



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/04663/2016

THE IMMIGRATION ACTS

**Heard at the Royal Courts of Decision & Reasons Promulgated
Justice/Field House
On 12 January 2017 and 6 July On 10 August 2017
2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

**RY
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Fisher, Counsel (12 January 2017)
Ms J Norman, Counsel (6 July 2017)

For the Respondent: Mr P Duffy, Home Office Presenting Officer (12 January
2017)

Mr T Melvin, Home Office Presenting Officer (6 July 2017)

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal (Judge N M K Lawrence) dismissing his appeal against the respondent's decision of 25 April 2016 refusing his application for asylum.

Background

2. The appellant is a citizen of Ukraine born on [] 1980. He was born in Crimea and is Russian by ethnicity. He claimed that he did not support either the Ukrainians or the Russians but being of Russian ethnicity, he would be persecuted in Ukraine. He also claimed that he would be forced to enlist in the military and if he refused, he would be imprisoned and the conditions would be in breach of his human rights. He believed in the Keylontic Science religion and feared that he may be institutionalised because of practising his religion. Finally, he relied on article 8 as he was in a relationship with a national of Belarus who had lived in the UK for nine years.
3. The appellant arrived in the UK on 3 November 2000 with entry clearance as a student until 3 May 2001. His leave to remain as a student was extended on a number of occasions until 30 November 2009. On 26 November 2009 he made an application for further leave to remain as a Tier 4 student but this was refused and an appeal subsequently dismissed. He then applied for leave to remain outside the Rules which was refused on 7 November 2013. He made an application for judicial review in January 2014 which was refused in October 2014 and then on 15 October 2014 he claimed asylum, his application being refused on 15 April 2015 and the decision certified.
4. Further judicial review proceedings were then issued and on 17 September 2015 they were settled by consent on the basis that the respondent would reconsider the asylum decision and grant an in-country right of appeal if adverse. The decision to refuse asylum was confirmed on 25 April 2016 for the reasons set out in the detailed reasons for refusal at Annex A of the decision letter. The respondent accepted the appellant's identity and nationality but was not satisfied that Russians from Crimea would face discrimination in other parts of Ukraine. His claim to be a follower of Keylontic Science with a consequential risk of discrimination in Ukraine was not accepted. The respondent was not satisfied that the appellant would be at risk of persecution or treatment contrary to article 3 from the risk of conscription into the Ukrainian armed forces. The appellant was not able to meet the requirements of article 8 within the Rules and there were no exceptional circumstances justifying a grant of leave outside the Rules.

The Hearing before the First-tier Tribunal

5. At the hearing before the First-tier Tribunal the appellant claimed that the Ukrainian Embassy in London had refused to confirm his Ukrainian nationality but the judge was not satisfied that the appellant was stateless. When he had first applied for a visa to enter the UK, he had provided his Ukrainian passport and that had been verified. The letters he had submitted from the Ukrainian Embassy simply indicated that it could

not confirm whether he was or was not a citizen without the original valid passport.

6. The appellant had argued that as he looked Russian, in the current climate following the annexation of Crimea by the Russian Federation, he might face persecution on the grounds of his Russian ethnicity. The judge commented that there was no expert report to substantiate the claim that the appellant looked Russian and, in any event, the background information demonstrated that, rather than persecuting Ukrainians of Russian ethnicity, the Ukrainian government had put in place measures to invite those who wished to leave Crimea and live in Ukraine. The respondent's Country Information Guidance (CIG) January 2016 accepted that people displaced from Crimea to Ukraine may face difficulties but not insurmountable ones.
7. The appellant had claimed that, should he be returned, he would be conscripted into the military. He did not wish to be so and in consequence he would be imprisoned. On the evidence produced at the hearing, the judge found that the punishment imposed for draft evasion had not been imprisonment, although it was an option available to the courts. The norm appeared to be probation or fines. He found that the appellant had to show not only that imprisonment for evasion of military service was provided for by statute but also that the risk that he would be imprisoned was real and not just theoretical. The judge found that he had not discharged this onus. He had been referred to AC (Ukraine) [2105] NZIPT 800749-52, a decision of 25 June 2015 of the New Zealand Immigration and Protection Tribunal and to PA/02186/2015, a decision of the First-tier Tribunal issued on 15 April 2016 where both Tribunals had found that in the current military conflict the applicant in each appeal would be at risk but the judge said that there was no current military conflict facing the appellant and those decisions were not applicable to the instant appeal.
8. The judge considered the appellant's evidence about the Keylontic Science religion but commented that he was entirely vague about the religion, was unable to articulate its teachings or structured practice and, in any event, there was no cogent evidence that he would be persecuted in Ukraine for practising it. So far as his relationship with his partner from Belarus was concerned, she was not a settled person in the UK. There had been no investigation as to whether they could continue their relationship in Belarus or in Ukraine. He noted that the appellant's partner needed a sign language interpreter but said that that did not by itself amount to compelling circumstances that required a consideration of the application outside the Rules. He accepted that the appellant must have established some form of private life in the UK since 2000 but there was no evidence that he satisfied any part of para 276ADE(1) of the Rules and he was not satisfied that he had demonstrated on balance that there were very significant obstacles to him integrating in Ukraine. For these reasons the appeal was dismissed.

The Grounds and Submissions

9. The grounds raise five issues which can briefly be summarised as follows. The first ground argues that the judge failed to make a number of relevant findings and in particular whether the appellant was eligible for conscription, could be required to engage in acts contrary to international law, would be imprisoned for draft evasion and, if so, whether this would contravene article 3. The judge had found that there was no current military conflict in Ukraine but this was a finding which was not open to him on the evidence. He had failed to consider whether the appellant would be at real risk of being required to engage in conduct contrary to international standards if conscripted. The second ground argues that the judge erred in his approach to article 3 wrongly relying on PS (prison conditions; military service) Ukraine CG [2006] UKIAT 00016 and the CIG 2014 on the risk of imprisonment for draft offenders. It was submitted that PS (Ukraine) was no longer authoritative on penalties for draft evasion and that the CIG 2014 was out of date. It had been argued on behalf of the appellant that there was a real risk of imprisonment for draft evasion or even for simply encouraging it but the judge had not engaged with this submission.
10. The third ground argues that the judge adopted an erroneous approach to the standard of proof failing to apply the lower standard as set out in Sivakumaran [1988] 1 AC 958. There was evidence that the Ukrainian military had been implicated in acts that violated international humanitarian law and might amount to war crimes and this was sufficient for there to be a real risk that the appellant might find himself required to be involved in such acts. The fourth ground argues that the judge erred in rejecting the New Zealand decision in AC (Ukraine) and the decision in PA/02186/2015 and that both cases dealt with exactly the issues advanced in the present appeal, the position facing a Ukrainian national of Russian ethnicity who would be eligible for conscription on return. Finally, the fifth ground argues that the judge failed to consider the article 8 appeal fully. It had not been argued that the need of the appellant's partner for a sign language interpreter amounted to compelling circumstances but that she was a person from Belarus with a disability who could not realistically live in Ukraine. It was argued that disability rights in both Belarus and Ukraine lagged far behind the UK. The judge had therefore failed to make relevant findings in relation to article 8.
11. In her submissions Ms Fisher adopted the grounds. She argued that there had been a lack of necessary findings on the issue relating to military service including whether the appellant would be subject to conscription. The judge had erred in finding that there was no military conflict in Ukraine. He had failed to take proper account of the persuasive decision from New Zealand. She submitted that the Tribunal might well have

concluded that the appellant would not be eligible for conscription but that issue had not been dealt with. The issue of whether he would be at risk of imprisonment had been glossed over. Further, the judge had failed to make findings about article 3 and whether, if the appellant was at risk of imprisonment, that would lead to a breach of that article. She also submitted that the judge's approach to the letter from the Ukrainian Embassy reflected the inadequate approach he had taken to the issues he had to resolve.

12. She submitted that, similarly, when considering article 8 the judge had failed to take all relevant matters into account or to make the findings necessary to carry out a full article 8 assessment. She referred to the judgment of the Court of Appeal in Kamara v Secretary of State [2016] EWCA Civ 813 and in particular the consideration at [14] of the concept of being integrated into the country of proposed return. The judge had made no findings of fact on that issue or on other issues relevant to article 8 and the Razgar [2004] UKHL 27 analysis had not been carried out.
13. Mr Duffy submitted that the judge had dealt with the issue of risk to the appellant at [15] - [16] and had been entitled to find that he would not be at real risk of persecution or serious harm on return. There had been no adequate evidence to suggest that the conflict in Ukraine would lead to a risk of a breach of article 3 or article 15(c) so far as the appellant was concerned. He accepted that article 8 had not been dealt with in a detailed way but the burden of proof was on the appellant. No evidence had been produced that he and his partner could not live in either of their home countries. It was not for the Tribunal, so he argued, to search about for reasons when a claim was not supported by adequate evidence.

Assessment of whether the First-tier Tribunal erred in Law

14. In ground 1 it is argued that the judge failed to make relevant findings on the issue of whether the appellant would be conscripted and what the penalties would be in the event of draft evasion. In the decision letter the respondent relied on the CIG Ukraine Military Service November 2015 which stated that the decree reinstating military prescription was for males between the ages of 18 and 25 and therefore it was considered that the appellant was over the age of conscription. However, the judge took into account the CIG September 2016 which showed that conscription was reintroduced in 2014 and was compulsory for those aged 18 to 60 and to 65 for officers and was for eighteen months [15]. The judge therefore accepted that the appellant would be liable for conscription and the grounds are wrong when they assert that the judge made no finding on this issue.
15. The judge went on to consider whether the appellant's rights were likely to be violated should he seek to evade military service. He noted that by statute draft evasion was punishable by up to three years' imprisonment but that in practice the courts issued fines or suspended sentences in most

cases. He found that on the information provided it appeared that punishment for draft evasion had not been imprisonment although it was an option available to the courts and that the norm appeared to be probation or fines. He also noted that in PS (Ukraine) at [139] the UKAIT had found that whilst there was a remote risk of punishment of imprisonment for draft evasion, it was not a real risk.

16. However, the judge assessed risk on the basis that there was no current military conflict in Ukraine and that for this reason the appellant's situation could be distinguished from the position of the applicants in AC (Ukraine) and PA/02186/2015 but this failed to take into account the background evidence about the ongoing conflict between the Ukrainian authorities and the separatist movement in the Donetsk and Luhansk regions of eastern Ukraine set out in the background evidence in the appellant's documents produced at the hearing (see by way of example the reports at 138 - 175). There was also evidence before the Tribunal capable of supporting the argument that both sides in the conflict were resorting to activities contrary to international humanitarian standards (see the reports at 181 - 189 of the bundle) but the judge failed to make any findings on whether there was a real risk that the appellant, if conscripted, would be required to act in contravention of such standards.
17. Ground 2 argues that the judge erred in his approach to article 3 in the context of a real risk of imprisonment, that PS (Ukraine) was no longer authoritative on the penalties for draft evasion as it predated the current conflict and that the CIG relying on 2014 information was out of date. Although the judge took into account the later CIG, he failed to make findings on the background evidence adduced on behalf of the appellant that the situation had changed for the worse. Ground 3 argues that the judge adopted an erroneous approach to the standard of proof but this ground adds nothing to the other grounds.
18. In ground 4 it is argued that the judge failed to consider relevant supporting evidence, wrongly rejecting both the New Zealand decision in AC (Ukraine) and PA/02186/2015. I am satisfied that this ground is made out. The findings and conclusions in AC (Ukraine) were carefully reasoned and, although each appeal will generally depend on its own individual facts, the judge failed to give sustainable reasons for not regarding this decision as relevant to the appellant's circumstances.
19. Ground 5 argues that the judge failed to consider article 8 in accordance with the law. It is submitted that he failed to make a finding as to whether there was family life or whether article 8 was engaged; he conflated the engagement of the Rules with the engagement of article 8 outside the Rules; he failed to deal with any of the appellant's or his partner's evidence about disability rights in Belarus or Ukraine, any of their evidence about their mutual dependency in the light of her disability or with the evidence about whether his partner could reasonably live alone in Ukraine without support as a disabled person while he was doing military

service if conscripted or went through a possible criminal prosecution if he refused.

20. It was not argued that the appellant could bring himself within the Rules so far as family life is concerned. The judge's comment that the fact that the appellant's partner needed a sign language interpreter did not mean that that fact alone amounted to compelling circumstances appears to be a response to the request for such an interpreter in the letter dated 30 September 2016 from the appellant's solicitor. The judge's comment is right so far as it goes but as the grounds argue, he did need to deal more fully with the issues arising under article 8 set out in ground 5 and, in particular, there has been no consideration of the evidence from the appellant's partner in her witness statement or of the issues addressed by the respondent in paras 181 - 189 of the reasons for refusal letter.
21. In summary, I am satisfied that the judge erred in law in his assessment of both the protection and the human rights appeals such that the decision should be set aside. My preliminary view was that the appeal should be retained in the Upper Tribunal rather than be remitted to the First-tier Tribunal for the decision to be re-made but before making a decision on that I gave the parties an opportunity of making submissions on how the appeal should proceed and what further directions should be made.
22. Further submissions were made in writing by the appellant that the appeal should be relisted as a country guidance case on the issue of draft evasion and prison conditions in Ukraine but in the light of the fact that there has been a recent country guidance decision on these issues, VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079, this appeal was not considered suitable for listing for country guidance. Both parties were given permission to file further documentary evidence in so far as it related to draft evasion, prison conditions and article 8 not already covered in the evidence before the First-tier Tribunal. The appellant has submitted a consolidated bundle of documents ("CB") indexed and paginated 1 - 406 and a further skeleton argument dated 24 May 2017. The respondent has filed the Country Policy and Information notes for Ukraine on both military service and prison conditions dated April 2017 and further written submissions dated 23 May 2017.
23. The appeal was originally relisted for hearing on 24 May 2017 but had to be adjourned to give the respondent a proper opportunity of considering an expert report from Professor Mark Galeotti which, although dated 5 March 2017 was, most unfortunately, not served on the respondent until very shortly before the hearing on 24 May 2017. The appellant has not sought to adduce further oral evidence but did seek on the morning of the hearing to produce a Canadian Refugee Board report dated 1 December 2015 on military conscription and exemption from military service in Ukraine. I was not prepared to adjourn the hearing again but, bearing in mind the issues arising in international protection cases, I gave permission to the appellant to file this document with any further submissions by 13

July 2017 with permission to the respondent to file any further representations in reply by 27 July 2017. The document has been filed and further written submissions have been received from both parties.

Further Submissions

24. Ms Norman submitted that the appellant was a “de facto” Ukrainian national as he had never lived outside Crimea in “mainland” Ukraine. Following the annexation of Crimea by Russia in 2014, he had not taken Russian nationality. He could not be returned to Crimea as he was not a Russian passport holder. He feared return to Ukraine on the basis that he was a Russian speaker, had never lived in mainland Ukraine, belonged to a minority religion, was against the Ukrainian government and feared mobilisation.
25. The appellant had entered the UK in November 2000 and had successive grants of leave as a student until December 2010 when his application as a Tier 4 student was rejected and an appeal dismissed. He had made strenuous efforts to regularise his status from 2011 and 2014. In March 2014 Russia annexed Crimea and in October 2014 he applied for asylum. His claim was sur place in that the situation in Ukraine had escalated since he had been in the UK. If conscripted, he would refuse to fight in the current conflict.
26. Ms Norman submitted that the appellant was eligible for conscription and that on this issue Professor Galeotti’s report should be preferred to the information set out in the respondent’s decision. If conscripted, so she argued, the conflict in Ukraine had now reached the stage that the Ukrainian military was committing human rights violations in the course of the conflict as documented by Amnesty International and the OHCHR. She referred to and relied on the of the New Zealand decision in AC (Ukraine). She submitted that, if the appellant had to perform military service, there was a real risk that it would involve acts, with which he may be associated, contrary to basic rules of human conduct as defined by international law: see Krotov v Secretary of State for the Home Department [2004] EWCA Civ 69 at [29 ff]. She supported this submission with references to the background information and in particular to the Amnesty International Report “Breaking Bodies: Torture and Summary Killings in Eastern Ukraine” (CB 149-182) and the U.S. State Department Report on Country Human Rights Practices for Ukraine, April 2016.
27. She accepted that following the country guidance in VB and Another (Ukraine) that the appellant may struggle to establish a real risk of imprisonment for draft evasion but she argued that he had established a real risk of detention at port having left Ukraine knowing that he was eligible for mobilisation but having then ignored the summons. The appellant’s Russian ethnicity, whilst not constituting an independent basis for asylum, was of considerable importance when assessing his political

views, his reasons for refusing to engage in anti-Russian military activity and the likely attitude of the authorities to those factors.

28. Ms Norman further submitted that the appellant should also succeed under article 8 grounds. It was accepted that he did not meet the requirements of Appendix FM as his partner had discretionary leave and not indefinite leave to remain but her disabilities meant that she was unusually dependent on him and would be unable to go to Ukraine due to her disabilities. The appellant was unable to get a Ukrainian passport and so he could not move to Belarus. In these circumstances, removal would be disproportionate and he should be granted leave in line with his partner.
29. Mr Melvin submitted that the appellant could not bring himself within the country guidance in VB and Another (Ukraine) and there was no evidence that the Ukrainian authorities were seeking him or would treat him as a deserter. The appellant had failed to show that he was at real risk of conscription in the light of the fact that he was now 37 years old. Even if he was conscripted and failed to serve, in all likelihood he would be punished by a fine. The COI policy summary on military service indicated that the upper age limit for compulsory military service was 27. In summary it was very unlikely that the appellant would face conscription.
30. He further submitted that there was insufficient evidence to support the proposition that anyone conscripted was at real risk of being associated with war crimes. Whilst the appellant might face some discrimination on account of his ethnicity, that would not amount to persecution. As far as his relationship with his partner was concerned, any application under the Rules would fail on the basis that she did not meet the eligibility requirements in E-LTRP.1.2. Following the expiry of her last student leave in January 2016 she was granted six months leave outside the Rules in order to obtain a CAS which according to her witness statement she was unable to do. There were no exceptional circumstances which would warrant consideration outside the Rules.

The report of Professor Galeotti

31. Professor Galeotti has set out his qualifications in [7] - [11] of his report (CB387-396). The main focus of his research since 1991 has been post-Soviet and transnational crime, policing and security. He has carried out research in Ukraine and other post-Soviet countries and across Europe and the USA. He is head of his department at Keele University and was the founder and director of the Organised Russian and Eurasian Crime Research Unit. He has also been a visiting professor at Charles University (Prague) and MGIMO (Moscow) and in 2016/2017 is a visiting fellow with the European Council on Foreign Relations. He is now a senior researcher at the Institute of International Relations, Prague and head of its Centre for European Security having until 2016 been clinical professor of global affairs at New York University. He has been seconded to the Foreign &

Commonwealth Office in an advisory capacity and has given evidence before the House of Commons Foreign Affairs Select Committee and advised the European Commission, the US House of Congress and the Canadian and Latvian Parliaments. He has travelled on numerous occasions to Ukraine since his first visit in 1991, most recently in December 2016, and has written extensively on it. He has maintained professional and personal links with police, officials of the judiciary, journalists, academics and others in and from Ukraine. I also note that he has been cited in the Home Office's current CIG Guidance Note, Version 2.0 of May 2016.

32. In the light of this background and taking into account his publications and articles identified at [11], I am satisfied that Professor Galeotti is well-qualified to give an expert opinion on the appellant's position. He was asked firstly whether the appellant would be eligible for conscription if returned to Ukraine. His conclusion is that the appellant is undoubtedly eligible for mobilisation as an able-bodied man within the age ranges with no grounds for exemption for conscientious objection. He notes that having abandoned conscription in 2013, it was reinstated by the Ukrainian authorities in 2014 following the Russian annexation of Crimea and subsequent incursion into Ukraine's south-eastern Donbass region. Initially, it was for young men of 18 to 25, then 20 to 27. The appellant did not do his national service before he left Ukraine in 2000 when it was still in effect and presumably was granted deferment on the basis of higher education, a standard basis for such deferment.
33. According to Professor Galeotti, a draft deferment is not the same as an exemption and the appellant would be considered eligible for service in the reserves as a junior officer in case of mobilisation. The appellant did not meet any of the exemptions and would be considered available for mobilisation. This was generally taken lightly as a theoretical rather than likely occurrence as such mobilisations had not happened until the outbreak of undeclared war with Russia in 2014. Since then the Ukrainian state had held successive mobilisation rounds which have extended beyond the usual draft pool and which would have covered the appellant's age group and circumstances. There have been seven such waves of mobilisation, initially only those with military training were chosen but the requirements became increasingly less stringent and by 2015 the appellant would have been considered eligible. The seventh wave in 2016 sought to impress another 20,000 - 25,000 troops up to the age of 47.
34. Professor Galeotti says that there was no retrospective amnesty for those who ought to have presented themselves to military commissariats (draft boards) and that it is possible that the appellant is already considered a draft evader but, even if not, he would be considered eligible for mobilisation on return. The right to conscientious objection is set out in the Ukrainian Constitution and the appellant would not be considered eligible on the basis of religious belief because he does not fall within the list of religious organisations whose doctrine prohibits the use of weapons.

35. Professor Galeotti then considered the likelihood, should the appellant refuse to comply with military drafting, that he would be forced to comply and by what means. It is his opinion that the appellant would face the option of complying or facing prosecution which could plausibly lead to a prison sentence of up to five years potentially in especially poor conditions. He confirms that some 380,000 young men reached conscription age in Ukraine every year of whom around 76,000 actually served. The majority either did not meet the medical standards of service or the minimum education requirements or else they were exempted on various grounds. A War Resisters' International Ukraine report quoted a Defence Ministry official to the effect that there were some 50,000 draft dodgers every year and that 48,624 were prosecuted over an eight year period, suggesting that each had actually a one in eight chance of being prosecuted. However, the government now takes an increasingly dim view of draft dodging. The undeclared war with Russia continues, stepping up arrests and prosecutions. He refers to the fact that in February 2015 the authorities arrested a Russian blogger, charging him with treason for issuing a call to boycott military mobilisation and he was then sentenced to three and a half years' imprisonment. As of August 2015, reportedly some 400 draft dodgers were already in prison.
36. So far as whether the appellant's mobilisation in Ukraine would carry a real risk of being compelled to engage in acts contrary to international law, Professor Galeotti says that it is possible, albeit unlikely. He notes that a Human Rights Watch Report has warned that government forces, pro-government paramilitaries and insurgents alike have acted in ways that violate international human rights law but this is relatively uncommon. However, that said, if the appellant did find himself in that situation he would face a real risk of serious punishment were he to refuse to carry out such orders.
37. Professor Galeotti then considered what other issues were relevant to the appeal and in this context it is his opinion that it is unlikely that a draft dodger could re-enter Ukraine without being detained or at least identified on arrival, especially one without a valid passport. Ukraine's land and sea airports have been developed to modern standards of entry and immigration control and he refers to country advice from the Australian Refugee Review Tribunal which has noted that "if a person has broken the law by evading the draft their return to Ukraine is likely to attract the attention of the authorities - particularly if they enter Ukraine through official channels". Professor Galeotti adds that this is all the more true of a Ukrainian without a valid passport.

The Country Guidance in VB and Another (Ukraine)

38. The country guidance in VB and Another (Ukraine), as summarised in the italicised head note, is as follows:

- “1. At the current time it is not reasonably likely that a draft evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings for that act, although if a draft evader did face prosecution proceedings the Criminal Code of Ukraine does provide, in articles 335, 336 and 409, for a prison sentence for such an offence. It would be a matter for any Tribunal to consider, in the light of developing evidence, whether there were aggravating matters which might lead to an imposition of an immediate custodial sentence, rather than a suspended sentence or the matter proceeding as an administrative offence and a fine being sought by a prosecutor.
2. There is a real risk of anyone being returned to Ukraine as a convicted criminal sentenced to a term of imprisonment in that country being detained on arrival, although anyone convicted in absentia would probably be entitled thereafter to a retrial in accordance with article 412 of the Criminal Procedure Code of Ukraine.
3. There is a real risk that the conditions of detention and imprisonment in Ukraine would subject a person returned to be detained or imprisoned to a breach of article 3 ECHR.”

The Decision in AC (Ukraine)

39. The appellant relies on New Zealand decision in AC (Ukraine). This concerned an ethnic Russian born in Ukraine when it was part of the Soviet Union, who claimed to be in fear of returning to Ukraine because he would be required to serve in the Ukrainian military which was committing war crimes against his own ethnic Russian people. After analysing the evidence and reminding itself that the standard of proof in refugee claims was one which did not require it to be satisfied that the appellant would be persecuted or that it was even probable or likely to happen, the Tribunal accepted that the applicant would either be forced to undertake military service in which there was a real chance of being compelled to participate in military action where the military engages in internationally condemned acts or his objection to such service would result in him being prosecuted and imprisoned for a number of years and, given the illegitimacy under international law of the nature of the military action in question, both would constitute “being persecuted” as understood in refugee law.

Country Background Information

40. The country background information submitted by the appellant is at CB149-296 and 397-404. The appellant relies in particular on the Amnesty Breaking Bodies: Torture and Summary Killings in Eastern Ukraine report (CB149-182), which records that the evidence overwhelmingly indicates that both the Ukrainian forces and pro-Kyiv militia on the one side and separatist forces on the other have committed the war crime of torture of people in their custody.
41. The U.S. State Department Report on Country Human Rights Practices for Ukraine published in April 2016 records as follows:

“The HRMMU reported a ‘persistent pattern’ of physical abuse and torture by government forces. Throughout the year the HRMMU and AI interviewed individuals who claimed to have been tortured, beaten, and subjected to mock executions during the course of the ‘antiterrorist operation.’ A December HRMMU report documented ‘recurrent allegations’ of mistreatment during arrest and interrogations by the SBU, including interviews with several individuals detained on suspicion of taking part in terrorist acts. SBU authorities beat them heavily, restrained them in painful poses for long periods, and subjected them to suffocation while in custody.”

The Human Rights Watch Report “You Don’t Exist” of July 2016 (CB 199-230) records that both the Ukrainian government authorities and Russia-backed separatists in eastern Ukraine have held civilians in prolonged arbitrary detention without any contact with the outside world, including their lawyers or families and that most of those detained suffered torture or other forms of ill-treatment, several being denied needed medical attention for the injuries they sustained in detention. This report documents arbitrary detention, enforced disappearances and torture by both Ukrainian forces and Russian-backed separatists.

The Country Policy and Information Note on Military Service

42. The respondent’s CPI note on military service April 2017 confirms at 5.4.1 that conscription was reinstated for males between the ages of 18 and 25 and that in January 2015 the upper limit was raised from 25 to 27. It also confirmed there have been various waves of mobilisation as set out in 5.2.2 – 5.2.7. In September 2016 a seventh wave of mobilisation began. Para 5.2.7 records that the Ukraine Interfax News Agency stated:

“According to the decree of the Cabinet of Ministers of Ukraine No. 684 dated September 22 [2016], which is released on the official website of the government, 7,908 people will be sent to the armed forces of Ukraine, 5,000 people to the National Guard and 1,000 people to the state special transport service out of the total number of conscripts. ... At the same time, army discharge of those who have served fixed term of time military service has started. A total number of those who must be released in October - December of 2016 is 8,315 people.”

43. The issue of draft evasion is dealt with at 9.2. At 9.2.5 the UNHCR said that in January 2015 an analysis of some of the cases conducted in August 2014 was reported to have shown that all persons found guilty received administrative fines, community service or suspended sentences but in September 2015 the UNHCR said that whilst conscription practices vary from region to region, the government is reported to have stepped up prosecution of those suspected of evading conscription and mobilisation, with reports of coercive measures being used in certain areas. A further report of September 2015 noted that according to statistics from the Ukrainian courts from 1 July 2014 to 1 July 2015 there were 661 criminal cases recorded against draft and mobilisation evaders whereas in November 2015 Global Research reported that “about 7,000 criminal

cases were opened against men who were eligible for the draft but evaded their mobilisation orders”.

Assessment of the Appellant's Claim

44. The first issue when considering the appellant's claim in relation to military service is whether he is eligible for conscription. It is clear that the upper age for conscription is now 27 but the fact that the appellant is now over the age of 27 does not mean that he will not be liable for mobilisation. As Professor Galeotti makes clear in [12] - [16] of his report, as the appellant did not do his national service before he left he was presumably granted a deferment on the basis of his higher education. The appellant has confirmed in his most recent statement at CB407 that his service was deferred on the basis that he would be eligible for service in the reserves in case of mobilisation. In any event, if his military service was not deferred the position would be that the appellant would have evaded the draft. I also accept that the appellant would have been eligible from 2015 for the sixth and seventh wave of mobilisation and I accept, as Professor Galeotti says, that it is possible that the appellant is already considered a draft evader but even if not, he would be eligible for mobilisation on return to Ukraine. The report from the CIRB dated 1 December 2015 submitted following the hearing provides some support for this view and is consistent with Professor Galeotti's opinion.
45. The evidence set out in the CPI note of April 2017 shows that the effect of the recent mobilisation waves has been limited. In the sixth wave in July - August 2015 the Ukrainian military managed to get just over 60% of the intended draftees as reported by the Defence Ministry and these included 8.5% volunteers. It is also recorded that the military complained that its officers often had problems with getting the summonses to potential draftees who moved to another address or simply refused to open their doors. Of those who did get their summons over half chose to ignore it and ran. The fact that there may be problems in enforcing mobilisation does not detract from the fact that the appellant would be eligible on return and I am therefore satisfied that there is a reasonable degree of likelihood that the appellant would be at risk of being mobilised.
46. It is clear that the appellant does not fall within any of the exemption categories or qualify for exemption on conscientious objection grounds. To the extent that the appellant sought to rely on being a follower of Keylontic Science, that claim was rejected by the First-tier Tribunal for reasons properly open to it and in any event, it does not fall within the list of recognised religious organisations recognised by the Ukrainian authorities as giving rise to a claim for conscientious objection.
47. It is argued on behalf of the appellant that mobilisation would bring a real risk that he would be required to engage in acts contrary to the basic rules of human conduct. I have been referred to Krotov v Secretary of State,

which confirms that prosecution or punishment for refusal to take part in military service and conflict which would involve acts, with which he may be associated, contrary to basic rules of human conduct as defined by international law would be persecutory. A similar provision appears in article 9(2)(e) of the Qualification Directive 2004/83/EC that “prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in article 12(2)” can amount to an act of persecution. There is certainly evidence in the background material that both sides in the current conflict in Ukraine have acted in breach of international law. Professor Galeotti says that it is “impossible, albeit unlikely” that the appellant would be engaged or associated with such activities. He says at [25]:

“In this context, Human Rights Watch has warned that government forces, pro-government paramilitaries and insurgents alike have acted in ways that violate international humanitarian law or the laws of war and may amount to war crimes especially by shelling populated areas. However, this is relatively uncommon.”

48. In his conclusions at [36] Professor Galeotti described the risk of the appellant being compelled to engage in acts contrary to international law as “unlikely, but not impossible”. I have taken into account the decision in AC (Ukraine) but, in the light of Professor Galeotti’s opinion, I am not satisfied that the evidence is such that the appellant is able to show that there is a real risk of being required to take part in or of being associated with such acts. On the issue generally of the consequences of being a draft evader, there is no sufficient basis in the evidence before me to justify departing from the country guidance in VB and Another (Ukraine) that a draft evader without any other extenuating circumstances is not reasonably likely to face imprisonment as opposed to a suspended sentence or being dealt with administratively by a fine.
49. However, it is further argued on behalf of the appellant that there is a real risk that he would be detained on arrival if returned to Ukraine. I accept that there is a reasonable degree of likelihood that when the appellant left Ukraine in 2000, he was granted a deferment of military service on the basis of higher education. At [14] of his report Professor Galeotti says that there is no retrospective amnesty for those who ought to have presented themselves to draft boards and that it is possible that the appellant is already considered a draft evader but, even if not, he would be considered eligible for mobilisation on return to Ukraine. He also confirms that in the past avoiding national service was a widespread problem but most draft evaders were not prosecuted but that situation has changed with the undeclared war on Russia and, as Professor Galeotti puts it at [22], the government now takes an increasingly dim view of draft dodging and as the undeclared war with Russia continues, is stepping up arrests and prosecutions.

50. He goes on to consider at [28] whether a draft dodger could re-enter Ukraine without being detained or at least identified on arrival and he cites the Australian Refugee Review Tribunal's view that, if a person has broken the law by evading the draft, their return to Ukraine is likely to attract the attention of the authorities - particularly if they enter through official channels, Professor Galeotti adding that this is all the more true of a Ukrainian without a valid passport. In his conclusions, he puts it more succinctly saying the appellant could not re-enter Ukraine without coming to the attention of the authorities, nor could he evade them through internal relocation as there is still a national registration system even though the old propyska system has been abolished.
51. In light of the current situation in Ukraine in relation to military service and in particular Professor Galeotti's evidence about the authorities stepping up arrests and prosecutions, I am satisfied that there is at least a reasonable degree of likelihood that the appellant would be at risk of being detained as a draft evader and the fact that he is of Russian ethnic origin and has strong views about the situation in Ukraine could only aggravate his position on return. There has been no challenge to the country guidance confirmed in VB and Another (Ukraine) that there is a real risk that the conditions of detention and imprisonment in Ukraine would subject a person detained or imprisoned to a breach of article 3.
52. In conclusion, whilst I am not satisfied that the appellant is able to show that there is a real risk of persecution for a Convention reason on return to Ukraine, I am satisfied that there is a real risk of detention in conditions which would breach article 3. In these circumstances, I need not deal with the claim under para 276ADE of the Rules or with the appeal on article 8 grounds.

Decision

53. The First-tier Tribunal erred in law and the decision has been set aside. I re-make the decision by dismissing the appeal on asylum grounds but allowing it under article 3. The anonymity order made by the First-tier Tribunal remains in force until further order

Signed

Date: 10 August 2017

H J E Latter

Deputy Upper Tribunal Judge Latter

