

## **Military Service and Conscientious Objection**

### **Introduction**

This instruction gives guidance on the issues which caseworkers must consider when dealing with asylum and human rights claims based on evasion of or desertion from military service. The majority of claims on these grounds come from those who object to performing compulsory military service and this instruction is primarily concerned with these cases. However it should be noted that the guidance on desertion and conscientious objection could equally apply to those who have volunteered for military service.

Where a person has carried out a crime against humanity or a war crime during his military service and has subsequently left for fear of reprisal Article 1F still applies. Please refer queries regarding Article 1F (exclusion) to: **Policy Group C, APU, Apollo House, 020 8760 8656**

The instructions contained in this section take account of the UNCHR handbook to the 1951 Convention (paragraphs 167-174) and, in particular, the House of Lords judgment in Sepet and Bulbul. In Sepet and Bulbul the Court held that there was no internationally recognised right to conscientious objection, such that failure to recognise the right by exempting a conscientious objector from punishment for draft evasion might itself amount to persecution within the meaning of the Convention. The effect of this decision is that punishment for draft evasion or desertion on conscientious grounds does not, without more, amount to persecution.

The UNHCR handbook envisages that refugee status could be granted to conscientious objectors in wider circumstances than outlined by the House of Lords in Sepet and Bulbul (e.g. where a person's genuine religious beliefs prevent them from performing military service but are not taken into account by the authorities). However, the policy on this matter as set out in this instruction accords with the legal position set out by the House of Lords.

Where the limited circumstances outlined in paragraph 2 below do not apply, therefore, asylum should not be granted in respect of a claim based solely on risk of punishment for conscientious objection.

### **Draft Evasion and Desertion**

Both draft evasion and desertion are usually criminal offences and are therefore punishable by law. It is legitimate for countries to require their citizens to perform compulsory military service and therefore punishment for failing to complete this duty will not automatically be regarded as persecution. Similarly where volunteers are concerned punishment in accordance with the law for desertion will not automatically constitute persecution.

## **Conscientious Objection**

A conscientious objector is someone who can show that the performance of military service would require his participation in military action contrary to his genuine religious or moral convictions.

Distinctions can be made between "partial" and "absolute" conscientious objectors. A partial objector is someone who claims that they are not opposed to military service in principle but to a certain aspect of it such as a particular military action (e.g. Russians opposed to the war in Chechnya or a Turkish Kurd who believes he may have to fight against his own people). An absolute objector is someone who is opposed to any form of military service in principle (e.g. pacifists or members of religious orders that are fundamentally opposed to military service).

The House of Lords held in *Sepet and Bulbul* that punishment for refusing to perform military service either because of an "absolute" or a "partial" conscientious objection will not in itself give rise to a well founded fear of persecution. They found that there is no provision in international law which requires States to recognise the right to conscientious objection or to provide some form of alternative service. Therefore it is legitimate for States to treat conscientious objectors in the same way as any other draft evader. As a result punishment for refusing to perform military service due to genuine reasons of conscience does not amount to persecution except in the limited circumstances outlined in 2 below.

A conscientious objection to military service, even if it is on moral rather than political grounds, may be construed by others as the expression of a political opinion (for further guidance on political opinion see *API on Assessing the Claim*). Similarly, a person may have a religious basis for conscientious objection. Punishment for draft evasion and desertion can, in particular circumstances, amount to persecution on political or religious grounds. However, if the state was simply punishing a conscientious objector for their failure to comply with its laws rather than being motivated by a Convention reason (see paragraph 2.4 - "for reasons of") that would not amount to persecution.

### **Circumstances in which persecution will arise.**

There are certain situations in which punishment for refusing to perform military service would amount to persecution. It should be noted that the existence of persecution in these situations would not be grounds for a successful claim to refugee status unless it is established that the persecution occurred for a Convention reason (see paragraph 2.4 below).

The three situations are:

1. Where the military service would involve acts, with which the person may be associated, which are contrary to the basic rules of human conduct.
2. Where the conditions of military service would be so harsh as to amount to persecution.
3. Where the punishment for draft evasion or desertion is disproportionately harsh or severe.

Where these circumstances arise caseworkers must consider the facts in each case taking into account:

- credibility;
- the availability of any alternatives to military service (including alternatives to military service which might involve acts contrary to the basic rules of human conduct);
- how the law is applied in practice in the country in question; and
- to whom the law is applied in practice in the country in question.

Even where the punishment is not overly harsh, if the individual is still required to complete military service which may involve association with acts contrary to the basic rules of human conduct or where the conditions of service would be so harsh as to amount to persecution then the punishment may amount to persecution..

### **Where the service involves acts contrary to the basic rules of human conduct.**

The key issue here is to identify whether a conflict in which a person might be involved is contrary to the basic rules of human conduct. The IAT determination in 00020 B (Russia) sought to clarify this by resolving an apparent difference of views in previous Tribunal decisions (Foughali and Krotov). The Tribunal followed the approach in Foughali, which adopted a test based on international law, rather than the approach adopted in Krotov which based it on "international condemnation" of the conflict.

The Court of Appeal in Krotov also found that the reasoning set out in Foughali is to be preferred. The Court held that although evidence of international condemnation is likely to be the main measure that a conflict involves acts contrary to the basic rules of human conduct, it cannot be the only measure. There were norms of human conduct that could be derived from international law that were capable of establishing whether acts are contrary to the basic rules of human conduct without the need for international condemnation.

The Foughali test is met if the armed conflict in general is contrary to international law. However, persecution will arise only if there is a "real risk" that an individual would in the course of their military service be involved in acts contrary to international law and that they would be punished for failure to undertake such military service. The test of real risk 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 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 would be faced with a real risk of being implicated in incidents which were isolated in number and character. 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 and evidence that the applicant would be required to be an active participant in such violations.

The Court of Appeal in *Krotov* found that a Convention ground is established if there is satisfactory evidence that:

- the level and nature of the conflict, and the attitude of the relevant governmental authority towards it, has reached a position where combatants are or may be required on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognised by the international community; and
- the person will be punished for refusing to carry out the act(s); and
- disapproval of such methods and fear of such punishment is the genuine reason motivating the refusal of an asylum seeker to serve in the relevant conflict.

Caseworkers should consult the Country Report and/or Operational Guidance Notes for the country in question or a Senior Caseworker before making an assessment of whether a particular conflict is contrary to the basic rules of human conduct.

**Where the conditions of military service are so harsh as to amount to persecution.**

Although the conditions in many armed forces may be described as harsh, in order for a person to establish that these conditions amount to persecution a person would need to show:

- that this harsh treatment amounted to persecution; and
- that there is a reasonable likelihood that they may face this harsh treatment;

For a claimant to succeed under this heading there would have to be both evidence of treatment, such as serious and condoned bullying, in the military of that country and evidence that the individual would be singled out for or part of a group of people who were at real risk of being subject to such treatment (and that the treatment was incurred "for reasons of" a Convention reason).

Caseworkers should consult the Country Report and/or Operational Guidance Notes for the country in question or a Senior Caseworker before making an assessment of whether the conditions of military service are so harsh as to amount to persecution.

### **Where punishment for draft evasion or desertion is disproportionately harsh or severe**

In order for a punishment to be considered disproportionately harsh or severe it would need to be of a particularly serious nature.

Long prison sentences will not normally be enough to engage the protection of the Convention. The tribunal found in Foughali that a substantial period of imprisonment (2-10 years in this particular case) was not disproportionate in itself for refusing to perform military service (see also 3.1 below on prison conditions and potential breach of Article 3 ECHR).

### **"For reasons of"**

The question of whether persecution is directed against a person "for reasons of" a Convention reason is not always a simple one. It is necessary to assess carefully the real reason for the persecution, looking at the real reason in the mind of the persecutor rather than the reason which the victim believes to be the reason for the persecution. In any particular case, there may be more than one real reason in the mind of the persecutor.

Therefore, where it can be established that punishment for refusing to perform military service would be persecutory, in order for that persecution to be "for reasons of" a Convention reason it must be shown that there is discrimination in the application of the punishment and that the discrimination is based, or partly based, on a Convention reason. For instance if punishment for draft evasion and desertion is so harsh as to constitute persecution but is applied to all regardless of their reasons for draft evasion or desertion then the persecution could not be "for reasons of" a Convention reason. However, if certain ethnic or religious groups were treated less favourably than other draft evaders then there would be an element of discrimination and any persecutory treatment would be "for reasons of" a Convention reason.

The result of this is that even where punishment for draft evasion or desertion is persecutory, conscientious objectors will not be able to raise a valid claim to refugee status if that punishment is applied equally to all draft evaders and deserters. Even if it is not applied equally care must be taken in assessing whether there is a Convention "reason" present. The question of whether

such punishment attracts protection under ECHR should be considered separately (see 3 below).

If any cases arise in which there is uncertainty regarding this issue then advice should be sought from a senior caseworker.

### **ECHR and Humanitarian Protection / Discretionary Leave**

Any situation in which a risk of persecution can be established due to any of the circumstances outlined in paragraph 2 above, but where the persecution is not "for reasons of" a Convention reason, should be examined carefully in terms of whether the person is at real risk of treatment in breach of ECHR. If they are, a grant of Humanitarian Protection would normally be appropriate.

Further guidance on these issues can be found in the APIs on **Humanitarian Protection, Discretionary Leave and The European Convention on Human Rights**.

### **Prison conditions and Article 3 ECHR**

In many cases where asylum claims are made based on a fear of persecution owing to a refusal to perform military service it is also claimed that if imprisoned the conditions would be so severe as to make removal a breach Article 3 ECHR (prohibition of torture or inhuman or degrading treatment or punishment).

Caseworkers should take into account the general guidance in the API on the European Convention on Human Rights in order to consider whether Article 3 will be breached in circumstances where an individual will be subjected to harsh prison conditions. Further information on conditions in particular countries may also be found in the relevant Country Report and/or Operational Guidance Note.

### **Articles 4 and 9 ECHR**

Article 4 of the ECHR would not be breached by removal of a conscientious objector because Article 4.3(b) states that this Article does not include "any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service".

Article 9 would not be breached by removal of a conscientious objector because the European Court of Human Rights has found that "the right to conscientious objection is not as such guaranteed by Article 9 of the Convention or any other provision of the convention and its protocols" (*Autio v Finland*).

**Enquiries:** Further enquiries should normally be made in writing via a Senior Caseworker to Policy Group A, Asylum Policy Unit.