Neutral Citation Number: [2008] EWCA Civ 540

Case No: C5/2007/1310

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
CC/03113/2002

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2008

Before :

LORD JUSTICE WARD
LORD JUSTICE SEDLEY
and
LORD JUSTICE WALL

- -

Between :

BE (IRAN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Miss F Webber (instructed by Newcastle Law Centre) for the **Appellant**
Mr T Eicke (instructed by The Treasury Solicitors) for the **Respondent**

Hearing dates: Monday 28 April and Tuesday 29 April 2008

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Judgment

Lord Justice Sedley :

This is the judgment of the court.

1. Although this is the third occasion on which the present case has reached this court, it is a case of some importance and there are good reasons for its return here. It concerns the claim to international protection of a sapper from the Iranian army who in 1999 deserted rather than continue to lay anti-personnel mines in a populated part of Iranian Kurdistan where no state of war existed.

The facts

2. The appellant, who was born in 1970, carried out his two years' military service and then in 1988 joined up as a regular soldier. In 1998 he was sent to the Bāneh area of Kurdistan, where he was required to plant landmines in a populated area. Rather than do this he went absent without leave, but was found and sentenced to 3 months' imprisonment. On release he was demoted from sergeant and in September 1999 sent back to Kurdistan. There he was told that an officer who had been refusing to plant landmines had been shot and his death blamed on Kurdish rebels. A week later the appellant was again ordered to plant landmines. Believing that to do so might result in civilian deaths, he deserted and fled to the United Kingdom.

3. All this has been found as fact and accepted throughout the proceedings. To it the following needs to be added. The appellant's evidence was that he was required to plant these devices in roads. He did not know how close to the frontier these roads were: they could have been 3 km or 30 km from it. Although he gave no detail about the devices, it has been accepted throughout, in the light of his knowledge of landmines and his evidence of the risk they posed to civilians, that these were anti-personnel and not, or not solely, anti-vehicle devices. As the first adjudicator found, **"**whatever the position generally, the appellant was asked on the particular occasion in question to obey an order whose carrying out he had valid reasons for considering would result in endangering civilian life."

4. There was no state of war or insurgency in Iranian Kurdistan in 1998-9. The AIT found

> "a lack of any specific objective evidence to show that at this particular time the Iranian authorities had planted anti-personnel landmines in this region with the deliberate intent of harming civilians or being reckless of harming them."

They also recorded, in reliance on the 2003 Iran Landmine Monitor Report, that

> "During the relevant period: (i) the Iranian government, whilst condemning landmines as inhumane weapons, confirmed that it has used and would go on using them to protect its borders and to combat drug smugglers and terrorists; (ii) areas it had mined included the province of Kurdistan (the area referred to by the appellant); and (iii) there have been civilian casualties in Kurdistan."

The proceedings

5. In March 2001 the Home Secretary refused the appellant's claim for asylum. He pointed out that the appellant had not only undertaken his military service but had thereafter signed on as a regular soldier without any apparent qualms, and that civilian deaths were an unfortunate consequence of war which did not justify desertion. He also correctly pointed out that desertion out of fear or dislike of combat does not make a soldier a refugee.

6. An appeal to an adjudicator, Mr D.Chandler, in February 2002 failed on the ground that, although the appellant's evidence was credible, it did not disclose a refugee convention reason for the anticipated persecution. But Dr. Storey V-P gave permission to appeal to this court because of an apparent conflict between the adjudicator's acceptance of a well-founded fear of persecution (albeit not for a refugee convention reason) and his rejection of the appellant's claim to protection under article 3 of the European Convention on Human Rights. With the agreement of both parties Laws LJ remitted the appeal to the IAT for reconsideration without any express limitation. It came before a panel of three, chaired by Dr Storey, which in July 2004 dismissed the appeal on grounds of some complexity.

7. The IAT accepted the adjudicator's finding that the appellant had been ordered to plant mines and had refused because he genuinely believed that to do so might lead to the killing of innocent civilians. But they dismissed both the asylum and the human rights claims on the ground that the orders to which the appellant objected were not contrary to either national or international law (the mine ban treaty not having been signed by Iran and the Geneva Conventions depending on there being a state of war), and that the appellant faced no more than condign punishment for disobeying orders.

8. Permission to appeal to this court was refused by the AIT but was granted by Maurice Kay LJ. Once again with the consent of the parties, Ward LJ in January 2005 allowed the appeal and remitted the case for reconsideration by what was now the AIT. Although the court's order is unqualified, the agreed reasons for it were noted by the AIT:

> The consent order is in the following terms:
>
> *"The Secretary of State agrees that the IAT erred in law and that this appeal should be allowed and the case remitted to a differently constituted IAT, on the basis that:*
>
> *(a) In the Court of Appeal judgment in Krotov v SSHD [2004] EWCA Civ 69; [2004] INLR 304, the Court (at §38) indicated that courts must consider, when assessing such claims under the refugee Convention, whether the appellant is 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' (§51);*
>
> *(b) However, the IAT only considered the different and separate question whether the actions the appellant was ordered to undertake were lawful under international law;*

> *(c) Further the Court indicated that, in times of peace, those 'basic rules of human conduct generally recognised by the international community' would find their reflection in international human rights law rather than international humanitarian law:*
>
> '… human rights really concern rights enjoyed by all at all times, whereas humanitarian rules concern rights which protect individuals in armed conflicts. Most Conventions and other documents which provide for the protection of human rights (a) include a far wider variety of rights than the rights to protection from murder, torture and degradation internationally recognised as set out above; (b) in any event contain safeguards which exclude or modify the application of such rights in time of war and armed conflict' [*Krotov, §38]*
>
> *(d) The IAT decided that in the present case there was no armed conflict. As a result, they should have considered the position of a deserter in times of peace.*
>
> *(e) However, the IAT has only considered the position in relation to international humanitarian law (i.e. the laws of war) but has completely failed to consider the position under (wider) international law norms, and failed to ask itself the question identified by the Court of Appeal in §§37, 38 and 51 of the judgment in Krotov namely:*
>
> *i) What are the 'basic rules of human conduct generally recognised by the international community' in times of peace based on an analysis of the relevant international human rights norms?; and/or*
>
> *ii) How far do the 'basic rules of human conduct' applicable in times of conflict and identified by the Court of Appeal in its judgment of Krotov apply in times of peace?"*

9. From these reasons the AIT (C.M.G. Ockleton D-P, SIJ Eshun and SIJ Grubb) deduced their remit:

> The order makes clear that the scope of this reconsideration is limited in, at least, two respects. First, it is restricted to the appellant's claim to be a refugee under the 1951 Convention. The appellant's human rights claim is no longer in issue. Second, the IAT's finding that the appellant was not engaged in war or an internal armed conflict stands and our concern is with what, if any, are the applicable provisions of international law which apply in their absence.

They noted that they had heard no argument based on the Qualification Directive in relation to humanitarian protection going beyond the refugee convention. The claim was now a pure asylum claim

10. The AIT concluded that the original adjudicator, Mr Chandler, had made no error of law and that his determination should stand. Notwithstanding a carefully considered refusal by the AIT, Maurice Kay LJ gave permission to bring this appeal. He wrote:

> "The 'war and peace' points merit the consideration of this court because the appeal has a real (as opposed to a merely fanciful) prospect of success, and notwithstanding that this will be the third time 'round the block' for this case."

11. The "war and peace" argument forms the central pillar of the argument now advanced by Frances Webber for the appellant and resisted by Tim Eicke for the Home Secretary. It is, in a word, that the irreducible minimum of civilised conduct cannot, or should not, be lower in peace than in war, and that it is his acknowledged refusal to go below that minimum that makes the appellant a refugee.

12. In a closely reasoned and impressive decision to which a summary cannot do justice, the AIT

    (a) noted the evidential position set out in paragraph 4 above;

    (b) reminded itself of the seminal passage in Lord Bingham's speech in *Sepet and Bulbul* [2003] UKHL 15, §8 (see below);

    (c) noted that neither the second nor the third limb of this formulation was presently engaged;

    (d) held that on the known facts the first limb was not engaged either; and

    (e) rejected, after extensive and detailed consideration, a multi-layered argument that, even if this was so, what the appellant had been required to do was contrary to international law.

The issues

13. Although her grounds, and therefore Mr Eicke's response to them, put the case rather differently, Ms Webber's argument before this court has been in essence that, accepting that conscientious objection alone does not entitle a soldier to international protection as a refugee, the contrary contention that a soldier is entitled only to refuse to commit war crimes and crimes against humanity is unjustifiably narrow: the soldier's right of refusal, and the entitlement to international protection which it attracts, extends (at least in peacetime) to orders to commit any human rights violation of sufficient seriousness. Such a level of seriousness is reached where, as here, the order would breach international humanitarian law were it to be given in the course of an armed conflict, because the protection given to civilians in peacetime by art. 6 of the ICCPR cannot be weaker than that accorded to them in war.

14. Mr Eicke's contention, again in short form, is that whether or not the planting of these landmines would have been a crime in time of war – something which he does not necessarily accept – the material protection of civilians in peacetime is against atrocities and gross violations of human rights. The setting of these devices, he

submits, while deplorable and while now a criminal offence in UK law, cannot be so characterised. Iran had neither signed the Ottawa Convention outlawing anti-personnel landmines nor legislated domestically against them, and no norm of customary international law forbids their use.

Recklessness and intent

15. It is first necessary to say something about the state of mind to be imputed to those responsible for sowing anti-personnel devices in populated areas in peacetime. We have noted above the finding that there was no evidence of lethal intent or of recklessness. Ms Webber submits that this flies in the face of reality. Mr Eicke submits that in international law recklessness has in any event no bearing: what matter are policy and intent. Assuming for the present that one can marginalise recklessness in this context, a factual conclusion on policy and intent cannot in our judgment be reached without looking objectively at the nature of these devices.

16. The seeding of terrain with anti-personnel explosive devices is one of the most vicious tactics in modern warfare and – what is by no means the same thing – in state security. Whatever military or security justification or excuse may have existed for sowing them, both during and for decades following the end of the situation in which they have been deployed these devices, unless rigorously marked and fenced, will randomly kill and maim uninvolved civilians, a high proportion of them children. Detecting and neutralising them is the work of endless painstaking and dangerous years.

17. There was abundant evidence of this before the tribunal, even if it were not a matter of judicial notice. The preamble to the Ottawa Convention itself records that the states parties are

> "determined to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement".

By its first article, each state party

> "undertakes never under any circumstances (a) to use anti-personnel mines…"

The International Committee of the Red Cross in a major report, issued in 1996, on the military use and effectiveness of anti-personnel mines said:

> "1. It is now becoming generally accepted that the world's mine contamination problem is reaching crisis point. The US State Department has estimated the number of uncleared landmines around the world to be 84 million in 64 countries. The United Nations projects that if the use of mines were stopped immediately it would take 1,100 years and $33 billion dollars to clear, at current rates, those already in place. The list

> of mine- infested States reads like the history of recent conflicts: Angola, Afghanistan, Bosnia-Herzegovina, Cambodia, Croatia, Ethiopia, Iraq, Mozambique, Rwanda, Somalia, Sudan and Yugoslavia. Each year 2-5 million new mines are put in the ground, adding to "one of the most widespread, lethal and long-lasting forms of pollution" the world has ever known.
>
> 2. These weapons currently claim some 2,000 victims a month, and over the last 50 years have probably inflicted more death and injury than nuclear and chemical weapons combined. Landmines, which were originally conceived to counter the use of tanks and other armoured vehicles, have been increasingly designed to target human beings. Anti-personnel (AP) mines have become the weapons of choice for parties involved in guerrilla-type operations and internal conflicts, as they are cheap, easy to lay and highly effective in killing and maiming human beings.
>
> 3. Landmines differ from most weapons, which have to be aimed and fired. Once they have been laid, mines are completely indiscriminate in their action. Unless cleared, they continue to have the potential to kill and maim long after the warring parties they targeted have ceased fighting. The United Nations has reckoned that landmines are at least ten times more likely to kill or injure a civilian after a conflict than a combatant during hostilities. They are also long-lasting. No estimate has been given for the "life" of a mine; however, mines laid in Libya and Europe during World War II are still active and causing casualties over 50 years later. Modern plastic-cased mines, which are stable and waterproof, are likely to remain a hazard for many decades.
>
> 4. The main characteristic of a mine is that it is designed to be victim activated…"

The ICRC recorded that the want of evidence that any government had tried to reduce the lethality of AP mines indicated that "this excessive capacity to injure is a matter of deliberate design", and concluded:

> "The limited military utility of AP mines is far outweighed by the appalling humanitarian consequences of their use in actual conflicts. On this basis their prohibition and elimination should be pursued as a matter of utmost urgency by governments and the entire international community."

18. While these facts might be regarded as going to recklessness, they might more cogently be regarded as consequences as ineluctable as those of shouting "Fire!" in a crowded theatre. They mean, in our judgment, that anyone who, and any state which, sows unmarked anti-personnel mines in terrain from which civilians are not excluded is responsible for the deaths and injuries which will result. With great respect to the

approach of the AIT, it seems to us nothing to the point that there is no independent evidence of intent to kill: the concealed planting of anti-personnel devices in a path or highway is by itself compelling evidence of either intent to kill and maim at random or, at lowest, of recklessness towards the taking of human life. This is the point from which we therefore start.

19. It is also the point at which the Ottawa Convention arrives, although in relation to states rather than to individuals. By signing and ratifying the Convention, some three-quarters of the world's states have unconditionally repudiated the use of landmines, making no exception for military necessity. The United Kingdom's Landmines Act 1998 criminalises (save for a limited defence based on personal ignorance) the use of landmines by anyone within the United Kingdom and by UK nationals anywhere in the world. But neither of these, we accept, can come directly to the appellant's aid: he is neither a state nor a state decision-maker nor a UK citizen.

20. The Ottawa Convention which followed the ICRC report, albeit not universally ratified, appears to have had perceptible effects. The International Campaign to Ban Landmines reported in 2005:

> "One of the most significant achievements of the Mine Ban Treaty has been the degree to which any use of anti-personnel mines by any actor has been stigmatised throughout the world. Use of anti-personnel mines, especially by governments, has become a rare phenomenon, rather than the devastatingly common occurrence witnessed decade after decade from the mid-20th century onward."

This is likely to mean that new cases like the present appellant's will be rare; but the acts in which he refused to take part were perpetrated in 1999 by a state which had, as it still has, refused to sign the Convention.

International morality

21. The materiality of the international instruments to Ms Webber's argument is, however, not as sources of hard law. She relies on them, and on other persuasive material, to make good her submission that by 1999 the almost universal condemnation of anti-personnel landmines had placed their use in the category of atrocities or of gross abuse of the human right to life and bodily integrity. Her case, accepting that international humanitarian law is formally confined to situations of armed conflict, is that by the end of the 20th century international human rights law had recognised that a state which in peacetime was prepared randomly to kill or maim its own citizens might be guilty of systematic abuse of human rights, and international refugee law had accepted that individuals who refused to obey their state's orders to commit abuses of such gravity were entitled to international protection.

22. Mr Eicke has presented the Home Secretary's position in this regard with care and tact. The Home Secretary has not sought to suggest that the use of anti-personnel landmines is, or by 1999 was, either morally or militarily defensible. The United Kingdom was among the first signatories of the Ottawa Convention and immediately backed its international commitment by passing the Landmines Act 1998. Nor has it been any part of Mr Eicke's brief to defend the policies and practices of the state of

Iran. He has restricted his case to these propositions: first, that there is no necessary transposition of the illegality of the random use of landmines from situations of armed conflict, where international humanitarian law heavily restricts their use, to peacetime, where international humanitarian law has no direct application; secondly, that Iran is not a party to the Ottawa Convention; thirdly, that as a sovereign state it has taken the stance that these devices were a legitimate security measure against incursions by drug-smugglers and terrorists, and not a means of intimidating the civilian population.

The standard of abuse

23. Mr Eicke nevertheless accepts that a point may come at which the systematic and indiscriminate use by a state of lethal weapons against unarmed civilians constitutes a gross abuse of human rights and an atrocity. But he instances *Streletz and others v Germany* (2001) 33 EHRR 31, where the use by the German Democratic Republic of landmines coupled with a shoot-to-kill policy on its frontier was placed in this class by the European Court of Human Rights; and while he accepts that *Streletz* does not set a fixed standard, he contends that the present case is not in the same class. Ms Webber contends that, in kind if not in degree, it is.

24. The argument has assumed this relatively narrow scope because the parties agree that the material test is to be found in the decisions of the Court of Appeal and the House of Lords in *Sepet and Bulbul* [2003] UKHL 15.

25. *Sepet* concerned draft evasion, but in the leading speech Lord Bingham, at §8, made this wider observation:

> "There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses, or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment."

It is on the first limb of this formulation – a requirement to participate in atrocities or gross human rights abuses – that Ms Webber founds her case.

26. Laws LJ in this court (whose decision their Lordships upheld) put it this way (at §61):

> "…it is plain (indeed uncontentious) that there are circumstances in which a conscientious objector may rightly claim that punishment for draft evasion would amount to persecution: where the military service to which he is called involves acts, with which he may be associated, which are contrary to the basic rules of human conduct…"

Jonathan Parker LJ (at §152) adopted Professor Guy Goodwin-Gill's formulation that

> "to oblige a person to commit, or be accessory to, or participate in … serious violations of human rights of others, is in itself incompatible with that person's basic human right to respect for dignity, integrity and identity"

although he rejected (as we would) Professor Goodwin-Gill's rider that conscientious objection rather than the risk of involvement was the overarching principle.

27. In support of his opinion in the House of Lords, Lord Bingham cited the Canadian Federal Court's decision in *Zolfagharkhani v Canada* [1993] 3 FC 540, a case concerning an Iranian soldier's refusal to participate in chemical warfare against the Kurds. MacGuigan J, upholding the soldier's asylum claim, held not only that there was a "total revulsion of the international community to all forms of chemical warfare" but that such warfare was now contrary to customary international law. In the present case, given among other things the refusal of states including China, Russia and the US to sign the Ottawa Convention, Ms Webber realistically stops short of asserting the same in relation to anti-personnel mines.

28. We agree with the AIT that there is neither a rule of customary international law forbidding the use of these weapons nor any simple reading across into peacetime of the restrictions placed on their use in warfare by international humanitarian law. But this does not necessarily render either body of law irrelevant to the argument from human rights to which *Sepet* points.

Customary international law

29. So far as concerns customary international law, Ms Webber is in our judgment entitled to rely on certain important aspects of the Ottawa Convention. Three-quarters of the world's states have signed and ratified it. Of those who have not, the United States in 1998 set out its condemnation of anti-personnel landmines, recognising them as the cause of a 'global humanitarian crisis' reflected in the fact that whereas at the start of the 20th century 90% of wartime casualties were soldiers, by the end of the century 90% were civilians, and undertaking that the US would sign the Convention by 2006 "if we succeed in identifying and fielding suitable alternatives to our APL and mixed anti-tank systems by that date". Iran claimed in 2005 to have stopped using or making landmines and to be against the use of them, "but war in and occupation of two countries bordering Iran are not conducive to Iran joining the Mine Ban Treaty". No state, in short, appears since 1998 to have contested the arbitrary and unjustifiable effects of anti-personnel landmines or to have advanced any but a temporary pragmatic reason for not repudiating their use. In this situation Ms Webber is in our view right to describe the outlawing of such weapons as an emerging norm of international law.

International humanitarian law: the law of war

30. International humanitarian law, as the AIT noted and as Mr Eicke accepts, requires belligerents to minimise collateral harm to civilians. In particular common article 3 of the four 1949 Geneva Conventions on the Law of Armed Conflict unconditionally

prohibits violence to the life and person of non-combatants. There is no doubt in our minds that any belligerent state or group which sows and leaves unmarked anti-personnel landmines in a populated area violates this fundamental rule of human conduct. That it forms part of the law of war prevents direct reliance on it in a case like the present; but it does not follow, as the AIT held it did, that any reliance on it for present purposes "must fail". Ms Webber is still entitled to ask, as she does, why civilians should be entitled to expect less legal protection in time of peace than they would have if there were a war on.

31. It is a question to which Mr Eicke has been able to offer no answer of principle. His answer, like that of the AIT, is that for better or for worse the law of war and the law of peace have not marched in step. But the question for us is whether, in determining what the law of peace is in this context, the law of war has at least an analogical bearing. We see no reason why it should not, and very good reasons why it should. So did the International Court of Justice in the *Corfu Channel* case (ICJ Reports, 1949, 4) when it held that it was incumbent on a government which laid mines in its territorial waters to warn foreign shipping of their presence.

> "Such obligations are based, not on the Hague Convention of 1907, no. VIII, which is applicable in time of war, but on certain general and well-recognised principles, namely elementary considerations of humanity, even more exacting in peace than in war …."

32. In *Krotov v Home Secretary* [2004] EWCA Civ 69 this court had to consider the asylum claim of a deserter from the Russian army whose objection was to participating in the war in Chechnya. Remitting the case to the AIT for redetermination, the court held that the prospect of punishment for a genuine conscientious refusal to participate in inhumane acts was sufficient to attract international protection as a refugee. Following an illuminating consideration of some of the principal sources of international humanitarian law, Potter LJ concluded:

> 37. In my view, the crimes listed above, if committed on a systematic basis as an aspect of deliberate policy or as a result of official indifference to the widespread actions of a brutal military, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate will constitute persecution within the ambit of the Convention relating to the Status of Refugees (1951).
>
> 38. It is in my view preferable to refer in this context to "basic rules of human conduct" or "humanitarian norms" rather than to "abuse of human rights", at least unless accompanied by the epithet "gross": cf the observations of Lord Bingham quoted above. That is because human rights really concern rights enjoyed by all at all times, whereas humanitarian rules concern rights which protect individuals in armed conflicts. Most Conventions and other documents which provide for the protection of human rights (a) include a far wider variety of rights than the rights to protection from murder, torture and degradation internationally recognised as set out above; (b) in any event, contain safeguards which exclude or modify the application of such rights in time of war and armed conflict: see

generally the approach set out in *Detter, The Law of War,* 2nd ed (2000) pp 160-163.

Human rights: the law of peace

33. It is therefore on the normative corpus of human rights law, set in the foregoing context, that the argument for the appellant comes to rest. Ms Webber founds first and foremost upon the International Covenant on Civil and Political Rights (1966), regarded as the binding version of the 1948 Universal Declaration of Human Rights and adopted by effectively all the world's states. Iran signed it in 1968 and ratified it in 1975. By article 6 it provides:

> (1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 7 forbids cruel or inhuman treatment.

34. The protection afforded by article 7 is unconditional. Any permissible exceptions to article 6 (apart from the death penalty, which the article goes on to provide for) are wrapped up in the word "arbitrarily". Despite some discussion in the course of argument about what this entailed[1], it seems to us sufficient for present purposes to find, as we do, that few things could be more arbitrary than the death or maiming of a civilian, very probably a child, by the accidental detonation of an anti-personnel mine. It appears to us nothing to the point that the device may have been laid with the intention of blowing up drug-smugglers or terrorists. For reasons given earlier in this judgment, any such intent is swallowed up in what any rational person would appreciate was the continuing random and deadly nature of the device. To plead a want of lethal intent is no more relevant or acceptable in such a situation than it would be on firing a gun into a crowd. Marked and fenced minefields may afford evidence of an absence of general lethal intent, but the evidence here is directly to the contrary.

35. It follows, in our judgment, that the order given to the appellant to plant anti-personnel mines in roadways was an order to commit a grave violation of human rights. If it is necessary to characterise such a violation as gross before it can rank as a sufficient breach to attract refugee protection, we would so characterise it. We would also characterise it, even in the absence of resultant deaths or maimings, as an atrocity. We do not take this course lightly. One can readily recognise that there are denials of human rights – for example gaoling someone for debt (see ICCPR article 11) or restricting their freedom of movement (article 12) – which will not ordinarily come anywhere near this class. We are also prepared to accept that there may be right-to-life cases which fall short of the "gross violation" category – for example (see

[1] We were shown in particular a helpful commentary on the ICCPR by Dr Manfred Nowak, which deduced from the *travaux préparatoires* that the word "arbitrarily" had been agreed upon, in preference to a more detailed qualification, as indicating such factors as unlawfulness, injustice, capriciousness and unreasonableness in the taking of life. Article 2 of the European Convention on Human Rights, by contrast, spells out a number of specific inroads into the right.

Keenan v United Kingdom (2001) 33 EHRR 38, *Ergi v Turkey* (ECtHR 28.7.98)) where the state has allowed or caused life to be lost by neglect. But, as the courts have repeatedly recognised, no right is more fundamental than the right to life, and a state which embarks on a course which is bound sooner or later, save by pure chance, to rob innocent people of that right without any justification beyond the state's perceived self-interest is in our judgment - and, we say with some confidence, in the judgment of the community of nations - committing a grave breach of human rights.

Policy and system

36. Mr Eicke submits that, even if this is so, more is needed: the breach must be widespread or systemic, not isolated or localised. *Streletz*, he points out correctly, was such a case. In *Krotov* Potter LJ at §37 (quoted earlier in this judgment) stressed the need for crimes to be "committed on a systemic basis as an aspect of deliberate policy or as a result of official indifference to the widespread actions of a brutal military" before they can rank as acts contrary to the basic rules of human conduct and so found a conscientious objection to particular military service.

37. This is right, but it was said in the context of a carefully drawn distinction between the law of war (which was what *Krotov* concerned) and the law of peace, which is at issue here. Where Mr Eicke is entitled, as we have held, to rely on the distinction in order to block a simple transposition of principles from wartime to peacetime, Ms Webber, it seems to us, is equally entitled to rely on it to prevent the importation into the law of peace of restrictions apposite to the law of war. The restriction relied on by Mr Eicke reflects the fact that the occurrence of atrocities in war is often the result of individual or local indiscipline, so that more – for example policy or system – is required if an objector is to be able to rely on his potential involvement in such abuses to secure international protection. But that has little if any bearing where, as here, the objector is a military specialist who has twice been ordered to carry out such atrocities. Moreover, the evidence is clearly indicative of policy and system: nothing known to the tribunal or to us suggests that this was a one-off enterprise by a local commander, and the statement made a few years later by Iran strongly suggests that it was not.

Article 1F: refoulement of offenders.

38. None of the foregoing reasoning touches on an issue which featured quite prominently in the earlier stages of this case – the possible materiality of article 1F of the refugee convention, which excludes international criminals from protection. It reads:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purpose and principles of the United Nations.

39. There is a superficial attraction in making the entitlement to protection an exact counterpart of the exclusion, so that only an individual who has sought asylum in order to avoid breaching article 1F can succeed in a claim based on conscientious objection. But there is no foundation in law or logic for this, and Mr Eicke has not pressed the argument. In the end it is common ground that, while such an individual can expect to succeed in an asylum claim, refugee status is not limited to such persons. Where the limits lie is the question we have addressed above.

Conclusion

40. In our judgment, on the limited facts before the tribunal, this appellant was entitled to succeed in his claim for international protection. It is common ground that, once it is established that the individual concerned has deserted rather than commit a sufficiently grave abuse of human rights, whatever punishment or reprisal consequently faces him will establish a well-founded fear of persecution for reasons of political opinion.

41. For the reasons we have given, we hold that what this appellant was seeking to avoid by deserting was the commission of what this country and civilised opinion worldwide recognise as an atrocity and a gross violation of human rights – the unmarked planting of anti-personnel mines in roads used by innocent civilians. He is consequently entitled to asylum, and his appeal accordingly succeeds.