

AT AUCKLAND

Appellant:	AB (Ukraine)
Before:	L Moor (Member)
Representative for the Appellant:	J Yakunina
Counsel for the Respondent:	No Appearance
Dates of Hearing:	2 & 3 June 2015
Date of Decision:	25 June 2015

DECISION

[1] This is an appeal against a decision of a refugee and protection officer, declining to grant refugee status and/or protected person status to the appellant, an ethnic Russian citizen of Ukraine.

INTRODUCTION

[2] The appellant claims to be at risk of being persecuted because he objects to being forced to serve in the Ukrainian military against ethnic Russians. He also fears harm at the hands of the Ukrainian authorities or pro-Ukrainian extremist groups, as he opposes the current Ukrainian government and fears being viewed as a separatist.

[3] The Tribunal finds that the appellant's account is credible. For the reasons which follow, it finds that the appellant does have a well-founded fear of being persecuted for reasons of political opinion. He would face a term of imprisonment if he refuses to serve in the Ukrainian military. The Ukrainian military is currently engaged in a conflict in which it commits internationally condemned acts through breaches of international humanitarian law and international human rights law, and

there is no alternative to service available to him. The Tribunal finds the appellant is a refugee.

[4] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[5] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

[6] The appellant was born in 1974 in Z town, Ukraine. At the time, the Ukraine formed part of the USSR. The appellant is ethnically Russian. He speaks the Russian language and can read and understand a few Ukrainian words. He is a Russian Orthodox Christian.

[7] In 1992, having turned 18 years old, the appellant presented himself for military service. He failed to pass the medical examinations due to his flat feet. He was issued a military card/certificate stating that he was unfit for service in peace-time, but fit for war-time service.

[8] In the Ukraine, the appellant worked as a welder. He also owned a store which sold towels and plastic bags. He had many wholesale customers who travelled from the Russian Federation, the border of which is [XX] kilometres from Z town.

[9] In 2004, in the lead up to the presidential election, the appellant engaged in political campaigning for Viktor Yanukovich. He distributed party leaflets and campaigned directly with customers at his store.

[10] In January 2014, the appellant travelled to New Zealand to visit his brother.

[11] In March 2014, Russian forces seized control of Crimea. The appellant supported this action.

[12] In March 2014, the appellant made his Confirmation of Claim to the Refugee Status Branch.

[13] The appellant fears that on his return to the Ukraine, he will be forced to serve in the Ukrainian military. He fears he will be identified at the airport and taken immediately to perform military service. The recent travel ban for Russian

male citizens of military age means that the authorities will be checking the entry and exit of military-age men at the airports. Alternatively, the appellant may re-enter the country, but be mobilised to serve in the army shortly thereafter. If the appellant is ordered to undertake military action against ethnic Russians, he will refuse. He would not be able to be involved in any conflict against his own people. As a consequence, he fears he will be subjected to imprisonment for two to five years or be physically harmed. Recent legislation has provided authority for the military to use deadly force against those who desert or do not follow military orders.

[14] The appellant says that he also risks being harmed by fellow soldiers who will view him as pro-Russian.

[15] The appellant is aware that, since his departure, his former next-door neighbour has been called up for military service. The neighbour did not receive a summons, as would have occurred in the past. Instead, he was forcibly taken by the military from his home. The appellant has had contact with the neighbour's wife who is fearful of communicating but has confirmed that he is serving in the military. A copy of the Skype chat was produced as evidence. The appellant is also aware, through conversations with people in Ukraine and information from the internet, that mobilisation efforts are increasing and more direct action is being taken to identify those liable for military service. Military officials have commenced boarding public transport and checking documents. Two YouTube videos of this were produced as evidence to the Tribunal.

[16] The appellant opposes the current Ukrainian government. In their eyes, he believes that he will be seen as a "beetle or insect that should be exterminated". Comparisons are made by Ukrainians between "Colorado beetles", which bear a similarity to the St George's flag, and ethnic Russians. If forced to return to the Ukraine, the appellant would feel compelled to express his opposition to the Ukrainian government. He would not be able to stand by and allow his country to be overtaken in the way it is. He would attend political meetings and would try to publicly promote his ideas of living in peace and with respect for human rights. He would also participate in protests against the government. He would publicly call on people to look around at what was happening and try and find ways to live in peace. These activities would be viewed as separatist by the Ukrainian authorities. This would place the appellant at risk of being killed or otherwise harmed. The appellant fears physical harm from neo-Nazi gangs who are pro-West and pro-Ukraine.

[17] The appellant believes that the current Ukrainian-Russian conflict can be resolved in a peaceful way. He believes that it is possible for ethnic Russians and Ukrainians to once again live side-by-side, without problems. However, the current government encourages the killing of ethnic Russians, for example as happened in Odessa where people were burned alive and for which no-one has been held accountable. This differs hugely from the peaceful approach taken by the former President Yanukovich, whom the appellant strongly supported. At the start of the Maidan protests, President Yanukovich did not allow soldiers to open fire and protected all Ukrainians.

[18] The anti-Russian sentiment in Ukraine now permeates all aspects of life. Attempts are being made to destroy the Russian culture in every way possible. Russian celebratory days are no longer permitted. Russian language and television channels are now banned. All symbols linked to Russia are now being prohibited. In their place, the ban on Nazi symbols has been removed.

Material and Submissions Received

[19] On 18 May 2015, the Tribunal received two folders of country information and other evidence relating to this appeal and the appeals of the appellant's brother-in-law and his family (see [NZIPT] 800749-752). On 27 May 2015, the Tribunal received comprehensive submissions from the appellant's representative.

[20] During the hearing the appellant's representative also produced written opening submissions dated 2 June 2015, further country information, links to video evidence on YouTube regarding the situation in the Ukraine and a memory stick containing copies of all videos referred to.

ASSESSMENT

[21] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") (section 129); and
- (b) a protected person under the 1984 Convention Against Torture (section 130); and

- (c) a protected person under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[22] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant’s account.

Credibility

[23] The Tribunal finds the appellant to be a credible witness. It accepts his account in its entirety.

Summary of facts

[24] The appellant is an ethnic Russian citizen of Ukraine. He is 40 years old and liable for compulsory military service in the current mobilisation. He is steadfastly opposed to serving in the Ukrainian military and would refuse to fight against ethnic Russian people.

[25] The appellant is also strongly opposed to the current government led by President Poroshenko. He was a supporter of President Yanukovich’s government. In 2004, the appellant campaigned for Yanukovich. If forced to return to the Ukraine, the appellant would feel compelled to express his anti-government pro-Russian views and seek to organise with other likeminded ethnic Russians. He would attend meetings and explore other avenues of involvement in terms of finding a peaceful solution to the current crisis.

The Refugee Convention

[26] Section 129(1) of the Act provides that:

“A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.”

[27] Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

“... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

[28] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

[29] For the purposes of refugee determination, “being persecuted” has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000) at [67].

[30] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Ukraine?

[31] It is necessary first to consider the country information.

Country information – background to the eastern-Ukrainian conflict

[32] The conflict within eastern Ukraine began in March 2014, after the annexation of the Crimean peninsula by the Russian Federation. In April and May 2014, opponents of the Poroshenko government occupied buildings belonging to the local administrations and law enforcement agencies in the Donetsk and Luhansk regions of eastern Ukraine, known as Donbass. Demanding increased local autonomy or independence from Ukraine and closer ties with Russia, protest organisers formed armed groups, justifying their actions by raising concerns about the rights of the region’s Russian-speaking residents. In

response to the separatists' flouting of central government power, the authorities in Kiev launched what they characterised as a "counter terrorist operation" (*antiteroristichna opertsiya*, or ATO), aimed at regaining control of the area (Amnesty International, "Breaking Bodies: Torture and Summary Killings in Eastern Ukraine" (May 2015)).

[33] Since that time, fighting has erupted in eastern Ukraine, amidst "compelling evidence of Russian military involvement". To date, more than 6,200 people have been killed as a result of the conflict. A cease-fire agreement between the Ukrainian government and separatists was reached on 5 September 2014, in Minsk, Belarus. Subsequent protocols, aimed at implementation, were later signed. Unfortunately, the cease-fire agreements have not brought an end to hostilities. While they did reduce fighting immediately after their signing, an upsurge in fighting has been seen in May 2015. *The Guardian* has recently reported that "Ukraine is experiencing its most serious increase in fighting in three months, sending more civilians fleeing and raising fresh doubts about the viability of a shaky February truce" – see Alec Luhn "Upswing In Fighting In Ukraine Sends Civilians Fleeing And Puts Truce In Doubt" *The Guardian* (3 May 2015) www.theguardian.com).

[34] Zz town (known to Russian speakers as Z town) is a Ukrainian town located [XX] kilometres from the border with the Russian Federation. It is outside the current conflict zone and remains Ukrainian government-controlled. Zz town hosts a large number of internally-displaced persons (IDPs), who have arrived there from conflict-affected areas further east. Resources in ZZ town and other host communities for IDPs are reportedly stretched – see Assessment Capacities Project (ACAPS) "Eastern Ukraine: Humanitarian Impact of the Conflict" (16 December 2014) and Alec Luhn "Upswing in Fighting in Ukraine Sends Civilians Fleeing and Puts Truce in Doubt" *The Guardian* (3 May 2015) www.theguardian.com.

[35] Outside the conflict zone there have been a number of bomb attacks targeting military and transport locations, as well as places frequented by pro-Ukrainian activists (Oleg Varfolomeyev "Security Service Suspects Moscow Behind Explosions Shaking Ukrainian Cities" *The Jamestown Foundation, Eurasia Daily Monitor* Volume: 12 Issue: 67 (10 April 2015); Simon Shuster "Meet the Pro-Russian 'Partisans' Waging a Bombing Campaign in Ukraine" *Time* (10 April 2015) www.time.com; RFE/RL's Ukrainian Service "Bomb Blast In Government-Held [...], Ukraine" *Radio Free Europe, Radio Liberty* (21 April 2015)).

[36] In February 2015, *BBC News* noted that Zz town, although "well away from the battle lines, has seen the lion's share of the attacks" and that "[m]ore than a dozen have been reported there in the past three months" (Vitaly Shevchenko "Ukraine Conflict: Bombings go Beyond Battle Zone" *BBC News* (7 February 2015) www.bbc.com). Linda Kinstler, writing in *Foreign Policy*, notes that Zz town's residents have been subjected to "a series of terrorist acts that continue to plague the city" and that residents "have had to adjust to a terrifying new normal" (Linda Kinstler "A Ukrainian City Holds Its Breath" *Foreign Policy* (20 February 2015) at <http://foreignpolicy.com>).

Military mobilisation

[37] According to article 65 of the 1966 Ukrainian Constitution and the 1999 Law on Military Duty and Military Service, all male citizens between the ages of 18 and 25 are liable for military service. Until this year, reservist obligations applied up to the age of 40, and up to the age of 60 for officers.

[38] However, in January 2015 the upper age limit for all reservists was increased to 60 years old. The compulsory draft age was also increased to 27 years ("New Military Draft Starts in Ukraine Amid Intensified Assault on Militia-Held Territories" *RT News* (20 January 2015) <http://rt.com/news>).

[39] Four waves of mobilisation are planned for 2015 with 50,000 men subject to "conscript" on 20 January 2015, and the same number planned for April and June ("Poroshenko Signs Law to Increase Ukrainian Army Strength to 250,000 Servicemen" *ITAR-TASS World Service* (18 March 2015) <http://tass.ru/en>; "Ukrainians Evading Draft May Face Five Years in Prison" *Sputnik News Service* (12 February 2015) <http://sputniknews.com>). Presumably, a further 50,000-100,000 will be mobilised later in the year.

[40] Reports vary as to the exact number of soldiers that the Ukrainian military intends to conscript in 2015, ranging from 100,000–200,000. ("Ukraine to Boost Armed Forces to 250,000 Within a Month – Defence Minister" *ITAR-TASS World Service* (18 March 2015) <http://tass.ru/en>; Shaun Walker and Oksana Grytsenko "East Ukraine Summit Looks Unlikely to Happen as Violence Spikes in the Region" *The Guardian* (11 January 2015) www.theguardian.com).

[41] The 2004 Law on Alternative Civilian Service stipulates that eligibility for civilian service, as an alternative to compulsory military service, is determined by religious adherence to one of ten named religious denominations that prohibit the

use of weapons. Russian Orthodox Christianity is not one of these denominations (International Fellowship of Reconciliation, Conscience and Peace Tax International and the Center for Civil Liberties “Ukraine: Military service, conscientious objection and related issues” (June 2013) at pp1-3). The United Nations Human Rights Council has frequently expressed concern over the discriminatory nature of Ukrainian law on the provisions for alternative military service (Human Rights Committee *Concluding observations on the seventh periodic report of Ukraine* CCPR/C/UKR/CO/7 (22 August 2013)).

Draft evasion and penalties

[42] The penalty for draft evasion is two to five years of imprisonment (UNHCR *International Protection Considerations Related to the Developments in Ukraine – Update II* (15 January 2015); “Ukrainians Evading Draft May Face Five Years in Prison” *Sputnik International* (12 February 2015)).

[43] Since February 2015, failing to follow orders or refusing to serve in the military would also place an individual at risk of physical harm at the hands of military commanders. According to the newly-inserted article 22(1) in the Charter Regulating Service in the Armed Forces of Ukraine:

“Commanders have the right to personally use physical force, special means, and weapons when in combat” against soldiers who commit “criminal acts.”

[44] Criminal acts include:

“[d]isobedience, resistance or threat to use force against the commander, voluntary abandonment of military positions and certain locations of military units in areas of combat missions.”

[45] Other penalties for those publicly opposing the mobilisation may include charges of treason. In March 2015, the Ukrainian authorities sentenced a prominent blogger, Ruslan Kotsaba, to up to 15 years’ imprisonment for “high treason” after he posted a video online describing the conflict in the south and east of the country as “the Donbas fratricidal civil war” and expressed opposition to the military conscription of Ukrainians to take part in the offensive. This follows a trend of attempting to silence public critics of government policy, with reports of other bloggers and journalists being detained and possibly killed (Michael Welch, Anatoly Shary, and Robert Parry “The End of Journalism in Ukraine: A Feature Interview with Anatoly Sharij” *Global Research News Hour* (audio interview, episode 103, 12 May 2015) at www.globalresearch.ca).

Resistance to current mobilisation

[46] The current mobilisation efforts are being met with resistance, with many conscripts evading. While no exact figures on the number of those avoiding military service are available, it could be “as many as tens of thousands”, according to *Foreign Policy*. In September 2014, the military reported that, during the 2014 mobilizations, “85,792 of those summoned did not report to their draft offices and 9,969 were proven to be illegally avoiding service”. (Alec Luhn “The Draft Dodgers of Ukraine” *Foreign Policy* (18 February 2015) <http://foreignpolicy.com>).

[47] On 29 February 2015, Global Research reported that, according to the “Fort Russ” blog, a Poroshenko adviser had leaked “disastrous data about the fourth wave of mobilization.” According to the adviser, Yury Biryukov:

“(H)eads of 14 rural councils of Ivano-Frankivsk oblast refused to accept the summons for notifications.

57% of notified conscripts in Ivano-Frankivsk region did not arrive for medical commission.

37% of notified conscripts of Ivano-Frankivsk region have left the territory of Ukraine.

Ternopil region rural council heads openly sabotage events of notification.

Konyukhi, Kozovsky village council head reported residents leaving for Russia on two rented buses.

In Transcarpathian region Colchino, Mukachevo township, only 3 of 105 summons were presented.

In the last 30 days, 17% of Chernivtsi region conscripts left the area.

Unofficial sources report Ukrainian/Romanian border area hotels and motels “completely filled with Ukrainian men evading conscription.”

[48] *Foreign Policy* reports that large numbers are avoiding service because they are (Alec Luhn “The Draft Dodgers of Ukraine” *Foreign Policy* (18 February 2015) <http://foreignpolicy.com>):

“... [d]isturbed by the prospect of fighting their fellow countrymen in the rebel ranks, are against the war in principle, or because they are simply afraid to go.”

[49] Many are leaving the country to avoid having to serve in the Ukrainian army (see for example “Ukraine: Military Personnel” *Global Security* at www.globalsecurity.org).

[50] In response, a number of measures aimed at curbing draft evasion have been introduced. The Ukrainian authorities are pursuing criminal charges against those who evade military service. By February 2015, 7,500 were reported to be

facing criminal charges for evading military service, following the 15 January 2015 initial wave of mobilisation (“Ukrainian Parliament Passes Law Allowing Army Deserters To Be Shot” *RT News* (5 February 2015) <http://rt.com/news>). This signals a sharp increase in draft evasion from previous months and years. UNHCR reported in January 2015, that:

“[a]ccording to the judicial registry, as of 8 December, 32 persons have reportedly been sentenced for evasion of conscription or mobilization in 2014 (compared to 0 in 2013).”

[51] Another measure that has been introduced, is the authorisation for military commanders to use physical force against those who disobey their orders, as described above at [43]-[44].

[52] Furthermore, a travel restriction for men eligible for military service has been introduced. (“Ukrainian Parliament Passes Law Allowing Army Deserters To Be Shot” *RT News* (5 February 2015) <http://rt.com/news>).

Duration of the conflict

[53] The potential duration of the conflict is unknown. Currently, it shows no signs of abating. In April 2015, President Poroshenko stated that the military operation would cease when Kiev regained control of the Crimea and Donbass territories. The President stated that combat operations in the conflict zone would be carried out “for as long as it is necessary... the issue of ensuring sovereignty, territorial integrity and independence of our homeland is the top priority” (“War in Ukraine Will Be Over After Kiev Regains Crimea Donbass – Poroshenko” *Sputnik News* (30 April 2015) <http://sputniknews.com>).

[54] According to the President’s official website, speaking at the commencement of the Ukrainian-American military training operation on 20 April 2015, he emphasised that the war was waged not only against Ukraine but “[i]t is symbolic that on the 70th anniversary of victory of Anti-Hitler Coalition over Nazism, frontier of civilizational battle for the future of Europe and the world is laid in Ukraine once again”. Petro Poroshenko continued:

“[i]t is a war not only for the independence of Ukraine, but also for the freedom and democracy of Europe and the world. This war will decide whether the rules of the international law will be efficient in the world, whether the borders will be inviolable and integral, whether one can apply force without a reason and without being punished. Can ethnic affinity be a reason for unceremonious interference in the internal affairs of a foreign state? Are authoritarianism and dictatorship compatible with European political culture, the main value of which is a free citizen with his rights of a free state?”

Ukrainian armed forces and internationally condemned acts

[55] The Ukrainian armed forces (and other actors) and Russian separatists are currently fighting in what the International Committee of the Red Cross (ICRC) has classified as, a 'non-international armed conflict'. (ICRC "Ukraine: ICRC Calls on All Sides to Respect International Humanitarian Law" (23 July 2014) www.icrc.org). The conflict is located in the east of Ukraine.

[56] The Ukrainian armed forces currently comprise approximately 230,000 personnel. The military has increased in size significantly during the current conflict through mobilisations of reservists. In 2014, it stood at approximately 130,000 personnel ("Ukraine reinstates conscription as crisis deepens" *BBC News* (2 May 2014) www.bbc.co.uk). Current and future mobilisations are aimed at replacing those soldiers who have completed their required 18-month service and increasing its size to 250,000 ("Ukraine plans to double military budget against fighting in east" *Deutsch Watch* (12 December 2014) at www.dw.de). The armed forces are currently said to consist of ground forces of 180,230 personnel, an Air Force of 36,300 personnel and a Navy of: 15,470 personnel (www.wikipedia.co.nz).

[57] The Ukrainian military is receiving financial, training and other support from the United States of America (see Office of the Press Secretary "Fact Sheet: US Support for Ukraine" *The White House* (18 September 2014) www.whitehouse.gov). In April 2015, a joint US-Ukraine training initiative was launched (see above at [55]).

[58] Other actors involved in the conflict on the Ukrainian side are Territorial Defense Battalions and the Secret Service of the Ukraine (SBU). The Territorial Defense Battalions are formed from local volunteers, an estimated 10,000 of whom are serving in around 50 volunteer battalions. The volunteer battalions are being integrated into Ukraine's National Guard. Formally, they were under the control of the Ministry of Defence or Ministry of Interior, but this is "rarely the case on the ground". (Luke Coffey "Ukraine: Volunteer Battalions are a Short Term Solution" *Al Jazeera* (30 April 2015) www.aljazeera.com).

[59] According to Amnesty International's May 2015 report: "Breaking Bodies: Torture and Summary Killings in Eastern Ukraine", the Ukrainian military has breached international human rights and international humanitarian law in the course of the conflict. Amnesty International reports that the Ukrainian military and other actors have tortured, ill-treated and unlawfully detained prisoners. Cases

documented in the report include detention and torture of persons perceived to be separatist supporters. Amnesty International states that it has seen “compelling evidence to suggest that prisoner abuse is both frequent and widespread”. Further, this is “not restricted to any particular police or military unit”.

[60] In addition to such breaches by the military, the report details unlawful detention, ill-treatment and torture by the National Guard and Security Service of Ukraine (SBU), as well as irregular armed groups participating in the conflict such as Right Sector. These different actors are reported to have been working in conjunction with each other.

[61] In one case, Ukrainian military forces picked up an individual from a checkpoint, as he attempted to drive his family to Russia to escape the fighting. He believes he was picked up by regular Ukrainian troops, but does not know which unit they were from. He was then handed over to Right Sector members, who proceeded to torture him. Subsequently, he was handed over to the Kyiv Special Service Police (UBOP), who detained, ill-treated and tortured him. He was detained with others, including civilians.

[62] In another case, suspected separatists were detained and ill-treated by battalion members manning Ukrainian military checkpoints and handed over to the SBU. In SBU custody they were tortured, including being subjected to a mock burial.

[63] The Amnesty International report documents the detention of civilians in a Right Sector Basement cell who were “viciously beaten on a regular basis”. Most of the detainees “had been picked up for apparently trivial reasons” – for example, having pro-separatist photographs on their mobile phones, or for having attended a march organised by the pro-Russian Party of Regions.

[64] A February 2015 UN Office of the High Commissioner for Human Rights (OHCHR) “Report on the human rights situation in Ukraine: 1 December 2014 to 15 February 2015” (undated) at pp5-6 states that:

“...allegations of violations of international human rights law and international humanitarian law have persisted over the reporting period [1 December 2014 to 15 February 2015]. Credible reports of arbitrary detention of civilians, torture and enforced disappearance have been alleged against the armed groups and the Government.”

[65] The Human Rights Mission in the Ukraine has received reports from detainees, their relatives and lawyers revealing a pattern of “enforced disappearances, secret detention and ill-treatment by Ukrainian law enforcement

agencies in the security operation area and adjacent territories”. It records violations as having occurred at the hands of “unidentified Ukrainian servicemen”, “people in military uniform” and “SBU officers” (OHCHR “Report on the human rights situation in Ukraine: 1 December 2014 to 15 February 2015” (undated) at pp10-11).

[66] OHCHR also reports that in the areas of hostilities, “there is continuing and indiscriminate shelling of highly populated civilian areas by all parties” (pp3-4).

[67] Such violations are occurring in a climate of impunity. In February 2015, the OHCHR also reported that little progress had been made in achieving accountability for violations of human rights committed in the context of the continuing conflict. In early April 2015, Amnesty International wrote to the Prosecutor General of the Ukraine, seeking a response to the allegations of unlawful detention, torture and other ill-treatment. The organisation had received no response by the time the report was published in May 2015.

[68] The OHCHR’s September 2014 monitoring report similarly found breaches of international human rights and humanitarian law (OHCHR “Report on the human rights situation in Ukraine” (16 September 2014)):

“Serious abuses continue to be reported in the course of the hostilities. Parties to the conflict are reported to have shown disregard for civilian life through indiscriminate shelling of densely populated areas and the intermingling of armed groups in civilian areas has further endangered the local population.”

[69] In October 2014, Human Rights Watch reported on the use of cluster munitions in populated areas in Donetsk city by Ukrainian government forces. The use of cluster munitions in populated areas violates the laws of war due to the indiscriminate nature of the weapon and may amount to war crimes (Human Rights Watch “Ukraine: Widespread Use of Cluster Munitions” (20 October 2014)).

[70] The Tribunal is cognisant of the limited, and at times biased, reporting on the context of the Ukrainian-Russian conflict. In the words of Amnesty International:

“Each side has made allegations against the other of extrajudicial killings and other grave human rights abuses, which have been extensively broadcast in the Ukrainian and Russian media. Many of these reports, however, have been poorly substantiated or unsubstantiated.”

Application to the appellant's case

[71] The Tribunal finds that there is a real chance that the appellant will be required to perform military service on his return to the Ukraine. No civilian alternative to military service is available to the appellant as a Russian Orthodox Christian.

[72] The Tribunal finds that the appellant's likelihood of being mobilised reaches the real chance level. It makes this finding in light of the continued uncertainty surrounding the duration of the conflict and the high rates of mobilisation.

[73] The Ukrainian President has clearly stated that the Ukraine will continue the conflict until Crimea and Donbass are reclaimed. The Tribunal notes the support of the United States and Europe, which facilitates on-going military action. Because of the potentially protracted nature of the conflict, on-going mobilisations of troops are likely, as those who have served their terms are replaced. Similarly, the high rates of draft evasion mean that, to reach the desired troop target numbers, on-going mobilisations can be expected to be larger.

[74] The Tribunal accepts that the appellant will refuse to participate in the conflict due to his strong pro-Russian views. He does not wish to be involved in a conflict that is aimed at harming people of his own ethnicity, including through committing human rights abuses. His refusal to engage in military action will place him at risk of two to five years imprisonment.

[75] On their own, these findings would be insufficient to establish a claim to refugee status. States are entitled to require citizens to participate in the defence of the nation's sovereignty and the actions of pro-Russian separatists in the east of Ukraine are a direct, military attempt to secede by violent means. On its face, Ukraine is entitled to require Ukrainians to defend the nation's sovereignty. However, that is not the end of the enquiry which must be made.

[76] The above material establishes that the Ukrainian military is committing human rights violations, including torture, ill-treatment and unlawful detention, in the course of the conflict. It is currently unknown how widespread this is but, according to Amnesty International, it is not confined to any particular unit or branch of the armed forces. Similarly, the OHCHR reports a pattern of violations by military personnel and other actors.

[77] Amnesty International has also identified, through its research, the cooperation between official state authorities including the military and informal

armed groups. This sheds a troubling light on the extent to which the conflict is being waged in a way that respects human rights and the laws of war. The Tribunal also notes the constraints on obtaining objective data from the conflict zone. This places a significant level of uncertainty on the extent to which documented violations can be said to be isolated, as opposed to being the implementation of state policy. Finally, the human rights violations are occurring in a climate of impunity.

[78] On the independent evidence which is available at this time, and in light of the on-going uncertainty of the situation, the Tribunal extends the benefit of the doubt to the appellant that the reported violations of human rights are sufficiently widespread as to be occurring across most, if not all, Ukrainian military units.

[79] The Authority reminds itself that the standard of proof in refugee claims is one which does not require it to be satisfied that the appellant will be persecuted or that it is even probable or likely to happen. Further, as observed by Priestley J in *MA v Attorney-General* (HC Auckland, CIV2006-404-1371, 21 September 2007) at [107], refugee determination procedures are benign and tilted very much in favour of a claimant.

[80] The appellant does not wish to serve in the Ukrainian armed forces at the present time because it would amount to conscription into a military where he faces a real chance of being involved in internationally condemned acts.

[81] As was noted in *Refugee Appeal No 75378* (19 October 2005):

“[42] The leading decisions of the Authority on conscientious objection and claims for refugee status are Refugee Appeal No 70742/97 (28 January 1999) and Refugee Appeal No 71219/98 (14 October 1999). From these decisions the following propositions may be extracted:

1. Persons who claim refugee status on the basis of a refusal to perform military service are neither refugees per se nor excluded from protection.
2. There is, in general, no right to refugee status arising from objections based on religion or conscience, where the state fails to recognise that belief by providing for an alternative form of service. While the existence of any alternative service provision may be a relevant factor in considering whether or not the level of punishment amounts to persecution, its absence does not per se establish persecution.
3. Conscription laws are laws of general application and the infliction of punishment for their breach is not motivated by the belief of the claimant. There is, therefore, no nexus between the punishment and a Convention ground.
4. Nevertheless, a valid claim for refugee status on the basis of conscientious objection may be made where:
 - (a) conscription is conducted in a discriminatory manner in relation to one of the five Convention grounds;

- (b) prosecution or punishment for evasion or desertion is biased in relation to one of the five Convention grounds; and
- (c) the objection relates to being required to participate in military action where the military engages in internationally condemned acts. In such cases it is necessary to distinguish between cases:
 - (i) where the internationally condemned acts were carried out as a matter of government policy. If so, all conscripts face a real chance of being required to so act; and
 - (ii) those where the state encourages or is unable to control sections of its armed forces. In such circumstances a refugee claimant is required to show there is a real chance he/she will be personally involved.”

[82] The Tribunal is satisfied that the appellant will either be forced to undertake military service in which there is a real chance of him being compelled to participate in military action where the military engages in internationally condemned acts or his objection to such service will result in him being prosecuted and imprisoned for a number of years. Given the illegitimacy at international law of the nature of the military action in question, both will constitute “being persecuted” as it is understood in refugee law.

[83] As the Tribunal has found he faces a well-founded fear of being persecuted on the basis of his objection to military service, it does not need to make a finding on whether he would be at risk through any political involvement because of which he would be perceived by the Ukrainian authorities of being a separatist.

Is there a Convention reason for the persecution?

[84] As was noted in *Refugee Appeal No 75378* (19 October 2005) at [116]-[117]:

“[116] Under any circumstance, an objection by an individual to a law requiring compulsory military service is inherently an expression of an opinion as to the boundaries of state power in relation to the individual; it is inherently political – see generally Heywood *Politics* (2nd ed, Palgrave, Basingstoke 2002) at p4, who places politics within the realm of conflict resolution in which competing ideas (here, between the individual and the state) are resolved. As noted by Goodwin Gill *The Refugee In International Law* (Clarendon Press, Oxford 1996):

‘Military service and objection thereto, seen from the point of view of the State, are also issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of State authority; it is a political act.’

[117] This proposition was accepted by the Court in [*Zolfagharkani v Canada* (Minister of Employment and Immigration) (1993) 3 FC 540]. The Authority respectfully agrees.

[85] Here, the appellant’s predicament is contributed to by a genuinely held belief that is central to him – that he ought not to commit, or be a party to, serious

human rights violations against ethnic Russians. His belief is political in nature inasmuch as the impermissible actions of the state in requiring him to commit, or be a party to, serious human rights violations does not simply reflect a rejection of the acceptable exercise of state sovereignty but goes to the boundary of state power. His predicament is being contributed to by his political opinion and the second principal issue is also answered in the affirmative.

Conclusion on Claim to Refugee Status

[86] The Tribunal finds the appellant is a refugee.

The Convention Against Torture

[87] Section 130(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.”

[88] The appellant has been found to be a Convention refugee. The recognition of the appellant as a refugee means that he cannot be deported from New Zealand to Ukraine; see article 33 of the Refugee Convention and sections 129(2) and 164 of the Act. The exception to section 129, which is set out in section 164(3) of the Act, does not apply. Therefore, there are no substantial grounds for believing the appellant would be in danger of being subjected to torture in Ukraine.

The ICCPR

[89] Section 131 of the Act provides that:

“(1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

...

(6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.”

[90] Again, because the appellant is recognised as a refugee, he is entitled to the protection of New Zealand from *refoulement* to Ukraine. For the reasons already given in relation to the claim under section 130 of the Act, there is no prospect of the appellant being deported from this country. Therefore, there are

no substantial grounds for believing that the appellant is in danger of being subjected to arbitrary deprivation of life or to cruel, inhuman or degrading treatment or punishment.

CONCLUSION

[91] For the foregoing reasons, the Tribunal finds that the appellant:

- (a) is a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture;
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[92] The appeal is allowed.

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