High Court of Ireland Decisions

Judgment Title: A.M & Anor -v- The Refugee Appeals Tribunal & Ors

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THE HIGH COURT

JUDICIAL REVIEW

[2008 No. 1232 J.R.]

BETWEEN

A. M.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

THE HIGH COURT

JUDICIAL REVIEW

[2008 No. 1233 J.R.]

BETWEEN

M. M. (A MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND S. M.)

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered the 29th day of July, 2014

1. These applications by A.M. and M.M., seek to quash the decisions of the Refugee Appeals Tribunal made in their respective cases on 3rd October, 2008, affirming the recommendations made by the Refugee Applications Commissioner that they not be declared refugees. Leave to apply for judicial review was granted by order made 21st March, 2012 (Birmingham J.) on the following grounds in respect of both applicants:-

> "A. In his decision of 3rd October, 2008… (the tribunal member)…erred in fact and in law in finding, in relation to mandatory military service that "there is a right to genuine absolute objection in Israel".
>
> B. The (tribunal member) acted unreasonably in finding that the applicant should have exhausted domestic legal remedies, where country of origin information shows that availing of such (remedies) may involve the possibility of imprisonment and prolonged legal challenge over the course of several years."

2. In respect of A.M. leave was also granted on a further ground:-

> "C. The first respondent erred in fact and in law in relying upon s. 39(c) of the *Israeli Defence Service Law (Consolidated) Act 1986*, as providing for a special exemption from military service for female, as opposed to male, conscientious objectors in circumstances where the Israeli Supreme Court in *Laura Milo v. Minister for Defence* (H.C. 2383/04), found such special treatment of women to be unlawful on gender equality grounds and effectively rendered s. 39(c) redundant apart from in the context of objection on purely religious grounds, which is not the case here."

Though a number of reliefs are sought, the main issue is whether the applicants have

established that an order of *certiorari* should be granted on the basis of the grounds advanced.

Background
3. A.M. and M.M. are brother and sister. Both were born in Kazakhstan in the former Union of Soviet Socialist Republics on 26th October, 1990 and 18th November, 1992 respectively. They are Orthodox Christians, Russian speaking and of Russian ethnicity and, at the time of their births, were citizens of the USSR.

4. On 26th May, 2006, the applicants and their parents voluntarily left Kazakhstan, of which they were then citizens, and moved to Israel. All are now citizens of Israel. They qualified as immigrants to Israel because at least one of their grandparents was Jewish. They remained there for one year and two months with their father and mother. Their uncle, who lived in Israel, encouraged the move because the quality of life there was said to be better than in Kazakhstan.

5. The family claims that it was subject to severe forms of discrimination because of their Russian ethnicity and Christian faith while in Israel. They were also apprehensive that the two applicants would have to submit to compulsory military service for a period of two years in respect of A.M. and three years in respect of M.M., once they reached the age of eighteen years.

6. The interviews conducted with A.M. clearly indicate her disaffection from her fellow Israelies. She complained of the severe discrimination allegedly perpetrated against her and other family members, particularly after the outbreak of the six week Israeli-Lebanese War in the summer of 2006. Each member of the family made similar complaints. However, the main complaint made by A.M. and M.M. concerns the fact that both will be required to join the Israeli Defence Forces at the age of eighteen and submit to periods of compulsory military service. They have a conscientious objection to military service. They each express the apprehension that if compelled to join the army they would have to kill and injure other people, which they do not wish to do. They also fear that they may be killed or wounded. Both intend to refuse to join the army as a result of which they may be exposed to prosecution and sentences of imprisonment. M.M. also expresses a fear that, if he were obliged to join the army, he would be discriminated against and beaten by officers because of his Russian origin and faith. Both believe that if convicted and sentenced for failure to carry out their military service, they would receive more severe sentences than Jewish objectors and more unfavourable treatment whilst in prison.

7. On 2nd/3rd August, 2007, the family, travelling on Israeli passports, left Israel and flew to Belarus. The applicants' father informed the immigration authorities at the airport on arrival that "they might stay for good". They intended to stay with their grand-uncle for a period. Their passports were retained as was other official documentation relating to their life in Kazakhstan. They remained in Belarus for little more than two weeks before leaving for Ireland. They did not claim asylum in Belarus. The applicants claim that they are unable to return to Kazakhstan because, upon assuming Israeli citizenship, they lost their Kazakh citizenship. Attempts to obtain permission to return to Kazakhstan and resume citizenship have failed. The entire family claimed asylum in Ireland. The Tribunal was not satisfied that Kazakh citizenship could not be regained on application.

Tribunal Decisions
8. Oral hearings were held in respect of the applicants and their parents on 3rd September, 2008. Separate decisions were delivered in respect of each applicant. While there was an obvious overlap in the narrative, the principal issues of complaint set out in the father's case, particularly in relation to allegations of discrimination (which were rejected), were not repeated in the other decisions but were deemed to apply to each of them, as was the decision of the Tribunal on those issues as expressed in the father's

decision (No. 1811/07A). The mother's case was determined by the findings made in respect of the father's case (No. 1811/07B). The main findings and determination in respect of the applicants' claim to have a well founded fear of persecution because of their conscientious objection to military service were set out in the decision relating to A.M. (No. 1812/07). The decision in respect of M.M. is set out separately (No. 1813/07). There is also some limited consideration of this issue in the decision concerning the father.

9. It was accepted by the Tribunal that both applicants had a genuine and absolute objection to military service. The Tribunal set out its understanding of Israeli law in relation to conscientious objection.

10. The Tribunal noted that s. 36 of the Defence Service Law (Consolidated) Act 1986, empowers the Minister for Defence in Israel to exempt a person from military service in certain circumstances connected with "education, security, …or…family or other reasons". The meaning of the word "other" was considered by the Israeli Supreme Court in *Zonstein & Ors v. Judge Advocate General* HCJ 7622/02 23rd November, 2002, to include conscientious objectors. The applicants in that case, failed in their attempt to overturn a refusal to exempt them from military service. The court distinguished between what it called "full" objection and "partial" conscientious objection. Full objection was entitled to consideration, but partial objection was not within the meaning of "other reasons". The Tribunal noted the court's conclusion that "the person of military age may be exempt from regular service if he is "a conscientious objector and objects to the framework of military service as a matter of principle". It also noted that a special military committee for exercising the Minister's authority was established to investigate issues of conscience following a decision in the case of *Ben Artzi* (HCJ 1380/02, Isr SC 56(4) 476). The Tribunal was satisfied that the applicants were asserting conscientious objection in the full sense.

11. The Tribunal was also satisfied that the Israeli Supreme Court had determined that a "full" objector is entitled to seek acknowledgment of his status in Israel. However, though freedom of conscience was acknowledged and respected, this had to be balanced against the duties imposed on others which may involve the ultimate sacrifice of their lives. The Tribunal noted that:-

> "The (Israeli) court considered it right when weighing the balance to attribute "greater weight to considerations of conscience as well as those of personal development, humanism and tolerance over opposing considerations". The court further considered a situation where the balance presumed that security could be preserved without drafting those who object, but took the view that "where security needs are extreme, not even pacifists should be exempted"."

12. The Tribunal was satisfied that the only question to be considered was whether as a genuine absolute objector the applicants were entitled to and in need of international protection. It accepted that a "genuine and absolute" objector may be entitled to status, but that the right was not absolute. It acknowledged that disproportionate penalties attaching to those who refuse to serve on the basis of conscientious objection may be regarded as persecutory and was aware through "curial deference" that an initial term of imprisonment of 28 days may be imposed, which may be repeated successively or extended beyond that period. (See the father's decision 1811/07A). It stated that the obligation to provide protection only arose where the applicants' home state was unable or unwilling to discharge its duty to protect its own nationals. It stated in the A.M. ruling that:-

> "Therefore, if the appellant was likely to be without relief in Israel, and could not find any relief from or assistance to resist her call up to the army, then she would be entitled to the protection of the international community. As there is statute law, case law, and a right to genuine absolute objection in Israel, with relief through the Supreme Court where there are now

several precedents, and where the court is guided by human rights law, this application cannot succeed. The appellant must exhaust remedies which are available before fleeing the country of origin. This she did not do."

13. In M.M's case the Tribunal repeated what was stated in A.M.'s case and added:-

"There is relief in Israel available through several organisations, and the courts. The law requires that domestic remedies be first exhausted before flight where that is possible. As such remedies are available and no attempt was made to access any of them, then the claim is premature. Although persecution can be a forward looking process, it must be realistically assessed where the actual threat of serious harm has not yet arisen, and it is uncertain whether it will arise. If it does, and the Tribunal supposes for the purposes of this decision that it will, then there is a remedy within the state which must first be exhausted. This is not a situation…which defines persecution as a serious threat of harm without remedy by the state."

The Law of Israel

14. To what extent is a person who establishes a genuine absolute conscientious objection to military service protected by Israeli law in maintaining that belief and stance if he/she refuses to comply with the obligation to perform military service in the Israeli Defence Forces? It is necessary to consider the legal principles applicable to the determination by the Israeli authorities as to whether an exemption may be granted to such a person, and the materials advanced to or considered by the Tribunal in making its decision.

15. Section 36 of the Israeli Defence Service Law (Consolidated Version) Act,1986 states:-

"The Minister of Defence may, by order, if he sees fit to do so for reasons connected with the size of the regular forces or reserve forces in the Israeli defence forces or for reasons connected with the requirements of education, security, settlement or the national economy or for family or other reasons

(1) exempt a person of military age from the duty of regular service or reduce the period of his service;

(2) exempt a person of military age from the duty of reserve service for a specific period or absolutely;"

16. It is clear that the phrase "other reasons" allows for exemptions for conscientious reasons to be granted by the Minister of Defence under the section. This principle was established in a number of decisions of the Israeli courts, including *Epstien v. Minister of Defence* (Unreported decision) HCJ 4062/95, and *Barnowski v. Minister of Defence* (Unreported decision) HCJ 2700/02.

17. The Supreme Court of Israel sitting as the High Court of Justice in the case of *Zonstien & Ors v. Judge Advocate General* (Unreported, 23rd November, 2002) HCJ 7622/02, confirmed that exemptions from military service may be granted in accordance with the discretion of the Minister of Defence pursuant to s. 36. In that case the applicants refused to serve in what are described as "administered territories". They were subjected to disciplinary proceedings and sentenced following conviction. The Minister refused to grant the petitioners an exemption from military reserve service on the basis that they were "selective conscientious objectors". The judgments of the court recognise and respect an individual's entitlement to freedom of conscience as deriving from the democratic nature of the Israeli state and the central status of human dignity and liberty in the Israeli legal system. The court was satisfied that a person of military age may be exempted from regular service if he/she is a conscientious objector and objects to the framework of military service as a matter of principle. Issues of conscientious objection are investigated by a special military committee established following the decision in *Ben*

Artzi v. Minister of Defence (already cited above).

18. The court in *Zonstien* recognised that there were various justifications, including religious and moral reasons, as a result of which an individual may consider himself/herself bound to act in accordance with conscience and refuse to engage in military service. The court noted that the application of the Minister's discretion was a delicate balance between conflicting considerations. Barak J. stated:-

> "9. …the need to take the objectors conscience into account stems from our respect for individual dignity and for the need to allow its development. It is derived from a humanist position and from the value of tolerance…
>
> 10. On the other hand stems another consideration - it is neither proper nor just to exempt part of the public from a general duty imposed on all others. This is especially true when fulfilling the duties subjects a person to the ultimate trial - sacrificing his life. This is certainly true when granting exemptions which may harm security and lead to administrative unfairness and discrimination in specific cases.
>
> 11. In balancing these conflicting considerations, many of the modern democracies have, as we have seen, concluded that it would be proper, in all things related to exemption from military service, to attribute greater weight to consideration of conscience, as well as those of personal development, humanism and tolerance, over opposing considerations. Consequently, many modern legal systems grant military service exemptions to pacifists who conscientiously object to bearing arms and participating in war. This balance presumes that national security may be preserved without drafting those who request exemptions. However, it seems that all agree that, where security needs are extreme, not even pacifists should be exempted…Moreover, although many democratic countries recognise pacifism as a cause for military service exemption, many of them require that the pacifists perform national service and impose various sanctions if they refuse to do so…
>
> 12. The question at hand arises against this normative background. This question involves striking the proper balance between these aforementioned interests, where the request for exemption from service does not involve a general obligation to bearing arms and fighting in war, whatever its cause - but an objection to a specific war or military operation. The question concerned the law regarding *selective* objection. We presume that the selective objector acts, as does his colleague the "full" objector, out of conscientious motives. Our fundamental point of departure is that the selective objector's refusal to serve in a particular war is based on true conscientious reasons, just as is the case with the "full" objector. Of course, this factual presumption raises evidential difficulties. However, in those situations where these problems may be overcome, and there is no reason to presume that they are impossible to overcome, we come face to face with the fundamental issue of the status of the selective conscientious objector…
>
> 15. …As we have seen, granting an exemption from military service due to conscientious objection is in the discretion of the Minister of Defence. This discretion is based on a delicate balance between conflicting considerations. In striking this balance, the Minister of Defence came to the conclusion that there is room to grant exemptions from military service in cases of "full" objection. This balance does not necessarily require that a similar exemption should be granted in the case of selective conscientious

> objection…
>
> 17. …We are willing to presume - again, without ruling in the matter - that the state may cause harm to the conscience of the conscientious objector (whether selective or "full") only where substantial harm would otherwise almost certainly be caused to the public interest."

The court determined that the Minister of Defence was entitled to refuse exemption on the basis of selective conscientious objection for reasons of national security. It would undermine the cohesiveness of the army, the unity and preservation of the security and peace of the state and "damage the framework of the military".

Ground A
19. It is clear, therefore, from the materials before the Tribunal, that the Minister of Defence has a discretion to exempt a person claiming "full" conscientious objection from service in the Israeli Defence Forces. Israeli law also provides that certain categories of persons may be exempt from military service. For example, under TAL law, ultra orthodox Jews were exempt from service on purely religious grounds. Sports prodigies were granted exemption. A medical exemption could be obtained. New emigrants over the age of 30 years were exempt and pacifists may also be exempt. There was evidence of provision of an alternative civic service to be completed by a person who is accepted as a full conscientious objector, though this facility was limited by law to specific categories of persons, including religious students but excluding the applicants. The Military Conscience Committee was established by the Israeli Government to determine whether a person might properly be regarded as a conscientious objector. Country of origin information and the case law submitted to the Tribunal indicates that if an application for exemption is refused, the applicant must complete his/her military service. Failure to do so may result in prosecution and imprisonment. The military prisons to which applicants may be committed are said to be difficult, bad or harsh but not such as would violate international standards. I am satisfied, therefore, that Israeli law permits a person to claim exemption as a "full" conscientious objector and the Tribunal was justified on the evidence available to it in reaching that conclusion. If the Committee determines that he/she is genuinely a full conscientious objector, the person "may" be exempted. If an applicant is refused exemption, he/she must enter military service. If the applicant refuses to do so, he/she may be dealt with by prosecution which may result in imprisonment. There is no absolute right to exemption for a person who is accepted to be a "full" conscientious objector.

20. The Supreme Court of Israel has established the balance to be struck in making that decision and accepted that the state "may cause harm to the conscience of the conscientious objector (whether selective or "full") only where substantial harm would otherwise almost certainly be caused to the public interest". There was no evidence before the Tribunal concerning the number of exemptions claimed on the basis of conscientious objection or the number refused, nor was there evidence to suggest that any person who was deemed to be a "full" conscientious objector was refused an exemption on the exercise of ministerial discretion.

21. I am satisfied, therefore, that the Tribunal did not err in law or fact in finding that "there is a right to genuine absolute objection in Israel". I am also satisfied that when viewed in context, the Tribunal's determination clearly acknowledges the limitations on the right to seek an exemption as expressed in the judgment of the Supreme Court of Israel in *Zonstein* in the extracts quoted. The tribunal member clearly understood that the granting of an exemption was a matter for ministerial discretion, which must be exercised in accordance with the principles as set down by the Israeli Supreme Court. Ground A has not been established.

Conscientious Objectors and Refugee Status
22. Notwithstanding the view taken by the Tribunal and the grounds upon which leave

was granted, counsel on behalf of the respondents sought to maintain that the applicants as "full conscientious objectors" are not entitled to claim refugee status outside the terms of the Geneva Convention or s. 2 of the Refugee Act 1996, and/or Article 9 of the Qualification Directive. A conscientious objector is not specifically included in the definition of a refugee under the Geneva Convention or s. 2 of the 1996 Act. A state may apply a compulsory military service requirement on its citizens. That is not in itself persecutory.

23. The United Nations High Commission for Refugees (UNHCR) Handbook (1992) contains guidance as to the circumstances in which a conscientious objector may be granted refugee status:-

> "170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or for valid reasons of conscience.
>
> 171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.
>
> 173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of states have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (*i.e.* civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies. In the light of these developments, it would be open to contracting states to grant refugee status to persons who objected to performing military service for genuine reasons of conscience.
>
> 174. The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions."

24. There is no evidence that Israel would afford the applicants an opportunity as "full" conscientious objectors to engage in alternative civilian service in lieu of military service.

25. In *Z. v. the Minister for Justice, Equality and Law Reform & Ors* [2002] IESC 14, the Supreme Court approved the use of the Handbook as a legitimate aid to the interpretation of the Geneva Convention and the understanding of refugee status and what constitutes a

"well founded fear of being persecuted".

26. The respondents contend that the applicants do not have a legal entitlement to claim refugee status because the Qualification Directive 2004/83/EC does not recognise a right to advance "full" conscientious objection as a basis for a claim of refugee status beyond the terms of Article 9.1 and 9.2. Article 9.1 states that:-

> "Acts of persecution within the meaning of Article 1A of the Geneva Convention must:
>
> > (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedom; or
> >
> > (b) be an accumulation of various measures, including violations of human rights which are sufficiently severe as to affect and individual in a similar manner as mentioned in (a)."

Article 9.2 states that persecution may take a number of forms, *inter alia*:-

> "(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)."

The exclusion clauses include crimes against peace, war crimes, crimes against humanity as defined by International Instruments, serious non-political crime involving particularly cruel actions even if committed with allegedly political objectives or acts contrary to the purposes and principles of the Charter of the United Nations. This is reflective of para. 172 of the Guidelines. Though it is clear that the applicants fear prosecution and imprisonment for refusal to perform military service, it is not contended in this case that such service would involve participation in a conflict described in Article 9.2.

27. The respondents also rely upon the decision of the House of Lords in *Sepet & Bulbul v. Secretary of State for Home Department* [2003] UKHL 15, in which it was held that there was no international consensus recognising a right to refuse to undertake military service on the grounds of conscience. It was held that although there was compelling support for the view that refugee status should be accorded to one who had 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, there was no clear international consensus recognising a right to refuse to undertake military service on grounds of conscience and that consequently, there was no legal entitlement to refugee status on the grounds of conscientious objection to military service.

28. Lord Bingham did not accept that the leading international human rights instruments at that time, literally interpreted, gave any assistance to the argument that there was a fundamental right recognised internationally to refuse to undertake military service on grounds of conscience. Article 18 of the Universal Declaration of Human Rights 1948 provided a right to freedom of thought, conscience and religion including a right to manifest religion or belief publicly or privately, but made no express reference to a right of conscientious objection. He noted that a very similar right to freedom of thought, conscience and religion was embodied in Article 9 of the European Convention on Human Rights and Article 18 of the International Covenant on Civil and Political Rights. It was accepted that there was a large body of material in which respected human rights bodies had recommended and urged member states who were signatories to the various Conventions to recognise a right of conscientious objection to compulsory military service,

to provide a non-combatant alternative to it and to consider the grant of asylum to genuine conscientious objectors. However, these did not establish any legal rule binding in international law.

29. Lord Bingham considered that the quoted paragraphs of the UNHCR Handbook did not provide a clear statement supporting the existence of the right claimed. He described the language in particular of paras. 171 - 173 as tentative in suggesting that a person "may be able to establish a claim to refugee status" and that "it would be open to contracting states to grant refugee status" on the basis of conscientious objection.

30. Article 10 of the Charter of Fundamental Rights of the European Union provides:-

> "1. Everyone has the right to freedom of thought, conscience and religion. the right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
>
> 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right…"

Under Article 51(1) the provisions of the Charter are addressed to the member states only when they are implementing union law and "they shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers". Article 52(3) provides that:-

> "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent union law providing more extensive protection."

It is clear that the application of the provisions of the Qualification Directive and s. 2 of the Refugee Act 1996, involve the implementation of European Union law. The definition of who may qualify as a refugee under Article 2(c) of the Directive is reflected in s. 2 of the Refugee Act 1996.

31. The respondents, contrary to the decisions of the first named respondent contend that the tribunal member went beyond what is provided for or required under the Geneva Convention, the Qualification Directive or domestic law insofar as a person claiming to be a "full" conscientious objector is not entitled to the international protection of a declaration of refugee status. I do not accept that this argument is open to the respondents having regard to the terms of the decisions made, but even if it were, I do not accept that it is correct.

32. There is no conscription in Irish law. Article 44.2.1 of the Constitution provides that "freedom of conscience and the free profession and practice of religion are subject to public order and morality, guaranteed to every citizen". Though the provision appears under the heading "Religion" and though the limited case law considering the provision has for the most part dealt with freedom of conscience in the religious context, (*McGee v. Attorney General* [1974] I.R. 284 *per* Fitzgerald C.J., pp. 291 - 2 and Walsh J., p. 303: see also Henchy J., p. 326), it is difficult to contemplate a "freedom of conscience" excluding conscientious objection, which is in itself an obvious exercise of conscience rooted in religious or other moral or philosophical convictions.

33. Freedom of individual conscience underpins many of the democratic values and fundamental rights of the Constitution. The right to vote, to participate as a candidate in any form of election, the rights to freedom of expression, association and assembly and religious freedom are all dependent on the freely exercised will and conscience of the individual. Though it is not recognised as a separate fundamental right under the

Constitution, it is clearly part of the constitutional fabric and, as such, is, I am satisfied, an unenumerated right guaranteed by Article 40.3 of the Constitution. Its recognition in this case is entirely in accordance with assuring the "dignity and freedom of the individual" as outlined in the Preamble and the democratic nature of the state as defined by Article 5. The right to freedom of conscience is guaranteed by the state which must defend and vindicate it as far as practicable and protect it from unjust attack. It is not an absolute right. However, its existence informs the interpretation of s. 2 of the Refugee Act 1996, in a manner that is consistent with the Constitution.

34. It is not necessary to define the extent to which the state may be obliged to respect a right to "full" conscientious objection to military service domestically. The exercise of a right to freedom of conscience is not absolute and may be regulated in accordance with law. Thus, environmentalists who block a road or commit other offences while trying to protect a habitat, peace or human rights protestors who commit criminal damage or seek to gain entry to prohibited areas may face prosecution and/or imprisonment or a fine, as will a person who fails to pay taxes because in conscience they do not wish them to be applied towards a military budget. It was accepted by the Tribunal that the applicants in this case are genuine, absolute objectors and their claim for international protection was considered on that basis. Indeed, the Tribunal and the Israeli Supreme Court recognised that the right of conscientious objectors derived from freedom of conscience and respect for individual dignity.

35. As already noted, the respondents rely on the provisions of Article 9.2 of the Directive and the *Sepet & Bulbul* decision as providing a limited basis for the recognition of a right to refugee status based on conscientious objection as defined in the Directive. I am satisfied that the absence of an international consensus referred to in the *Sepet & Bulbul* case does not determine the matter. The provisions of Article 9.2 and the Directive are minimal standards and it is open to any state in its laws to grant wider protection to refugee applicants. I am, therefore, satisfied that s. 2 of the Refugee Act 1996, must be interpreted in accordance with the right to freedom of conscience under Article 40.3 of the Constitution and requires that international protection must be accorded to a full conscientious objector who has a well founded fear of persecution.

36. Apart from the right to freedom of conscience under Bunreacht na hÉireann, the provisions of s. 2 of the Refugee Act 1996, must be construed in a manner that is compatible with the obligations of the state as provided by s. 2 of the European Convention on Human Rights Act 2003. Furthermore, the Qualification Directive must be applied in accordance with the provisions of Article 10 of the Charter of Fundamental Rights.

Bayatyan v. Armenia
37. Article 9 of the European Convention on Human Rights provides:-

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

38. In *Bayatyan v. Armenia* (Application No. 23459/03 judgment 7th July, 2011 - Grand Chamber) the European Court of Human Rights considered the application of Article 9 to

the case of a conscientious objector. The applicant, a Jehovah's Witness, was eligible for compulsory military service in Armenia. In April 2001, at the beginning of the period for which he might have been drafted, the applicant wrote to the military authorities stating that he was refusing to perform military service but was ready to perform alternative civilian service. He was informed that no legal alternative of civilian service existed and that he was obliged to submit to the current law and serve in the Armenian army. At that time there was no provision for the granting of an exemption from military service on the basis of conscientious objection. He failed to report for service on the due date and was subsequently detained and prosecuted for draft evasion. He was convicted and sentenced initially to a period of six months imprisonment which was increased on appeal to a sentence of two years and six months. The Armenian Court of Cassation determined that Article 23 of the Constitution which permitted freedom of conscience, was subject to limitations in the interests of public safety, state security and the protection of public order. Following his conviction, an alternative Service Act was introduced in Armenia in 2004 in accordance with its international human rights obligations.

39. The court reviewed the history of Article 9. It noted that the Parliamentary Assembly at the Council of Europe (PACE) in Resolution 337 (1967) argued as a basic principle that persons liable for conscription, who for reasons of conscience or professed conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives, refused to perform armed service should enjoy a personal right to be relieved of that obligation. The right was regarded as "deriving logically from the fundamental rights of the individual in democratic Rule of Law States which are guaranteed in Article 9" of the Convention. In a later recommendation PACE stated that the right to conscientious objection was a "fundamental aspect of the right of freedom of thought, conscience and religion" enshrined in the Convention. In 2010 the Committee of Ministers adopted a recommendation that member states should ensure that any limits on the right to freedom of conscience and religion of members of the armed forces should comply with the requirements of Article 9.2 of the Convention, that conscripts should have the right to be granted conscientious objector status and that alternative service of a civilian nature should be proposed to them. The court also noted the provisions of Article 10.2 of the Charter of Fundamental Rights of the European Union, already quoted.

40. The court stated that the overwhelming majority of members of the Council of Europe had already recognised in their law and practice the right to conscientious objection. It regarded the explicit addition of Article 10.2 of the Charter of Fundamental Rights as deliberate and reflective of the unanimous recognition of the right to conscientious objection by the member states of the European Union (including Ireland), as well as the weight attached to that right in modern European society (para. 106). The applicant's claim was determined solely in relation to the provisions of Article 9 of the Convention. The court stated:-

> "110. In this respect, the court notes that Article 9 does not explicitly refer to a right to conscientious objection. However, it considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 (see, *mutatis mutandis, Campbell and Cosans v. the United Kingdom*, 25 February, 1982, 36. Series A. No. 48 and by contrast *Pretty v. the United Kingdom*, No. 2346/02, 82, ECHR 2002 - III). Whether and to what extent objection to military service falls within the ambit of that provision must be assessed in the light of the particular circumstances of the case.
>
> 111. The applicant in the present case is a member of Jehovah's Witnesses, a religious group whose beliefs include the conviction that service, even

> unarmed, within the military is to be opposed. The court, therefore, has no reason to doubt that the applicant's objection to military service was motivated by his religious beliefs, which were genuinely held and were in serious and insurmountable conflict with his obligation to perform military service. In this sense, and contrary to the government's claim…the applicant's situation must be distinguished from a situation that concerns an obligation which has no specific conscientious implications in itself, such as a general tax obligation…Accordingly, Article 9 is applicable to the applicant's case."

The court concluded that the applicant's failure to report for military service was a manifestation of his religious beliefs. His conviction for draft evasion, therefore, amounted to an interference with his freedom to manifest his religion as guaranteed by Article 9.1. That interference then fell to be considered under Article 9.2, namely whether it was "prescribed by law", pursued one or more the legitimate aims set out in para. 2 and was "necessary in a democratic society". The court reaffirmed that freedom of thought and conscience constituted one of the fundamentals of a "democratic society", and that the states which are parties to the Convention had a certain margin of appreciation in deciding whether and to what extent an interference with the right was necessary. The court's task was to determine whether the measures taken at national level were justified in principle and proportionate. It stated:-

> "122. In order to determine the scope of the margin of appreciation in the present case the court must taken into account what is at stake, namely the need to maintain true religious pluralism, which is vital to the survivor of a democratic society…The court may also have regard to any consensus and common values emerging from the practices of the state's parties to the Convention…
>
> 123. The court has already pointed out that almost all the member states of the Council of Europe whichever had or still have compulsory military service has introduced alternatives to such service in order to reconcile the possible conflict between individual conscience and military obligations. Accordingly, a state which has not done so enjoys only a limited margin of appreciation and must advance convincing and compelling reasons to justify any interference. In particular, it must demonstrate that the interference corresponds to a "pressing social need"…
>
> 124. The court cannot overlook the fact that, in the present case, the applicant, as a member of Jehovah's Witnesses, sought to be exempted from military service not for reasons of personal benefit or convenience but on the ground of his genuinely held religious conviction. Since no alternative civilian service was available in Armenia at the material time, the applicant had no choice but to refuse to be drafted into the army if he was to stay faithful to his convictions and, by doing so, to risk criminal sanctions. Thus, the system existing at the material time imposed on citizens an obligation which had potentially serious implications for conscientious objectors while failing to allow any conscience exceptions and penalising those who, like the applicant, refused to perform military service. In the court's opinion, such a system failed to strike a fair balance between the interests of society as a whole and those of the applicant. It, therefore, considers that the imposition of a penalty on the applicant, in circumstances where no allowances were made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society. Still less can it be seen as necessary taking into account that there existed viable and effective alternatives capable of accommodating the competing interests, as demonstrated by the experience of the

> overwhelming majority of the European states.
>
> 125. The court admits that any system of compulsory military service imposes a heavy burden on citizens. It will be acceptable if it is shared in an equitable manner and if exemptions from this duty are based on solid and convincing grounds…The court has already found that the applicant had solid and convincing reasons justifying his exemption from military service…It further notes that the applicant never refused to comply with his civic obligations in general. On the contrary, he explicitly requested the authorities to provide him with the opportunity to perform alternative civilian service. Thus, the applicant was prepared, for convincing reasons, to share the societal burden equally with his compatriots engaged in compulsory military service by performing alternative service. In the absence of such an opportunity, the applicant had to serve a prison sentence instead."

41. The court's decision was heavily influenced by the fact that Armenia had already pledged upon accession to the Council of Europe to introduce alternative service within a specific period and that it was implicit from its undertaking not to prosecute conscientious objectors during a transition period, that conscientious objectors not falling within that period would not be subject to prosecution and conviction. The applicant's conviction in that case was, therefore, contrary to the official policy of reform and legislative change being implemented in Armenia at the material time in accordance with its international obligations and could not, therefore, be deemed to be prompted by a pressing social need.

42. I am satisfied that the proper interpretation of s. 2 of the Refugee Act 1996, and the application of the Qualification Directive in a manner compatible with the state's obligations under Article 9 of the Convention and Article 10 of the Charter of Fundamental Rights necessitates an interpretation of those provisions which permits a "full" conscientious objector to apply for international protection and claim refugee status on the basis of a well founded fear of persecution for that belief. However, it is clear that the applicant in *Bayatyan* was subject to a law which did not permit him to seek an exemption from military service, though a deferral of service was possible. This contrasts with Israeli law which permits an application to be made for an exemption. When that exemption is granted, there can be no question of prosecution or imprisonment and there is no sustainable basis for a fear of persecution.

43. I am also satisfied that such an interpretation of s. 2 of the Refugee Act 1996, is in accordance with the right to freedom of conscience as provided under Article 40.3 of the Constitution.

44. The Tribunal decision in both cases clearly acknowledged that there is a legal right to claim an exemption from military service on that ground, but that a discretion was vested in the Minister of Defence to refuse the exemption. That discretion is exercised in accordance with the case law of the Israeli courts. There is scope for a refusal to grant the exemption even if the applicant is accepted as having a religious, moral of philosophical reason based on conscience for the exemption. A pacifist may be refused "when substantial harm would otherwise almost certainly be caused to the public interest". However, to isolate the phrase used by the Tribunal, namely that an objector has a "right to genuine absolute objection in Israel" takes that sentence out of its overall context and the analysis contained in the decisions of Israeli law.

45. It was open to the applicants to apply for the exemption but they did not have an absolute right to receive one. If refused, the applicants are subject to call up to military service which, if refused, may result in their prosecution and imprisonment. There is no alternative non-military service open to the applicants on the evidence presented to the

Tribunal or the court.

Ground B
46. The applicants, however, submit, that the nature and extent of the protection afforded by the state of Israel to full conscientious objectors is so flawed as to give rise to a well founded fear of persecution by full conscientious objectors under the system presently prevailing in Israel. It is submitted that the finding by the tribunal member that the applicants should have exhausted their domestic legal remedies was unreasonable because country of origin information demonstrated that "availing of such (remedies) may involve the possibility of imprisonment or prolonged legal challenge over the course of several years". The applicants never sought an exemption from military service on the grounds of conscience while in Israel. Their parents pursued and obtained Israeli citizenship on their behalf. There is a supposition on the part of the applicants that their applications for exemption will be refused and that, inevitably, they will be prosecuted and imprisoned when they subsequently refuse to serve in the Israeli armed forces. It was, of course, always open to the applicants to claim exemption from military service on the grounds of "full" conscientious objection prior to leaving Israel. It is clear from the Tribunal decisions that many young people in Israel have asserted claims for exemption on that basis without leaving the country. However, it is not at all clear how many claimants have been granted an exemption.

47. It is clear from the material submitted to the Tribunal and the court that many countries impose military conscription and criminal penalties for failure to serve when required to do so by law. That, in itself, is unexceptional. The Tribunal decisions emphasise that there is "state protection" available for those who wish to claim an exemption from service based on "full" conscientious objection. The applicants may apply to the relevant Military Committee and the Minister for Defence seeking the exemption. If it is accepted that they are conscientious objectors, they may be granted the exemption. The appellants complain that this element of discretion puts them at risk of compulsory military service if a finding is made against them either on the basis that they are not *bona fide* conscientious objectors in the full sense or that the Minister, notwithstanding an acceptance of that fact, nevertheless, for other reasons based on national security or public interest exercises his discretion against them, thereby exposing them to the risk of prosecution and imprisonment. The Tribunal accepted that the applicants may be repeatedly prosecuted and imprisoned for failure to serve in the army should they repeatedly refuse to attend for call up as directed. It was claimed cumulatively that this could amount to so disproportionate a penalty as to constitute a form of "persecution" for the purposes of section 2.

48. It is axiomatic that in order to grant an exemption, there must be a decision making process. There was no evidence before the Tribunal to suggest that decisions of the Military Committee were so compromised or flawed as to be inherently unfair or biased: the evidence suggests that the decision maker must exercise judicial discretion informed by the rationale of and respect for freedom of conscience, but balanced against other matters of public interest and national security when appropriate.

49. The application of s. 36 is not said to be discriminatory in its nature or effect. The question of prosecution and/or imprisonment only arises following the rejection of an application for an exemption and a failure to present for military service when directed. That process is subject to the rule of law and the exercise of judicial review. The repeated prosecution of a person who refuses on a number of occasions to present for military service when directed may give rise to an accumulation of numerous terms of imprisonment which over time may be regarded as so oppressive as to reach the level of persecution, if it were established that the accused was a full conscientious objector who was refused an exemption and/or alternative civic service by the prosecuting state. The applicants' submissions in that regard are based on the unproven proposition that they

would be refused an exemption for which they never applied.

50. In *Canada, in Hinzman v. the Minister of Citizenship and Immigration* [2007] 1 FCR 561, MacTavish J. (Federal Court) stated that even if military service was compulsory and no alternative to military service was available, the repeated prosecution and imprisonment of a sincere conscientious objector did not amount to persecution on a Convention ground. In so finding, the court was applying the decision of the Federal Court of Appeal in *Ates* [2005] FCA 322. On the other hand, the question of detention of conscientious objectors was addressed on several occasions by the Working Group on Arbitrary Detention established in 1991 by the United Nations Commission on Human Rights. It found that the repeated punishment and incarceration of conscientious objectors in Israel constituted a violation of the principle of *ne bis in idem* (Opinion No. 24/2003 (Israel) cited in para. 64 of the *Bayatyan* decision).

51. I am satisfied that a well founded fear of persecution may be established on the basis of the repeated application of penal sanctions to a person who has asserted a right to conscientious objection. The purpose of repeatedly applying a criminal sanction is not only to punish a breach of the law but also to deter conscientious objectors from acting in accordance with their conscience in the future. It is undoubtedly the case that draft evasion or failure to serve when required is a law of general application applied ostensibly without discrimination between draft evaders and draft evaders who are conscientious objectors. However, an applicant may be able to establish by reference to the transcript of prosecutions and/or statements of policy by the authorities that repeated prosecution and imprisonment is a calculated response to their accepted status as conscientious objectors. Furthermore, it does not necessarily follow that a refusal of an exemption or a subsequent prosecution and short term of imprisonment in itself would amount to persecution within the meaning of s. 2, if matters were not taken any further. The mere fact that Israel does not comply with the standards laid down in Article 9 of the European Convention on Human Rights does not mean that the applicants face persecution within the meaning of Article 1A of the Convention. However, I am satisfied that it is open to applicants for refugee status to present evidence of fear of persecution based on a risk of repeated prosecutions and imprisonment, but I am also satisfied that it was open to the tribunal member to conclude that there were remedies available to the applicants in Israel, in particular the right to seek an exemption. In that sense, the applicant's claims was premature.

52. Israel is an internally democratic state, with democratic institutions and a separation of powers which is subject to the rule of law applicable to its own citizens. Unlike other countries in which the rule of law has completely broken down and are in a state of near anarchy from which refugees may arrive, it may be presumed that the state of Israel will act to protect its own citizens internally. The court notes the very limited amount of information presented to the Tribunal in the course of its consideration of this issue despite the fact that there are numerous studies and a body of country of origin information concerning the treatment of this issue in Israel and, in particular, the operation of the Military Committees. Very little of this information was presented to the Tribunal. The Tribunal itself relied on "curial deference" in relation to the member's knowledge of law in Israel. The court is aware that courts in other jurisdictions were furnished with more information which is readily available on the operation of the Military Committees in Israel. It is regrettable that very little research appears to have been carried out and presented to the Tribunal on this matter.

53. I am not satisfied that the tribunal member acted unreasonably in determining that the applicants should have had recourse to the local remedy seeking an exemption, or that its decisions were fundamentally flawed for the reasons set out at Ground B.

Ground C

54. A.M. was also granted leave on the ground that the tribunal member erred in relying

upon s. 39(c) of the Israeli Defence Service Law (Consolidated) Act 1986, as providing for a special exemption from military service for female as opposed to male conscientious objectors. The Israeli Supreme Court had in the case of *Laura Milo v. Minister for Defence* (HC2383/04) found that this special treatment of women was unlawful on gender equality grounds, and it was said effectively rendered s. 39(c) redundant, save for reference to religious grounds which were not applicable in this instance.

55. I am satisfied that, assuming A.M.'s contention to be correct, thereby rendering the provisions of s. 39(c) inapplicable, her case would fall to be determined under the provisions of s. 36 on the same basis as that of her brother, M.M. Section 39(c) provided an exemption from military service for "a female person of military age who has proved…that reason(s) of conscience…prevent her from serving in (the) defence service". Section 39 allowed for an exemption to women on grounds of conscience, while men up to that time were dealt with under s. 36. It would appear that two separate systems of Military Committees existed. Following the Supreme Court ruling the section was interpreted as providing for exemption on religious grounds only. It would appear that applications from men and women are now considered under s. 36 by the Military Committee. In the circumstances, I am satisfied that A.M. is entitled to apply for an exemption on the same basis as her brother before the Military Committee and the error by the tribunal member in relying upon s. 39(c) does not affect that reality and is not such as to warrant the quashing of the decision.

56. I am, therefore, satisfied that these two applications must be refused.

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