

AT AUCKLAND

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

DECISION

[1] These are appeals against decisions of a refugee and protection officer, declining to grant refugee status and/or protected person status to the appellants, citizens of Ukraine of Russian ethnicity.

INTRODUCTION

[2] The appellants are a family comprising the father (NZIPT 800749), the mother (NZIPT 800750), the daughter (NZIPT 800751) and the son (NZIPT 800752). The father's brother-in-law is the appellant in *AB (Ukraine)* [2015] NZIPT 800742. Because the children are minors (aged five and 13), the mother acted as their responsible adult at the hearing in accordance with section 375 of the Immigration Act 2009 ("the Act").

[3] The father claims to be at risk of being persecuted as he objects to being forced to serve in the Ukrainian military, fighting against ethnic Russians. The mother and father fear harm at the hands of the Ukrainian authorities or pro-Ukrainian extremist groups, as they oppose the current Ukrainian government and fear being viewed as separatists. The couple believe their children, by

association, face similar harm. The appellants also fear discrimination on the basis of their ethnicity, including in relation to finding employment.

[4] The Tribunal finds that the appellants' accounts are credible. For the reasons that follow, it finds that the father and mother do both have a well-founded fear of being persecuted for reasons of their respective political opinions. The father and mother are refugees. However, it finds that the children do not face a real chance of serious harm and are not refugees or protected persons.

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

THE APPELLANTS' CASE

[6] The accounts which follow are summaries of those given by the father and the mother on behalf of all four appellants at the appeal hearing. They are assessed later.

The Father's Evidence

[7] The father was born in Z town, Ukraine in 1982. At the time, the Ukraine was part of the Soviet Union. The father is ethnically Russian. He speaks Russian and cannot communicate in Ukrainian. He is Russian Orthodox Christian.

[8] The father is married to the mother and together they have a daughter aged 13 years old and a son aged five years old.

[9] In April 2001, the father was called for military service. The military medical commissioner found he was unfit for military service during peacetime, because of his asthma. However, he was deemed fit for military service during war time.

[10] In the early 2000s, the father worked as a welder for a secret government military and industrial production company which produced military tanks.

[11] In 2006 and 2008, the father visited New Zealand, as the holder of a visitor visa. He travelled to visit his sisters who live here. In December 2011, the father returned to New Zealand, as the holder of a visitor visa. He was subsequently granted a work visa and commenced employment as a welder in New Zealand. The father was joined by the mother and their two children in October 2012. They have all remained here since that time.

[12] The father was living in New Zealand when the current conflict commenced. He has monitored the situation through the internet and by speaking with friends and family who remain there.

[13] The father fears returning to the Ukraine because he would be required to serve in the Ukrainian military which is committing war crimes against his own ethnic Russian people. As he is currently in New Zealand, he has not received a summons. However, on his return to Ukraine he believes he will be called up. If he was required to undertake military service, he would “categorically refuse to do it” as he opposes killing ethnic Russians. His refusal would mean he would be liable for a term of imprisonment from two to five years. Alternatively, if he was taken forcibly to perform military service and failed to follow orders, he would be at risk of being physically harmed. This is due to a February 2015 law which now allows for physical force to be used against those in the military who commit “criminal acts”. Refusing to follow orders or deserting are such acts.

[14] The father believes he will be called up for military service as he is obliged to serve because of his relatively young age, 33 years, and the fact that he has previously worked in military production. Because of the high number of draft evaders, the military is taking more direct action in terms of mobilising those eligible for military service. This now includes going on to public transport and ‘press-ganging’ eligible men. The conflict will continue until Crimea, Donbass, Donetsk and all other regions are returned to Ukrainian control and, he believes, will last a number of years.

[15] The father’s cousin has already been mobilised to perform military service. His official term of service has finished, but he is still being required to serve in the military. An acquaintance of the father who is approximately 48 years old has also been mobilised.

[16] The father was a supporter of the former President Viktor Yanukovich. During the time of his presidency, the father worked in military production as a welder. There was no discrimination against ethnic Russians in Ukraine during Yanukovich’s time. Yanukovich was illegally overthrown and the new authority of “Nazis” came to power with a strong divisive ideology. The current president, Petro Poroshenko, supports and assists the “current Nazi situation to flourish”. Even though President Poroshenko states that Russia is the aggressor, it does not carry out a war with Russia, but internally against the ethnic Russian population in Ukraine. The Ukrainian military targets ethnic Russian civilians, who it mistakenly

regards as separatists. It is Poroshenko's Nazi ideology to eradicate all of the Russian population in Ukraine.

[17] Because of his anti-Ukrainian government views, the father fears that he will be viewed as a separatist and detained, tortured or extra-judicially executed. The father is aware that there are billboards and hotlines in Ukraine set up for people to report those who they believe are separatists. The anti-Russian sentiment is so strong he believes the mere fact of speaking Russian or expressing any disagreement with authority will immediately put him at risk of ill-treatment by the authorities or others who are acting with impunity.

[18] The father feels so strongly about his opposition to fighting his own people and against the current regime that he would be unable to keep his personal views inside, even though he knows this would put him at risk. He would seek out other people with similar opinions against the Ukrainian authorities. He imagines this would have to occur at night secretly or through other covert means, with an aim of uniting people to stand up against the current Ukrainian authority. The father would like to see Z town as independent or part of the Russian Federation, but does not go as far as wanting to fight for such ends.

[19] As the father has been in New Zealand since the change in government, he has not yet had the opportunity to be involved in any political activities in current times. This follows a family tradition of defiance. His mother has been politically active, including defending a Lenin statue in Z town in February 2014. In recognition of this action she received a letter of commendation from Z town's mayor. Following her protest, in 2014, she was visited on two occasions by two unidentified armed people who threatened that if she did not stop such pro-Russian activities she and her family would be harmed. She was asked if she was hiding separatists in her home or weapons. The father's mother has since stopped any pro-Russian activities as she is caring for her sick daughter.

[20] The father also fears harm from bombings and other actions by pro-Ukrainian extremist groups. Although Z town is outside the official conflict zone, there are attacks on a regular basis.

[21] The father also fears discrimination against him as an ethnic Russian. This is pervading all parts of Ukrainian society with Russian language television channels and programmes now banned. Newspapers are no longer being published in the Russian language, official documents are no longer allowed in Russian and must be in Ukrainian. President Poroshenko has also prohibited

Russian celebrations on 23 February, 1 May and 9 May, days used to commemorate Russian war veterans. The St George's Ribbon or other Russian logos are banned.

[22] The father fears that his children will be mistreated at school by school authorities and because of the children's connection to him and his wife who would be viewed as separatists because of their pro-Russian views. They would be at risk of physical ill-treatment and possibly death.

The Mother's Evidence

[23] The mother was born in 1982 in Z town. She is a citizen of Ukraine. The mother is an ethnic Russian and speaks the Russian language. She understands a little Ukrainian, but is unable to communicate in it.

[24] The mother is married to the father and together they have a 13-year-old daughter and a five-year-old son. The children speak Russian and English. The mother and children have lived in New Zealand since October 2012.

[25] The mother fears returning to the Ukraine because of her Russian ethnicity, and her strong opposition to the current Ukrainian authorities. She views the new government as authoritarian and having a nationalist policy which seeks to "exterminat[e] people who are pro-Russia".

[26] If forced to return to Ukraine, the mother would feel compelled to take action and seek to change the status quo. She would participate in protests and political meetings, distribute leaflets or become involved in publicising her opposition with others who shared her concerns. Even though these activities would place her at risk of being harmed by the authorities or by pro-Ukrainian extremist groups, she would be unable to live in a country run by "fascists".

[27] The mother thinks it would be a positive move if Z town became a part of Russia. Although she is sympathetic to the separatist movement, she would not be willing to fight in a separatist movement herself. However, she believes in what they are fighting for, namely to protect her and other ethnic Russians from being ill-treated and for the freedom of their language.

[28] The ideal outcome to the current conflict would be for the Ukrainian authorities to agree with the federalisation of the Donbass and Donetsk regions, for the Russian language to be made the second official language of Ukraine and for others not to ill-treat people because they are Russian.

[29] The mother strongly disagrees with moves made to eradicate Russian culture from Ukrainian life, including the banning of Russian-speaking television channels and a ban on the Russian language. The Ukrainian government has also prohibited all Russian celebrations, for example those previously held on 23 February and 9 May, commemorating Russian lives lost during the Second World War.

[30] The mother fears that she will be unable to find employment on return to Ukraine as she does not speak Ukrainian. The Ukrainian language is now an informal requirement for employment as Russian-speakers are seen as not being pro-Ukrainian.

[31] The mother fears for her husband's safety because of the high likelihood he will be mobilised and forced to fight against ethnic Russians. As he does not wish to fight his own people, he will refuse. This would put him at risk of being killed or physically harmed for failing to obey orders. It will also mean he is viewed as a separatist. The mother fears that she and the children will also, by association, be viewed as separatists and be at risk of physical harm.

[32] The mother fears for her children's future and what will happen to them living in a society where young people are taught that Russia is the enemy. She fears that her children will be at risk of discrimination, harassment and ill-treatment because of their ethnicity. The mother has learnt through her sister that the school syllabus in Ukraine has changed and "history has been re-written, painting Russia in a negative light".

Material and Submissions Received

[33] On 18 May 2015, the Tribunal received two folders of country information and other evidence relating to these appeals and the appeal of the father's brother-in-law (*AB (Ukraine)* [2015] NZIPT 800742). On 27 May 2015, the Tribunal received comprehensive submissions from the representative.

[34] During the hearing the representative produced written opening submissions, further country information, links to video evidence on YouTube regarding the country situation and copies of all videos. The country information is referred to hereafter, as relevant.

ASSESSMENT

[35] 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 appellants as:

- (a) refugees under the 1951 Convention Relating to the Status of Refugees (“the Refugee Convention”) (section 129); and
- (b) protected persons under the 1984 Convention Against Torture (section 130); and
- (c) protected persons under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[36] In determining whether the appellants are refugees or protected persons, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the father and mother’s accounts.

Credibility

[37] The Tribunal finds the father and mother to be credible witnesses. It accepts their accounts in their entirety.

Summary of facts

[38] The appellants are Ukrainian citizens of Russian ethnicity. The father is aged 33 years old and is liable for compulsory military service in the current and forthcoming rounds of mobilisation. The father is completely opposed to serving in the Ukrainian military and would refuse to fight against ethnic Russian people. In the early 2000s, under Yanukovich’s government, the father worked in military production for a secret government workshop.

[39] The mother and father are strongly opposed to the current Poroshenko government and were supporters of Yanukovich’s government. If forced to return to the Ukraine, the father and mother would feel compelled to express their anti-government pro-Russian views and seek to organise with other likeminded ethnic Russians. They would attend meetings and explore other avenues of involvement in terms of finding a peaceful solution to the current crisis. The father’s mother has been involved in pro-Russian protests and has received visits from unknown individuals, threatening her if she did not cease such activities.

The Refugee Convention

[40] 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.”

[41] 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.”

[42] 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

[43] 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].

[44] 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?

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

Country information – background to the eastern-Ukrainian conflict

[46] 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 cooperation” (*antiteroristichna opertsiya*, or ATO), aimed at regaining control of the area. Since that time, fighting has erupted in eastern Ukraine, amidst “compelling evidence of Russian military involvement” (Amnesty International *Breaking Bodies: Torture and Summary Killings in Eastern Ukraine* (22 May 2015)).

[47] 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. Alec Luhn in “Upswing In Fighting In Ukraine Sends Civilians Fleeing And Puts Truce In Doubt” *The Guardian* (3 May 2015) at www.theguardian.com, 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.”

[48] 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 the Assessment Capacities

Project (ACAPS) report “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) at www.theguardian.com.

[49] 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” *Eurasia Daily Monitor* (10 April 2015) at www.jamestown.org; Simon Shuster “Meet the Pro-Russian 'Partisans' Waging a Bombing Campaign in Ukraine” *Time* (10 April 2015); “Bomb Blast In Government-Held [...], Ukraine” *Radio Free Europe/Radio Liberty* (21 April 2015)).

[50] 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” (see Vitaly Shevchenko “Ukraine Conflict: Bombings Go Beyond Battle Zone” *BBC News* (7 February 2015)). 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 its resident “have had to adjust to a terrifying new normal” (Linda Kinstler “A Ukrainian City Holds Its Breath” *Foreign Policy* (20 February 2015) at www.foreignpolicy.com).

Military mobilisation

[51] 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.

[52] 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) at <http://rt.com>).

[53] Four waves of mobilisation are planned for 2015 with 50,000 men subject to “conscription” 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) at <http://tass.ru/en>; “Ukrainians Evading Draft May Face Five Years in Prison” *Sputnik News Service*

(12 February 2015) at <http://sputniknews.com>). Presumably, a further 50,000-100,000 will be mobilised later in the year.

[54] 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 - Defense Minister” *ITAR-TASS World Service* (18 March 2015) at <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) at www.theguardian.com).

[55] 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 *Submission to the 108th Session of the Human Rights Committee – Ukraine: Military Service, Conscientious Objection and Related Issues* (June 2013) at pp1-3). The United Nations Human Rights Committee has frequently expressed concern over the discriminatory nature of Ukrainian law on the provisions for alternative military service (UN Human Rights Committee *Concluding Observations on the Seventh Periodic Report of Ukraine* CCPR/C/UKR/CO/7 (22 August 2013)).

Draft evasion and penalties

[56] The penalty for draft evasion is two to five years of imprisonment (United Nations High Commissioner for Refugees (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)).

[57] 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 (“Ukrainian parliament passes law allowing army deserters to be shot” *RT News* (5 February 2015):

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

[58] 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.”

[59] 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 (“The End of Journalism in Ukraine: A Feature Interview with Anatoly Sharij” *Global Research* (12 May 2015) at www.globalresearch.ca).

Resistance to current mobilisation

[60] 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) at <http://foreignpolicy.com>).

[61] 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'."

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

"... [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."

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

[64] 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 people 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) at <http://rt.com/news>). This signals a sharp increase in draft evasion from previous months and years. In January 2015, UNHCR reported (UNHCR, *International Protection Considerations Related to the Developments in Ukraine – Update II* (15 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)."

[65] 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 [57]-[58].

[66] 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) at <http://rt.com/news>).

Duration of the conflict

[67] 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) at <http://sputniknews.com>).

[68] According to the President’s official website (<http://www.president.gov.ua/en/>), speaking at the commencement of the Ukrainian-American military training operation on 20 April 2015, he emphasized that the war was waged not only against Ukraine, “It 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”. President 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

[69] 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) at www.icrc.org). The conflict is located in the east of Ukraine.

[70] 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) at 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” *Deutsche Welle* (12 December 2014) at www.dw.com). 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).

[71] The Ukrainian military is receiving financial, training and other support from the United States of America (see The White House press release “Fact Sheet: US Support for Ukraine” (18 September 2014) at www.whitehouse.gov). In April 2015, a joint US-Ukraine training initiative was launched (see above at [68]).

[72] 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 are 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) at www.aljazeera.com).

[73] 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”.

[74] 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.

[75] 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.

[76] 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.

[77] 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.

[78] The February 2015, UN Office of the High Commissioner for Human Rights (OHCHR) Report on the Human Rights Situation in Ukraine (15 February) 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.” (pp5-6).

[79] The UN Human Rights Monitoring Mission in 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” (15 February 2015), pp10-11).

[80] 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).

[81] 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 (Amnesty International *Breaking Bodies: Torture and Summary Killings in Eastern Ukraine* (22 May 2015)).

[82] The OHCHR September 2014 monitoring report similarly found breaches of international human rights and humanitarian law (“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.”

[83] 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)).

[84] 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 (*Breaking Bodies: Torture and Summary Killings in Eastern Ukraine* (22 May 2015)):

“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 father’s case

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

[86] The Tribunal finds that the father’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. It also notes the father’s experience working in military production in the early 2000s.

[87] 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 the European Union, 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.

[88] The Tribunal accepts that the father 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.

[89] 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.

[90] 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.

[91] Amnesty International has also documented cooperation between official state authorities, including the military, and informal 'paramilitary' 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.

[92] On the 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 father that the reported violations of human rights are sufficiently widespread as to be occurring across most, if not all, Ukrainian military units.

[93] The Tribunal 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, CIV-2006-404-1371, 21 September 2007, Priestley J) at [107], refugee determination procedures are benign and tilted very much in favour of a claimant.

[94] The father 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.

[95] 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.”

[96] The Tribunal is satisfied that the father 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.

[97] As the Tribunal has found the father 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 the Ukrainian authorities would perceive him to be a separatist.

Application to the mother's case

[98] The mother claims she faces a real chance of being persecuted as she will be viewed as pro-Russian and therefore pro-separatist through her association with the father and by engaging in political activities in support of Russia.

[99] While, her husband's refusal to perform military service will put him at risk of imprisonment by the authorities, there is no suggestion that this will result in any further inquiries about the wife. However, the Tribunal accepts that she holds strong pro-Russian views and would become involved in political activities, including protests and other forms of organising support for the pro-Russian cause.

[100] The Tribunal is satisfied that the mother's strong opposition to the Ukrainian government would compel her to engage in anti-Poroshenko government protests and other forms of political activism. This would bring her to the attention of the authorities and anti-Russian extremist groups, who would mistakenly regard her as a separatist. As confirmed by the aforementioned country information, any activity seen as supporting the separatist cause is met with a harsh response. This would place the mother at risk of ill-treatment and unlawful detention.

Application to the children's cases

[101] The claim that the children are at risk of serious harm to the real chance threshold, however, is not established. The Tribunal finds that any risk of physical harm faced by the children, through association with their parents, is speculative. The military service process would not involve the children and it is speculative that they would be viewed as supporting the separatist cause even if their parents were, because of their age and lack of country information, establishing that children are targeted.

[102] While it is accepted that the children may face some discrimination, in the form of a modified school curriculum which is pro-Ukrainian, and bullying from other children, this does not amount to serious harm for the purposes of the Convention.

Is there a Convention reason for the persecution?

[103] The Tribunal finds that the father faces a real chance of being persecuted for reasons of his political opinion.

[104] 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.”

[105] Here, the father’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.

[106] The father’s predicament is contributed to by his political opinion. The mother’s predicament is contributed to by her political opinion as a pro-Russian supporter. The second principal issue is also answered in the affirmative for the father and mother and in the negative for the children.

Conclusion on Claims under the Refugee Convention

[107] For all the reasons given above, the Tribunal finds that the mother and father both have a well-founded fear of being persecuted if returned to Ukraine, for a Convention reason. They are both refugees.

[108] The children do not have well-founded fears of being persecuted on return to Ukraine and are not therefore refugees.

The Convention Against Torture

[109] 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.”

[110] The mother and father have been found to be Convention refugees. The recognition of them as refugees means that they 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 mother and father would be in danger of being subjected to torture in Ukraine.

[111] As to the children, they rely on the same evidence in support of their claims under the Convention Against Torture as they did to support their claims under the Refugee Convention. The Tribunal has already found that the evidence does not establish that they face well-founded fears of being persecuted in Ukraine. For the same reasons, on the basis of the evidence before it, the Tribunal is satisfied that the children have not established that there are substantial grounds for believing that they would be in danger of being subjected to torture if they are now returned to Ukraine.

[112] The children are not entitled to be recognised as protected persons under section 130(1) of the Act.

The ICCPR

[113] 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.”

[114] Again, because the mother and father are recognised as refugees, they are 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 mother and father being deported from this country. Therefore, there are no substantial grounds for believing that the mother and father are in danger of being subjected to arbitrary deprivation of life or to cruel, inhuman or degrading treatment or punishment.

[115] As to the children, they rely on the same evidence in support of their claims under the ICCPR as they did in support of their claims under the Refugee Convention. For the same reasons, the Tribunal finds that the children have not established substantial grounds for believing that they would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if returned to Ukraine.

[116] The children are not, therefore, persons requiring protection under the ICCPR and it follows that they are not protected persons within the meaning of section 131(1) of the Act.

CONCLUSION

[117] For the foregoing reasons, the Tribunal finds that the mother and father:

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

The mother's and father's appeals are allowed.

[118] For the foregoing reasons, the Tribunal finds that the children:

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

[119] The children's appeals are dismissed.

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