



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: PA/00296/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 20th June 2024

Before

UPPER TRIBUNAL JUDGE REEDS
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

VS (Ukraine)
(ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr J. Greer, Counsel, instructed by Batley Law Solicitors
For the Respondent: Mr J. Anderson, Counsel, instructed by the Government Legal Department

Heard at Phoenix House (Bradford) on 19 March 2024

DECISION AND REASONS

1. This is an appeal against a decision of the Secretary of State dated 7 December 2020 to refuse the appellant's fresh claim for asylum. The appeal was originally heard (and dismissed) by First-tier Tribunal Judge Moxon ("the judge"), by a decision promulgated on 15 June 2021. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").
2. By a decision dated 22 August 2022, Upper Tribunal Judge Reeds, sitting with Deputy Upper Tribunal Judge Alis, set the decision of the First-tier Tribunal aside, and directed that the decision be remade in this tribunal, acting under section

12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. A copy of the Panel's decision may be found in the **Annex** to this decision.

3. Following a number of case management hearings and other preliminary matters in 2022 and 2023, the matter resumed before us, sitting as a panel, on 18 March 2024.

Principal controversial issues

4. The appellant is a citizen of Ukraine. He was born in 1976. His case is that he is a reserve officer in the Ukrainian military, that he has been mobilised, and that he has not completed any of the compulsory military service in Ukraine that he is obliged to perform. He claimed asylum on the basis that if he were to return to Ukraine, he would be required to perform compulsory military service that would or might involve "acts contrary to the basic rules of human conduct", such is the conduct of the Ukrainian military and other branches of the state in the conflict with Russia. For that reason, he would defy (and on his case already has defied) the legal obligations to which he is subject to perform compulsory military service. He claims to have been tried in his absence for draft evasion, and to have been sentenced to a period of custody. He will have to serve that sentence upon his return, and, in any event, would face punishment for any continued refusal to engage in military service, which would be likely to include a period of imprisonment. He claims that those circumstances mean that he is a refugee within the meaning of the Refugee Convention.
5. On 8 December 2022, the Secretary of State granted humanitarian protection to the appellant and his family, valid for five years, in light of the war in Ukraine. There is therefore no present prospect of the appellant's removal. By a notice under section 104(4B) of the 2002 Act supported by a statement from a solicitor at Batley Law dated 3 April 2023, the appellant gave notice that he wished to pursue the appeal in so far as it was brought under section 84(1)(a) of the 2002 (removal of the appellant would breach the United Kingdom's obligations under the Refugee Convention). By a decision dated 25 May 2023, Upper Tribunal Judge Reeds granted an extension of time for such notice to be given. It follows that these proceedings remain pending and are now solely concerned with the lawfulness under the Refugee Convention for the appellant's prospective removal to Ukraine. The proceedings do not concern the general humanitarian situation or any prospective Article 3 ECHR breaches arising from the appellant's return, in light of the appellant's humanitarian protection status.
6. The principal controversial issues to be resolved in these proceedings have been agreed by the parties as follows:
 1. Whether military service by the appellant in Ukraine would or might involve acts which are contrary to the basic rules of human conduct?
 2. If the answer to issue (1) is "yes", whether the appellant is a refugee for that reason alone?
 3. If the answer to issue (2) is "no", whether:
 - a) the appellant, on return to Ukraine, would be subjected to prosecution for draft evasion?
 - b) if so, whether the appellant would receive any punishment following that prosecution, such as, fine, probation, suspended sentence or a custodial sentence?

- c) whether the prospect of that prosecution or punishment means that the appellant is a refugee?

Immigration history

7. The appellant entered the UK with his wife and daughter on 9 November 2014 and claimed asylum on the same day. The claim was refused in May 2015. The appellant appealed, and his appeal was dismissed by the First-tier Tribunal on 9 September 2015 (Judge Henderson). He made further submissions in May 2016 and August 2017 which were both refused. The latter were refused as a fresh claim with a right of appeal on 2 May 2018. The appellant's appeal against that decision was dismissed by the First-tier Tribunal on 25 June 2018 (Judge Hillis). On 16 September 2019, the appellant made a third set of further submissions which, following an application for permission to bring judicial review proceedings, were refused on 7 December 2020 in circumstances which attracted a right of appeal. It is that decision which the appellant challenges in these proceedings.

Factual background

8. The basis of the appellant's first two appeals before the First-tier Tribunal, and his fresh claim to the Secretary of State in September 2019, was that he had completed national service in Ukraine through attending the Donetsk Technical University, having specialised in artillery and radio. He later worked in civilian roles. In 2014, pro-Russian militia began to engage in a series of disruptive activities in the east of Ukraine, and the appellant feared that he would be conscripted into the army. He did not want to serve in the army, for such service would entail the commission of acts contrary to the basic rules of human conduct, committed by the Ukrainian forces on a deliberate and systematic basis. He fled Ukraine for the United Kingdom and claimed asylum.
9. In 2015, Judge Henderson found that there was a possibility that the appellant would be called up to serve in the Ukrainian military in the future, in view of his qualifications, but that there was no evidence that the then wave of mobilisation would have extended to men of the appellant's age, given the then upper age limit of 27.
10. By the time of the appellant's appeal before Judge Hillis on 7 June 2018, the upper age limit for mobilisation in Ukraine had been increased to 43. Judge Hillis accepted that the appellant was a military training graduate, and as a reserve officer then aged 41 he would be likely to be conscripted into the Ukrainian army for active service (para. 22). However, the judge found on the basis of *VB and Another (draft evaders and prison conditions) Ukraine CG* [2017] UKUT 00079 (IAC) that the prospect of imprisonment was minimal, and that there was no evidence to support the appellant's claims that he had been prosecuted and sentenced in his absence. The appellant's subjective fear did not amount to a well-founded fear of being persecuted, and there was nothing to suggest that the conditions of the appellant's prospective military service would engage the Refugee Convention.
11. The appellant's fresh claim in September 2019 was based on what he claimed were documents relating to his mobilisation, and trial in his absence, sent to his former home address in Ukraine. Judge Moxon found those documents to be reliable and accepted to the lower standard that a prosecution had been initiated against the appellant, although he noted (at para. 25) that the documents did not state that the appellant had been convicted and that no sentence against him was recorded. There were no factors in the appellant's case that would lead him

to be treated exceptionally and legislative developments in Ukraine did not place the appellant at an increased risk of serving a custodial sentence (para. 31).

12. The appellant's appeal against Judge Moxon's decision contended that the judge had failed to take into account certain aggravating features which would (i) expose him to the risk of an immediate custodial sentence in Ukraine upon his return, and (ii) mean that any military service that he would perform might involve acts contrary to the basic rules of human conduct. Those characteristics were primarily the length of his absence from Ukraine and his military background, training and profile. In challenging Judge Moxon's decision, Mr Greer submitted that those characteristics meant that, first, if the appellant were prosecuted, he would be more likely to receive a custodial sentence, and, secondly, that he would have the skills profile to engage in acts contrary to the basic rules of human conduct, in the event he were compelled to engage in military service.
13. The Panel allowed the appeal on the basis that the appellant's claimed aggravating features had not been addressed. The Panel reached the conclusion that the decision of Judge Moxon involved the making of an error of law on the basis that the appellant's claimed aggravating features had not been addressed.
14. While none of Judge Moxon's findings of fact relating to the appellant's prosecution in Ukraine were expressly preserved, there was no challenge to them and, for the reasons set out below, we adopt those findings as the starting point for our own findings of fact relating to the appellant.

The law

15. The applicable ground of appeal is that the removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention (section 84(1)(a), 2002 Act). The burden of proof is on the appellant to establish to the lower standard applicable to protection appeals (that is, real risk or reasonable likelihood) that his removal would be contrary to the Refugee Convention.
16. The law relating to refugee status and military service was recently summarised in *PK and OS (basic rules of human conduct) Ukraine CG* [2020] UKUT 314 (IAC). The relevant extracts of the headnote are as follows:
 - a. Where a person faces punishment for a refusal to perform military service that would or might involve acts contrary to the basic rules of human conduct, that is capable of amounting to 'being persecuted' on grounds of political opinion for the purposes of the Refugee Convention.
 - b. The term "acts contrary to the basic rules of human conduct" refers to the core of humanitarian norms generally accepted between nations as necessary and applicable to protect individuals in war or armed conflict and, in particular civilians, the wounded and prisoners of war. It includes, but is not limited to, the indicative examples listed in *Krotov v Secretary of State for the Home Department* [2004] EWCA Civ 69 at [30] to [36].
 - c. In order to engage the Refugee Convention, the conduct in question must be committed on a systematic basis, as the result of deliberate policy or official indifference to the widespread actions of a brutal military. In practice, the term conveys an elevated threshold.

[...]

f. The individual concerned must demonstrate that it is reasonably likely that their military service would involve the commission of acts contrary to the basic rules of human conduct, or that it is reasonably likely that, by the performance of their tasks, they would provide indispensable support to the preparation or execution of such acts.

[...]

i. Where a causal link exists between the likely military role of the conscript or mobilised reservist, the commission of or participation in acts contrary to the basic rules of human conduct, and the punishment to be imposed, punishment including a fine or a non-custodial sentence will be sufficient to amount to 'being persecuted' for the purposes of the Refugee Convention, provided it is more than negligible.

17. The parties agreed that the law as summarised in *PK and OS* was correct.

The hearing

18. The hearing to remake the decision of the First-tier Tribunal took place before us on 19 March 2024. The case had originally been listed to be heard over two days, in order to allow for oral evidence, including expert oral evidence called by the appellant. However, the hearing proceeded by way of submissions only. Mr Greer informed us that the appellant had chosen not to attend and wanted the hearing to proceed in his absence. He had not provided an updating witness statement following the earlier hearing before Judge Moxon. The appellant obtained an expert report from Professor William Bowring dated 19 August 2023, but he did not attend the hearing either. In those circumstances, we were content for the hearing to take place in the absence of the appellant, whose interests were fully represented by Mr Greer.

19. The parties prepared a joint bundle of documents. Mr Greer relied on his skeleton argument dated 18 February 2024; Mr Anderson relied on his skeleton argument dated 11 March 2024.

20. We reserved our decision.

Issue 1: whether military service by the appellant in Ukraine would or might involve acts which are contrary to the basic rules of human conduct?

21. To address this question, we will first consider the general background evidence relied upon by the appellant to demonstrate that the Ukrainian military engages in acts contrary to the basic rules of human conduct. To address this question we must address the developments post-dating the Russian invasion of Ukraine, determine the extent to which the country guidance findings of fact in *PK and OS* remain valid, and address the extent to which the present background materials to which we have been referred require a different approach. We will then address the extent to which, if at all, the appellant's prospective role in the military would be relevant to that question.

22. Naturally, we have considered the entirety of the background materials and other evidence to which we have been referred, in the round, to the lower standard.

23. While Mr Greer did not place particular reliance on Prof. Bowring's report, he did not seek to resile from it. We accept that Prof. Bowring is a respected expert in this field. His expertise was detailed at the outset of his report. He was the

expert in *VB (Ukraine)* and *PK and OS*. While Prof. Bowring's report in these proceedings defers to the Upper Tribunal to answer the questions posed by the agreed issues, we find that it provides a helpful (and unchallenged) overview of some of the major changes in the factual landscape that have happened since the last significant judicial determination of the appellant's appeal, and to that extent is helpful.

Appellant's submissions

24. Mr Greer relied on his skeleton argument. In submissions he highlighted three areas in which he contended that the Ukrainian authorities engage in acts contrary to the basic rules of human conduct: (i) the treatment of prisoners of war and perceived collaborators; (ii) the use of cluster munitions and landmines; and (iii) the prosecution for war crimes of Russian combatants in breach of the combatant immunity they enjoy under international humanitarian law.
25. We will not set out the entirety of Mr Greer's submissions by reference to each source but will instead select extracts sufficient accurately to convey an overall sense of the submissions Mr Greer sought to advance.

Treatment of prisoners of war and perceived collaborators

26. Mr Greer relied on the report of the Office of the High Commissioner for Human Rights ("OHCHR") for 1 August to 30 November 2023. He highlighted that it stated there were 13 documented cases of torture against prisoners of war and two cases of conflict-related sexual violence. Para. 73 of the report said that the both the Ukrainian and Russian authorities allowed videos of captured prisoners of war to be published on the internet. Mr Greer also relied extracts of the report concerning the approach of the Ukrainian prosecution authorities as demonstrating the Ukrainian State's overall defiance of international humanitarian law. Para. 71 of the August to November 2023 OHCHR report said that 92 Ukrainian court verdicts against Russian servicepersons and prisoners of war included 48 trials conducted *in absentia*, ten of which were for war crimes.
27. Mr Greer also took us to examples of the Ukrainian authorities prosecuting perceived collaborators with occupying forces, and bringing criminal proceedings for conduct that could, in principle, be lawfully performed under international humanitarian law, such as the distribution of social security payments administered by the occupying administration. This conduct, submitted Mr Greer, demonstrated that the findings reached in *PK and OS* about the overall attitude of the Ukrainian authorities to the rule of law and international humanitarian law remain valid. He submitted that there were widespread breaches of international humanitarian law coupled with official indifference to those breaches.
28. The February to July 2023 OHCHR report documented the continued practice of torture in detention. Twelve Russian prisoners of war said they had been tortured during interrogations. Unofficial internment premises were used by the Ukrainian authorities.
29. Mr Greer took us to other materials which recorded enforced disappearances and detentions, the detention of Russian civilian sailors, torture of those detained, and concerns surrounding the overall fairness of prosecutions. There have been concerns about the extra-judicial execution of perceived collaborators, and corresponding failures by the Ukrainian authorities to bring charges against those responsible, or conclude criminal proceedings, despite commitments to the contrary. On one occasion (as documented in the February to July 2022 OHCHR

report), of 142 interviews conducted with those in Ukrainian detention, 50 reported being tortured or mistreated. Others reported sexual mistreatment in detention. Mr Greer submitted that these factors, taken together, are sufficient to demonstrate that the Ukrainian authorities continue to engage in widespread and systemic acts contrary to the basic rules of human conduct.

Use of cluster munitions

30. Mr Greer submitted that the position concerning Ukraine's use of landmines and cluster munitions has changed since *PK and OS*. In *PK and OS*, the Upper Tribunal found (at paras 262 to 268) that it was not reasonably likely that the Ukrainian military engaged in acts contrary to the basic rules of human conduct on this account. Mr Greer highlighted extracts from the July 2022 report from the Office for Democratic Institutions and Human Rights ("ODIHR") *Interim Report on reported violations of international humanitarian law and international human rights law in Ukraine* which suggested that indiscriminate cluster munitions had been deployed by the Ukrainian military (see, e.g., para. 50). Other materials, including a Human Rights Watch report, painted a similar picture (see HRW report dated 7/6/23).

Prospect of prosecution

31. Paragraph 30 of Mr Greer's skeleton argument cited statistics from the Ukrainian judiciary for 2023 concerning the increased prospect of prosecution for draft evasion under Article 336 of the Ukrainian Criminal Code; 1,321 prosecutions resulted in 1,242 convictions. This was a significant increase on the findings in *PK and OS* at para. 279. Accordingly, if the appellant were prosecuted, there is a far greater chance now that he would be convicted than was the case previously, and that risk is sufficient to cross the "real risk" threshold applicable to protection proceedings.

Secretary of State's submissions

32. Mr Anderson submitted that the tragic reality of conflict is that there will be collateral damage, and that all parties to a conflict will, at some point, fail to adhere to the standards expected of them by international humanitarian law. However, he submitted, the evidence relied upon by Mr Greer did not get remotely close to demonstrating that the "elevated threshold" (*PK and OS*, headnote 1(c)) was met. When assessing the country materials it was necessary to look at the figures in the context of the period of time, and it was not in issue that the present conflict is much greater than that in issue in *PK and OS* thus the context is very different. Mere membership of armed forces which has breached international humanitarian law elsewhere does not establish that the required personal, material contribution by an appellant to the commission of acts contrary to the basic rules of human conduct would be met (see *PK and OS* at para. 61).

33. Mr Anderson also submitted that there is no evidence that the appellant would be required to serve as a military prosecutor if he were returned; not only does the evidence concerning Ukrainian prosecutions not demonstrate that the Ukrainian State has engaged in acts contrary to the basic rules of human conduct, but there is no evidence that this appellant would be involved in such activities upon his return in any event.

FINDINGS OF FACT

34. In summary and for the reasons set out below, we have reached findings of fact set out below, having considered the entirety of the evidence, in the round, to the

lower standard. These are not country guidance findings but represent the state of the evidence at the date of the hearing:

- a. The war in Ukraine is a ferocious conflict of a quite different nature to that considered in *PK and OS*. The scale of the conflict and the magnitude of the Ukrainian military has now eclipsed that which obtained at the time of *PK and OS* and provides very strong grounds supported by cogent evidence to depart from the primary findings of fact in *PK and OS*.
- b. The practice of taking conflict detainees in order to provide currency for prisoner exchanges is no longer a significant characteristic of the Ukrainian conduct of hostilities, in contrast to the prevailing practice prior to Russia's invasion of Ukraine.
- c. The findings about the conduct of the Ukrainian military reached in *PK and OS* are relevant as recent background context.
- d. There is no evidence of the Ukrainian military's widespread and systematic engagement of acts contrary to the basic rules of human conduct.
- e. There have been some breaches of international humanitarian law by Ukraine in the detention of Russian prisoners of war, but those breaches do not presently demonstrate that Ukraine engages in acts contrary to the basic rules of human conduct, on a systematic basis, or as the result of deliberate policy or official indifference.
- f. The evidence suggests that Ukraine seeks to treat conflict detainees consistently with international humanitarian law. There are internal accountability and redress mechanisms which have been engaged in relation to reports of abuse by Ukrainian officials. Progress has been slow but the fact that such processes exist is significant, and the lack of visible progress is not indicative of Ukraine's commission of acts contrary to the basic rules of human conduct on a widespread or systematic basis.
- g. There is no evidence that compulsory military service in Ukraine entails any form of participation in criminal prosecutions, or other involvement with the Office of the Prosecutor General. There is no evidence that it is reasonably likely that prosecutions are brought against members of the Russian military for conduct which attracts combatant immunity. The treatment of perceived collaborators with occupying forces does not engage the acts contrary to the basic rules of human conduct threshold, nor otherwise demonstrate a wholesale disregard for the rule of law by the Ukrainian authorities.
- h. Ukraine's targeting and kinetic military engagement is conducted in a manner that largely respects the principles of proportionality, distinction and precaution.
- i. The evidence in these proceedings demonstrates that a relatively small (bearing in mind the overall magnitude of the conflict) number of civilian casualties are caused by the Ukrainian military.
- j. There is only limited evidence that Ukraine has deployed anti-personnel mines and such evidence that there is demonstrates targeting of Russian military installations.

- k. Ukraine uses cluster munitions. The evidence does not demonstrate that it is reasonably likely that such munitions will be used in a manner contrary to the basic rules of human conduct.
- l. Overall, there is no evidence that the Ukrainian military engages in acts contrary to the basic rules of human conduct on a systematic basis, as the result of deliberate policy or official indifference

Departure from *PK and OS* findings of fact: developments since 24 February 2022

- 35. On 24 February 2022, Russia invaded Ukraine.
- 36. Prior to the invasion, the conflict in the country was focussed in the east and involved the Ukrainian military and militia, and pro-Russia ‘unflagged’ militia groups. All existing country guidance findings of fact concerning Ukraine address the pre-invasion conduct of the Ukrainian military and affiliated armed groups. That factual matrix has now changed significantly. As Prof. Bowring stated at para. 34 of his report (page 10):

“...the all-out Russian invasion of Ukraine which commenced on 24 [February] 2022 is, as I have indicated above, **a ferocious armed conflict of a quite different nature.**” (Emphasis added)

- 37. We have therefore reached our findings by reference to the position at the date of the hearing on 19 March 2024.
- 38. *PK and OS* found that the conflict-related detention activities conducted by the professional Ukrainian military and associated militia in the east of the country (the “ATO” zone; the Anti-Terrorist Operation zone) entailed the commission of acts contrary to the basic rules of human conduct. See paras 2(a) to (d) of the headnote:

a. Elements of the Ukrainian military engage in the unlawful capture and detention of civilians with no legal or military justification. The detention of some detainees will be justified by military necessity or otherwise permissible under international humanitarian law (‘IHL’), but a large number of detentions feature no such justification and are motivated by the need for ‘currency’ for prisoner exchanges with the armed groups.

b. There is systemic mistreatment of those detained by the Ukrainian military in the conflict in the ATO, which is in the east of the country. This involves torture and other conduct that is cruel, inhumane and degrading treatment contrary to Article 3 of the ECHR. Even where such detainees are eventually transferred into the judicial detention process, there is likely to be official indifference to the mistreatment they have received.

c. There is an attitude and atmosphere of impunity for those involved in mistreating detainees. No one has been brought to justice. Pro-Kyiv militia have been rewarded for their work by formal incorporation into the military. Lawyers are afraid of taking on cases due to the risk of retribution.

d. The systemic and widespread detention practices of the Ukrainian military and law enforcement officials involving torture and

Article 3 mistreatment amount to acts contrary to the basic rules of human conduct.”

39. *PK and OS* also found that forced conscripts or mobilised reservists are not sent to serve on the “contact line” in the ATO, and that it would not be reasonably likely that conscripts or mobilised reservists would play a part in that aspect of the conflict. Mr Greer submitted that the war provides the required “very strong grounds supported by cogent evidence” (see *SG (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 940 at para. 47) to justify not following that aspect of the country guidance. He submitted that the background materials now demonstrate that the findings in *PK and OS* concerning the detention-related acts contrary to the basic rules of human conduct remain applicable, but also provide a basis to depart from the conclusion that such conduct is limited to professional soldiers in the ATO. In his submission, all aspects of the Ukrainian military now engage in detention-based activities amounting to acts contrary to the basic rules of human conduct.
40. We find that there are very strong grounds supported by cogent evidence to depart from the findings of fact in *PK and OS*. There would be an air of unreality in seeking to extend and apply those findings of fact, reached in a significantly different factual context, to the present conflict. But we do not accept Mr Greer’s submission that some findings survive (namely, the commission of acts contrary to the basic rules of human conduct in the course of taking conflict detainees), while others do not (the restriction of such conduct to the professional military). It is necessary to determine the applicable factual matrix by returning to the primary evidence. We set out the reasons for reaching this conclusion below.
41. First, the conflict at the time of *PK and OS* involved the professional Ukrainian military and pro-Kyiv militia groups conducting targeted engagements with pro-Russia unflagged militia in the east of the country. *PK and OS* noted that respected background materials at the time described that dimension of the conflict as a “particular feature” (para. 130). The conflict was not at that stage “all-out” war. It involved (although was not limited to) light artillery exchanges, prisoner swaps, and militia-backed occupation of land in the east of the country, coupled with self-declared attempts to cede from the Ukrainian State by, for example, the Russia-backed “Donetsk People’s Republic” and the “Luhansk People’s Republic” (*PK and OS*, para. 113). The Ukrainian military was engaged in geographically-focussed attempts to resist incursions by unflagged militia. It approached its operations primarily within a counter-terrorism paradigm.
42. By contrast, the present conflict involves, as we have noted, a “ferocious conflict of a quite different nature” (Bowring, page 10), characterised by the exchange of heavy artillery by the opposing military forces of two sovereign states, and attempts to take – and re-take – large swathes of land in the east of the country. The conflict now bears the characteristics of a “conventional” war, if such a concept exists.
43. Secondly, prisoner exchanges were a significant feature of the pre-invasion conflict in Ukraine as a primary means of conducting hostilities. *PK and OS* explains (see paras 114, 133) that the second peace agreement between Ukraine and Russia, signed in Minsk in 2015, sanctioned prisoner exchanges between both sides to the conflict. In turn, the prospect of such exchanges incentivised both sides to the conflict to detain large numbers of prisoners, outside formal processes, often with no legal justification for such detentions, simply in order to provide currency for prisoner exchanges to take place. Prior to the present “all out” armed conflict, detentions and prisoner exchanges were a significant part of

the currency of the proxy conflict pre-dating the Russian invasion of Ukraine: see *PK and OS* at para. 133.

44. At the time of *PK and OS*, the actors on the Ukrainian side whose conduct was the focus of the country guidance findings were largely outside the official chains of command (albeit with official indifference) and were more likely to be lawless and violent towards their treatment of prisoners of war, although the regular Ukrainian military was still involved. That fuelled clandestine detention without authority or oversight (*PK and OS*, para. 133) by volunteer militia (para. 134), with detainees later handed to the SBU, the Security Service of Ukraine. By contrast, at present the Ukrainian military is fully mobilised (Bowering, para. 17), and the practice of taking conflict detainees in order to provide currency for prisoner exchanges is not a documented feature of the conflict to the extent it was previously. The focus of the Ukrainian military is repelling the invading Russian forces through heavy artillery fire.
45. Thirdly, at the time of *PK and OS*, there had been a downward trajectory in the Ukrainian authorities' use of torture against conflict detainees (para. 239). The practice remained prevalent and merited the Upper Tribunal's conclusion that Ukrainian military in the east of the country engaged in acts contrary to the basic rules of human conduct. In contrast, we set out our findings on this issue based on the contemporary materials, below.
46. Fourthly, the size of the Ukrainian military has increased significantly since the Russian invasion. The Home Office's *Response to an information request - Ukraine: Military service*, 13 October 2023, quotes at para. 2.1.2 statistics taken from a February 2023 source that following the invasion the size of the army has increased from 250,000 to over a million. At the time of *PK and OS*, the focus of the professional military's activities lay in the ATO zone, on the "contact line", within a counter-terrorism paradigm. Ukraine's current military focus, and its corresponding military capabilities, are significantly different now from the position as it obtained in *PK and OS*. There are now far more soldiers than there were at the time of *PK and OS*.
47. For those reasons, we conclude that the general country guidance findings in *PK and OS* cannot form the basis for our findings of fact in these proceedings. That is not to say that the findings in *PK and OS*, particularly in relation to the systemic commission of acts contrary to the basic rules of human conduct, whether by deliberate policy or official indifference, are of no relevance. They form part of the recent history and context of Ukraine's pre-February 2022 military activities. Just as there would be an air of unreality about extending the findings of *PK and OS* to the present conflict without modification, so too there would be an air of unreality were we to proceed as though the findings in *PK and OS* had never been reached.

Issue (1): insufficient evidence to demonstrate widespread and systemic acts contrary to the basic rules of human conduct

48. Even taking account of the recent history as documented in *PK and OS*, we do not accept that the evidence demonstrates the widespread and systemic engagement of acts contrary to the basic rules of human conduct on the part of the Ukrainian military. While we accept that the pre-February 2022 factual matrix is relevant to an extent, we do not accept Mr Greer's submissions that some of the country guidance findings of fact reached by *PK and OS* continue to apply, while others do not.

49. The scale of the conflict and the magnitude of the Ukrainian military has now eclipsed that which obtained at the time of *PK and OS*. There are around one million members of the Ukraine armed forces. We accept that the background materials demonstrate isolated examples of breaches of international humanitarian law, but do not accept Mr Greer's submissions that the required policy, system or official indifference to the widespread actions of a brutal military is present to merit reaching the findings we are invited to make in relation to the Ukrainian military as a whole. The Ukrainian military is engaged in a complex defensive exercise in response to an invasion by one of the world's largest armies. It is fighting on many fronts and has had to repel invading Russian forces from taking territory and has re-taken (and in some cases re-lost) territory occupied by enemy forces. Military activity of such a magnitude will, regrettably, entail breaches of international humanitarian law. But we find that the elevated threshold required to demonstrate the required policy, system or official indifference to the commission of acts contrary to the basic rules of human conduct is not met. See also our analysis of the *Report of the Independent International Commission of Enquiry on Ukraine*, dated 5 March 2024, at para. 70, below.

Treatment of prisoners of war

50. While the pre-February 2022 findings of *PK and OS* provide some background context preceding the Russian invasion, we consider the contemporary background materials demonstrate that Ukraine has taken positive steps to extend appropriate treatment to Russian prisoners of war. For example, para. 65 of the August to November 2023 OHCHR report (the most recent OHCHR report before us) states that UN officials enjoyed full access to the Lviv prisoner of war camp where Russian soldiers were detained. The report said that "previously noted improvements in the conditions of internment have been sustained." We accept that there were 13 reports of unspecified torture of prisoners of war during transit during the reporting period, and two cases of conflict-related sexual violence, albeit before the reporting period. There are other examples throughout the materials to which Mr Greer referred us.
51. While the examples of mistreatment of prisoners of war in Ukrainian detention are deeply regrettable, we accept Mr Anderson's submission that such instances do not meet the elevated threshold required pursuant to para. 1(c) of *PK and OS*. We do not consider that such incidents are sufficiently widespread or prevalent at the present time to merit the conclusion that the threshold has been met, bearing in mind the magnitude of the conflict, and the size of the Ukrainian military.
52. The overall picture established by the background materials to which we have been referred largely demonstrates the steps taken by the Ukrainian military to treat military detainees in a manner consistent with international humanitarian law. Where there has been mistreatment, the most recent reports record that redress mechanisms have been commenced. Such redress mechanisms entail internal oversight and redress, demonstrating that internal investigations themselves are subject to superintendence processes. The fact that such processes exist is significant. First, it demonstrates that redress mechanisms are in place and that investigations have been commenced. Secondly, it demonstrates that there are examples of internal oversight within Ukraine providing scrutiny of delays; para. 84 of the OHCHR August to November 2023 report describes a military prosecutor quashing an earlier decision to close an investigation into war crimes on the basis that the earlier decision had been unreasonable and unlawful. This demonstrates internal redress and

accountability. While delays are regrettable, the evidence relied upon by Mr Greer does not demonstrate that the elevated threshold has been met.

53. The fact that the OHCHR August to November 2023 report considers there to have been a “lack of visible progress” in internal oversight and accountability (para. 82, page 104) does not demonstrate that the elevated threshold has been met. Similarly, we do not consider that reports of exposing some prisoners of war to “public curiosity” (see para. 5 of the ODIHR report dated 12 December 2023) meets the elevated threshold. The prevalence of the practice is not clear, meaning that there is insufficient evidence to demonstrate the required policy or system on the part of the Ukrainian military in relation to its treatment of conflict detainees.

Prosecution for conduct attracting combatant immunity and of perceived collaborators

54. Mr Greer took us to what he submitted were examples of the Ukrainian authorities prosecuting Russian soldiers for engaging in hostilities, thereby violating the combatant immunity they enjoyed under international humanitarian law.
55. By way of a preliminary observation on this point, there is no evidence that compulsory military service in Ukraine entails any form of participation in criminal prosecutions, or other involvement with the Office of the Prosecutor General. None of the previous country guidance cases concerning military service in Ukraine raise the prospect of such involvement as being reasonably likely to form part of military service. We have not been taken to any materials in the evidence before us which demonstrates such a connection, and it has been no part of this appellant’s case that he would be required to perform functions as a prosecutor. There is simply no basis to conclude that this appellant would be involved in any activity of this nature, even assuming it reached the threshold of demonstrating acts contrary to the basic rules of human conduct.
56. Mr Greer’s submissions on this issue appeared to recognise the above limitation, and instead relied on the evidence outlined above to demonstrate that the Ukrainian authorities’ disregard for core principles of international humanitarian law demonstrated an overall disregard for the rule of law, and, therefore, a propensity to engage in acts contrary to the basic rules of human conduct.
57. Even assuming that Russian soldiers do enjoy combatant immunity for their activities in Ukraine (neither party was in a position at the hearing to assist us on that matter), we do not consider this submission to assist the appellant. At its highest, the evidence relied on by Mr Greer demonstrated that there were court verdicts against Russian servicepersons and prisoners of war (see, for example, para. 71 of the August to November 2023 OHCHR report), and that a proportion of those verdicts were for war crimes. There is no evidence concerning the nature of the other verdicts, still less evidence leading to the conclusion that it is reasonably likely that prosecutions were brought for engaging in conduct which attracted combatant immunity. We respectfully consider that it would be speculative to conclude otherwise. There could be any number of reasons why the Ukrainian authorities prosecuted members of the Russian military. It is also clear that there are large numbers of Russian prisoners of war who have *not* been prosecuted by Ukraine and have instead been detained as prisoners of war, thereby undermining this strand of the appellant’s case.
58. The appellant also relies on the Ukrainian authorities’ treatment of perceived collaborators with Russia as being indicative of Ukraine’s disregard for the law.

This is in reliance on materials including paras 76 to 78 of the August to November 2023 OHCHR report, which states that the Office of the Prosecutor General of Ukraine had commenced over 6,600 criminal proceedings related to collaboration activities, and over 2,000 related proceedings. Of 139 verdicts returned during the reporting period, OHCHR concluded that 36 per cent were for conduct that could, in principle, lawfully be performed under international humanitarian law.

59. We do not consider that such materials assist the appellant's case. Even if Ukraine had prosecuted members of the Russian military for offences attracting combatant immunity, or perceived collaborators for activity sanctioned by international humanitarian law, we doubt whether such conduct would, of itself and without more, be indicative of official policy or indifference in relation to the commission of acts contrary to the basic rules of human conduct, bearing in mind the indicative examples of such conduct given in *Krotov*, and the elevated threshold which we have outlined elsewhere.
60. In relation to the prosecution of perceived collaborators for activity that is, in principle, sanctioned by international humanitarian law, the OHCHR report referred to above states (para. 77) that in "most cases" the sanction imposed prohibited the convicted person from holding public office for up to a decade. In our judgment, assuming all such convictions are unsafe and have been imposed contrary to the requirements of international humanitarian law (something which is by no means clear), the imposition of such non-custodial sanctions cannot, without more, amount to the widespread and systematic engagement in acts contrary to the basic rules of human conduct.

Conduct of hostilities

61. As for the Ukrainian military's conduct of hostilities, the most recent evidence demonstrates that collateral damage in civilian areas is "on a much smaller scale" than the equivalent Russian conduct (para. 3 ODIHR report, and para. 25 at page 346, 12 December 2023). The observations in *PK and OS* (see para. 2(e) of the headnote) concerning the difficulties inherent to engaging a military target that is embedded within a civilian area and alongside civilian infrastructure apply with equal measure in the present context.
62. We consider that the background materials demonstrate that Ukraine's targeting and kinetic military engagement is conducted in a manner that largely respects the principles of proportionality, distinction and precaution. Tragically, armed conflict will result in civilian deaths, especially when defending a military invasion on the magnitude of that faced by Ukraine. The unimaginable horrors of war will be present even when the elevated threshold for the commission of acts contrary to the basic rules of human conduct on a systemic basis has not been met. Para. 25 of the 12 December 2023 ODIHR report states that Ukrainian shelling of civilian areas is on a "much smaller scale" than equivalent Russian activity. The number of civilian casualties highlighted in the report, and in other reports relied upon by Mr Greer, are relatively small. Against that background, we respectfully agree with Mr Anderson's reliance on para. 44 of *PK and OS* in relation to this issue:

"It may be difficult to extrapolate from an examination of the consequences of particular military action the conclusion that the attack entailed breaches of the principles of, for example, precaution, distinction and proportionality. Knowing *what* took place is distinct

from knowing *why* something took place, and with IHL, the *why* question is as relevant as the *what* question.” (Emphasis original)

63. The evidence in these proceedings demonstrates that a relatively small (bearing in mind the overall magnitude of the conflict) number of civilian casualties are caused by the Ukrainian military. Where there is evidence of civilian casualties, there is no evidence as to *why* the targets were engaged in the first place. Of course, such evidence could be difficult to obtain; but it is in that respect that the numbers of casualties, and apparent disproportionate or undistinguished targeting are relevant. This is not the widespread destruction of reams of ostensibly civilian targets, or large numbers of civilian deaths attributable to Ukraine, that have attracted the condemnation of the international community (*PK and OS*, para. 48, “condemnation from the international community... can assist with the evidential question as to whether the armed forces engaged in acts contrary to the basic rules of human conduct”), but rather reports of isolated and relatively low numbers of civilian deaths attributable to Ukrainian fire.
64. Mr Greer took us to a number of materials documenting Ukraine’s use of anti-personnel mines. *PK and OS* noted that in 2008 the Court of Appeal had documented what it termed an “emerging” (i.e. not settled) norm of international law against the use of anti-personnel mines: see para. 36 and the discussion of *BE (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 540. There was no evidence in *PK and OS* that that previously emerging norm had settled by 2020 (see para. 262), and we have not been taken to any evidence that, in 2024, the law has settled. However, Ukraine is a party to the Mine Ban Treaty, so the use of anti-personnel mines by Ukrainian forces may amount to a breach of its own international obligations. We do not consider that the breach by a State party of a treaty, in circumstances when international law concerning the issue has not settled, to amount to evidence of widespread and systemic acts contrary to the basic rules of human conduct, without more.
65. *PK and OS* held (para. 262) that the “continued indiscriminate use of anti-personnel and other mines in heavily populated or accessed civilian areas would be conduct capable of amounting to an act contrary to the basic rules of human conduct” (para. 262). We respectfully agree with those conclusions (as do, we understand, the parties). However, the reports to which we have been taken primarily concern collateral civilian damage arising from what appears to be the targeting of military installations. Mr Greer relied on a Human Rights Watch article dated 31 January 2023 which reported that anti-personnel mines had apparently been fired by Ukraine “into Russian-occupied areas *near Russian military facilities*” (page 930). The report continued (page 933):
- “the nine areas [where anti-personnel mines were reportedly fired] were all close to where Russian military forces were positioned at the time, suggesting they were the target.”
66. The report also quoted the Ukrainian defence ministry’s insistence that Ukraine complied with its international obligations (at p934).
67. In our judgment, when assessed to the lower standard, this evidence does suggest limited past use of anti-personnel mines by the Ukrainian military in order to target Russian military installations in occupied Ukraine on the occasions listed in the article. It does not demonstrate broader or widespread use of anti-personnel mines on a systematic basis, or as a result of deliberate policy. We have not been taken to evidence that such munitions are deployed by Ukraine elsewhere throughout the conflict on a wider or systematic basis.

68. Mr Greer also relied on a further Human Rights Watch article, dated 7 June 2023, which recorded that the United States government had authorised the transfer of additional cluster munitions to Ukraine. The Ukrainian defence minister is quoted as having said that Ukraine's use of cluster munitions would be subject to the following governing principles: they would be used only in Ukraine; they would not be used in Urban areas; they would only be used in rural settings where there is a concentration of Russian military; strict records of where the munitions were used would be kept; clearance activities would be conducted following de-occupation; and Ukraine would report on their use to its partners.
69. Cluster munitions are not prohibited by international humanitarian law, provided their use is consistent with its principles. We consider that Ukraine's commitments concerning the use of cluster munitions (and their subsequent decommissioning), demonstrates that Ukraine is aware of the need to comply with the applicable principles of international humanitarian law. The examples of civilian deaths caused by cluster munitions which he relied upon occurred primarily during the early phases of the conflict (see, for example, the ODIHR report dated 20 July 2022, at para. 50). That some civilian casualties have occurred as a result of the use of such munitions does not, without more, demonstrate that the elevated threshold for the commission of facts contrary to the basic rules of human conduct has been met.

Report of the Independent International Commission of Inquiry on Ukraine

70. The most recent evidence before us, served by the respondent shortly before the hearing (and admitted by us with no objection from Mr Greer) was from the Human Rights Council ("HRC") of the UN. We were provided with an 'advanced unedited version' of its *Report of the Independent International Commission of Enquiry on Ukraine*, dated 5 March 2024 (A/HRC/55/66). The report was Agenda item 4 of the 55th session, which was due to take place from 26 February to 5 April 2024. Mr Anderson told us that its status as "advance unedited" should not be taken to mean that its contents carry less weight; observe that a footnote to the report suggests that it had been submitted to the HRC conference services after the deadline for processing.
71. Paragraphs 98 and 99 of the report contrast reports of the conduct of Russian forces with those of Ukraine:
- "98. During its second mandate, the Commission has found further evidence showing that in the context of their full-scale invasion of Ukraine, Russian authorities have committed a wide array of violations of international human rights law and international humanitarian law, as well as war crimes. These include indiscriminate attacks affecting civilians and civilian objects, in violation of international humanitarian law, and the war crimes of torture, wilful killing, rape and sexual violence, and the transfer of children, which also violate international human rights. The evidence gathered has reinforced the Commission's previous findings that Russian authorities used torture in a widespread and systematic way.
99. The Commission documented a few cases in which Ukrainian authorities committed human rights violations against persons they accused of collaborating with Russian authorities."
72. The conclusion of the Commission is consistent with our own analysis of the conduct of Ukrainian forces; there are "a few cases" of reported human rights violations against perceived Russian collaborators (see paras 81 to 83 of the main

report). Such conduct must, of course, be condemned. But this finding is consistent with the analysis set out above which records declining numbers of such occurrences and internal accountability mechanisms for where it does.

Conclusions on the country materials

73. Drawing this analysis together, bearing in mind the overall magnitude of the conflict, we consider that the civilian casualties which are apparently as a result of Ukrainian artillery to which we have been referred do not reach the elevated threshold to merit the conclusion that the Ukrainian military engages in acts contrary to the basic rules of human conduct on a systematic basis, or as a result of deliberate policy or official indifference.

Principal controversial issues determined

74. Our conclusion on issue (1), therefore, is that there is no real risk that military service by the appellant in Ukraine would or might involve acts which are contrary to the basic rules of human conduct.

75. This conclusion applies taking into account the appellant's artillery and radio qualifications. Nothing in the materials to which we have been referred demonstrates that the appellant would be at an enhanced risk on account of those characteristics. If anything, those characteristics mean that he would be far less likely to be deployed to a role that involved close personal combat of the sort which characterised the *PK and OS* era practice of clandestine detentions and mistreatment. Even if the Ukrainian military *did* continue to engage in such activities, therefore, there is no evidence to suggest that this appellant would be at a real risk of being required to engage in them. *PK and OS* summarised the point at para. 61:

“...it must be reasonably likely that the individual concerned would make an essential material contribution (“provide indispensable support”) to the acts contrary to the basic rules of human conduct, if not involved in the commission of such acts directly. Mere membership of armed forces which, elsewhere and separately, engage in acts contrary to the rules of human conduct with which the conscript or mobilised reservist would not be involved would not be sufficient to meet this threshold.”

76. We find that the appellant's military service would be in one of the roles for which he is already qualified, namely as an artillery or radio specialist. Those roles are entirely distinct from the *PK and OS* findings concerning the Ukrainian army's detention-based activities.
77. The answer to question 1 is “no”. As Mr Anderson writes at para. 4(a) of his skeleton argument, this appeal therefore be dismissed.
78. In light of our answer to the first question, the question posed by question 2 falls away. So, too, do the questions posed by question 3, in light of the appellant's grant of humanitarian protection and our findings set out above.
79. In relation to question 3(a) (whether the appellant would be prosecuted for draft evasion), even if the appellant were to be prosecuted for draft evasion upon his return, that would not be capable of amounting to persecution for the purposes of the Refugee Convention. There is no suggestion that the appellant would be targeted for prosecution or a more severe penalty on account of one of the five reasons listed in Article 1A(2) of the Convention. The appellant's subjective belief that the Ukrainian military engages in acts contrary to the basic rules of human

conduct is not objectively well-founded. At the error of law stage Mr Greer had suggested that as a Russian speaker, the appellant would be more likely to face prosecution for draft evasion, but he did not press the point then, and did not renew that submission before us.

80. In light of our findings concerning question 1 and the fact the appellant holds humanitarian protection and now prosecutes this appeal solely on the basis of section 84(1)(a) (removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention), question 3(b) (whether the appellant would receive any punishment following prosecution) does not need to be determined. Any punishment the appellant would face for draft evasion would, in light of our findings concerning question 1, only be relevant to the issue of whether the appellant would face Article 3 mistreatment or serious harm. The appellant is not at risk of any such mistreatment in light of the humanitarian protection he currently enjoys.
81. For the same reasons, question 3(c) also falls away. There is no Convention nexus to any prospective mistreatment which the appellant would be at a hypothetical risk of receiving, were he to return.
82. This appeal is therefore dismissed. The removal of the appellant from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention.

Notice of decision

The decision of Judge Moxon involved the making of an error of law and is set aside.

We remake the decision, dismissing the appeal on Refugee Convention grounds under section 84(1)(a) of the Nationality, Immigration and Asylum Act 2002.

Stephen H Smith

**Judge of the Upper Tribunal
Immigration and Asylum Chamber**

6 June 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

ANNEX - ERROR OF LAW DECISION

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

Appeal Number: PA/00296/2021(V)

THE IMMIGRATION ACTS

**Heard at a remote hearing
On 27 July 2022**

**Determination
Promulgated**

.....

Before

**UPPER TRIBUNAL JUDGE REEDS
DEPUTY UPPER TRIBUNAL JUDGE ALIS**

Between

**V S
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Greer, Counsel instructed on behalf of the appellant.
For the Respondent: Ms Z. Young, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction:

- 1.** The appellant appeals, with permission, against the determination of the First-tier Tribunal (hereinafter referred to as the FTT) promulgated on 15 June 2021. By its decision, the FTT dismissed the appellant’s appeal against the Secretary of State’s decision dated 7 December 2020 to refuse his protection and human rights claim.
- 2.** The appeal concerns a protection claim and we therefore continue the anonymity direction made by the First-tier Tribunal Judge (hereinafter referred to as the FtTJ) which reads as follows: Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or his family members. This direction applies both to the

appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The background:

- 3.** The background history of the appellant is set out in the decision of the FtTJ at paragraphs [1 – 9] and in the decision letter. We summarise that history.
- 4.** The appellant is a citizen of Ukraine. He entered the UK with his wife and daughter on 9 November 2014 and claimed asylum upon arrival asserting fear of persecution on account of being a draft evader.
- 5.** The application was refused and his appeal against that decision was dismissed in a decision taken on 9 September 2015 by Judge Henderson, who did not accept that he was at risk of conscription and in any event found that he had not provided evidence that he would be subjected to inhumane or degrading treatment or punishment. Whilst his home area was in a war zone, Judge Henderson found that he could reasonably relocate.
- 6.** His appeal against a further application on similar grounds, was dismissed on 25 June 2018 by Judge Hillis. The judge accepted that the appellant had graduated from military training and was liable for conscription. He also accepted that failure to sign the mobilisation documents may result in him being prosecuted but that custodial sentences were extremely rare, and the usual sentence was a fine. He found that there were no aggravating factors that would lead to immediate imprisonment and accepted that upon return to Ukraine, the appellant will be required to sign mobilisation documents. In reaching his decision, Judge Hillis relied on the country guidance decision of *VB and others (draft evaders and prison conditions) Ukraine* CG [2017] UKUT 00079 (IAC).
- 7.** The appellant remained in the United Kingdom following that decision. He submitted further representations to the Secretary of State which were refused and proceedings for judicial review were commenced by the appellant acting in person. Permission was refused on the papers however on oral renewal with the appellant acting in person permission was granted and a consent order was signed on 2 September 2020 whereby the respondent agreed to reconsider her decision. This resulted in a further decision letter refusing his protection and human rights claim issued on 7 December 2020.
- 8.** The appeal came before the FtTJ on 9 June 2021. At paragraph 7 of his decision, the FtTJ set out the documents that the appellant relied upon which consisted of:
 - a copy of the demand of the X municipal military registration and enlistment office dated 14th of July 2017;
 - a copy of the report of an offence under the criminal code of Ukraine with an aim to register it in the united register of the pre-trial investigation, dated 3 August 2018 and;
 - a draft notice dated 16th of July 2018.
- 9.** The FtTJ also set out that the appellant relied upon a bundle dated 21 April 2021 and 2 articles which he had brought on the day of the hearing and was permitted to read out loud during the proceedings. Additionally it is said that the appellant

referenced various sources of objective evidence in addition to case law from New Zealand dated 2004.

10. The FtTJ set out his findings of fact from paragraphs [25] –[41].

11. They can be summarised as follows:

- (1)** the appellant’s account of his background in Ukraine had previously been found to be credible and in light of the fact the conscription of the Ukraine army was foreseeable in light of that background, the FtTJ was satisfied that it was plausible that he would have received draft papers and upon failing to surrender, documentation in relation to prosecution. The FtTJ therefore found that the document provided was reliable and accepted to the lower standard that a prosecution has been initiated against him. The documentation did not state that he been convicted and therefore no sentence had been outlined (at [25]).
- (2)** The FtTJ was satisfied that the appellant had a genuine objective and subjective fear of conscription and criminal prosecution (at [26])
- (3)** However the FtTJ found that the legal authorities “are clear that being a conscientious objector and being punished as such, does not in itself engage the Refugee Convention.”
- (4)** The FtTJ took into account the volume of supportive articles and objective evidence including the New Zealand case law but found that they almost exclusively predated the UT’s CG decision in PK and OS. The judge took into account the recent introduction of the Law of Ukraine No. 3553 but found that there was “no reliable objective evidence that this would result in the appellant been required to undertake certain acts during military service, or receive punishment for draft evasion, which had not been envisaged within the country guidance”. The FtTJ stated “whilst it states that there will be a new type of military service, it does not state that these types of service will require duties over and above those envisaged by the authorities. Similarly, whilst it says that it strengthens the criminal and administrative liability for evasion, it does not state that this will increase the potential of imprisonment and there is no objective evidence adduced to show that there has been an increase in such penalties.”

12. The FtTJ considered those factual findings in the light of the current CG decision and set out paragraph 287.

13. The FtTJ also took into account the Country Policy and Information Note – Ukraine: military service, dated December 2020 which outlined the objective evidence and concludes, at paragraph 2.4.17:

“in general, the conditions likely to be faced, the treatment likely to be received, by a person required to undertake compulsory military service would not be so harsh as to amount to persecution of serious harm and the onus will be on the person to show otherwise. Each case must be determined on the individual facts.”

14. In the light of that material the FtTJ reached the following conclusions:

- (1)** whilst the appellant has been required to surrender to military service, during such service he would not be required to engage in acts contrary to the basic rules of human contact and otherwise would not face treatment amounting to persecution. The FtTJ found that the evidence adduced by the appellant did not lead him to depart from the judgment in the country guidance or the objective evidence.
 - (2)** Whilst the FtTJ found the appellant may be prosecuted for draft evasion, he found that it was highly unlikely that he would be detained pending trial or that, if convicted, he would be sentenced to a period of imprisonment. The FtTJ expressly found “I do not find any factors in the appellant’s case which would lead him to be treated exceptionally. The new law relied upon does not provide evidence of an increased risk of the appellant receiving a custodial sentence” (at [31]).
 - (3)** The FtTJ rejected the appellant’s argument that he would be at risk of indiscriminate violence throughout Ukraine. The FtTJ found that the appellant had not adduced sufficient evidence to show that there was a risk of indiscriminate violence throughout Ukraine and that there were currently areas that were not within the war zone. The FtTJ took into account the appellant’s personal characteristics that he and his wife were educated and there were no health difficulties within the family. The FtTJ was satisfied that they would be able to obtain work in Ukraine and their daughter would be able to access education. Thus he was satisfied it would not be unduly harsh on them to relocate to one of the areas of Ukraine that was not experiencing combat and thus internal relocation would be reasonable (at [32]).
 - (4)** The FtTJ concluded that he did not accept that there would be a reasonable degree of likelihood that returning the appellant to Ukraine would expose him to a real risk of an act of persecution for the reasons set out in Regulation 6 of the Refugee or Person in need of International Protection (Qualification) Regulations 2006).
- 15.** As regards the article 8 claim, the FtTJ found that the appellant could not satisfy paragraph 276 ADE(1) of the Immigration Rules in relation to his length of residence and his daughter was not a “qualifying child” as she had been present in the UK for less than 7 years. The FtTJ found that the appellant could not meet paragraph 276 ADE(1) (vi) that there would be “very significant obstacles” to his integration into Ukraine as he lived there for the majority of his life, he was familiar with the language and culture there. His wife was educated and capable of obtaining work and supporting themselves in the absence of other family support. The appellant’s daughter remained young but there was no evidence adduced that she would be unable to access education in Ukraine. There were no assertions that he or his family had any health difficulties (at [36]).
- 16.** The FtTJ accepted that the appellant and his family had developed a private life in the United Kingdom as they had been present for just over 6 ½ years and that removal would interfere with that private life however family life would not be interfered with as the family would return to Ukraine together as none of them had leave to remain in the United Kingdom. The FtTJ considered the proportionality of the decision taking into account the public interest considerations set out in Section 117B of the 2002 Act. The FtTJ found that the

appellant demonstrated proficiency in English but had not adduced evidence that he was financially independent. Less weight was given to the private life developed in the United Kingdom given the appellant's immigration status throughout his presence. At [40] the FtT addressed the appellant's daughter's best interests as a primary consideration. He took into account that she was in education and was "excelling" and spoke English. The FtT stated that he worked on the basis that she had made friends and would prefer to remain in the United Kingdom however there was no asserted language barrier for her in Ukraine and she would return with both of her parents. She would have some familiarity with Ukrainian culture, having been brought up by Ukrainian parents. He found that in respect of education it was not at a critical stage and remained a few years away from the GCSEs. There were no reported medical conditions and she lived in the UK for less than 7 years. Having considered all the facts together and taking into account the best interests of the child concerned, the judge was satisfied that the removal of the appellant and his family members was proportionate. He therefore dismissed the appeal.

- 17.** The appellant sought permission to appeal that decision on 24th of June 2021.
- 18.** On the 4 August 2021 permission was granted by FtTJ Neville.
- 19.** Following the grant of permission, UTJ Pitt issued directions on 14 December 2021 for the appellant to provide a copy of the materials relied upon by the appellant before the FtT.
- 20.** Thus the appeal came before the Upper Tribunal on 16 February 2022 by way of a remote hearing. On that date the appellant was not represented. In light of the legal issues involved and the effects of the pandemic time was given for him to obtain legal representation. An adjournment was granted.
- 21.** The appellant secured representation and after further directions were issued by the Upper Tribunal, the matter was listed for an oral hearing. The hearing took place on 27 July 2022, by means of *Microsoft teams* following a request made to the Tribunal by Counsel for the appellant. There were no objections on behalf of the respondent and both parties agreed that all issues could be determined in a remote hearing.
- 22.** Mr Greer of Counsel and the appellant attended by way of video link. Ms Young, the Senior Presenting Officer was present in the court room along with the panel. We confirm that there were no issues regarding sound, and no substantial technical problems were encountered during the hearing, and we are satisfied that both the advocates were able to make their respective cases by their chosen means.
- 23.** Mr Greer, Counsel on behalf of the appellant in his oral submissions relied upon his written skeleton argument dated 8 July 2022.
- 24.** He submitted that his arguments focused on ground 2 which was headed "Failure to take into account material considerations/failure to resolve a dispute between the parties/inadequate reasoning: Aggravating factors."
- 25.** Mr Greer submitted that there was no dispute concerning the facts and that the appellant was a reservist who had been called up and who faced criminal charges for his failure to answer to his call up papers. The appellant argued that aggravating factors existed in his case such as to give rise to a real risk of him facing an immediate custodial sentence upon return to Ukraine.

- 26.** Reliance was placed on the CG decision of *VB & Anor (draft evaders and prison conditions : Ukraine)* (CG) [2017] UKUT 79 (IAC) (6 March 2017) where the Tribunal held under the heading *Country Guidance*:

87. *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 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.*

- 27.** Mr Greer submitted that in relation to the *developing evidence* referred to at [87], the Tribunal summarised Professor William Bowring's accepted evidence on the point between paragraphs [51] - [58]. On the point of aggravating matters, the Tribunal summarised Professor Bowling's evidence at [57] as follows:

57. *The evidence in the public domain is that very few draft evaders have, to date, been subject to any criminal proceedings let alone convicted of any criminal offence or sent to prison. However, no precise official figures are available on criminal penalties and there is nothing at all available about those convicted in absentia who are being retried. It is possible that sentencing might be more severe for these appellants due to their efforts to do everything possible to avoid call-up. If criminal proceedings were brought there is not a power under Article 69 of the Ukrainian criminal code for a judge to give a lesser sentence than the prison terms set out in Articles 335, 336 and 409 but it would be possible for that prison sentence to be suspended, and if a term is suspended there is a power to give probation/supervision. Professor Bowring is of the view that the very recent change of staff for the prosecutor and judiciary may possibly herald a harder line against draft evasion. He felt that despite the new bail provisions it was very likely indeed that these appellants would not automatically be granted bail due to their having absconded previously.*

- 28.** Under the heading *Discussion - Country Guidance* at [71] - [72]:

71. *It is possible that a new harder line judiciary and prosecutor might decide to make some examples of those evading service, as was done with the blogger, Ruslan Kotsaba, who posted a YouTube video demanding an end to fighting in Donbass and called on Ukrainian men to resist conscription, who faced a treason trial and was sentenced to three and a half years in prison for hindering the activities of the Ukrainian armed forces in July 2016. At this stage it is very hard to understand if there would be a profile for an "ordinary" draft-evader who would be more likely to receive a prison sentence: the one case which has featured*

in the news press (and the FCO letter) from Zaporizhzhya district was of a plumber in Kryvyi Rih, who was married with a child, who ignored four notices calling him up, and then said in court he was not joining the army. He received a two-year prison sentence with one-year probation, although FCO information is that he is yet to serve his sentence due to ill-health. It is possible, as Professor Bowring has argued, that doing more to avoid the call-up might lead to harsher sentencing as an aggravating circumstance, and that leaving Ukraine might be seen as such an aggravating circumstance, but it is still unclear when that would be in the context of criminal proceedings or when this would be in the context of administrative proceedings, and it would seem to us that there is a major factor of unlucky chance involved before any particular draft-evader finds himself identified for any proceedings at all.

72. *We conclude at present there is no real risk of an individual receiving a prison sentence for draft-evasion in Ukraine. However, the law provides for such proceedings and penalties and in at least one apparently unremarkable case, discussed in the paragraph above, there was a prosecution which led to a two-year prison sentence.*

- 29.** Mr Greer also referred us to the later CG decision of PK and OS (basic rules of human conduct) Ukraine CG [2020] UKUT 314 (IAC) (19 November 2020) and specifically relied upon paragraph [102] which reads as follows:

102. *While every case will be fact-specific, in the Ukraine context, in light of our findings below that conscripts or mobilised reservists are not sent to the front line, we consider there would have to be some special factor, perhaps due to the prior qualifications or military experience of the individual concerned, in order to merit a finding that the individual would engage in acts contrary to the basic rules of human conduct, were they to perform their military service. In turn, such a person would, if prosecuted, be more likely to receive punishment of a more severe nature than a fine or suspended sentence, as it is likely that such an individual would have some special characteristic, such as enhanced military skills, training or prior experience, which would amount to an aggravating feature: see VB, Headnote (1).*

- 30.** Mr Greer submitted that in the appellant's case that the following aggravating factors apply. Firstly, the length of time he had been absent from Ukraine. He had left the country to avoid military service and remained abroad for a lengthy period (6 years and 8 months by the date of the hearing before the FtTJ). This would be viewed as him doing everything possible to avoid call up. Conspicuously defying an order to enlist is recognised by the authorities as a potentially aggravating factor (VB at [57]).
- 31.** The second factor related to his position as a reservist. Mr Greer submitted that this puts the appellant in a different position to other conscripts. The appellant graduated from Donetsk state Technical University in 2000 with Military occupational speciality of commanding. He was awarded the rank of lieutenant (appellant's FTT Bundle, Page D10). This amounts to a prior

military qualification, military experience and enhanced military skill. Holding such characteristics is recognised as a potentially aggravating factor (see PK at [102]).

- 32.** Whilst his skeleton argument identified a third factor based on his place of residence and that he is a Russian speaker, Mr Greer indicated that this had not formed part of the appellant's case and that in the circumstances he did not rely upon this as an "aggravating factor."
- 33.** The thrust of Mr Greer's submissions was that the FtTJ was required to determine whether this particular appellant would be at risk if returned, taking into account all relevant facts. The failure to adequately determine this central issue amounts to legal error.
- 34.** He submitted that whilst the determination made a passing reference to the appellant's personal characteristics at paragraph [6], the decision gave no other consideration as to whether these matters had the potential to amount to aggravating factors. As a consequence, the informed reader can have no confidence that the FtTJ had these factors in mind when he reached a decision on the ultimate issue in the case.
- 35.** Mr Greer referred to the Respondent's Position statement at paragraph 5, where it was stated that the FtT made a finding at paragraph [31] that, "*I do not find any factors in the Appellant's case which would lead to him being treated exceptionally*". However, it was submitted that the decision is completely silent as to the extent to which the Appellant's personal characteristics, identified at [6], and above, may lead to the appellant's being treated exceptionally. Therefore Mr Greer submitted that this passage of the determination is inadequately reasoned and wrong in law.
- 36.** Ms Young on behalf of the respondent relied upon the rule 24 response dated 21/9/21 which sets out the following submissions:
 - (1)** In summary, the FtTJ directed himself appropriately.
 - (2)** When assessing the appellant's claim the FtTJ correctly looked at the nature of the role the appellant would have been expected to perform if he were conscripted (see paras 25 - 29). This reflects the guidance given in PK at headnote 1 (i) which requires a tribunal to assess whether an appellant would be required to undertake actions which go against the basic rules of human conduct and whether the appellant would be punished as a result.
 - (3)** Having already found that it is likely the appellant would have had a prosecution initiated, the FtTJ had to assess the evidence to determine what would be the likely outcome of such prosecution (VB at headnote 1) and link this to what the appellant would be expected to do in the army (PK at headnote 1 (i); headnote 3). The FtTJ found on the evidence that the appellant would not be required to engage in conduct contrary to basic human conduct. The FtTJ concluded that the evidence was insufficient to demonstrate that the appellant would receive a

custodial/suspended sentence given the country guidance and therefore did not depart from the guidance given. It was open to the judge given his finding that the evidence the appellant sought to rely on pre-dated *PK*. It will be argued that there is no error in the FtTJ's consideration of the appellant's claim.

- 37.** A second written response was provided on behalf of the respondent(not having had sight of the appellant's skeleton argument written by Mr Greer). It sets out the following submissions:
- (1)** The FtTJ gave clear and cogent consideration to the evidence before him at [25-28] and applied the CG appropriately at [29]. The key finding being [31], that even if identified as a draft evader by the authorities who may prosecute/or have prosecuted the Appellant he would not face treatment contrary amounting to persecution. The new law relied upon not providing evidence of increased risk of *custodial* sentences.
 - (2)** The findings on internal relocation and human rights were open to the FTTJ on the evidence applicable at the date of hearing [32-33; 34-41].
 - (3)** The grant makes reference to *Para 57 of 'VB & Anor'* with respect that was the evidence of an expert witness, the actual panel findings are highlighted in the headnotes of the CG case, with more detailed discussion between [65-86] with the actual conclusions being [87-89]. The FTTJ clearly found there were no '*aggravating factors*' (or *some special factor- see headnote (c) of 'PK & OS'*) in finding "*I do not find any factors in the Appellant's case which would lead him to being treated ,exceptionally"* [31].
- 38.** In her oral submissions, Ms Young, submitted that the appellant's case amounted to no more than a disagreement with the FtTJ's findings made in the decision and was an attempt to re-argue the case. She directed the our attention to paragraph [31] of the decision where the FtTJ had stated "I do not find any factors in the appellant's case which would lead to him being treated exceptionally. The new law relied upon does not provide evidence of an increased risk of the appellant receiving a custodial sentence." She submitted the finding was adequate and was reasoned and should not be read in isolation. She submitted the paragraph [31] was an adequate finding of fact based on the evidence that was placed before the tribunal and at [31] the FtTJ concluded that whilst the appellant might be prosecuted for draft evasion he would not be detained or subject to imprisonment and therefore the judge properly dealt with the point. At paragraph [26] the FtTJ acknowledged that he had a genuine objective fear of conscription and criminal prosecution and therefore the FtTJ had considered the relevant factors and had not simply stated at paragraph [31] that there were "no factors". The FtTJ therefore considered the factors relied upon and whilst not specifically highlighting them the consideration of them was there and a reasoned assessment was made at paragraph [31].
- 39.** Ms Young submitted that the position statement addressed the country guidance decision of *VB* at paragraph 5 and dealt with the application of the country guidance at paragraph 3 and she did not seek to add to that any further.
- 40.** Mr Greer did not seek to add anything further but relied upon the submissions already detailed above.

41. At the conclusion of the hearing we reserved our decision.

Discussion:

42. We begin by setting out the decisions relevant to our consideration of the issues.

VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC)

43. The factual circumstances in relation to each of the claimants are set out in the introductory paragraphs. VB, a citizen of Ukraine. He completed his military service during the period 1999 -2001 when he was a communications operator and driver. He suffered serious bullying and injury in the army. He entered the UK clandestinely on 5th January 2013, to join his wife who was already in the UK, and his daughter was born on 1st October 2013. Whilst in the UK call up papers were issued requiring his attendance with the military commissar in April 2014 and again in May 2014. VB claimed asylum on 19th May 2014; his claim was refused on 27th November 2014 and his appeal dismissed by the First-tier Tribunal on 9th November 2015. However, on 27th June 2016 the Upper Tribunal found that the First-tier Tribunal had erred in law and set aside their decision. The reasons for that decision are set out in Annex [B] of the decision.

44. The second appellant, IS, is a Ukrainian citizen born on 25th March 1986. He is married to a Ukrainian citizen who is presently in the UK, and has a daughter born in the UK on 9th February 2013. He entered the UK unlawfully in the back of a lorry with his wife in January 2013. He claimed asylum on 13th August 2015 on the basis of his having evaded military service, having been prosecuted and having been sentenced to two years' imprisonment on the 7th of July 2015 by the Ternopil City Court in accordance with Article 335 of the Criminal Code of Ukraine. IS's asylum claim was refused and his appeal against that decision was dismissed by the First-tier Tribunal, but an error of law was found in that decision by the Upper Tribunal, and it was set aside on 29th April 2016. The reasons for that decision are set out in Annex [C] of the decision.

45. It was agreed with the parties that decision provide Country Guidance on the following issues:

- (i) What are the likely punishments for draft evasion in Ukraine
- (ii) Are prison conditions for draft evaders in Ukraine contrary to Article 3 of ECHR, or has there been a significant and durable change in Ukraine such that the country guidance decision of PS (prison conditions; military service) CG [2006] UKAIT 00016 should no longer be followed?
- (iii) Are draft evaders who have been imprisoned under Article 336 of the Ukrainian criminal code required thereafter to undertake military service during periods of mobilisation? If so what are the conditions to which they will be exposed during such military service?

46. At the hearing however it was agreed by both parties and the Panel that it was only possible to address the first two issues with a view to providing country guidance and that there was simply insufficient country of origin material

available to make any informed guidance decision on the third issues as to whether those conscripted or mobilised into the Ukrainian army were at real risk of being required to commit acts contrary to international humanitarian law or whether they would be at real risk of persons such as the appellants being subject to "dedovshchina", which means violent bullying or initiation within the army, which might in turn put those recruited or mobilised at risk of serious harm.

47. Having set out a summary of the political and economic situation in Ukraine, an outline of the detention/imprisonment system of that country and the relevant sections of the penal code and administrative code, the tribunal referred to the background country material including that relevant to Ukrainian prisons and pre-trial detention. At paragraphs 51 – 58 the tribunal summarise the evidence of Professor Bowring who had provided expert reports before the tribunal and had given oral evidence. At [53] the tribunal set out his opinion that the documents relating to VB's conviction appeared to be genuine given its appearance and language and whilst the offence VB had been convicted of was one under article 409 of the criminal code the tribunal found that that was not necessarily incorrect given his past military service and his being a case of mobilisation although article 336 would also apply might be more appropriate. The Prof also accepted that the call-up papers must be hand-delivered according to material from the Canadian refugee Board.

48. At paragraphs 54-58 the Tribunal summarised his evidence as follows:

"54. Starting therefore from the premise that both appellants had been convicted of offences of failing to do military service in absentia Professor Bowring believes that it is highly likely that they would be arrested on return to Ukraine and held in a SIZO pending a retrial. They would be highly likely then, in his opinion, be entitled to be retried as Ukrainian law provides for this in almost all circumstances where an accused person has been convicted in absentia. This is in accordance with Article 412 of the Ukrainian Criminal Procedure Code. Further this would be the compatible with European Court of Human Rights law, (see Jones v UK Application No 30900/02 9th September 2003, [\[2003\] ECHR 713](#)) and would reflect the fact that the Ukrainian authorities do generally attempt to cooperate with the Council of Europe.

55. The appellants would, in Professor Bowring's opinion, be very likely to be detected as having been previously convicted of offences on entry to Ukraine as there are computerised systems at the airport. They would then be likely to be taken to a SIZO, with a significant possibility that this would be Kiev's SIZO No 1 as this is the largest one in Ukraine. This is the SIZO which featured in the Ombudsman's most recent critical report. A prosecutor would then have to decide what would happen next with the appellants, considering a possible retrial or other options to deal with them. Professor Bowring believes that there is therefore a real risk that the appellants would be subject to degrading treatment contrary to Article 3 ECHR if returned to Ukraine as they would be very likely to be in detention in a SIZO for a period of weeks or months whilst the prosecutor determined what should happen with the appellants.

56. Professor Bowring is unable to quantify the likelihood of the various options available to the prosecutor to dispose of the appellants

thereafter due to the lack of relevant evidence in the public domain. It is possible that there might not be a retrial if the appellants were to agree to be called-up (although on the evidence before us this is not something either would be likely to do), or they might be dealt with as administrative offenders - and thus in accordance with the Administrative Code only be liable to a fine. Professor Bowring noted that although the fines were low for administrative offences (a maximum of just over the minimum wage for a month) that Ukraine is a poor country, so these fines are not insignificant punishments to many citizens.

57. The evidence in the public domain is that very few draft evaders have, to date, been subject to any criminal proceedings let alone convicted of any criminal offence or sent to prison. However, no precise official figures are available on criminal penalties and there is nothing at all available about those convicted in absentia who are being retried. It is possible that sentencing might be more severe for these appellants due to their efforts to do everything possible to avoid call-up. If criminal proceedings were brought there is not a power under Article 69 of the Ukrainian criminal code for a judge to give a lesser sentence than the prison terms set out in Articles 335, 336 and 409 but it would be possible for that prison sentence to be suspended, and if a term is suspended there is a power to give probation/supervision. Professor Bowring is of the view that the very recent change of staff for the prosecutor and judiciary may possibly herald a harder line against draft evasion. He felt that despite the new bail provisions it was very likely indeed that these appellants would not automatically be granted bail due to their having absconded previously.

58. In relation to the issue of whether there had been a durable change in prison conditions in Ukraine warranting a departure from PS, Professor Bowring does not agree this is the case. He is clear that there have been real improvements regarding overcrowding and serious engagement with the EU and Council of Europe. For instance, there were six mini projects undertaken by the Ukrainian State Penitentiary Service with the Council of Europe and the EU, in the period 2015 to early 2016, to support prison reform by improving the rehabilitation of prisoners, examples being training prison staff in conflict free communication, improving preparation for release, training convicts to adopt a healthy lifestyle and improved systems for suicide prevention. So whilst there was an aspiration for positive change by the authorities the evidence of conditions in the 2014 CPT report, and the very recent evidence 2016 from the Ombudsman shows that significant overcrowding is still found in Kiev SIZO; and more broadly within the prison system (SIZOs and penal colonies) that abusive conditions (violence by staff who are often ex-military who treat prisoners as the enemy and poor physical conditions in prisons) continue to exist. He felt that Ukraine was not in a good position to make sustained durable improvements at the current time, despite some desire to do so, given it is a country at war and was starting from what is essentially an aging Soviet gulag system."

- 49.** The Tribunal set out its conclusions at paragraphs 65 – 86. The 1st issue as to what the likely punishments for avoiding military service were set out at [66 – 72]. Those conclusions are as follows:

“66. There is a stark contrast between the penalties provided in the law, which appear to be straight-forwardly long periods of imprisonment of between 2 and 5 years under the relevant parts of the Criminal Code at Articles 335, 336 and 409, or fines of varying severity under Article 210 of the Code of Administrative Offences; and the evidence of what is happening in practice in Ukraine, which is far less clear, but collectively does not lead us to conclude that statistically a prison sentence or even a fine is currently likely for the reasons set out below.

67. We lack a straightforward set of official statistics on the issue, but information obtained by the FCO, UNHCR and newspapers indicates only a couple of persons would appear to have actually been sent to prison for conscription or mobilisation evasion, with evidence of suspended sentences, probation or fines in only tens of other cases.

68. This appears firstly to be the case because the Ukrainian authorities have faced draft evasion, both from young, conscripted men and those summonsed for mobilisation, on a colossal scale and have not yet got anywhere near the stage of the process where they would be "sentencing" the majority of evaders. The overwhelming majority of the over 100,000 draft evaders would appear, from the information before us, to have faced to date no consequences for their actions at all. In some cases it would seem likely that this is because these people have left Ukraine as war refugees or otherwise, in others it seems likely that they are internally displaced, given that there are over a million internally displaced people in Ukraine; others may have avoided receiving their call up papers or simply ignored papers served.

69. It appears from the information before us that failure to answer call-up papers has historically been a major problem, and that problems with provision of kit, training and leadership in the army are likely to be the major issues with currently persuading citizens to serve in the army, rather than a lack of patriotism or support for the Ukrainian government in defending the state against Russian backed separatist aggression. It would also appear that the Ukrainian government has to date preferred to try to persuade parents to encourage their sons to cooperate with their conscription by reassuring them in political statements that they would not be sent to the front; and by agreeing generally to slightly better pay for those volunteering to join the army; and made attempts to regulate the borders and thus prevent people escaping, rather than by attempting to come down heavily on large numbers of evaders through criminal proceedings. It may well be that such a clampdown is something that they are not in a position to do, perhaps administratively or financially, and also in the sense of their not having the prison places to deal with such a large number of potential convicts. It would also perhaps not be in line with the Ukrainian government's intended future for the army as one of professional soldiers rather than coerced conscripts.

70. Of the less than 30,000 draft-evaders against whom some investigation or initial proceedings may have been instigated, according to the data before us, these steps would appear mostly to be at a very preliminary stage. The information about the tens of cases known to

have an outcome indicates that these are mostly dealt with by fines or suspended sentences.

71. It is possible that a new harder line judiciary and prosecutor might decide to make some examples of those evading service, as was done with the blogger, Ruslan Kotsaba, who posted a YouTube video demanding an end to fighting in Donbass and called on Ukrainian men to resist conscription, who faced a treason trial and was sentenced to three and a half years in prison for hindering the activities of the Ukrainian armed forces in July 2016. At this stage it is very hard to understand if there would be a profile for an "ordinary" draft-evader who would be more likely to receive a prison sentence: the one case which has featured in the news press (and the FCO letter) from Zaporizhzhya district was of a plumber in Kryvyi Rih, who was married with a child, who ignored four notices calling him up, and then said in court he was not joining the army. He received a two-year prison sentence with one-year probation, although FCO information is that he is yet to serve his sentence due to ill-health. It is possible, as Professor Bowring has argued, that doing more to avoid the call-up might lead to harsher sentencing as an aggravating circumstance, and that leaving Ukraine might be seen as such an aggravating circumstance, but it is still unclear when that would be in the context of criminal proceedings or when this would be in the context of administrative proceedings, and it would seem to us that there is a major factor of unlucky chance involved before any particular draft-evader finds himself identified for any proceedings at all.

72. We conclude at present there is no real risk of an individual receiving a prison sentence for draft-evasion in Ukraine. However, the law provides for such proceedings and penalties and in at least one apparently unremarkable case, discussed in the paragraph above, there was a prosecution which led to a two-year prison sentence."

50. The 2nd issue related to whether prison conditions for draft evaders in Ukraine are contrary to article 3 of the ECHR (see paragraphs 74 - 85). The tribunal noted that there was no difference in prison conditions for draft evaders than for other prisoners (at [74]) but having considered the relevant background material including the inspection reports of the CPT and the ombudsman and the evidence of Ukrainian authorities, the tribunal concluded at [82] that from all of the reports on prison conditions Ukraine the pre-trial facilities, particularly SIZO's, there is evidence that the required article 3 compliant standard of basic space is not being met. At [85] the tribunal concluded that there had been no significant change in prison conditions in Ukraine so as to mean that he would not be a breach of article 3 of the ECHR to return someone's detention in that country. The combined evidence of lack of space, poor material conditions, and lack of meaningful outer cell activity met the pre-trial detention in Ukraine poses a real risk of being inhuman and degrading treatment on return.

51. The conclusions given as country guidance are 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 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.*

52. The most recent country guidance decision is PK and OS (basic rules of human conduct) Ukraine CG [2020] UKUT 314 (IAC). The CG decision did reconsider issues decided in VB by reference to more updated expert evidence and other background material on the question of whether military service by the appellants would or might involve acts which are contrary to the basic rules of human conduct and the issue of prosecution for draft evasion. The decision also referred to updated evidence concerning the circumstances on arrival in Ukraine and the issue of computerised records. The agreed questions addressed were:

1. Whether military service by the appellants in Ukraine would or might involve acts which are contrary to the basic rules of human conduct?
2. If the answer to issue (1) is “yes”, whether the appellants, who are draft-evaders, are refugees for that reason alone?
3. If the answer to issue (2) is “no”, whether:
 - a) the appellants, on return to Ukraine, would be subjected to prosecution for draft evasion?
 - b) if so, whether the appellants would receive any punishment following that prosecution, such as, fine, probation, suspended sentence or a custodial sentence?
 - c) whether the prospect of that prosecution or punishment means that the appellants are refugees?

The head note to the decision is as follows:

1. Acts contrary to the basic rules of human conduct

a. Where a person faces punishment for a refusal to perform military service that would or might involve acts contrary to the basic rules of human conduct, that is capable of amounting to "being persecuted" on grounds of political opinion for the purposes of the Refugee Convention.

b. The term "acts contrary to the basic rules of human conduct" refers to the core of humanitarian norms generally accepted between nations as necessary and applicable to protect individuals in war or armed conflict and, in particular civilians, the wounded and prisoners of war. It includes, but is not limited to, the indicative examples listed in Krotov v Secretary of State for the Home Department [2004] EWCA Civ 69 at [30] to [36].

c. In order to engage the Refugee Convention, the conduct in question must be committed on a systematic basis, as the result of deliberate policy or official indifference to the widespread actions of a brutal military. In practice, the term conveys an elevated threshold.

d. It is not necessary for there to be specific international condemnation of the conflict in question for the conduct of the military to be categorised as engaging in acts contrary to the basic rules of human conduct. The international community of states as a whole has already condemned conduct which is contrary to the basic rules of human conduct through its recognition of the existence of international norms from which no derogation is possible, and through the adoption of international legal instruments recognising the prohibitions against such conduct.

e. However, where there is specific international condemnation of such acts, that is likely to provide an evidential basis for concluding that it is reasonably likely that the military force in question is engaging in acts contrary to the basic rules of human conduct on a widespread and systemic basis.

f. The individual concerned must demonstrate that it is reasonably likely that their military service would involve the commission of acts contrary to the basic rules of human conduct, or that it is reasonably likely that, by the performance of their tasks, they would provide indispensable support to the preparation or execution of such acts.

g. The political opinion of the person concerned must be to oppose the commission of acts contrary to the basic rules of human conduct. In practice, it is unlikely to be necessary for a person to adduce significant evidence that their political opinion is to oppose such conduct. It is only where there is evidence to the contrary that any real doubt is likely to arise, for example where there is evidence that the individual concerned has previously and voluntarily been responsible for acts contrary to the basic rules of human conduct. Such an individual may well fall foul of the exclusion clauses in the Refugee Convention in any event.

h. There must be no other way to avoid military service, for example through the individual concerned availing him or herself of a conscientious objector process.

i. Where a causal link exists between the likely military role of the conscript or mobilised reservist, the commission of or participation in acts contrary to the basic rules of human conduct, and the punishment to be imposed, punishment including a fine or a non-custodial sentence will be sufficient to amount to "being persecuted" for the purposes of the Refugee Convention, provided it is more than negligible.

53. 2. Country guidance: the conduct of the Ukrainian military in the conflict in the Anti-Terrorist Operation Zone ("the ATO")

a. Elements of the Ukrainian military engage in the unlawful capture and detention of civilians with no legal or military justification. The detention of some detainees will be justified by military necessity or otherwise permissible under international humanitarian law ("IHL"), but a large number of detentions feature no such justification and are motivated by the need for "currency" for prisoner exchanges with the armed groups.

b. There is systemic mistreatment of those detained by the Ukrainian military in the conflict in the ATO, which is in the east of the country. This involves torture and other conduct that is cruel, inhumane and degrading treatment contrary to Article 3 of the ECHR. Even where such detainees are eventually transferred into the judicial detention process, there is likely to be official indifference to the mistreatment they have received.

c. There is an attitude and atmosphere of impunity for those involved in mistreating detainees. No one has been brought to justice. Pro-Kyiv militia have been rewarded for their work by formal incorporation into the military. Lawyers are afraid of taking on cases due to the risk of retribution.

d. The systemic and widespread detention practices of the Ukrainian military and law enforcement officials involving torture and Article 3 mistreatment amount to acts contrary to the basic rules of human conduct.

e. The Ukrainian military has had to engage with armed groups that have embedded themselves in towns, residential areas, and civilian installations along the contact line. Legitimate military targets are often in close proximity to areas, buildings or people protected by IHL. The Ukrainian military's adherence to the principles of distinction, precaution and proportionality when engaging with such targets has been poor, despite that being a task which calls for surgical precision, especially in the context of a conflict in which legitimate military targets have been embedded within civilian areas, properties and installations. The widespread civilian loss of life and the extensive destruction of residential property which has occurred in the conflict will, in part, be attributable to poorly targeted and disproportionate attacks carried out by the Ukrainian military, but the evidence does not suggest that it is reasonably likely that there was targeting of civilians on a deliberate, systemic and widespread basis.

f. Water installations have been a particular and repeated target by Ukrainian armed forces, despite civilian maintenance and transport vehicles being clearly marked and there being an established practice of negotiating "windows of silence" on some occasions, and despite the protected status such installations enjoy under IHL. The background materials suggest a continued focus on water and similar civilian installations, but the evidence does not demonstrate that those targeting decisions were part of a policy and system. Often such installations serve both sides of the contact line, militating against the conclusion that government forces sought to deprive armed group territory of basic services through the prosecution of the strikes and attacks.

g. Most civilian casualties have been from indirect fire rather than specific targeting.

h. Civilian casualties continue to fall.

i. Damage to schools appears to have been collateral or accidental rather than intentional.

j. It is not clear whether Ukraine was responsible for laying any of the anti-personnel mines documented in the background materials. Mines are no longer deployed by either side, and Ukraine is committed to complying with its international legal obligations under the Ottawa Convention to clear mines that are in areas under its jurisdiction.

k. While regrettable, we do not consider the use of civilian property without payment or reparation, or looting, to amount to acts contrary to the basic rules of human conduct.

l. Ukraine has begun steps to establish a register of missing persons. It is not an act (or omission) contrary to the basic rules of human conduct not to have established that register with greater success or resolve.

m. There is no evidence that the Ukrainian military is engaged in the forced movement of civilians.

54. At part H; the tribunal gave country guidance on conscripts and mobilise reservists. It states as follows:

Part H: Country guidance: conscripts and mobilised reservists

287. In light of the above analysis, we give the following country guidance:

- a. The Ukrainian military relies upon professional soldiers in its conflict with Russia-backed armed groups in the east of the country, in the Anti-Terrorist Operation zone (“the ATO”). Forced conscripts or mobilised reservists are not sent to serve in the Anti-Terrorist Operation zone (“the ATO”) and play no part in the conflict there. It is not reasonably likely that conscripts or mobilised reservists would provide indirect support to the Ukrainian military effort in the ATO, for example through working in an arsenal.
- b. It remains the case that, 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. The guidance given by VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 79 (IAC) remains in force.
- c. Although the Ukrainian criminal code provides at Articles 335 and 336 respectively for sentences of imprisonment for conscripts and reservists who have unlawfully avoided military service, absent some special factor, it is highly unlikely that a person convicted of such an offence will be sentenced to a period of imprisonment.
- d. It is not reasonably likely that conscripts and mobilised reservists who have avoided military service would be identified as such at the border. Where a person has been convicted and sentenced *in absentia*, the guidance given in VB concerning their likely treatment at the border remains applicable.

- e. It is possible to defer military service as a conscript on grounds of ill health, under Article 14 of the 1992 law, or on one of the bases set out in Article 17 of the 1992 law. Whether those exceptions would be available as a fact-specific question.
- f. There is no evidence that it is reasonably likely that the ID card system introduced in 2016 will lead to an increased risk in a draft evader or mobilised reservist being prosecuted.
- g. It is highly unlikely that a draft evader would be detained pending trial at the border, given that the enforcement focus is on fines, rather than custody.

- 55.** Earlier in this decision we have set out the submissions made by Mr Greer on behalf of the appellant. In essence, it is submitted that the FtTJ failed to consider whether there were “aggravating matters” or any “special factors” personal to the appellant which might either lead to an imposition of an immediate custodial sentence (see VB at [87]) or may lead to the appellant being required to engage in acts contrary to the basic rules of human conduct (see PK and OS at [102]).
- 56.** The particular factual circumstances or “aggravating matters” have been distilled into 3 issues, firstly the length of time that the appellant has been absent from Ukraine and how the action taken by him may be perceived by the Ukrainian authorities. Secondly, the appellant’s background and profile and any special skills that he may have. The third matter related to the appellant’s origin in Ukraine and being a Russian speaker. However, Mr Greer properly accepted that the third issue was not one that was expressly raised before the FtTJ.
- 57.** Thus it is submitted that in reaching his analysis on the issues the FtTJ failed to take into account all the factors relevant to the appellant’s particular circumstances and that the assessment at [31] provided insufficient reasoning.
- 58.** We have considered with care the submissions made in the context of the FtTJ’s decision and the evidence before the FtT.
- 59.** The appellant’s account of his background in Ukraine had previously been found to be credible. It is important to set out those previous findings made by Judge Hillis. He records that he was provided with evidence from the appellant in the form of academic and military qualification documents (at [21]). Judge Hillis appeared to accept the content of those documents and set out that the appellant had shown to the lower standard required that he was “a graduate from the Ukraine military training camp.” As regards his profile, at [22] the judge considered the background material that those who were up to 43 years of age and completed full military training course of the reserve officers programme and had graduated from the reserve officers training department may be called up. The judge therefore found that the appellant was “a graduate of the military training programme” who “ came within the terms of the reserve officers liable to be conscripted into the Ukrainian army for active service. “ In addition the judge accepted that he had been served with mobilisation documents at his last address however he had not been prosecuted or sentenced in absentia.
- 60.** In terms of risk at paragraph [27] Judge Hillis stated that he accepted that the “appellant’s qualifications make him an attractive prospect for mobilisation and that he had been absent from his country of origin since 9 November 2014” but concluded that there were no aggravating features beyond his absence from Ukraine which on the background evidence and considering VB did not show that he faced a real risk of immediate imprisonment on removal to Ukraine.

- 61.** Having read the decision we are satisfied that Judge Hillis accepted the documentary evidence provided by the appellant concerning his previous background, qualifications and training in Ukraine.
- 62.** That decision was promulgated in June 2018. According to the immigration history the appellant provided further submissions including fresh evidence to the respondent post decision.
- 63.** When the appeal came before the FtT in June 2021, the FtT applied the well-known principles in Devaseelan (at [22]) and at [25] proceeded from the starting point that the appellant's account of his background in Ukraine had previously been found to be credible. The FtT did not set out in his findings of fact what that background was beyond a reference made at paragraph [6] that he was a "reserve officer who graduated from reserve officer training but did not complete his military service".
- 64.** The FtT found that his conscription to the Ukraine army was foreseeable in the light of his background and further found it was plausible that he would have received draft papers and upon failing to surrender, documentation in relation to prosecution.
- 65.** In terms of the fresh evidence that had not been before Judge Hillis and which the FtT had summarised at paragraph [7], the FtT accepted that the documents adduced by the appellant were reliable and thus accepted that a prosecution had been initiated against the appellant. However he observed that the documents did not state that he had been convicted and therefore no sentence had been outlined.
- 66.** The FtT then set out his analysis thereafter at paragraphs [28]-[31] taking into account the country guidance decision of PK and OS which had been promulgated after the decision of FtT Hillis in 2018.
- 67.** Whilst the FtT accepted that the appellant had a genuine and subjective fear of conscription and criminal prosecution, at paragraph [28] the FtT set out that he did not accept the evidence which had been provided by the appellant, which included evidence relating to the new Law of Ukraine No. 3553 and the other evidence in the form of articles, objective evidence and New Zealand case law, that this would result in the appellant being required to undertake certain acts during military service, or receive punishment for draft evasion that had not been envisaged within the country guidance. The FtT expressly considered the recent introduction of Law of Ukraine No. 3553 but concluded it did not state that "the types of service would require duties over and above those envisaged by the authorities" nor that its stated aim of strengthening the criminal and administrative liability for invasion would increase the potential of imprisonment.
- 68.** Having set out the CG decision in part at paragraph [29] and a short extract from the CPIN -Ukraine: military service, dated 2020, the FtT set out his concluding paragraph on these issues at [31] as follows:

"31. In making findings of fact, I have reminded myself of the low standard of proof to be adopted. I find as a fact that, whilst the appellant has been required to surrender to military service, during such service he would not be required to engage in acts contrary to the basic rules of human conduct and otherwise would not face treatment amounting to persecution. The evidence adduced by the appellant does not lead me to depart from the judgement in the country guidance or the objective evidence outlined above. Whilst the appellant may be prosecuted for draft

evasion, it is highly unlikely that he would be detained pending trial all that, if convicted, he will be sentenced to a period of imprisonment. I do not find any factors in the appellant's case which would lead him to being treated exceptionally. The new law relied upon does not provide evidence of an increased risk of the appellant receiving a custodial sentence."

- 69.** Having considered that analysis in the light of the submissions made and on the evidence before the FtTJ including the evidence provided for the judicial review proceedings we are satisfied that the FtTJ erred in law by failing to take into account material evidence when applying the CG decisions and undertaking the required factual analysis.
- 70.** We will set out our reasons for reaching that conclusion.
- 71.** The FtTJ plainly considered the evidence which he described as "adduced by the appellant" which he considered did not lead him to depart from the CG decision as set out at paragraph [28]. That evidence consisted of case law from New Zealand, extracts of articles and objective evidence described as an "admirable volume of supportive articles objective evidence" and principally the evidence relating to the recent introduction of Law of Ukraine No. 3553. We find no error in the findings reached by the judge on that evidence. Mr Greer did not seek to challenge that assessment. However that was not the only evidence adduced by the appellant which was potentially relevant to the 2 issues identified of whether the appellant would be required to undertake certain acts during military service or receive punishment for draft evasion.
- 72.** In the further submissions that ultimately led to the judicial review proceedings, the appellant referred to his military background training and profile. Whilst Mr Greer did not refer us to that particular document, the claim form at C22 was in the bundle of documents before the FtT. This set out the evidence he sought to rely upon. It expressly stated "I am in danger of being called up/mobilised into the Ukraine army. I have a specialism in weapons and artillery." Later on in that document he sets out that he undertook a qualification at university and the military Department 3 years specialising in artillery and radio. Reference is made to his asylum interview question 9. Reference was further made to being asked further details of the type of weapons and artillery that he studied and that he had attempted to provide this information to the best of his ability. Reference was also made to him being a Ukrainian reserve officer who graduated from reserve officer institutions and had not served previously to begin military service. Further reference was made to his degree from University in the field of electronics and that part of that exam was "military training." The appellant also sets out "as it was set out in my Ukrainian certificate in lieu of military ID card of reserve officer also translated from Ukrainian into English I was awarded with military rank of lieutenant by the Ministry of Defence of Ukraine after military training at an educational institution."
- 73.** The appellant also relied upon the new documents demonstrating that he had failed to comply with military conscription papers and had been referred to the local enlistment office and that he would be prosecuted and punished on return or if complied would be forced to commit acts in breach of international humanitarian law.
- 74.** Those issues were central to the appellant's claim as recognised in the grant of permission to apply for judicial review (see order made by UTJ Keith at B1-3), as demonstrated by the reference at subparagraph (4) in the context of whether the

respondent had erred in law “noting his particular liability to conscription as an artillery/radio specialist who graduated from a reservist officer Academy.”

- 75.** With that in mind, we are satisfied that the reference to the evidence adduced by the appellant plainly referred to the evidence described at paragraph [28] and not the evidence relating to his particular background and profile. Thus when the judge set out his conclusion at [31] “I do not find any factors in the appellant’s case which would lead him to being treated exceptionally” the FtTJ had not taken into account that evidence which was relevant material evidence.
- 76.** Whilst the FtTJ referred to the CG decision at paragraph [29] and set out head note ((c) which referred to “absent some special factor, it is highly unlikely that a person convicted of such an offence to be sentenced to a period of imprisonment”, one of the factors expressly identified related to the appellant’s particular military background and asserted expertise.
- 77.** Notwithstanding the submission made by Ms Young, we do not find that it is possible to read into paragraph 31 that the FtTJ had taken into account the appellant’s stated profile and background. Given the acceptance of the appellant’s background based on the documents provided before Judge Hillis and the FtTJ’s reference to that, it was incumbent on the judge to set out what the relevant factors were and to give reasons as to why, if that were the case, they would not lead to the appellant being treated exceptionally.
- 78.** The factors also included the appellant’s general background but also the length of time that he had been absent from Ukraine. Whilst Judge Hillis did not find that the length of absence fell within an “aggravating matter” that was in 2018. Further time had elapsed, and new evidence had been provided from the authorities which the FtTJ had accepted.
- 79.** No factual findings or any assessment was undertaken regarding the length of absence and whether on the particular factual circumstances they were such to be considered “aggravating.”
- 80.** The CG decision of *VB & Anor (draft evaders and prison conditions : Ukraine) (CG) [2017] UKUT 79 (IAC)* reads as follows:
- 87. 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 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.*
- 81.** Mr Greer submitted that in relation to the *developing evidence* referred to at [87], the Tribunal had summarised Professor William Bowering’s accepted evidence on the point between paragraphs [51] – [58]. On the point of aggravating matters, the Tribunal summarised Professor Bowering’s evidence at [57] as follows:

57. The evidence in the public domain is that very few draft evaders have, to date, been subject to any criminal proceedings let alone

convicted of any criminal offence or sent to prison. However, no precise official figures are available on criminal penalties and there is nothing at all available about those convicted in absentia who are being retried. It is possible that sentencing might be more severe for these appellants due to their efforts to do everything possible to avoid call-up. If criminal proceedings were brought there is not a power under Article 69 of the Ukrainian criminal code for a judge to give a lesser sentence than the prison terms set out in Articles 335, 336 and 409 but it would be possible for that prison sentence to be suspended, and if a term is suspended there is a power to give probation/supervision. Professor Bowring is of the view that the very recent change of staff for the prosecutor and judiciary may possibly herald a harder line against draft evasion. He felt that despite the new bail provisions it was very likely indeed that these appellants would not automatically be granted bail due to their having absconded previously.

- 82.** The tribunal identified from Prof Bowring's evidence that sentencing might be more severe for the appellants due to their efforts to do everything possible to avoid call-up and therefore length of residence outside Ukraine and his conduct were relevant factors.
- 83.** We were also referred to paragraph 102 of PK and OS by Mr Greer although we consider that that should be read alongside the earlier paragraphs and particularly paragraph 101. However reference is made to each case as "case specific" and while the tribunal found that mobilised reservists were not sent to the front line the tribunal set out that there would have to be "*some special factor, perhaps due to the prior qualifications or military experience of the individual concerned, in order to merit a finding that the individual would engage in acts contrary to the basic rules of human conduct, were they to perform their military service. In turn, such a person would, if prosecuted, be more likely to receive punishment of a more severe nature than a fine or suspended sentence, as it is likely that such an individual would have some special characteristic, such as enhanced military skills, training or prior experience, which would amount to an aggravating feature: see VB, Headnote (1).*"
- 84.** We are therefore satisfied that on a reading of paragraph 31 even when read with the earlier paragraphs, the FtTJ did not engage with the case specific circumstances or what were described by Mr Greer as "aggravating matters" identified by the appellant. We observe that it may not have been entirely clear from the large number of documents and the written submissions that he set out when acting as a litigant in person bearing in mind this is a difficult and complex legal area. However we are satisfied that the FtTJ did not identify what the factors were, aggravating or otherwise and gave no reasons for reaching the conclusion that there were no such factors.
- 85.** It may have been that if the judge had considered the appellant's evidence as to his past military background that he may have concluded that it would not place him at any enhanced risk when considering the 2 issues identified. Furthermore the judge might have considered that the profile of the appellants in the CG decisions could have been distinguished when undertaking an assessment of whether this appellant's actions were of the type to demonstrate that he had actually sought to avoid call-up, but it is not possible to say how the FtTJ would have concluded on those issues in the light of the lack of analysis upon them.
- 86.** We are therefore satisfied that the decision of the FtTJ involved the making of an error on a point of law and we set aside the decision. Having done so we consider

that the remaking of the decision should remain with the Upper Tribunal. There have been significant changes in Ukraine following the conflict and which postdates the FtTJ's decision. It is right to note that the respondent has stated in her response each case will be judged on its own merits against the known country information at the time of decision. The appeal will therefore be listed for a resumed hearing before the Upper Tribunal and in accordance with the directions accompanying this decision.

Notice of Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law; the decision is set aside to be remade before the Upper Tribunal on a date to be fixed.

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or his family members. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Upper Tribunal Judge Reeds
Dated : 22 August 2022