**THE HIGH COURT**
**JUDICIAL REVIEW**

**[2017 No. 11 JR]**

**BETWEEN**

**G.E.**

**APPLICANT**

**AND**
**THE REFUGEE APPEALS TRIBUNAL**
**AND**
**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENTS**

**AND**
**THE REFUGEE APPLICATIONS COMMISSIONER**

**NOTICE PARTY**

**JUDGMENT of Mr Justice David Keane delivered on the 3rd October 2018**

**Introduction**
1. This is the judicial review of a decision by the Refugee Appeals Tribunal ('the tribunal'), dated 7 November 2016 ('the decision'), under s. 16(2)(a) of the Refugee Act 1996, as amended ('the Refugee Act'), to affirm the recommendation of the Refugee Applications Commissioner ('the commissioner'), dated 10 November 2014, under s. 13(1) of that Act, that the applicant should not be declared to be a refugee.

2. The applicant is a national of Israel, born in 1997, who claims that, if returned there, she faces a well-founded fear of persecution on the ground of her political opinion due to her conscientious objection to compulsory military service. The applicant contends more specifically that, should she return to Israel, she faces prosecution or punishment for refusal to perform military service in a conflict in which that service would include crimes or acts that would amount to crimes against peace, war crimes, or crimes against humanity, or acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

**Procedural history and grounds of challenge**
3. The application is based on an amended statement of grounds dated 30 January 2017, supported by an affidavit of the applicant, sworn on 6 January 2017, and an affidavit of the applicant's solicitor, sworn on the same date.

4. By order made on 6 February 2017, O'Regan J granted the applicant leave to seek various reliefs, principal among which is an order of *certiorari* quashing the decision on the grounds: first, that that tribunal applied the wrong legal test in assessing the applicant's claim; second; that the tribunal erred in law; acted *ultra vires*; rendered a decision that was unreasonable or irrational; breached the applicant's entitlement to natural and constitutional justice and fair procedures; breached the provisions of Directive 2004/83/EC; breached the Refugee Act; and breached European Union law; and third, that the tribunal's decision, was unreasonable or irrational in concluding that the applicant had failed to establish with sufficient plausibility that her military service would involve the commission of war crimes or acts condemned by the international community as contrary to the basic rules of human conduct, or that there was no system in place in Israel to enable the applicant to lawfully avoid military service.

5. O'Regan J also granted the applicant leave to seek an extension of time to bring these proceedings. That is necessary because under s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000, as amended, a person cannot question the validity of a decision of the tribunal under s. 16 of the Refugee Act otherwise than by way application for judicial review made within 28 days of being notified of it, unless the High Court considers that there is good and sufficient reason for extending that period and is satisfied that there are substantial grounds for contending that the decision is invalid and ought to be quashed.

6. The respondents delivered a statement of opposition dated 17 July 2017. It is supported by an affidavit of verification, sworn on 17 July 2017 by John Moore, a higher executive officer in the Department of Justice and Equality. In that document, the respondents join issue with each of the applicant's contentions.

7. The applicant swore a short supplemental affidavit on 14 November 2017 to exhibit for completeness certain documentation that she had submitted to the tribunal but had not exhibited to her first affidavit.

**Background**
8. The applicant presented for an initial interview at the office of the commissioner on 24 July 2014. In the course of that interview, she identified herself as an Israeli national who had travelled from Israel to Ireland by air, departing on 23 July 2014 and arriving on 24 July 2014, specifically to seek asylum. The authorised officer who conducted that interview recorded the applicant's claim that she had been told to report for military service in Israel on 12 July 2015, which created for her the dilemma that, if she did military service, she may be required to kill or harm people either directly or indirectly and, if she did not, she would be prosecuted and jailed for two years and afterwards precluded from pursuing the profession of her choice in Israel.

9. On 2 August 2014, the applicant completed a questionnaire, which she submitted together with supporting documentation on her proposed military service and the penalties applicable to persons who fail to report for military service or who fail to fulfil an order or instruction given to them in the course of that service.

10. The applicant was formally interviewed, under s. 11 of the Refugee Act, on 13 October 2014. To briefly summarise the material part of the authorised officer's record of that interview, the applicant stated as follows. The results of the assessment of her suitability for military service in Israel made it very likely that she would be assigned to a combat unit. She requested a revised assessment that would preclude a combat unit assignment but did not get one. In a combat unit, she would 'have to shoot and interrogate people and be involved in military actions.' She stated: 'I know I just can't do [that] stuff and if you don't obey an order you go to jail.' When asked if she was a pacifist, the applicant sought clarification on the meaning of the term. When the question was rephrased as whether she was a conscientious objector or whether she objected to combat, the applicant responded that she was not a pacifist but would not be able to obey orders with the result that she could expect to be put in jail and barred from studying for, or entering, her chosen profession.

11. The applicant is recorded as stating that she was not opposed to military service in general but only to military service in a

combat unit. The applicant was asked if she had sought an exemption from military service or an opportunity to perform some form of alternative service and responded, in substance, that she had not done so because she did not think she could obtain an exemption and had been told that no alternative form of service was available to her. The applicant acknowledged that she had not sought legal advice in that regard.

12. The report of the commissioner, under s. 13(1) of the Refugee Act, is dated 31 October 2014. It concludes that the applicant had failed to establish a well-founded fear of persecution on any of the grounds specified in the 1951 U.N. Convention relating to the Status of Refugees and the 1967 Protocol to that Convention (together, 'the Refugee Convention'). A recommendation, dated 10 November 2014, that the applicant should not be declared to be a refugee is appended to that report.

13. The solicitors for the applicant filed a notice of appeal, dated 16 December 2014, against the recommendation on her refugee status claim.

14. The tribunal conducted an oral hearing on the applicant's appeal on 26 September 2016. After that hearing, the applicant's solicitors wrote to the tribunal on the same date, making written submissions on her behalf and enclosing a range of documents in support of those submissions.

15. The tribunal delivered its decision on 7 November 2016. That is the decision now under challenge. It was communicated separately to the applicant and her solicitors, in each case under cover of a letter dated 8 November 2016.

16. Although the relevant correspondence has not been exhibited, I understand that, by letter dated 30 November 2016, the applicant was informed that the Minister had adopted the recommendation of the commissioner, affirmed by the tribunal, that she should not be given a declaration of refugee status. I understand further that, by another letter of the same date, the Minister wrote separately to the applicant, informing her of her entitlement to apply for subsidiary protection, and that the applicant duly did so, by letter dated 19 December 2016, without prejudice to her entitlement to challenge the tribunal's decision to affirm the recommended refusal of her refugee status claim.

**The law**

17. At the material time, the definition of 'refugee' was that set out in s. 2 of the Refugee Act, directly reflecting the one provided under Article 1A(2) of the Refugee Convention. Thus, for the applicant to obtain a declaration of refugee status, it was necessary for the commissioner or, on appeal, the tribunal to be satisfied that she had established a well-founded fear of being persecuted, if returned to the State of Israel, for reasons of race, religion, nationality, membership of a particular social group or political opinion.

18. In *V.Z. v Minister for Justice* [2002] 2 I.R. 135 (at 145) , the Supreme Court (per McGuinness J, Keane CJ Denham, Murphy and Murray JJ concurring) endorsed the use of the United Nations High Commissioner for Refugees ('UNHCR') Handbook on Procedures and Criteria for Determining Refugee Status ("the UNHCR Handbook") as an aid to the interpretation of the Refugee Convention.

19. Chapter 5 of the UNHCR Handbook deals with what it describes as special cases. The second part of that chapter deals with 'Deserters and persons avoiding military service.' In material part, it states:

> '167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The Penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.
>
> 168. A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.
>
> 169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.
>
> 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 to 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 object 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.'

20. At the supranational level, Article 3(2) of the Treaty on European Union provides that, in offering its citizens an area of freedom, security and justice without internal frontiers, the free movement of persons will be ensured in conjunction with appropriate measures concerning, among other matters, asylum. At a special meeting of the Council of Ministers of the European Union in Tampere, Finland, in October 1999, an agreement was reached to work towards establishing a 'Common European Asylum System' ('CEAS'), based on the full and inclusive application of the Refugee Convention. One result was Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ('the Qualification Directive'). The third recital to the Qualification Directive expressly acknowledges that the Refugee Convention provides the cornerstone of the international legal regime for the protection of refugees.

21. Article 9(2)(e) of the Qualification Directive provides that acts of persecution within the meaning of the refugee definition under Art 1A of the Refugee Convention can take the form, inter alia, of 'prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the refugee status exclusion clauses as set out in Article 12(2).' Under Article 12(2), such crimes or acts include: a crime against peace; a war crime; a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; and an act contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations. These reflect the refugee status exclusion clauses in Article 1F of the Refugee Convention.

22. The Qualification Directive was transposed into the law of the State by the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006)('the 2006 Regulations'). While Art. 3 of the Qualification Directive provides that a Member State may introduce or retain more favourable standards for determining who qualifies as a refugee, the standards set under Reg. 9 of the European Communities (Eligibility for Protection) Regulations 2006 for the identifications of 'acts of persecution' directly mirror those under Art. 9 of the Directive.

**The arguments**

23. The applicant seeks to impugn the tribunal's decision on five separate grounds. Before addressing the substance of each of those arguments, it is first necessary to consider whether the evidence before me establishes each of the two factual premises upon which they all rest: first, that the applicant is solely or primarily a 'selective conscientious objector' to military service with the Israeli Defence Forces ('IDF') in the Israeli-occupied Arab territories; and second, that, as such, she could not have obtained the exemption from military service for which she never applied. As Lord Bingham of Cornhill pointed out in *Sepet and Another v Secretary of State for the Home Department* [2003] 1 WLR 856, in any asylum case the facts are all-important.

24. Those questions of fact fall to be considered against the background of the following legal framework. Article 10 of the Charter of Fundamental Rights of the European Union ('the Charter') deals with freedom of thought, conscience and religion. Article 10(1) of the Charter corresponds to Article 9(1) of the European Convention on Human Rights ('the ECHR'). Article 52(3) of the Charter states that the rights enshrined in it should be interpreted consistently with the corresponding rights guaranteed by the ECHR. In *Bayatyan v Armenia* [2011] ECHR 1095; (2012) 54 EHRR 15, the European Court of Human Rights ruled 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, cohesion and importance to attract the guarantees of Article 9 of the ECHR. Under Article 10(2) of the Charter, the right to conscientious objection is recognised, in accordance with the national laws of the Member States governing the exercise of that right.

25. What is a 'selective conscientious objector'? The term is a descriptive one, nowhere specifically defined. The adjectives 'selective' and 'partial' are used interchangeably in the jurisprudence and in legal literature to describe one form of conscientious objection, just as the contrasting adjectives 'full' or 'absolute' are used to describe another. At the risk of over-simplification, a 'full' or 'absolute' conscientious objector is one opposed on political, religious or moral grounds to participation in military action of any kind, *e.g.* a pacifist. A 'selective' or 'partial' conscientious objector is one opposed on political, religious or moral grounds to a particular military action or form of military action, rather than to military action generally. A person in either of these two categories must be distinguished from a 'mere' objector to military service e.g. a person who would simply prefer not to kill or injure anybody or to be placed in harm's way, or a person who would prefer to remain in civilian life, rather than perform military service.

26. Advocate General Sharpston provided the following very helpful summary in her opinion in Case C-472/13 *Shepherd v Germany* (11 November 2014) ECLI:EU:C:2014:2360:

> '53. …[T]he term "conscientious objection" has more than one meaning. It is understood to cover pacifists (such as Quakers) where the objection to military action is absolute. It may also refer to persons who object to a particular conflict on legal, moral or political grounds or who object to the means and methods used to prosecute that conflict.'

27. In the course of her section 11 interview, as part of the first instance refugee status application process, the applicant had stated that she was not a pacifist and was not opposed to military service, only to military service in a combat unit. The commissioner's s. 13 report invoked the statement at paragraph 168 of the UNHCR handbook that '[a] person is clearly not a refugee if his only reason for desertion or draft evasion is his dislike of military service or fear of combat', before concluding that the problems with military service feared by the applicant did not amount to persecution.

28. Rather unhelpfully and in evident disregard of the express requirements of s. 16(3) of the Refugee Act, the notice of appeal filed by the applicant's solicitor failed to set out any grounds of appeal. However, the written submissions contained in the letter sent to the tribunal by the applicant's solicitors at the conclusion of the appeal hearing on 26 September 2016 stated as follows (in material part):

> '4. [The applicant] states that she did not want to serve in the [IDF] mainly for two reasons, namely (a) she felt psychologically unable to carry arms and engage in armed combat, and (b) she did not want to take part in, or be complicit with, the military actions of the IDF vis a vis the Palestinians and in particular the Occupied Palestinian Territories. In relation to the latter, she recounted how her father, her grandmother and herself had been treated very well by Palestinian doctors in Israel and she could not live with herself if she was involved in military actions against the Palestinian people in the exercise of her duties as an IDF soldier.
>
> 5. While the evidence advanced by [the applicant] before the [c]ommissioner was to the effect that she was mostly

against serving with the IDF on the grounds that she felt personally and psychologically unable to carry arms and engage in armed combat, today she also articulated a specific unwillingness to be complicit with the IDF's actions against the Palestinian people in the Occupied Palestinian Territories. It was submitted in the course of the oral hearing that the [tribunal] should assess [the applicant's] evidence having regard to the fact that she was 17 years old when she applied for asylum and was interviewed by the [c]ommissioner and that she is currently only 19 years of age.

…

9. It is submitted that the case of the [applicant] is distinguishable from that of [the applicants in *A.M & Anor. v Refugee Appeals Tribunal & Ors* [2014] IEHC 388 (Unreported, High Court (McDermott J), 29th July, 2014)] in that she is not only a "full conscientious objector" but she is also a "selective conscientious objector" in that she not only refuses to serve in the IDF in general and in an absolute manner because she feels unable to carry arms and engage in fighting, but she also objects in a specific manner to serving in the Occupied Palestinian Territories on the ground that doing so would expose her to being complicit in actions she deems contrary to international law.'

29. Of course, a submission on the evidence is not evidence. No transcript or note of the hearing before the tribunal has been produced for the purpose of these proceedings. Subject to reasonableness review, the facts before me are the facts as found by the tribunal. There does not appear to have been any psychological evidence before the tribunal and there is no such evidence before me.

30. The tribunal's decision summarises the applicant's oral testimony at the hearing before it. The applicant stated that, at a five-day military camp that she was required to attend while still in school, she was asked to hold a rifle but could not bring herself to do it. She was asked if that was due to a psychological fear and replied that it was, adding 'I don't believe in using weapons or violence.' When the IDF visited her school, she told them that she didn't believe in weapons or bombs. Her reaction to her call-up letter was: 'there is a problem, I don't believe in violence. If I'm in combat, I will be expected to do violence. If I don't, it will be a criminal offence and therefore jail.' She was asked if she objected to military service because of an objection to fighting Palestinians and replied: 'I don't believe in fighting at all. We should solve things peacefully by talking.' When asked what she would do in the event of a war between Israel and, say, Iran, she replied: 'I would still object, I still would try to find peace. Nobody benefits from war.' Later she was asked if she would be prepared to serve with the IDF in a medical capacity and responded: 'I don't want to serve at all. What they do with Palestinians. I couldn't live with myself if I did. I don't want to serve directly or indirectly.'

31. After the applicant's solicitor had submitted that the applicant, who had matured, now described herself as a pacifist, the applicant referred to positive experiences she and her family had with Palestinian doctors and stated 'I can't associate with the bad things which happen those people. I wouldn't live with myself. Nor could I sit behind a screen. I would not be able to do that. I will disobey the order and I will be punished. Jailed.'

32. Having considered that evidence, the tribunal concluded:

'[The applicant] has adopted a political stance against military activity by her country of nationality (whether this is characterised as full conscientious objector or selective conscientious objector is not as relevant to this case as it may be in others. The [applicant] has developed an objection as "she refuses to serve in the IDF in general because she feels unable to carry arms and engage in fighting, but also objects in a specific manner to serving in the Occupied Palestinian Territories on the ground that doing so would expose her to being complicit in acts deemed contrary to international law" as per written submissions.)' (emphasis in original)

33. Thus it is evident that, on the applicant's own case, she was both a full conscientious objector and a selective conscientious objector. The tribunal appears not to have reached any conclusion on the question, which - from the tribunal's perspective - would have been one of fact, not law, since neither term has any defined meaning within the asylum law of the State.

32. The applicant's case is that her asserted status as a selective conscientious objector (ignoring her parallel assertions that she is also a full conscientious objector) means that she would not have been eligible for an exemption from military service under the law of the State of Israel. It is important to bear in mind that, insofar as it may be material in any case (including this one), the applicable Israeli law is an issue of fact, rather than one of law, for the purpose of the asylum law of this State.

33. In the written submissions contained in their letter of 26 September 2016, the applicants' solicitors wrote:

'6. The presenting officer submitted that it was open to [the applicant] to apply for an exemption from military service. [The applicant] stated that she did not because she did not think it would serve any purpose as she believed that she did not meet any of the grounds upon which such exemptions can be granted.

7. We would like to refer the tribunal to the enclosed query response from the Refugee Documentation Centre [of 4 February 2014]. It is submitted that this query response supports the proposition that [the applicant] would not be able to obtain an exemption from military service on the grounds that she objects to serving in the IDF for conscience an/or political reasons (such as an unwillingness to serve in the Occupied Palestinian Territories or to be engaged in any military action against the Palestinian people).

8. As agreed during the course of the oral hearing, we enclose herewith a copy of *A.M. & Anor. v Refugee Appeals Tribunal & Ors* [2014] IEHC 388, a judgment of McDermott J ….

9. It is submitted that the case of [the applicant] is distinguishable from that of *A.M. & Anor*. in that she is not only a "full conscientious objector" but she is also a "selective conscientious objector" in that she not only refuses to serve in the IDF in general and in an absolute manner because she feels unable to carry arms and engage in fighting, but she also objects in a specific manner to serving in the Occupied Palestinian Territories on the ground that doing so would expose her to being complicit in acts deemed contrary to international law.'

34. While the Refugee Documentation Centre document of 4 February 2014 refers to a number of Amnesty International reports concerning persons whose conscientious objection claims were rejected and who were prosecuted and jailed for the failure to serve in the IDF, on the applicable law and practice in Israel it quotes from a report of the Immigration and Refugee Board of Canada, entitled '*Israel: Sanctions for and consequences of avoiding military service or refusing to bear arms or to follow orders from officers, including in battle zones; possibility for soldiers to sue officers for improper conduct or wrong-minded orders (March 2009-January 2013), 27 February 2013*', which, in a section headed 'Conscientious Objectors', quotes in turn from the website of the Ministry of

Foreign Affairs of Israel as follows:

> 'According to Article 36 of the Israeli Defense Service Law (Consolidated Version), 1986, the Minister of Defense has the authority to exempt or defer any soldier, women and men alike, from fulfilling his national army service for reasons that are listed in the law. These reasons may stem from educational requirements, security settlement, the national economical situation, extenuating family circumstances, or other reasons.
>
> The IDF will respect the views of a conscience objector, provided that it is satisfied that these views are genuine. To this end, a special military committee, headed by the IDF's Chief Recruitment Officer, or his deputy, hears the application of those who wish to be exempted from the army on the basis of conscience objection. Among the members of this committee are an officer with psychological training, a member of the IDF attorney's office and a civilian expert on conscience objection. (Israel 13 July 2005)'

35. In *A.M. & Anor*., already cited, a decision upon which the applicant expressly sought to rely, McDermott J dealt with the applicable law of the State of Israel, as found by the tribunal whose decision was under judicial review in that case. McDermott J noted (at paras. 15-18):

> '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 *Epstein 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 *Zonstein & 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 *Zonstein* 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".'

36. Having considered those materials in this case, the tribunal made the following material findings of fact:

> '- [The applicant] is currently a civilian subject to a requirement to serve in the IDF.
>
> - It has not been decided [at] what location she will be required to serve.
>
> - It has not been decided what acts she would be required to do.
>
> - [The applicant] has not attempted to seek legal redress to lawfully avoid military service.
>
> - There is a system in place in Israel by which this can be achieved (see [Country of Origin Information ('COI')], such as [Refugee Documentation Centre ('RDC') query response, dated 4 February 2014] and [*A.M. v Refugee Appeals Tribunal, already cited*].'

37. The absence of military conscription in Ireland from the inception of the State, the problematic history of conscription proposals in Ireland before independence, and the State's enduring policy of neutrality probably all serve to obscure the significance of the underlying national defence and security interests that, together with the principle of equality of duty, can operate in any state in tension with the right to conscientious objection as a manifestation of the right to freedom of individual conscience. In *A.M. & Anor.*, already cited (at para. 35), McDermott J found the latter right to exist as an unenumerated, though obviously not unqualified, one under Article 40.3 of the Constitution of Ireland, which in turn requires s. 2 of the Refugee Act to be interpreted in a manner that extends the definition of refugee status to encompass a full conscientious objector who has a well founded fear of persecution.

38. It is no surprise, therefore, to learn that, according to the evidence of Israeli law that was before McDermott J in A.M. & Anor. in the shape of the decision of the Supreme Court of Israel in *Zonstein*, the interplay of similar rights and interests formed part of the normative background to the question before that court in that case. What is especially noteworthy about the decision in *Zonstein*, in light of the position adopted on behalf of the applicant in this case, is the conclusion of the Israeli Supreme Court that it was for the Israeli Minister for Defence to strike a balance between those rights and interests in exercise of the discretion conferred by the relevant Israeli statute, which had resulted in the conclusion that, while there was room to grant exemptions from military service in cases of full objection, that was not necessarily so in those of selective objection.

39. For my part, I can see no basis in law or fact for the argument advanced on behalf of the applicant in this case that, in claiming to be both a full and selective conscientious objector, she would have been refused an exemption from military service in Israel on the grounds of her selective objection to participation in certain specific military actions of the IDF. I do not see how a particular objection to specific military service displaces a general objection to all military service where the same person sincerely and conscientiously asserts both of those objections. Nor can I identify anything in the evidence before the tribunal or before this court to suggest that the relevant authorities in Israel would have taken that position, had the applicant sought an exemption from military service there as a conscientious objector. Further, even if the applicant had maintained merely a selective conscientious objection to military service, it is not clear to me how the tribunal could ever have been satisfied that the Israeli Minister for Defence would have refused an exemption to the applicant as a selective conscientious objector simply because that Minister had previously concluded that there was not *necessarily* room to grant an exemption to persons in that category generally.

40. In *A.M. & Anor.*, McDermott J concluded that the applicants' submissions were based 'on the unproven proposition that they would be refused an exemption for which they never applied' (at para. 49) and that, in that sense, their claim to have a well-founded fear of persecution as a result of their anticipated failure to perform compulsory military service 'was premature' (at para. 51.) For the reasons I have given, that seems to me to be the position in this case also.

41. Subsequently, in Case C-472/13 *Shepherd v Germany* ECLI:EU:C:2015:117 (26 February 2015), the European Court of Justice ('ECJ') held that, in asserting a claim covered by Art. 9(2)(e) of the Qualification Directive, whereby the persecution feared is prosecution or punishment for refusal to perform military service in a conflict, where doing so would include acts or crimes that exclude a person from refugee status:

> '- the refusal to perform military service must constitute the only means by which the applicant for refugee status could avoid participating in the alleged war crimes, and consequently, if [she] did not avail [herself] of a procedure for obtaining conscientious objector status, any protection under Article 9(2)(e) of [the Qualification Directive] is excluded, unless that applicant proves that no procedure of that nature would have been available to [her] in [her] specific situation.'

42. In circumstances where, as will become evident, the tribunal placed significant reliance on other aspects of the judgment of the ECJ in *Shepherd* and where, as already noted, it had already found as a fact that the applicant did not avail herself of the relevant procedure for obtaining conscientious objector status that was open to her in Israel, it is surprising that the tribunal did not rely primarily on the statement of principle just quoted in reaching its decision.

43. Instead, the tribunal focussed on another aspect of Art. 9(2)(e) of the Qualification Directive; specifically, whether the applicant had established that the military service that she was required to perform would include crimes or acts falling under the exclusion clauses set out in Article 12(2) of that Directive. With that in mind, I now turn to address each of the applicant's five arguments that the tribunal's decision is one that is bad in law.

**i. did the tribunal adopt an unduly narrow definition of acts of persecution?**
44. Under this head, the applicant raises a number of amorphous complaints about the manner in which the tribunal approached the concept of persecution as it applies to persons avoiding military service. The applicant points out - quite correctly - that the forms of persecution described in Art. 9(2) of the Qualification Directive, as transposed by Reg. 9(2) of the 2006 Regulations, are expressed to be non-exhaustive examples. However, I can find no suggestion that the tribunal ever suggested, much less concluded, otherwise.

45. The applicant then refines her argument by suggesting that the particular form of persecution described in Art. 9(2)(e) is cast more narrowly than that described in paragraphs 167-174 of the UNHCR Handbook, and that the tribunal wrongly considered the applicant's position under the former rather than the latter. The applicant submits that the distinction she seeks to draw follows from the observation by Lord Bingham of Cornhill (at 868) in *Sepet*, already cited , that certain provisions in what was then the draft Qualification Directive, specifically those later enacted in the same terms as Arts. 9 and 12, afforded a narrower ground for claiming asylum than statements in some, at least, of a range of international law instruments that he had quoted earlier in his judgment. Because the relevant portion of the UNHCR Handbook was one of those statements, the applicant submits that Lord Bingham's observation is authority for the proposition that the tribunal erred in failing to consider the applicant's claim by reference to the relevant text in the UNHCR Handbook in preference to that in the Directive.

46. There are three reasons why I cannot accept that argument. First, I can find no suggestion that the applicant ever made the case to the tribunal that her claim under s. 2 of the Refugee Act ought to be considered by reference to the relevant provisions of the UNHCR Handbook in preference to those of Art 9(2)(e) of the Qualification Directive. Second, the tribunal did have regard to the judgment of McDermott J in A.M. & Anor. in which the relevant provisions of the UNHCR Handbook were addressed at length.

47. Third and most importantly, Lord Bingham's consideration of both the terms of the draft Qualification Directive and the other international law instruments and materials from which he quoted (at 864 et seq) was directed towards the extent to which they evidenced or disclosed a legal rule binding in international law recognising a right of conscientious objection to compulsory military service, requiring the provision of a non-combatant alternative to it, and requiring consideration of the grant of asylum to genuine conscientious objectors. It was in that context that Lord Bingham concluded that the terms of the draft Qualification Directive were narrower than those of certain international law instruments (i.e. as the basis for a putative right of conscientious objection *etc*). Thus, the text Zorro and Symes, *Asylum Law and Practice*, 2nd edn. (Haywards Heath, 2010) (at p. 8, fn. 3) expresses the view, with which I respectfully agree, that Lord Bingham's reference did not imply that the terms of the draft Qualification Directive were inconsistent with the autonomous meaning of the Refugee Convention (informed by the UNHCR Handbook), given that the international community did not yet recognise a right of conscientious objection.

48. There was no question in this case of the tribunal rejecting the applicant's claim on the basis that there is no right of conscientious objection, the denial of which might amount to persecution. As we shall see the tribunal rejected the applicant's claim on the basis that she had failed to establish that the military service she would be required to perform would include crimes or acts falling under the exclusion clauses set out in Article 12(2) of the Qualification Directive. There is no suggestion that Article 9(2)(e) of the Qualification Directive is more narrowly cast in that specific regard than the refugee definition set out in Art. 1A(2) of the Refugee Convention, adopted under s. 2 of the Refugee Act, the interpretation of which is informed by the text of the UNHCR Handbook. Any conclusion to the contrary would make a nonsense of the recognition in recital (3) to the Qualification Directive that the Refugee Convention provides 'the cornerstone of the international legal regime for the protection of refugees.'

49. Hence, I reject the applicant's first argument.

**ii. did the tribunal adopt the wrong standard of proof under Art 9(2)(e) of the Qualification Directive?**
50. In its decision (at para. 6.5), the tribunal expressly acknowledged that the standard to which a well-founded fear of persecution under s. 2 of the Refugee Act must be established or proved is that of 'reasonable degree of likelihood'; *O.N. v. Refugee Appeals Tribunal* [2017] IEHC 13 (Unreported, High Court (O'Regan J), 17th January, 2017); *N.N. v Refugee Appeals Tribunal* [2017] IEHC 99, (Unreported, High Court (Keane J), 15th February, 2017).

51. In *Shepherd*, already cited, the ECJ was addressing the quite separate question of the standard of proof that must be met to establish that the performance of compulsory military service will include involvement in crimes or acts amounting to a crime against peace, a war crime, a crime against humanity, or an act contrary to the purposes and principles of the United Nations, as part of the broader exercise of seeking to establish (to a reasonable degree of likelihood) that the person concerned will be prosecuted or punished for refusal to perform military service in an existing conflict in those circumstances, thus establishing the form of persecution expressly recognised by Art. 9(2)(e) of the Qualification Directive.

52. The ECJ was asked to address seven separate questions concerning the proper interpretation of Art 9(2)(e). In doing so, it chose to examine those questions together, before providing the following answers (at para. 46):

> '... Article 9(2)(e) of Directive 2004/83 must be interpreted as meaning that:
>
> – it covers all military personnel, including logistical or support personnel;
>
> – it concerns the situation in which the military service performed would itself include, in a particular conflict, the commission of war crimes, including situations in which the applicant for refugee status would participate only indirectly in the commission of such crimes if it is reasonably likely that, by the performance of his tasks, he would provide indispensable support to the preparation or execution of those crimes;
>
> – it does not exclusively concern situations in which it is established that war crimes have already been committed or are such as to fall within the scope of the International Criminal Court's jurisdiction, but also those in which the applicant for refugee status can establish that it is highly likely that such crimes will be committed;
>
> – the factual assessment which it is for the national authorities alone to carry out, under the supervision of the courts, in order to determine the situation of the military service concerned, must be based on a body of evidence capable of establishing, in view of all the circumstances of the case, particularly those concerning the relevant facts as they relate to the country of origin at the time of taking a decision on the application and to the individual position and personal circumstances of the applicant, that the situation in question makes it credible that the alleged war crimes would be committed;
>
> – the possibility that military intervention was engaged upon pursuant to a mandate of the United Nations Security Council or on the basis of a consensus on the part of the international community or that the State or States

> conducting the operations prosecute war crimes are circumstances which have to be taken into account in the assessment that must be carried out by the national authorities; and
>
> – the refusal to perform military service must constitute the only means by which the applicant for refugee status could avoid participating in the alleged war crimes, and, consequently, if he did not avail himself of a procedure for obtaining conscientious objector status, any protection under Article 9(2)(e) of Directive 2004/83 is excluded, unless that applicant proves that no procedure of that nature would have been available to him in his specific situation.'

53. Having directly quoted this passage from the judgment of the ECJ in *Shepherd,* the tribunal went on to consider the standard of proof in respect of the prosecution of war crimes and crimes against humanity under Article 66(3) of the Rome Statute of the International Criminal Court, that of proof 'beyond reasonable doubt', and the standard of proof in respect of the application of an exclusion under Art. 12 of the Qualification Directive, as discussed in the European Asylum Support Office ('EASO') report on *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) - A Judicial Analysis (January 2016)*, that of 'serious reasons for considering', before reiterating its understanding that 'there is a legal requirement that there be sufficient evidence that [the applicant] will be reasonably likely to be required to engage in war crimes, genocide or other excludable acts.'

54. The applicant argues that the tribunal misconstrued and, hence, misapplied the judgment of the ECJ in *Shepherd*. Specifically, she contends that the requirement to establish with sufficient plausibility that military operations are carried out, or have been carried out in the past, in circumstances that make it highly likely that excluded acts will be committed in the future, identified at para. 43 of the judgment, is limited in its application to situations where it has been established that the state concerned prosecutes war crimes or that the military operations concerned have been carried out under a mandate of the United Nations Security Council or on the basis of a consensus on the part of the international community, as considered at paragraphs 41 and 42 of the judgment.

55. It seems to me that, while paragraphs 41 to 43 of the judgment in *Shepherd* are, on one reading, capable of being construed in that way, that construction is expressly ruled out by the manner in which the ECJ ultimately chose to answer the questions referred (at para. 46 of the judgment), already quoted above. In the third indent at paragraph 46, the ECJ explained that Article 9(2)(e) is capable of covering situations in which the applicant for refugee status can establish that it is highly likely that war crimes will be committed. In the fifth indent at that paragraph, the CJEU confirmed that the existence of a UN Security Council mandate or international community consensus supporting military intervention, or the willingness of the state concerned to prosecute war crimes, are circumstances to be taken into account in the refugee status assessment. There is no suggestion in paragraph 46 of the judgment that Art. 9(2)(e) of the Qualification Directive must be interpreted as meaning that it is only necessary to establish a situation in which it is highly likely that war crimes will be committed, as described at the third indent, in cases involving one or more of the circumstances referred to at the fifth indent.

56. I draw support for that conclusion, if support is needed, from the following commentary on the *Shepherd* judgment in Heilbronner and Thym, *EU Immigration and Asylum Law*, 2nd edn. (Munich, 2016) (at p. 1179):

> 'The ECJ makes clear that it is for the applicant to establish with 'sufficient plausibility' that his unit carries out operations assigned to it, or has carried them out in the past, in such conditions that it is 'highly likely' that acts constituting a war crime will be committed. Such plausibility will, in principle, be lacking when an armed intervention is engaged upon on the basis of a resolution adopted by the UN Security Council or when the operation gives rise to an international consensus.' (emphasis in original)

57. Thus, I reject the applicant's second argument.

**iii. did the tribunal wrongly apply the 'highly likely' standard under Art. 9(2)(e) of the Qualification Directive to matters covered by the 'reasonable likelihood' standard under s. 2 of the Refugee Act?**

58. The concluding paragraph of the tribunal's analysis of the applicant's claim to have a well-founded fear of persecution on Convention grounds states:

> '[6.14] Taking into account all of the above, [the applicant's] personal circumstances and statements set against the backcloth of objective COI, the [t]ribunal finds that she has not established "with sufficient plausibility" that her (unknown) future unit will commit war crimes, genocide or other [A]rt. 12 excludable acts. This is particularly so when the applicant has not engaged in the internal process in Israel with a view to establishing that she is a bona fide conscientious objector (see *A.M. & Anor. v Refugee Appeal Tribunal* [2014] IEHC 388) who is entitled to an exemption under Israeli law.'

59. The applicant submits that this conclusion demonstrates the application of the wrong test. That submission is based upon a combination of the two arguments that I have already rejected *i.e.* first, that the definition of persecution in the form of prosecution or punishment for failure to perform military service that would involve the commission of war crimes under Art. 9(2)(e) of the Qualification Directive is cast more narrowly than a broader conception of that form of persecution under the Refugee Convention and, by extension, s. 2 of the Refugee Act; and second, that the application of the 'highly likely' standard in respect of the commission of acts constituting war crimes requires the existence of particular conditions - in the form of UN Security Council resolutions, international condemnation, or a willingness by the state concerned to prosecute war crimes - that have not been established on the evidence before the tribunal in this case.

60. As I have already rejected each of the two arguments on which it is based, I must reject this argument also.

**iv. was the tribunal's conclusion an irrational or unreasonable one on the material before it?**

61. The applicant submits that the tribunal's separate conclusions that she had failed to establish with sufficient plausibility, first, that it is highly likely that her performance of military service will include the commission of war crimes and, second, that the existing procedure for obtaining conscientious objector status cannot avail her so that her prosecution or punishment for refusal to perform military service is reasonably likely, were each unreasonable or irrational, or both.

62. In support of the first of those conclusions, the tribunal gave the following reasons (at paragraph 6.13):

> 'The [t]ribunal has considered the evidence before it and concludes that there is insufficient evidence on which to conclude that Israel engages in systematic acts or official indifference in allowing war crimes or genocide. Nor is there sufficient evidence that [the applicant] will be required - under duress of imprisonment - to engage in excludable acts as defined by [A]rt. 12 [of the Qualification Directive].'

63. In support of the second conclusion, as already noted, the tribunal pointed to the applicant's acknowledged failure to engage in the relevant process in Israel to claim conscientious objector status.

64. To succeed in having the tribunal's decision set aside on grounds of unreasonableness, in accordance with the test authoritatively restated by the Supreme Court in *Meadows v Minister for Justice* [2010] 2 IR 70, the applicant must establish that it is fundamentally at variance with reason and common sense.

65. The applicant's argument on the tribunal's first conclusion is, in essence, that the COI material she had produced to the tribunal and, in particular, the *Report of the independent international commission of inquiry established pursuant to [UN] Human Rights Council resolution S-21/1* (24 June 2015, A/HRC/29/52) rendered any conclusion other than that the applicant's performance of military service with the IDF will involve her in war crimes fundamentally at variance with reason and common sense.

66. To take that claim at, what appears to me to be the high water mark, the written submissions filed on behalf of the applicant state, in material part, that '[t]he report makes numerous findings of violations of international law and breaches of human rights carried out by the IDF. In particular, it refers to "widespread" violations, including … violations of the prohibition of indiscriminate attacks, a grave breach of [A]rticle 147 of the Fourth Geneva Convention, which is a war crime and wilful killings.'

67. However, on reading the text of the report, it is immediately apparent that each of the relevant references is couched in, no doubt properly, equivocal terms by reference to the evidence available to the independent international commission. For example, the impression created in the applicant's written submissions that the findings of the independent international commission included an accomplished one of 'a grave breach of article 147 of the Fourth Geneva Convention, which is a war crime' belies the relevant text which states in material part (at para. 53):

> 'The concentration of destruction in areas close to the Green Line, in some areas amounting to 100 per cent and the systematic way in which these areas were flattened one after the other, however, raises concerns that such extensive destruction was not required by imperative military necessity. If confirmed, this would constitute a grave breach of article 147 of the Fourth Geneva Convention, which is a war crime.'

68. An expression of concern about a proposition that has not been confirmed is not the same thing as an accomplished finding that a proposition has been proved, and the tribunal's conclusion that the various expressions of concern in the report of the independent international commission were not sufficient to establish that Israel engages in, or is officially indifferent to, acts amounting to war crimes in which it is highly likely the applicant would be involved in performing her military service, cannot be said to be one that is fundamentally at variance with reason and common sense.

69. Further, for the reasons I have already given, I am also satisfied that the tribunal's conclusion that the applicant had failed to establish with sufficient plausibility that the existing procedure for obtaining conscientious objector status cannot avail her was entirely consistent with the material before it and, hence, was in no way at variance with reason or common sense.

70. Therefore, I reject this argument.

**v. did the tribunal breach the applicant's entitlement to natural and constitutional justice and fair procedures?**

71. The gravamen of the applicant's argument in this regard is that the tribunal failed to follow one of its own previous decisions - that in Recommendation No. 69/2393/06A&B (delivered on an unspecified date in 2010) - in a manner that was unreasonable or that was unfair to the applicant.

72. At the conclusion of the hearing before me, I was provided with a copy of that decision. It concerns a 'papers only' appeal brought by two nationals of Israel who sought refugee status on the basis that each faced punishment or prosecution for failure to perform military service that they asserted would involve each of them in the commission of war crimes. The tribunal upheld their appeal. The specific material upon which it relied in doing so is not clearly identified in the text of the decision. Reference is made in passing to certain Human Rights Watch documents and an Amnesty International document, although the contents of those documents are not described.

73. In the decision that is the subject of the present proceedings, the tribunal addressed that earlier decision in the following way (at paras. 6.11 and 6.12):

> '[6.11] It is contended that the Tribunal should form a view as to the conduct of the IDF to date, condemn the state of Israel, its people and its government into the future that they will commit war crimes, genocide or breach human rights of others or engage in other excludable acts. One Tribunal has done so, in recommendation 69/2393/06, where it was stated, inter alia:
>
> – "Article 147 of the Fourth Geneva Convention sets out a list of "grave breaches" of the Fourth Geneva Convention:
>
> – '...wilful killing, torture or inhuman treatment, including biological experiments wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.'
>
> – I have had the benefit of very helpful submissions from the Applicant's legal representatives which refer to the numerous abuses carried out by the IDF in the [Occupied Palestinian Territories 'OPTs'], I will not reiterate them here but I am satisfied from the examples referred to and the numerous reports of breaches of humanitarian law on the ground in the OPTs, that one cannot conclude that such abuses are not condoned by the State of Israel or at a minimum that they are effectively allowed to occur. There is ample reference to the exclusion of the international press from conflict zones by the State, that to me suggests a policy of cover up, one need not engage in deep speculation to arrive at a conclusion that what is being covered up is more than likely evidence of illegal conduct. I have read reports of reservists who have given harrowing reports of the violent repression of the Palestinians, including shooting at women and children and forcing unarmed people to pick up objects that might be bombs. From the evidence I must conclude that the nature of the tasks that the Applicants might be required to perform on the ground are such that he is entitled to refugee status."
>
> – [6.12] The Tribunal declines to follow that decision, primarily on the basis of the body of evidence required to

> reach such a conclusion and subsequent case law to that recommendation. Israel has been the subject [of] severe criticism and accusations of breaches of international law and a few of those were articulated at the hearing either orally (*e.g*. collective punishments of civilian population, disproportionately forceful measures, building a wall) or in COI (apartheid state). However, the Tribunal needs more than allegations, criticisms or accusations in reports (including that of the UN Human Rights Council of 25th June, 2015 or the UN General Assembly of 26th August, 2016 or European Coordination of Committees and Association for Palestine, 29th January, 2014).'

74. *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 (Unreported, Supreme Court 27th July, 2017) was a case involving a decision by the Minister under s. 3(11) of Immigration Act 1999 to refuse to revoke a deportation order against the appellant, after the Refugee Appeals Tribunal had earlier upheld a decision to refuse the appellant's application for subsidiary protection. The applicant relies on the following passage from the judgment of O'Donnell J (Denham CJ, MacMenamin, Dunne and O'Malley JJ concurring) (at para. 66):

> 'While the Refugee Appeals Tribunal, and indeed the asylum process more generally, are not given any specific statutory status in relation to the decision in respect of deportation, nevertheless, the Refugee Appeals Tribunal has a specific expertise in considering risks in countries of origin, and furthermore has a specific fact-finding role. Accordingly, its views must normally be treated with respect. That entails a reasoned explanation of why the decision maker has come to a different conclusion.'

75. The applicant also relies on the following passage from the judgment of Geoghegan J (Murray CJ, Denham, McGuinness and Hardiman JJ concurring) in *P.P.A. v Refugee Appeals Tribunal* [2007] 4 IR 94 (at 105):

> 'It is not that a member of a tribunal is actually bound by a previous decision, but consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary.'

76. The applicant submits that the tribunal failed to provide a reasoned explanation for coming to a different conclusion of fact than that in Recommendation No. 69/2393/06A&B, such that its decision must be considered arbitrary rather than objectively fair.

77. I cannot accept that submission for two principal reasons.

78. First, the tribunal did provide a reasoned explanation for coming to a different decision than the earlier tribunal. Its reasons were twofold: first, that its decision was based on the body of evidence before it, whereas the evidence upon which the tribunal in Recommendation No. 69/2393/06A&B based its decision is, regrettably, nowhere clearly identified; and second, there had been developments in the case-law in the intervening period, perhaps most notably the decision of the *ECJ* in Shepherd. There is no necessary inconsistency where different decisions are reached on different evidence or by reference to intervening developments in the jurisprudence, or both.

79. The second reason I cannot accept the applicant's submission on this point is that the tribunal's decision in Recommendation No. 69/2393/06A&B suffers from a fundamental infirmity. Before concluding (at p. 31), in reliance upon unidentified submissions and reports, that the applicants' military service would involve them in breaches of humanitarian law such that the risk of their prosecution or punishment for refusal to serve amounted to a reasonable likelihood of persecution, the tribunal in that case had earlier observed (at p. 23), in determining that there was not sufficient evidence to conclude that the applicants' military service would involve them in military action condemned by the international community as contrary to the basic rules of human conduct, that:

> 'while I do not personally agree with the actions of Israel and believe that the State has flouted international law in the past, I must not allow my personal opinion to cloud my judgment in this case.'

80. That - no doubt, honest - expression of opinion on the part of the tribunal member concerned established objective bias on her part that required her to recuse herself or, at the very least, to raise the issue of her own recusal with the parties before her, in accordance with the decision in *Dublin Well Woman Centre Limited v Ireland* (Unreported, Supreme Court ( Denham J, *nem. diss*.), 21st December, 1994). The failure of the tribunal member to do so deprives the resulting decision of any authority.

81. For those reasons, I reject the applicant's fifth and final argument.

**An extension of time**

82. As I have rejected this application for judicial review on the merits, it is superfluous to consider whether there was good and sufficient reason under s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000, as amended for extending the period of 28 days from notification of the tribunal's decision within which leave to bring the proceedings should have been sought. The following comments are, therefore, *obiter dicta*.

83. As the tribunal's decision was notified to the applicant by letter dated 8 November 2016, on the assumption that it was received no later than 11 November 2016 (in the absence of any suggestion of non-delivery or misdelivery), leave should have been sought no later than, say, 8 December 2016. Instead, the relevant papers were not filed until 6 January 2017 and the application for leave was not moved *ex parte* until 6 February 2017. The applicant's breach of the time-limit, though significant, was not inordinate and the subsequent intervention of the Christmas vacation partially mitigates it.

84. However, when the applicant's solicitor swore an affidavit on 6 January 2016 in support of the necessary application for an extension of time, the reason provided - that the solicitor 'was labouring under an unusually onerous workload' - was one that I could not possibly accept. The category of circumstances capable of constituting good and sufficient reason for extending time is an open-ended one. Accident, injury, personal or family difficulty, external intervention, or mistake may all suffice, once properly established, as good and sufficient reason to extend time in the interest of attaining justice.

85. But it seems to me that one of the few circumstances incapable of amounting to good and sufficient reason is the assertion by an applicant's legal representative that he or she was, in effect, too busy to take the necessary steps at the appropriate time. After all, the Law Society of Ireland *Guide to Good Professional Conduct for Solicitors*, 3rd edn. (Dublin, 2013) states (at p. 8) that a solicitor should not agree to act for a client if he knows that he will be unable to carry out the instructions of the client adequately or if he will not have time to give the necessary attention to the case. The notion of a statutory time limit that applies strictly only to persons who do not have legal representatives too busy to comply with it is both absurd and an affront to justice.

**Conclusion**

86. The application for judicial review is dismissed.