entitled to refuse to act in a way which would exclude him from protection under Article 1 F of the Convention. The degree of involvement has to be assessed in the light of all the circumstances. These are likely to include the area in which the applicant will be required to serve, the type of service he will have to perform and the past actions of those with whom he will serve, all set against the nature of his convictions. It would be more difficult, but not impossible, for an applicant to succeed if he were required to serve as a non-combatant in an area far removed from the conflict.

68. There is an example in the case of **Zolfagharkhani V Canada** at p. 185 of the appellants' authorities bundle. This involved an Iranian who served in that country's military for 27 months during the Iran/Iraq war and was subsequently requested to report for a further six months military service as a paramedic in the war against the Kurdish movement. The issue related to the use of chemical warfare. It was held that medical treatment of Iranian soldiers inadvertently caught in chemical clouds caused by changing winds, and treatment of Kurdish prisoners of war enabling them to be interrogated would both be of material assistance to the Iranian military in chemical weapons assaults. The international community judged the probable use of chemical weapons to be

contrary to basic rules of human conduct. It was not necessary to show that the appellant would be involved in the discharge of chemical weapons. The appellant succeeded on the combined basis of the likely use of chemical weapons contrary to the basic rules of human conduct and his close personal involvement in the manner indicated.

69. We find that there is no absolute threshold, degree of international condemnation, or level of violation of the basic rules of human conduct, which, once established for a particular country or conflict, entitles an applicant to refugee status. Every conflict will need to be assessed in the light of changing circumstances and the personal circumstances and beliefs of individual applicants.

70. We are unable to accept the submission that, in circumstances where there is no risk of a claimant being in a position where he is required to commit or be accessory to conduct contrary to basic rules of human conduct, a proper interpretation of the Convention requires automatic protection to be given where the military is itself engaged in such conduct. In circumstances where the claimant seeks disassociation from "illegal" military activity the mens rea of the claimant is not irrelevant or non-exacting.

71. A claimant must always establish that his objections to military service are the results of profound convictions arising from religious, ethical, moral, humanitarian, philosophical or similar motives. The ease with which a claimant is able to do so will be proportional both to the extent to which the military action in question is contrary to the basic rules of human conduct and the extent to which the individual concerned is likely to have to perform military service in a way that would involve taking or being closely involved in actions offending such rules.

72. <u>The application of these principles to these appeals</u>

73. The Special Adjudicator's conclusions in relation to Yasin Sepet's beliefs were that "the appellant has not claimed to have a conscientious objection to serving his country or to donning a uniform. Rather his objections stem from his political opposition to the present Turkish government and from his determination not to be involved on behalf of the Turkish Army in atrocities which he claims he might be required to participate in, especially against his own people in the Kurdish areas. He believes, and I accept, that this belief is genuine and that if he refuses to obey orders, he could himself be shot.

74. In relation to military service the Special Adjudicator concluded that Erdem Bulbul's objections related to his general antipathy towards the policy of the Turkish government to oppose self-determination for the Kurdish people. He had not claimed that he would refuse to don uniform under all circumstances. His views were also influenced by the death of two of his friends during their military service. He was afraid that he might be sent to the operational area and be required to take military action, possibly involving atrocities and abuse of human rights, against his own people.

75. We find that neither appellant is a total conscientious objector. It is clear that neither of them objects to all forms of military service. Most aspects of their objections to military service are similar. Both oppose the policies of the Turkish government. Both wish to avoid military action against Kurdish people, which might involve atrocities.

76. For the reasons we have already given we discount that part of the appellants' objections in which they say that they have no objection to military service as such but would not be prepared to take military action against Kurdish people. It cannot be a valid deeply held convictions if it is based on discrimination for a Convention reason.

77. What is left, leaving aside the identity of the possible victims, is a wish not to be involved in atrocities or other abuses of human rights. Such a situation, frequently encountered, reinforces our view that a conclusion cannot be reached without resort to all three of the tests to which we have referred. If the appellants' wish is not to be involved in atrocities or other abuses of human rights then it is essential to examine whether such occur and whether the appellants are likely to be involved.

78. After a careful examination of the documentary evidence, in particular the passages to which we have been referred, we find that the type of military action which is taking place in Turkey does not, in present circumstances, infringe Hathaway's list of the types of military conduct which are never permissible.

79. However, it is clear that there have been a substantial number of breaches of international law and violations of fundamental human rights, including killing and decapitation of prisoners, serious ill-treatment of non-combatants, torture and forced evacuation of villages. We find that there is insufficient evidence to confirm the alleged use of chemical weapons. It has to be said that the breaches of international law and violations of human rights have been committed by the Turkish forces, the PKK and similar terrorist organisations. This does not make the actions any more excusable but does explain how such actions escalate. It is clear that acts of the type the appellants wish to avoid have taken place.

80. The reports to which we have been referred show that there has been a degree of international condemnation of the violations of human rights on both sides. We do not find it necessary to expand on this finding in circumstances where we reject two arguments. The first is that international condemnation must be conclusive under paragraph 171. The second and closely related argument is contained in Mr Scannell's submission that, in circumstances where there is no risk of a claimant being in a position where he is required to commit or be accessory to conduct contrary to basic rules of human conduct, a proper interpretation of the Convention requires automatic protection to be given where the military is itself engaged in such conduct.

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

82. The argument that the appellants would be involved in human rights violations was that they would be sent to the southeast where most (but not all) of the hostilities involving Kurdish people were taking place. The main thrust of the submission was based on statistical analysis. It was submitted that there were an estimated 140,000 to 160,000 soldiers stationed in the southeast of Turkey, the majority of whom were conscripts. Kurds made up between 20% and 23% of the population of Turkey. Conscripts were allocated at random and there was doubt that the claimed 10% ceiling on Kurdish soldiers was in operation. The alternative submission was that the majority of Kurdish conscripts were being stationed in the southeast and the Army worked with the gendarmes, the village guards and the police in counter insurgency programmes.

83. In a situation where there are vast quantities of documentary evidence relating to most aspects of asylum claims by Turkish citizens of Kurdish ethnicity and where, from our own experience, many asylum claims are made by Kurds who have completed their military service in Turkey, we find it surprising that there is a dearth of evidence relating to the nature of military service which Kurds actually perform. As a matter of common-sense we share the view expressed by the Special Adjudicator that it is hard to believe that Turkish commanders would seek to place conscripts of Kurdish origin, particular those about whose reliability they had any doubt, in situation where they could come into direct military conflict with armed members of the PKK or might turn their weapons on their non-Kurdish colleagues. Similarly, it is hard to believe that conscripts would be likely to be assigned to missions among Kurdish villages if there was any risk that they might pass on information of a sensitive nature to those for whom they harboured political sympathies.

84. It is more likely than not that the appellants will have to perform their military service in an area other than the southeast and without becoming involved in a violent activity. However, there is sufficient evidence to indicate a reasonable likelihood that the appellants could be amongst the minority of the Turkish Armed Forces who are sent to the southeast during their military service.

85. It is not sufficient for these appellants to show that they may be sent to the southeast. They must show that wherever they go they are likely to have to perform military service in a way that would involve taking or being closely involved in actions offending the basic rules of human conduct. If Kurds performing their military service were involved in this way it is likely that it would have been reported and drawn to our attention. Those representing the parties have been most thorough in their research.

86. The evidence before us does not support an argument that the appellants are likely to have to perform military service in a way that would involve taking or being closely involved in actions offending the basic rules of human conduct.

87. On a close examination of the appellants' beliefs, and viewing them against the country conditions, we find that they do not amount to deeply held convictions. In any event we find that the appellants have not established a reasonable likelihood that they will have to perform military service in a way that would

breach their convictions (or beliefs). They fail both on the subjective test of whether their beliefs will be infringed and the objective test in relation to the nature of the military service they are likely to have to perform.

88. We find that the Special Adjudicator's conclusion that Erdem Bulbul would be able to refuse to carry out unlawful orders is unrealistic. However, this does not render his other findings unsafe or affect our conclusions.

89. Conclusion – the other grounds of appeal

90. The only other grounds of appeal relate to Yasin Sepet, an analysis of the inconsistencies in his accounts of events, the risks he faces on return to Turkey, and passport offences. The Special Adjudicators views are fully and clearly set out. His conclusions cannot be impugned.

91. Decision

92. For the reasons we have given we dismiss both appeals.

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P. R. Moulden
Vice-President