TV (Ukraine - prison conditions) Ukraine [2004] UKIAT 00222

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

12 August 2004

Before:

Dr H.H. Storey, (Vice President)
Mr Andrew Jordan (Vice President)

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

Representation

For the Appellant/Secretary of State:	Mr M. Blundell, Home Office Presenting Officer
For the Respondent/Claimant:	Mr H. Norton-Taylor, Counsel instructed by White Ryland, Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals against the decision of an Adjudicator, Mr L.A. North, following a hearing in Nottingham on 4 April 2002 dismissing the Claimant's human rights appeal but allowing his appeal on human rights grounds. The Secretary of State had previously rejected both claims.

2. The Claimant is a citizen of Ukraine and was born on 22 May 1978. He is 25 years old. He claims to have arrived in the United Kingdom on 2 November 2001 avoiding immigration controls. He claimed asylum on 5 November 2001. On 12 November 2001,

the Secretary of State made a decision to issue removal directions for the Claimant's removal to Ukraine. This gave rise to a right of appeal to the Adjudicator under paragraph 69 (5) of the Immigration and Asylum Act 1999 which the Claimant duly exercised.

The Claimant's case

3. As appears from paragraph 14 of the determination, the Claimant joined the Ukrainian National Assembly (UNA) closely associated with the paramilitary Ukrainian National Self Defence Organisation (UNSO) in 1997 whilst an undergraduate and attended a demonstration on 9 March 2001 that was violently broken up by the police. The Claimant was arrested and released on 10 March 2001 without charge. During the course of his detention he was beaten to such an extent that he required treatment in hospital. He was required to return to the police station on 12 March 2001 and released the same day. However, on 23 May 2001 he was again seen at the police station and released on condition that he remained in town. He subsequently received a court summons and it was this that prompted him to leave Ukraine. He left the country on 30 October 2001 travelling by car via Poland.

The Adjudicator's decision

4. In paragraph 24 of the determination, the Adjudicator found that the Claimant had been beaten by the Ukrainian police as a result of his participation in a demonstration. He was not satisfied that this amounted to persecution because the demonstration was unlawful, albeit the authorities used excessive force to dispel the demonstrators. The authorities were not, so the Adjudicator found, targeting the demonstrators for their political opinions but because they were involved in an unlawful demonstration. The Adjudicator found that the actions of the police may well have been over-zealous attempts by a poorly disciplined security force to maintain public order. The Adjudicator went on to find that the Claimant would not be targeted as a result of his political views. Accordingly, the Adjudicator dismissed the asylum claim. There is no appeal from that decision.

5. However, the Adjudicator allowed the claim under the ECHR. He said, in paragraph 26 of the determination:

> *"My reasons for allowing the Appellant's human rights appeal are that I am satisfied that he will face prosecution on his return to the Ukraine either for his involvement in the*

demonstration or because of his failure to surrender to the request to attend for questioning or the summons to appear at court. The background information is clear that bail is unlikely and a lengthy period of pre-trial detention and possibly post trial detention are likely. Because of my findings, noted above, as to the conditions the appellant would face while in detention and the fact that those conditions fall lower than the minimum internationally [sic] level, I find that the appellant is highly likely to experience inhuman and degrading treatment at the least, and a serious possibility of torture, if he is returned to Ukraine. I am satisfied that the national requirement for registration of addresses and internal travel documents make it unlikely that the appellant will successfully avoid detection. For those reasons I find it [likely] the appellant will experience treatment contrary to Article 3 if he is returned to the Ukraine."

The appeal to the Tribunal

6. The Secretary of State appealed against that finding. In the grounds of appeal, it is argued that the Adjudicator failed to say why the Claimant would experience treatment of such severity as likely to engage Article 3.

7. Mr Blundell, who appeared on behalf of the Secretary of State, relied on the judgment in **Hariri [2003] EWCA Civ 807** in which the Court of Appeal drew extensively upon the decision of the Tribunal in **Muzafar Iqbal [2002] UKIAT 02239** where the Tribunal stated in paragraph 57:

> *"In cases which rest not on a personal risk of harm (for example, where the police or prison staff would have cause to target a Claimant) but on a risk of serious harm said to face people generally, for example in this case all persons detained pending trial, it cannot be said that they would face a real risk of serious harm unless in that country there is a consistent pattern of gross and systematic violations of their human rights whilst in detention."*

8. This passage was approved by Laws LJ in **Hariri** as reflecting no more nor no less than the reality of the situation; the fact that ill-treatment or misconduct might be routine or frequent would not be enough. Laws LJ said in paragraph 8:

> *"5. At this stage, the appellant's argument before the IAT was that he was at risk of ill-treatment if returned as a*

member of a class, rather than on account of facts special to him. His essential complaint, and the point on which Ward LJ granted permission to appeal, is that the IAT in paragraph 10 applied a standard of proof for the establishment of a risk of persecution or treatment contrary to Article 3 which is higher than, and at variance from, the standard established in the jurisprudence. In short, it imposes greater burdens on an applicant than should be imposed having regard to the test set out in **Sivakumaran [1988] 1 AC 958***, in their Lordship's House, namely: "a reasonable degree of likelihood" of relevant ill-treatment. This requires proof of a real, that is, not a fanciful, risk; but its perceived incidence may well be less, perhaps a good deal less, than a formal probability of 51 per cent or more. It is common ground that the Sivakumaran standard applies as surely in appeals brought under the European Convention on Human Rights as it does in refugee appeals as such. The appellant's target in this argument is the requirement, adopted at paragraph 10 of the IAT determination which I have read, to show "a consistent pattern of gross and systematic violation of fundamental human rights" by way of punishment for draft evasion or unauthorised departure from the country, before a case of persecution or Article 3 ill-treatment could be accepted...*

7. Mr Nichol submits that this approach is flatly inconsistent with Sivakumaran, and that it is wrong in principle to treat the approach to Article 3 of the Torture Convention as a legitimate read-across to the 1951 Refugee Convention and Article 3 of the European Convention on Human Rights. In his skeleton argument he has enumerated a number of differences between the two sets of provisions.

8. In my judgment, however, the appellant's arguments all forget one simple but central fact in the case. It is that the points concerning the appellant's individual circumstances had all fallen away. When it came to paragraph 10 of the IAT determination, his case depended entirely upon it being established that there was a real risk that he would suffer unlawful ill-treatment, as I have said, as a member of a class or perhaps two classes: draft evaders and those who had left the country without authority. In those circumstances, as it seems to me, the "real risk" - the conventional Sivakumaran standard - could not be established without its being shown that the general

situation was one in which ill-treatment of the kind in question generally happened: hence the expression "gross and systematic." The point is one of logic. Absent evidence to show that the appellant was at risk because of his specific circumstances, there could be no real risk of relevant ill-treatment unless the situation to which the appellant would be returning was one in which such violence was generally or consistently happening. There is nothing else in the case that could generate a real risk. In this situation, then, a "consistent pattern of gross and systematic violation of fundamental human rights", far from being at variance with the real risk test is, in my judgment, a function or application of it.

9. The approach that we have set out above should be viewed in the light of the decision of the Court of Appeal in **Batayav [2003] EWCA Civ 1489**. This appeal proceeded solely in relation to the appellant's claim to the protection of Article 3 of the European Convention and the only issue was whether the return of the appellant to the Russian Federation would put the United Kingdom in breach of Article 3 because of the conditions of detention in the Russian penal system in which the appellant would be held in Russia. Sedley LJ said:

> *37. I want to add a word, however, about the evaluation of conditions which are alleged to create a real risk of inhuman treatment. The authority of this court has been lent, through the decision in Hariri, to the formulation that ill-treatment which is "frequent" or even "routine" does not present a real risk to the individual unless it is "general" or "systematic" or "consistently happening": see paragraphs 9 to 10 in the previous judgment.*
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> *38. Great care needs to be taken with such epithets. They are intended to elucidate the jurisprudential concept of real risk, not to replace it. If a type of car has a defect which causes one vehicle in ten to crash, most people would say that it presents a real risk to anyone who drives it, albeit crashes are not generally or consistently happening. The exegetic language in Hariri suggests a higher threshold than the IAT's more cautious phrase in Iqbal, "a consistent pattern", which the court in Hariri sought to endorse.*
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> *39. There is a danger, if Hariri is taken too literally, of assimilating risk to probability. A real risk is in language and in law something distinctly less than a probability, and it*

cannot be elevated by lexicographic stages into something more than it is.

10. Given that the Adjudicator has not approached the case by considering whether there was a consistent pattern of violations of the human rights of those in detention sufficient to engage Article 3, the Adjudicator had not adopted the correct approach and the Tribunal is enabled to consider the appeal afresh based on the Adjudicator's findings of fact. Mr Norton Taylor did not pursue his submission that the Adjudicator's approach was correct and that he was entitled to reach the conclusion that he did on the basis of clear findings of fact.

The background material

11. When the Adjudicator considered the appeal, he had before him the US State Department report for 2000, published in March 2001. We were referred to these passages:

> "The Government's human rights record was poor in some areas; however, the Government continued to respect the rights of its citizens in other areas. In previous years, police and military committed extrajudicial killings; however, there were no reports of such incidents during the year. Police and prison officials regularly tortured and beat detainees and prisoners, sometimes resulting in death. Prison conditions are harsh and life-threatening. There were instances of arbitrary arrest and detention. Lengthy pretrial detention in very poor conditions was common, and detainees often spent months in pretrial detention for violations that involved little or no prison time if convicted. Long delays in trials are a problem. The Government rarely punishes officials who commit abuses. The SBU, police, and Prosecutor's Office have drawn domestic and international criticism for their failure to take adequate action to curb institutional corruption and abuse in the Government. [Claimant's supplementary bundle pages 10-11.]
>
> There was no improvement during the year in prison conditions, which are harsh, life-threatening, and do not meet minimum international standards. Prison officials intimidated and mistreated inmates. Due in part to the severe economic crisis, prisons and detention centers were severely overcrowded and lacked adequate sanitation and medical facilities. According to official statistics, funding for prisons decreased by almost 14 percent over the last 3 years. During the year, the Government announced a general amnesty for

34,800 inmates intended to relieve overcrowding. Because the country lacks a well-developed system of suspended sentences, and the law does not differentiate between misdemeanors and felonies, at least one-third of inmates were convicted of only minor violations.
Conditions in pretrial detention facilities routinely failed to meet minimum international standards. Inmates sometimes were held in investigative isolation for extended periods and subjected to intimidation and mistreatment by jail guards and other inmates. Overcrowding is common in these centers. For example, the pretrial detention center in Kiev, houses 3,500; it was constructed to hold 2,850 persons.

According to official sources, information on the physical state of prison walls and fences as well as pretrial detention blocks is considered to be a government secret. However, the press reported freely about harsh prison conditions. In 1998 there were 1,901 deaths in prisons and detention facilities, which was more than 3 times the death rate of the general population. Poor sanitary conditions result in deaths from diseases such as tuberculosis and dysentery. There are frequent incidents of murder by fellow inmates and suicide. [Claimant's supplementary bundle page 12]

The US State Department report for 2002, released 31 March 2003 is not substantially different:

"According to complaints received from the Office of the Ombudsman and human rights NGOs, prison officials intimidated and mistreated inmates...According to official statistics of the Penal Department, in the first 6 months of 2001, there were 865 deaths in the prisons. Poor sanitary conditions resulted in 300 deaths from diseases such as tuberculosis and 13 from dysentery during the first half of 2001. There were frequent incidents of killings by fellow inmates, and in the first half of 2001, 13 individuals were reported officially to have committed suicide, although human rights groups believed the actual figure to be higher.

Prisoners were permitted to file complaints to the Ombudsman about the conditions of detention, but human rights groups reported that inmates were punished for doing so. In January 2001, the Rada passed amendments to the Penal Code that relaxed Soviet-era restrictions in high-security prisons and removed a requirement that all prisoners' letters should be read.

Conditions in pretrial detention facilities also were harsh. Inmates sometimes were held in investigative isolation for extended periods and subjected to intimidation and mistreatment by jail guards and other inmates. Overcrowding was common in these centers. Although there were no official figures, local lawyers believed that the pretrial detention center in Kiev housed as many as 6,000 persons, although its capacity was estimated to be 3,500. The SBU still maintained its own pretrial centers at year's end, although it had announced in 2001 that it would close them. According to Human Rights Ombudsman Nina Karpachova, approximately one-third of detainees were tortured.

12. These passages are the source of some of the material found in the Country Assessment prepared by CIPU. The relevant paragraphs in CIPU are as follows:

Prisons and Prison Conditions

5.22 Prison conditions are harsh and do not meet minimum international standards. Due in part to severe economic conditions, prisons and detention centres are severely overcrowded and lack adequate sanitation and medical facilities. In June 1999, official statistics put the prison population at 223,900, including 42,600 in pre-trial detention, twice that of 1992. In addition, prison officials intimidate and mistreat inmates, who are subject to regular beatings as well as torture, which has sometimes led to death. According to official statistics of the Penal Department, in the first 6 months of 2001, there were 865 deaths in the prisons. Poor sanitary conditions resulted in 300 deaths from diseases such as tuberculosis and 13 from dysentery during the firs half of 2001. There were frequent killings by fellow inmates, and in the first half of 2001, 13 individuals were reported officially to have committed suicide.

5.23 Because the country lacks a well-developed system of suspended sentences and the law does not differentiate between misdemeanours and felonies, at least one-third of inmates have been convicted of only minor offences. In response to the overcrowding, a mass amnesty in July 1999 released some 40,000 inmates

5.24 Diplomatic representatives and human rights monitors have reported that it has become more difficult to obtain access to prisons. In addition, cases were reported of prisoners being denied correspondence, and limited to one family visit per year. Prisoners may complain to the Human Rights Ombudsman about the conditions of detention, but human rights groups have

reported that inmates were subsequently punished for initiating complaints.

13. The overview of the human rights situation is in these terms:

Overview

6.1 The 1996 Constitution provides a legal framework for protecting civil and human rights **[11]** which reflects Ukraine's commitments as a member of the Council of Europe (since November 1995) **[9b]** and signatory to a number of international human rights instruments, **[9a]** including the European Convention on Human Rights. **[9b]** However, many constitutional provisions still await the passage of enabling legislation, while many areas of life are still regulated by Soviet law and practices, which means that actual human rights practices often do not conform to constitutional requirements. During 1999, there was limited progress in some areas of Ukraine's human rights record, although serious problems persist. The government has made little effort to punish officials who have committed or abetted human rights abuses or to end such abuses.**[11]**

6.2 A wide variety of domestic and international human rights groups operate in Ukraine without government restriction, investigating and publishing their findings on human rights cases. Government officials are generally co-operative and responsive to their views, but enquiries into penal conditions, which are a significant human rights concern, are limited by their status as state secrets, and human rights groups have reported increased difficulties in investigating in this area. In January 1998, the President signed the law creating the Parliamentary Commissioner on Human Rights, which is a constitutionally mandated independent human rights ombudsman, and parliament elected the first Ombudsman in April 1998. However, the law does not provide any significant enforcement authority or provide for penalties for obstructing the Ombudsman's enquiries. Nevertheless, the Office of the Human Rights Ombudsman has still been active in investigating human rights violations, and states that most of the complaints it has received involve abuses by law enforcement personnel. Citizens have the right to file appeals about alleged human rights violations with the European Court of Human Rights in Strasbourg. According to one human rights expert, some 13,000 appeals were made to the Court in 1998 and some 200 cases were accepted for review.**[11]**

6.3 Citizens have the right to file appeals with the ECHR about alleged human rights violations. Since 1997, Ukrainians have filed

approximately 4,000 applications with the court. There were 10 decisions on Ukrainian cases during 2002: 8 cases were ruled inadmissible, 1 was found partially admissible and in 1 case the Court ruled that the applicant had been deprived of his right to an impartial tribunal in Ukraine. **[11a]**

6.4 The Constitution prohibits torture, but there have been numerous reports of torture and ill-treatment of suspects in police custody and prisons throughout Ukraine, in contravention of its commitments as a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the International Covenant on Civil and Political Rights.**[4b]** Police and prison officials regularly beat detainees and prisoners, and there have been persistent reports that Berkut (special militia units or riot police) troops beat and torture inmates as part of regular training exercises. Two forms of torture reported are the "swallow" method, whereby the detainee is placed on his stomach and his feet are tied to his hands behind him, forcing his back to arch, and the "baby elephant" method, whereby a gas mask is placed on the victim's head and the flow of oxygen is slowly reduced. Another form of torture employed is called the "monument" method, whereby the detainee is suspended from his hands on a rope and beaten. Some detainees are beaten until they waive their right to a lawyer. There is no effective mechanism for registering complaints about mistreatment or for obtaining redress for such actions. Prisoners may address complaints to the Human Rights Ombudsman, who has received widespread reports of torture in pre-trial detention, but this avenue is limited by the Ombudsman's lack of enforcement authority, prisoners' fears of punishment for initiating complaints, and insufficient effort on the part of the government to end such practices or to punish those responsible. One positive step is a new Criminal Code that came into effect on 1 September 2001 mandating 3 to 10 years imprisonment for torture.**[11]** and on 28 May 2002, in the first case brought by the Ombudsman against law enforcement agencies, the Frankivskiy district court in Lviv ordered the the Lviv prosecutor's office and the Security Service of Ukraine to pay damages to the parents of a man tortured to death in prison **[56]**

6.5 Ukraine committed itself to a moratorium on the death penalty on joining the Council of Europe in November 1995. However, subsequent reports indicated that at least 212 people were executed between then and March 1997, which led the Council of Europe to adopt a third resolution, in January 1998, condemning the continuing executions in Ukraine and threatening it with expulsion should more executions be carried

out. Reports indicated that at least 345 prisoners remained under sentence of death at the end of 1998, which caused further international concern and doubts over Ukraine's commitment to ending the death penalty.**[4a],[4c]** However, in February 2000, the Rada passed amendments to the Criminal Code which abolish the death penalty in Ukraine and signed a special protocol of the European Convention on Human Rights to this effect on 3 May 2002 **[47]**. Crimes previously punished by the death penalty are now punishable by life imprisonment.**[14]**

14. The Amnesty International report of 15 October 2001 states:

> Allegations of torture and ill-treatment of detainees by police officers persisted and appeared to be widespread. Prison conditions continued to fall below international minimum standards and were frequently cruel, inhuman and degrading.
>
> Torture and ill-treatment
> Allegations of torture and ill-treatment by police officers continued. AI's long-standing concerns were reflected in the reports of three visits by the European Committee for the Prevention of Torture (CPT) to Ukraine in 1998, 1999 and 2000, which were published in October 2002. The CPT concluded in its report on its visit in 2000 that people in the custody of the police ran a significant risk of being physically ill-treated, particularly at the time of arrest and during interrogation, almost invariably for the purposes of extracting a "confession". During its 1998 and 2000 visits the CPT encountered "numerous allegations" of ill-treatment, which included kicks, punches and blows with a truncheon. However, the CPT also received allegations of more severe forms of ill-treatment which could amount to torture. These included electric shocks, pistol whips, burns using cigarette lighters, asphyxiation by placing a gas mask or plastic bag over a detained person's head, beatings while handcuffed and suspended by the legs or arms, and beatings on the soles of the feet. Allegations of ill-treatment were not confined to police custody. During its 2000 visit to several prisons the CPT encountered a number of allegations of ill-treatment which included blows with fists, various wooden objects and rubber batons or tubes. Disturbingly, the CPT stated that many detainees in police holding facilities and prisons appeared afraid to talk to members of its delegation or to be examined by its medical members for fear of subsequent reprisals.

Harsh prison conditions

Only very limited progress was made in improving conditions in pre-trial detention centres and prisons, which fell below international minimum standards. Endemic overcrowding was exacerbated by a general policy of remanding criminal suspects in custody and the infrequent use of non-custodial punishments. Delays in the administration of justice resulted in prolonged periods of pre-trial detention. After its visit to Ukraine in 2000 the CPT described conditions at the SIZO No. 15 detention centre in Simferopol as characteristic of conditions often experienced by prisoners. "[The majority] of the prison population... were subjected to appalling material conditions. Inmates were crammed into severely overcrowded dormitories... with virtually no natural light, often poor artificial lighting and inefficient ventilation ... Furthermore, the establishment was unable to provide each prisoner with a bed; consequently, in many dormitories, inmates had to take turns to sleep. While some dormitories had been freshly painted, many others were dirty and infested with cockroaches and other vermin."

The appellant's case before the Tribunal

15. At the hearing of the appeal, Mr Norton-Taylor sought to introduce some material that was not before the Adjudicator. At page 39 of the Claimant's supplementary bundle is the first of a series of documents that are said to evidence criminal proceedings against the Claimant in the Ukraine. These have never been tested in any previous hearing and the Tribunal is uncertain of their provenance. The documents were, however, considered by Robert Chenciner in a report prepared on or about 21 September 2003, after the Adjudicator's determination. He comments in the report that Article 71 of the criminal code carries a punishment of 2 to 12 years imprisonment. His report at paragraph 1.3 relating to prison and detention conditions is extremely short and is derived from the material we have set out extensively above. We are prepared to take this new material into account but bear in mind the uncertainties associated with it.
16. We were also referred to a report by Dr Rosaria Puglisi of the University of Leeds that was faxed to the Tribunal shortly before the hearing. Of this report we were referred to page 2 in which it is said that the systematic failure of the Ukrainian institutions to guarantee the rights of suspects in pre- and post-trial detention has prompted Amnesty International to conclude that "a wide gap between law and reality still exists." Dr Puglisi refers to the

report of the International Helsinki Federation quoting the Parliamentary Ombudsman is saying that 30 percent of prisoners are victims of torture and that the lack of any effective mechanism to register complaints against mistreatment and abuse contributes to the perpetration of such behaviour. (See page 5 of the report.) Much of the report uses the same sources as we have used.

17. Mr Norton-Taylor referred us to the decision of the ECtHR in **Kalashnikov**, as an example of a case where poor prison conditions are capable of violating Article 3 of the ECHR. The Court considered the overcrowded conditions in a Russian detention establishment where 18 to 24 men were housed in a cell designed for 8 measuring 17 to 20 square metres. The cell was infested with vermin, leading to skin disease and fungal infections. Each bed was used by 3 inmates who had to sleep in 8-hour shifts. The cell was constantly lit and noisy. Smoking was permitted inside the cell which was ill-ventilated and stuffy. The toilet facilities did not afford adequate privacy. The cell was filthy and dilapidated. Those conditions amounted to a breach of Article 3 – see paragraph 102. The applicant spent an aggregate of 5 years in detention, most of which was awaiting trial.
18. Mr Norton-Taylor conceded that in Ukraine the period of detention following a trial and conviction was speculative. He submitted that it ranged from 2 years to 15 years. We accept the submission of Mr Blundell in this regard to the effect that if the fact of trial and conviction was speculative, the risk of post-trial detention becomes so speculative as to fail to establish that there was a real risk of its happening at all. Furthermore, it was the Claimant's case that he was arrested with several hundred others in the clashes that formed part of the demonstration on 9 March 2001. In the almost three years that have followed, the Claimant has not produced any information as to whether others were convicted of offences arising out of this incident and, if there were, what sentences were imposed. This information must be capable of verification. For these reasons, we find that the appellant has failed to establish that he will be convicted or sentenced to imprisonment, although it remains a possibility.
19. However, we consider that the Claimant has established that he faces a period of pre-trial detention. Our reasons are as follows. In the first place, the background material establishes it is likely that the period will be lengthy. In the second place, this material establishes that conditions are poor, with overcrowding and inadequate sanitation. There is a risk of intimidation and ill-treatment by prison officials. These conditions are caused in part by the huge prison population compared with the size of the population (224,000 in custody out of a population of 49 million –

of which some 43,000 were in pre-trial detention in 1999). The ECHR does not guarantee for this Claimant that prison conditions will be of a particular standard or in accordance with European or British norms. Whatever the reference in the material to international standards may mean, Ukrainian prisons, like many others, fall below the European and United Kingdom standards. Nevertheless the Claimant is required to establish a consistent pattern of serious violations of the human rights of detainees of a severity to violate the threshold set by Article 3. It is only by establishing such a consistent pattern that he will satisfy the "real risk" test that triggers the right not to be returned.

20. The material to which we have referred is a catalogue of serious human rights abuses taking place in the Ukrainian prison system. The difficulty with which the Tribunal is faced is in making an assessment of the scale and frequency of these abuses. In that regard, we find it extremely difficult not to attach significant weight to one of the assessments that attempts to quantify the incidence of abuse. According to Human Rights Ombudsman Nina Karpachova, approximately one-third of detainees were tortured. The Tribunal expresses some concern as to the basis on which this calculation is made. It is not clear whether the information comes from inmates themselves, in spite of the suggestion that many are reticent to complain. Its reliability has not been established beyond reasonable doubt. If the assessment is made simply on those cases that have been reported to her, it may not provide a conclusive or reliable statistic for condition across the entire penal system. Nevertheless, particularly given that we have to decide only whether there is a reasonable degree of likelihood that the appellant will face ill-treatment in pre-trial detention, the Tribunal cannot lightly disregard this evidence.

21. Against this evidence, there is some evidence that the government is taking steps to address some of the problems. Steps, for example, have been taken to reduce overcrowding. The figures for the Kiev detention centre, for example, whilst demonstrating an occupancy significantly beyond its design capacity (6,000 although designed for 3,500) may not be worse than overcrowding in some European facilities. Overcrowding is not, in itself, a violation of an inmate's human rights. Similarly, the deaths in custody, although high, include deaths from natural causes and this may be a reflection of the poor state of the physical health of those prior to detention. It also appears that the government has taken steps to address the problem of torture, albeit under pressure form the Council of Europe, by introducing an amendment to the Criminal Code specifically

aimed at criminalising it. In May 2002, a successful prosecution was brought.

22. In spite of these reasons for limited optimism, the material that we have set out above cannot, in our judgment permit a finding that Article 3 will not be breached. In reaching this conclusion, we consider that it is only relatively recently that the Ukraine has sought to bring itself under European scrutiny. The authorities are aware of the problem and are addressing it, albeit with only limited success on current information. The fact that there is a Human Rights Ombudsman prepared to make outspoken criticisms of failings within the system is a mark of the government's efforts to make improvements.

23. However, we would emphasise that the material that we have used is relatively out-of-date. In that sense, the decision may be historical. For this reason we do not consider the findings we have made should necessarily be regarded as of continuing relevance in future cases. Nevertheless, the material before us establishes a reasonable likelihood that the Claimant faces a violation of his Article 3 rights.

24. This was the conclusion reached by the Adjudicator. Having reviewed the material, we consider the Adjudicator reached a sustainable decision. For these reasons, we dismiss the appeal.

Decision: The appeal of the Secretary of State is dismissed.

Andrew Jordan
Vice President