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

Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 October 2016	
& 1 November 2016	**……**

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE LINDSLEY

Between

VB (1)
IS (2)
(ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Symes and Ms S Panagiotopoulou instructed by Yemets Solicitors

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

1. *At the current time it is not reasonably likely that a draft-evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings for that act, although if a draft-evader did face prosecution proceedings the Criminal Code of Ukraine does provide, in Articles 335, 336 and 409, for a prison sentence for such an offence. It would be a matter for any Tribunal to*

consider, in the light of developing evidence, whether there were aggravating matters which might lead to imposition of an immediate custodial sentence, rather than a suspended sentence or the matter proceeding as an administrative offence and a fine being sought by a prosecutor.

2. *There is a real risk of anyone being returned to Ukraine as a convicted criminal sentenced to a term of imprisonment in that country being detained on arrival, although anyone convicted in absentia would probably be entitled thereafter to a retrial in accordance with Article 412 of the Criminal Procedure Code of Ukraine.*

3. *There is a real risk that the conditions of detention and imprisonment in Ukraine would subject a person returned to be detained or imprisoned to a breach of Article 3 ECHR.*

DECISION AND REASONS

Introduction

1. The agreed facts in relation to the first appellant, VB, are as follows. He is a citizen of Ukraine born on 29th July 1981. He completed his military service during the period 1999 -2001 when he was a communications operator and driver. He suffered serious bullying and injury in the army. He entered the UK clandestinely on 5th January 2013, to join his wife who was already in the UK, and his daughter was born on 1st October 2013. Whilst in the UK call up papers were issued requiring his attendance with the military commissar in April 2014 and again in May 2014.

2. VB claimed asylum on 19th May 2014; his claim was refused on 27th November 2014 and his appeal dismissed by the First-tier Tribunal on 9th November 2015. However, on 27th June 2016 the Upper Tribunal found that the First-tier Tribunal had erred in law and set aside their decision. The reasons for that decision are set out in Annex [B]

3. The agreed facts in relation to the second appellant, IS, are as follows. He is a Ukrainian citizen born on 25th March 1986. He is married to a Ukrainian citizen who is presently in the UK, and has a daughter born in the UK on 9th February 2013. He entered the UK unlawfully in the back of a lorry with his wife in January 2013. He claimed asylum on 13th August 2015 on the basis of his having evaded military service, having been prosecuted and having been sentenced to two years' imprisonment on the 7th July 2015 by the Ternopil City Court in accordance with Article 335 of the Criminal Code of Ukraine.

4. IS's asylum claim was refused and his appeal against that decision was dismissed by the First-tier Tribunal, but an error of law was found in that decision by the Upper Tribunal and it was set aside on 29th April 2016. The reasons for that decision are set out in Annex [C]

5. The decisions of the First-tier Tribunal were both set aside with no findings preserved, and adjourned for remaking in the Upper Tribunal. We now remake these two appeals.

6. It was agreed with the parties that this decision would also seek to provide Country Guidance on the following issues:

   (i) What are the likely punishments for draft evasion in Ukraine

   (ii) Are prison conditions for draft evaders in Ukraine contrary to Article 3 of ECHR, or has there been a significant and durable change in Ukraine such that the country guidance decision of PS (prison conditions; military service) CG [2006] UKAIT 00016 should no longer be followed?

   (iii) Are draft evaders who have been imprisoned under Article 336 of the Ukrainian criminal code required thereafter to undertake military service during periods of mobilisation? If so what are the conditions to which they will be exposed during such military service?

7. At the hearing however it was agreed by both parties and the Panel that it is only possible to address the first two issues with a view to providing country guidance and that there was simply insufficient country of origin material available to make any informed guidance decision on the third issues as to whether those conscripted or mobilised into the Ukrainian army were at real risk of being required to commit acts contrary to international humanitarian law or whether they would be at real risk of persons such as the appellants being subject to "dedovshchina", which means violent bullying or initiation within the army, which might in turn put those recruited or mobilised at risk of serious harm.

8. The only substantial material on the issue of "dedovshchina" is in the Strasbourg judgement of Mosendz v Ukraine 52013/08 in which a violation of Article 2 ECHR was found for failure to uphold the positive obligation to protect the life and investigate the death of a young soldier doing his military service, where that soldier had committed suicide due to violent bullying. This case cites evidence, including a report from the Ukrainian Parliamentary Commissioner for Human Rights and the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe regarding this issue, but all evidence is prior to 2007. There is also evidence of a small number of convictions for such offences by members of the military in the 2013 US State Department Report on Ukraine. Professor Bowring accepted that he had only anecdotal evidence that the practice, which he believed was mostly an issue for younger recruits, remained widespread in the Ukrainian army today.

Current Political & Economic Situation in Ukraine

9. We must acknowledge the current political and economic situation in Ukraine, which is not a matter in dispute between the parties.

10. Political unrest started with mass demonstrations in Kiev's Independence Square in November 2013 in reaction against the government's suspension

of the preparations to sign an association agreement with the European Union. This movement became known as "Euromaidan" or "Maidan". Violent protests followed against repressive measures by the then government, with a change in power in February 2014. Shortly thereafter Russia annexed Crimea and armed conflict broke out in the east of Ukraine. Russian-backed armed separatists continue to hold substantial territory in the areas of Donetsk and Luhansk.

11. The US State Department Report on Ukraine published in 2016 reports that more than 9000 have died and 18000 people have been wounded in this conflict since 2014. More than two and a half million people have fled this region. More than one and a half million people are registered as internally displaced persons and over a million Ukrainians are refugees in other countries, mostly Russia.

12. In this context the US State Department Report 2016 notes that the country suffers severely from corruption, including in the prosecutor's office and judiciary, and deficiency in the administration of justice. In September 2016 441 judges were sacked for having made illegal decisions regarding Maidan participants or being pro-Russian with 104 new ones appointed by Presidential decree, and a new prosecutor general was appointed who has no legal education and is associated with current President Poroshenko's political party; see the supplementary evidence from Professor Bowring relying upon internet news reports.

13. The UN Human Rights Commissioner's Report on the human rights situation in Ukraine 16 May to 15 August 2016 states that the entire population of Ukraine is affected by the deteriorating economic situation as a result of the conflict and instability in the east, with a 4.9% rise in prices over the first six months of 2016, and the price of utilities for heating and hot water double that of the beginning of the year by 1st July 2016. There has been no increase in the average salary, and the impact is felt acutely by vulnerable groups such as internally displaced people and pensioners.

Basic Outline of the Detention/ Imprisonment System in Ukraine

14. The system of penitentiary provision in Ukraine is not a matter of dispute between the parties.

15. The main source of information on the detention system is the reports produced by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT"). The CPT was set up under the Council of Europe's European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1989. It is a non-judicial preventative mechanism to prevent those deprived of their liberty from being exposed to torture or other ill-treatment. To achieve this aim the CPT carry out periodic inspections about every four years with additional ad hoc inspections where necessary. CPT delegations have unlimited access to places of detention, and the right to move inside such places without restriction. They interview persons deprived of their

liberty in private, and communicate freely with anyone who can provide information. Co-operation with the national authorities is at the heart of the CPT's work, since the aim is to protect persons deprived of their liberty rather than to condemn States for abuses. However, if a state fails to co-operate or refuses to improve the situation in the light of the CPT's recommendations, the Committee may decide to make a public statement

16. The other sources, principally the Home Office's report "Country Information and Guidance (CIG) Ukraine: Prison conditions report January 2016" are reliant on the CPT's reports as a source which is cited extensively. Further information about the system is provided in the CIG report and by Dr William Bowring.

17. The Ukrainian penitentiary system is one inherited from the Soviet era. Subject to some exceptions, detention prior to sentence is mainly in one set of establishments known as SIZOs. Those sentenced to custodial punishments are held in a range of different institutions including correctional colonies, where prisoners live in barrack type accommodation, and closed prisons.

18. There were 148 facilities controlled by the State Penitentiary Service of Ukraine in 2015, 29 SIZOs and 113 correctional colonies for adults and 6 for juveniles. In addition, there are also internal detention isolators (ITTs) for short periods of initial detention (generally up to 10 days although this can be longer when needed as a protective measure) run by the various regional divisions of the Ukrainian Home Office. There are also said to be secret detention facilities used in security cases but these are not the focus of this decision.

19. Historically there was a high rate of incarceration in Ukraine with 147,142 (324 prisoners per 100,000 of population) persons imprisoned in 2013 where as in July 2016 the number had been reduced to 61,816 (or 170 prisoners per 100,000 of population). The high rate of detention had resulted in a very severe problem of overcrowding. The numbers in detention were reduced by a combination of government actions starting in 2012. The most significant measure was the introduction of the new Criminal Procedural Code, the CCP, which came into force on 19th November 2012 which provided for automatic bail rather than pre-trial detention in the majority of cases. The Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishments (CPT) Report on Ukraine dated April 2014 comments that this provision led to a 57% reduction in remand prisoners in the period November 2012, when the new Code came into force, to October 2013. At the same time other legislative steps were also taken to decriminalise some petty crimes and to introduce probation for some offences which also reduced prison numbers.

20. There is no separate military prison system for those convicted of offences relating to failure to be drafted into military service, so they are held in the civil detention and prison facilities as outlined above.

21. As with the basic prison system the overall operation of the military service system was not a matter of dispute between the parties in the appeal. This summary draws on the materials provided to the Tribunal in the joint bundle including the Country Information and Guidance (CIG) Ukraine: Military Service September 2016, the evidence of the expert Dr William Bowring and UNHCR in their January 2015 report International Protection Considerations related to developments in Ukraine Update II, as well as reports from Amnesty International and the Quaker Council for European Affairs cited below. We use the term "conscription" to refer to the compulsory military service system by which young men are taken into the army for the first time for a period of service and the term "mobilisation" for the forced re-recruitment of those who have done service at a later stage in their lives. However, we are aware that reports, particularly those from the press, do not necessarily use these terms with any precision.

22. The Constitution of Ukraine provided at its inception as an independent state in 1991 for compulsory military service for all male citizens aged 18 to 25 years for a period of 12 months in the army or air force, or 18 months in the navy, with a number of exemptions, for instance for those medically unfit or those who had served a prison sentence. Under Article 335 of the Criminal Code avoidance of conscription was punishable by imprisonment for a term of up to 3 years, although there were provisions for a range of exemptions, as indicated above, and for conscientious objection based on religious grounds with an alternative service for such persons.

23. Ukraine's army consisted largely, at this stage, of conscripted recruits: there were in the region of 300,000 men, 250,000 of whom were conscripts. In 2005 plans were made for phasing out conscription and a transition to a professional army by 2010, although due to insufficient funding the transition period was extended to 2015.

24. The army of modern Ukraine has always had a very substantial problem with draft evasion. In 2004 the Ukrainian Ministry of Defence said that between 1996 and 2004 there were 48,624 cases of draft evasion. Amnesty International and the Quaker Council for European Affairs estimated that around only between 10% to 30% of those eligible actually performed their military service; see material set out in the Australian Refugee Tribunal Country Advice on Ukraine dated 11th December 2009. Information from this period on the numbers prosecuted for draft evasion is not available to the Panel.

25. In October 2013 President Viktor Yanukovych abolished conscription hoping to create a professional army instead. In spring 2014, when fighting broke out in eastern Ukraine, he did not immediately resort to conscription but instead relied upon mobilising former soldiers to replenish his forces.

26. In May 2014 acting President Oleksandr Turchynov signed a decree reinstating general conscription. At this point the army wished to conscript some 40,000 20 to 27 year olds for 18 months of military service.

27. In July 2014 the Ukrainian parliament raised the age to which former soldiers could be recalled to 60 from 50 years. There were three waves of mobilisation of former soldiers in 2014. In 2015 there were a further three waves of such mobilisation, with the purpose to bring qualified personnel into the army. Persons targeted included those with past experience as paratroopers, grenade launchers, in artillery, logistical support and other personnel including physicians, electricians, mechanics and drivers. However, it has proved difficult to source military personnel in this way, and the last wave of the recruitment drive raised only half of the 25,000 soldiers the military wanted.

28. In 2014 and 2015 it is reported in the press that approximately 125,000 of those summons to military service did not report. In 2015 it was reported in the press that 1500 criminal investigations had been commenced against persons for avoiding military service; and that in 2016 the defence ministry reported that 26,800 men were subject to prosecution for avoiding military service, and that military prosecutors had sent to the courts 2500 prosecutions for evasion of military draft. There were said to be 8000 arrest warrants, 3750 search warrants but only 337 persons detained for these reasons at the beginning of 2016.

29. The Ukrainian army is reported in the press as being in very poor shape suffering from a shortage of basic supplies, disastrous discipline, low competence of soldiers and officers, a lack of leadership, large numbers of non-combat casualties, and corruption and theft of supplies. It is reported that many evade military draft by bribery or by leaving the country.

Relevant Sections of the Penal Code and Administrative Code

30. **Chapter XIV.**
CRIMINAL OFFENSES RELATED TO THE PROTECTION OF STATE SECRETS, INVIOLABILITY OF STATE BORDERS, CONSCRIPTION AND MOBILIZATION

Article 335. Avoidance of conscription for active military service

Avoidance of conscription for active military service, - shall be punishable by restraint of liberty for a term up to three years.

Article 336. Avoidance of mobilization

Avoidance of mobilization, - shall be punishable by imprisonment for a term two to five years.

Article 337. Avoidance of military registration or special assemblies

1. Avoidance of military registration by a person bound to military service after notification by an appropriate military commissariat, - shall be punishable by a fine up to 50 tax-free minimum incomes, or correctional labor for a term up to two years, or arrest for a term up to six months.

2. Avoidance of military training or special assemblies by a person bound to military service, - shall be punishable by a fine up to 70 tax-free minimum incomes, or arrest for a term up to six months.

Chapter XIX.

CRIMINAL OFFENSES AGAINST THE ESTABLISHED PROCEDURE OF MILITARY SERVICE (MILITARY OFFENSES)

Article 409. Evasion of military service by way of self-maiming or otherwise

1. Evasion of military service by a military serviceman by way of self-maiming or malingering, or forgery of documents, or any other deceit, - shall be punishable by custody in a penal battalion for a term up to two years, or imprisonment for the same term.

2. Refusal to comply with the duties of military service, - shall be punishable by imprisonment for a term of two to five years.

3. Any such acts as provided for by paragraph 1 or 2, if committed in state of martial law or in a battle, - shall be punishable by imprisonment for a term of five to ten years.

The Code of Administrative Offences of Ukraine

Article 210. The violations of the law by military service staff or subjects on general Military Duty and Military Service.

- For failing to appear in the military recruitment office without good reason or late submission of information on change of residence, education, employment, position, and also violations of the order of educational meetings (sessions) are punishable by a fine of 85-119 UAH.

31. We adopt the abbreviation "UAH" for the Ukrainian currency, the Hryvnia. As at the date of hearing, the exchange rate was 31.25 UAH to the Pound Sterling making the maximum fine approximately £3.90. A further offence within one year can lead to a fine starting from 170 UAH to 255 UAH. However, in May 2014 the Administrative Code was supplemented by an article on violation of legislation on mobilization, where fines are much higher:

Article 210-1. Violation of legislation on defence mobilization preparation and mobilization:

- Violation of legislation on defence mobilization preparation and mobilization entails a fine of up 170-510 UAH, and for officials - 510-1700 UAH. If the violation is

repeated within a year then the penalty increases to 510-1700 UAH for citizens and for officials to 1700-5100 UAH.

32. Also the Administrative Code has a fine of UAH 17-51 for wilful damage or loss of military documents and 17 UAH for failure to appear for recruitment to be registered at the military recruiting station.

Strasbourg Case Law

33. There is a large body of case law from the European Court of Human Rights assessing whether conditions of imprisonment or detention breach Article 3 of the Convention.

34. As set out in the very recent case of Mursic v Croatia (7334/13 Grand Chamber judgment of 20th October 2016), torture, inhuman or degrading treatment or punishment is prohibited irrespective of the circumstances and the victim's behaviour. Ill-treatment must attain a minimum level of severity to fall within the scope of Article 3. To conclude there has been a breach of Article 3 there must be an assessment which takes into account all the circumstances of the case which include the duration of the treatment, its physical and mental effects and in some cases the sex, age and health of the victim. It usually includes bodily injury or intense physical or mental suffering, but even if these are absent a violation can be found where there is a diminishing of human dignity so as to raise fear and or anguish capable of breaking an individual's moral and physical resistance. An absence of an intention to humiliate a detainee by placing him in poor conditions does not conclusively rule out a finding of a violation of Article 3. It is incumbent on the government to organise its penitentiary system in such a way as to ensure respect for the dignity of detainees regardless of financial and logistical difficulties.

35. In relation to the issue of prison overcrowding the Grand Chamber concluded in Mursic that a minimum standard of 3 square metres per detainee in multi-occupancy accommodation should be maintained as the relevant minimum standard of assessment under Article 3, and that failure to meet that standard creates a strong presumption of a violation of Article 3. Rebutting this presumption of a violation could be done by showing that there was only a short, occasional or minor reduction in the required personal space where this is accompanied by sufficient freedom of movement outside the cell, where there are adequate out of cell activities and where the detention facility is otherwise appropriate. Reference is made to Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishments (CPT) standards requiring all prisoners to be allowed at least one hour's exercise in the open air every day, with a reasonable part of the day outside cells doing purposeful activities such as work, recreation or education.

36. There are a series of cases against Ukraine brought by prisoners or detainees in which violations of Article 3 ECHR are found. Truten v Ukraine [2016] ECHR 561 found a violation due to lack of space and exercise conditions in a

SIZO; Yarovenko v Ukraine [2016] ECHR 835 found a violation regarding detention in three SIZOs and a temporary detention facility as a result of the poor physical conditions of detention, but not in the prison where the applicant was eventually held, and found also treatment for tuberculosis inadequate and in violation of Article 3; Andrey Yakovenko v Ukraine [2014] ECHR found a breach of Article 3 in SIZOs because of overcrowding, lack of lighting and ventilation and lack of proper sanitary facilities; Yakovenko v Ukraine [2007] EHCR 877 found a breach of Article 3 in a SIZO and pre-trial detention centre due to overcrowding, sleep deprivation, lack of natural light and air, and failure to provide adequate medical assistance; Poltoratskiy v Ukraine [2003] ECHR 216 found a breach of Article 3 in a prison for overcrowding, inadequate lighting and heating, and lack of outside walks, correspondence and visits. However, it is to be noted that all of the cases relate to detention and imprisonment in Ukraine prior to 2007.

Extradition Cases

37. In the case of Igor Lutsyuk v Government of Ukraine [2013] EWHC 189 (Admin) the Administrative Court reviewed the decision in PS (Conditions; Military Service) Ukraine v SSHD CG [2006] UKAIT 00016, with additional evidence provided by Professor William Bowring, Professor of Law at Birkbeck University, in the context of having to decide whether the appellant should be extradited to Ukraine where he had been convicted of robbery and sentenced to two years imprisonment given his contention that this would breach his Article 3 ECHR rights as a result of detention and prison conditions in that country. The appellant contended that he was likely to be held in a SIZO on return to Ukraine. Lord Justice Laws takes PS as an authoritative starting point, and concludes that the evidence presented by Professor Bowring from the Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishments (CPT) and US State Department reports on Ukraine "paints a picture which, if anything, displays a deteriorating state of affairs." Laws LJ also concludes that the succession of visits and reports by the CPT "speaks loud as to the gap between aspiration and achievement" on the part of the Ukrainian government. The conclusion of the Administrative Court was that there were substantial grounds for believing that the appellant would be subject to ill-treatment on return to Ukraine due to the detention conditions he would face on return.

Original Sources of Country of Origin Information on the Situation in Ukrainian Prisons and Pre-trial Detention

38. The Panel finds that the key original sources of information on the situation in Ukrainian detention centres and prisons are the reports of the Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishments (CPT); the reports of the United Nations Subcommittee on Prevention of Torture (SPT) and the reports of the Ukrainian Parliamentary Commissioner for Human Rights (the Ombudsman). These three sources are all viewed as reliable, as any reports are written by impartial bodies with relevant expertise which have the right

to carry out often unannounced prison inspections and gain access to all detention areas, thus basing their reports on first-hand un-sanitised information. We therefore provide summaries of the key relevant material provided from these sources.

Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishments (CPT) Reports dated 29th April 2014 and 29th April 2015

2014 CPT Report on Ukraine Relating to a Visit in October 2013

39. The 2014 CPT report results from a visit in October 2013 to eight ITTs in Kiev, Crimea, Dnipropetrovsk, Odessa and Vinnytsia regions, four SIZOs (Kiev, Dnipropetrovsk, Odessa and Simferopol), a closed prison and a correctional colony. This was a periodic report rather than ad hoc visit, although it is notable that the last visit had been less than a year previously in December 2012. This was the tenth visit to Ukraine by the CPT. It was not suggested by any party that this report did not provide a representative view of SIZOs and pre-trial detention facilities, and clearly it included Kiev SIZO which is the largest such facility in Ukraine.

40. It is noted at paragraph 9 of the report that intimidatory action or retaliatory action against prisoners prior to, during and after CPT visits has been a recurrent issue since the CPT's first visit in 1998, and that there were on-going concerns in two of the SIZOs and in the prisons. This is deplored by the CPT, at paragraph 11 as "an assault on the principle of co-operation which lies at the heart of the Convention."

41. CPT noted a major decrease in the number of inmates due largely to the adoption of the new Criminal Procedure Code (CCP) in 2012 but commented that "localised overcrowding" had been seen in all the SIZOs visited. At paragraph 18 the CPT notes that key issues previously identified had not been progressed at all: "By way of illustration, the Committee noted that no decisive action had been taken to upgrade material conditions in most SIZOs visited and to introduce programmes of out-of-cell activities for adult remand prisoners. Further the situation for male prisoners facing/sentenced to life imprisonment remained basically unchanged. Measures to improve the medical examination of inmates and to ensure the proper documentation of any injuries observed on examination were clearly ineffective."

42. It is clear from paragraph 23 of the report that there were still concerns about the effective investigation into allegations of torture and ill-treatment from public officials, with the phenomena of torture being said to have been "an issue of grave concern for the CPT since the Committee's first visit to Ukraine 15 years ago". In relation to those held in Kiev by internal affairs officials in ITT facilities the Committee found that since the entry into force of the new CCP the instances of severe physical abuse had reduced although there were still many detained persons who complained of physical ill treatment such as punches, kicks and being hit with hard objects, and threats of beatings. The improvement in relation to such matters was not as good in

other regions outside Kiev and there were also allegations of treatment which was severe enough to amount to torture such as being suspended, the use of electric shocks, burning with cigarettes and asphyxiation. CPT conclude that the phenomenon of ill-treatment is a long way from being overcome and has become closely connected with corrupt practices. There were great improvements in relation to this issue at Kiev and Simferopol SIZOs where no complaints of ill-treatment by staff were made, but this was not the case at Odessa and Dnipropetrovsk SIZOs. In the correctional colonies and in the closed prisons improvements relating to staff ill-treatment were found, but in both cases a group of inmates was being used to ill-treat others at the behest of the prison authorities.

43. At paragraph 99-102 of the report it is reiterated that the overall level of overcrowding in the Ukrainian prison system had diminished significantly, and explained that the Ukrainian Ministry of Justice now believed that their system was compliant with their own national legal standard of providing 2.5 square meters of living space per inmate. However, the view of the CPT was that the Ukrainian standard was not acceptable and that the SIZO system remained seriously overcrowded in the institutions they visited. They also noted serious problems of disrepair in the majority of the prison estate, with little in the way of purposeful out of cell activities for the inmates and with most remand prisoners being locked up in their cells all day. Although in contrast a new block for women in Kiev SIZO provided reasonable space, and conditions were materially better.

44. At paragraph 144 the CPT summarises their conclusions on health care as being that there were insufficient health-care staffing resources.

2015 CPT Report on Ukraine relating to a visit in September 2014

45. The 2015 CPT report results from an ad hoc visit by the Committee in February 2014 to two correctional colonies (No. 25 and No. 100) in the Kharkiv area and an investigation into the position of those detained in SIZOs in Kiev and Kharkiv and in a State Security Service detention facility in Kiev as a result of anti-terrorism operations. The Committee found evidence that state security staff had used ill-treatment on detainees in anti-terrorism operations, although there were no substantial allegations of ill-treatment by custodial staff in the SIZOs or in the State Security detention facility.

46. It was noted that at the two penal colonies that there were frequent and serious allegations of ill-treatment by staff and a climate of fear and intimidation of prisoners observed by the delegation. There was also an unacceptable system of "duty prisoners" who had delegated authority from staff; and frequent allegations of corruption and exploitation of prisoners for economic reasons. The Committee concluded that there were major management problems in both establishments. At paragraphs 42 and 43 of the report detailed remedial actions are set out giving the measures taken by the Ukrainian government as a result of the information provided by the Committee, which included the dismissing of both directors of the colonies

and instigation of criminal investigations against staff as a result of complaints of ill-treatment by two prisoners. The CPT concluded that "a page is being turned and decisive action is now being taken by the relevant authorities to combat the phenomena of ill-treatment and intimidation of prisoners in colonies", although it was noted that the Committee would continue to monitor the situation of prisoners in these colonies and others and would reinvestigate if improvements were not sustained or if actions not vigorously pursued. Concerns were also expressed about life prisoners and their conditions, which had not improved in line with previous recommendations.

United Nationals Subcommittee on Prevention of Torture (SPT)

47. The SPT was established pursuant to the provisions of a treaty, the Optional Protocol to the Convention against Torture (OPCAT). The OPCAT was adopted in December 2002 by the General Assembly of the United Nations and entered into force in June 2006. The SPT has two primary operational functions. First, it may undertake visits to States Parties, during the course of which it may visit any place where persons may be deprived of their liberty. Under the OPCAT, the SPT has unrestricted access to all places where persons may be deprived of their liberty, their installations and facilities and to all relevant information. Second, it has an advisory function which involves providing assistance and advice to States Parties on the establishment of National Preventive Mechanisms (NPM) which OPCAT requires that they establish, and also providing advice and assistance to both the NPM and the State Party regarding the working of the NPM. In addition, the SPT cooperates, for the prevention of torture in general, with relevant United Nations organs and mechanisms as well as with international, regional, and national institutions or organizations.

48. Whilst we do not have a report from the SPT on Ukraine Professor Bowring has brought to our attention a report of the Human Rights House Network (HRHN), an umbrella organisation for 90 non-governmental human rights groups, website which explains that in May 2016 the United Nations Subcommittee on Prevention of Torture suspended its visit to Ukraine where it was trying to investigate allegations of torture in places where it suspected persons were being held by the Ukrainian security services. "This denial of access is in breach of Ukraine's obligations as a State party to the Optional Protocol to the Convention against Torture," said Sir Malcolm Evans, head of the four-member delegation. "It has meant that we have not been able to visit some places where we have heard numerous and serious allegations that people have been detained and where torture or ill-treatment may have occurred." "This cancellation suggests that Ukraine is unwilling to fully cooperate with the international community on human rights," responded Florian Irminger, Head of Advocacy at HRHN. "After Euromaidan, the annexation of Crimea, and the conflict in the East, one would expect the government in Kiev to fully cooperate with such mechanisms – in order to build a Ukraine committed to human rights and universal values. Ukraine

must really choose the side of full cooperation with international and regional human rights mechanisms."

The Ukrainian Parliamentary Commissioner for Human Rights (the Ombudsman)

49. Ms Valeriya Lutkovska was appointed to this position in April 2012. She is a qualified lawyer who has amongst other things been deputy minister of justice in Ukraine and a government agent before the European Court of Human Rights. She is the National Preventative Mechanism (NPM) since Ukraine ratified the Optional Protocol to the UN Convention Against Torture. States must allow the NPM to visit all, and any suspected, places of deprivation of liberty, and the NPM must be able to carry out visits in the manner and with the frequency that the NPM itself decides. This includes the ability to conduct private interviews with those deprived of liberty and the right to carry out unannounced visits at all times to all places of deprivation of liberty, in accordance with the provisions of the Optional Protocol. Concerns have been raised about the insufficient financial support provided to her to fulfil the service of the NPM in the Ukrainian Human Rights Union report on the implementation of the Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishments (CPT) report. Her work is of course far wider than dealing with prison conditions (although it is said she has conducted more than 300 inspections of prisons in Ukraine in the letter from the FCO dated 20th September 2016), and it is perhaps notable that her office has issued no reports at all since 2013.

50. In September 2016 Ms Lutkovska put information regarding human rights violations at Kiev SIZO No 1 into the public domain which is accompanied by photographs which show cells with no windows, insufficient space, walls covered in fungus and dangerous electrical fittings. Ms Lutkovska notes that cells have insufficient ventilation, do not have a lavatory, that inmates do not have free access to drinking water and that there is no night lighting so the lights are on all of the time. She notes, as examples regarding over-crowding, that the national standard of 2.5 square meters per inmate was not met with one cell measuring 8.3 square meters containing 4 people and another measuring 7.5 square meters containing 6 people. This information will, it is anticipated by her office in conversation with Professor Bowring, be part of a forthcoming official report.

Evidence of Professor William Bowring

51. Like Laws LJ in Igor Lutsyuk v Government of Ukraine we are satisfied that Professor Bowring is an appropriate expert and we give weight to his opinions and evidence. He is a qualified barrister who still practises at the European Court of Human Rights and is a professor of law at Birkbeck University. He is fluent in Russian and has provided expert evidence in extradition cases since 2003, including seven relating to Ukraine. He has an extensive experience of working on the penitentiary systems of post-Soviet countries.

52. We find he has collated in his report the evidence on the issues before the Tribunal from the key sources, the sources outlined above as well as notably information from the press, from the Home Office Country Information and Guidance Reports (CIGs) on Ukraine and the US State Department Reports on Ukraine. In oral evidence he was able to give fully reasoned answers to all questions put to him, being careful both in his report and in oral evidence to say when his evidence was speculative. He has provided additional responses both as a result of questions from the Tribunal and the respondent.

53. Professor Bowring's opinion is that the document relating to VB's conviction appears to be genuine given its appearance and language. Although the offence VB is convicted of is one under Article 409 of the Criminal Code this is not necessarily incorrect given his past military service, and his being a case of mobilisation, although Article 336 would also apply and might be seen to be more appropriate. Professor Bowring also accepted that call up papers must be hand delivered according to material from the Canadian Refugee Board.

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

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

56. Professor Bowring is unable to quantify the likelihood of the various options available to the prosecutor to dispose of the appellants thereafter due to the lack of relevant evidence in the public domain. It is possible that there might not be a retrial if the appellants were to agree to be called-up (although on

the evidence before us this is not something either would be likely to do), or they might be dealt with as administrative offenders – and thus in accordance with the Administrative Code only be liable to a fine. Professor Bowring noted that although the fines were low for administrative offences (a maximum of just over the minimum wage for a month) that Ukraine is a poor country so these fines are not insignificant punishments to many citizens.

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

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

59. Key relevant information in these reports not already set out elsewhere is summarised as follows.

60. The CIG opinion is that conditions within military service do not amount to a real risk of serious harm, and that penalties for failing to do it are not disproportionate.

61. The FCO information, set out in a letter dated September 2016, is that only one person has been given a prison sentence for draft evasion, and even this has been postponed, and that this is despite hundreds of cases being opened for this offence. 77 guilty verdicts were said to have been issued by courts as of February 2016 but the majority were given probation and released. UNHCR information from January 2015 indicated that in December 2014 32 people had been sentenced for evasion of conscription or mobilisation and that when 16 of those cases were looked at all got administrative fines, community service or suspended sentences. A UNHCR report from September 2015 found statistics from Ukrainian courts showing that from July 2014 to July 2015 661 criminal cases were recorded against draft and mobilisation evaders. Further in November 2015 the organisation Global Research reported 7000 criminal cases opened against evaders of mobilisation. A blogger who had urged conscientious objectors not to fight was sentenced to a three-and-a-half year prison term in July 2016. The publication "Global Security" stated in June 2015 that there have been 10,000 cases of desertion registered in the Ukrainian army since the outbreak of war in April 2014.

62. Information provided by the Canadian Immigration and Refugee Board in June 2015, and taken from a US private non-profit foundation, indicates that military service call-up is via a written instruction to citizens to go to a commissariat for further instructions and a medical check-up. This notice has to be hand-delivered and requires the signature of the recipient. News reports are cited that show that attempts to mobilise reservists have led to between 70% and 95% ignoring the notices. Some had moved to another address, other refused to open their doors and some ignored the notice or ran away. Corruption enables richer persons to bribe their way out of service whilst poorer rural residents were a large portion of those mobilised.

63. With respect to prison conditions it is accepted in the FCO letter of September 2016, annexed to the CIG, that many prison and pre-trial detention centres are in old buildings which sometimes do not have adequate sanitary facilities or ventilation, and that overcrowding is a problem in Ukrainian prisons. The letter goes on to say that there are common complaints about medical care, being held in a cell with someone who has TB, lack of open air activities, lack of access to drinking water, lack of timely response to emergencies in cells, lack of furniture in cells, lack of light, showers and adequate food. Prisons in Ukraine, it is accepted, do not meet European standards, and conditions in some prisons violate human

rights although it is said that they do not pose a direct threat to life. There have been improvements since 2014: for instance, social and psychological services established in prisons; religious services and visits by priests; and fewer cases of torture and mistreatment recorded by human right organisations since 2012. There have also been measures, such as house arrest and probation, to reduce the numbers serving prison sentences.

64. In the CIG itself reliance is placed on the CPT report of April 2015 that "decisive action" is now being taken to combat the phenomena of ill-treatment and on positive comments in the April 2014 CPT report with regards to marginal systemic improvements in the treatment of prisoners, and on the Ukraine Council of Europe/ EU project of reform for 2015 to 2017. It is accepted that the US State Department covering events in 2014, and other reports, found that prison and detention centre conditions remained poor, did not meet international standards, and at times posed a serious threat to life and health of prisoners. Poor sanitation, abuse, and lack of adequate light, food, and medical care were persistent problems. However, the conclusion is that although prison conditions are poor in Ukraine and there are reports of torture and mistreatment in some establishments, conditions are not so systemically inhumane and life threatening as to meet the high threshold of Article 3 ECHR.

Discussion – Country Guidance

65. The first issue identified for country guidance is what are the likely punishments for avoiding military service.

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

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

68. This appears firstly to be the case because the Ukrainian authorities have faced draft evasion, both from young conscripted men and those summonsed for mobilisation, on a colossal scale and have not yet got anywhere near the stage of the process where they would be "sentencing" the majority of evaders. The overwhelming majority of the over 100,000 draft evaders would appear, from the information before us, to have faced to date no consequences for their actions at all. In some cases it would seem likely that this is because these people have left Ukraine as war refugees or

otherwise, in others it seems likely that they are internally displaced, given that there are over a million internally displaced people in Ukraine; others may have avoided receiving their call up papers or simply ignored papers served.

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

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

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

administrative proceedings, and it would seem to us that there is a major factor of unlucky chance involved before any particular draft-evader finds himself identified for any proceedings at all.

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

73. The second issue identified for country guidance is whether prison conditions for draft-evaders in Ukraine are contrary to Article 3 ECHR, or whether they are not as there has been a significant and durable change in Ukraine such as to mean that previous country guidance in PS should no longer be followed.

74. It is firstly important to note that that there is no difference in prison conditions for draft-evaders than for other prisoners. They are held in the same conditions, and are not subject to any military prison regime.

75. We are guided by the decision in the Grand Chamber of the European Court of Human Rights in Mursic in considering the circumstances in which imprisonment will amount to a breach of Article 3 ECHR due to the conditions of that imprisonment. We note of course that torture, inhuman or degrading treatment or punishment is prohibited irrespective of the circumstances and the victim's behaviour but that ill-treatment must attain a minimum level of severity to fall within the scope of Article 3. It is important to note, given the situation of armed conflict and economic crisis in Ukraine, that the Grand Chamber said: "It is incumbent on the government to organise its penitentiary system in such a way as ensure respect for the dignity of detainees regardless of financial and logistical difficulties." We note that without a minimum standard of 3 square metres space per detainee in multi-occupancy accommodation there is a presumption that prison/detention conditions are in breach of Article 3 ECHR unless there is only a short, occasional or minor reduction in the required personal space where this is accompanied by sufficient freedom of movement outside the cell, where there are adequate out of cell activities and where the detention facility is otherwise appropriate.

76. We find that the cases drawn to our attention against Ukraine, finding breaches of Article 3 ECHR based on prison conditions before the European Court of Human Rights, support PS having been rightly decided but that as they are all about violations of Article 3 ECHR based on prison conditions prior to 2007 they do not assist us in assessing whether there is a current real risk of a breach of Article 3.

77. We find that there have been some positive changes in Ukraine regarding the prison system since PS was decided. The most significant positive development has been changes to the criminal code and criminal procedural code which have led to a very significant reduction in the prison population,

with there being around 61,000 persons incarcerated in 2016 compared to 147,000 in 2013. This must have reduced overcrowding, particularly in pre-trial detention facilities given the presumption in favour of bail introduced for those awaiting trial and the removal of criminal penalties for minor matters.

78. Also significant has been the fact that the various inspection reports of the CPT and Ombudsman available to us do, if generalised, indicate a reduction in the reporting of mistreatment severe enough to qualify as torture in pre-trial detention and a pattern of lesser allegations of acts of ill-treatment, not so severe as to qualify as torture, by staff in pre-trial detention.

79. However, with respect to torture and ill-treatment contrary to Article 3 the evidence before us is that whilst in the 2014 CPT report improvements in staff treatment of inmates in correctional colonies and other provision for convicted prisoners were noted, this was sadly countered by the fact that systems were in place whereby control was retained by the authorities using groups of inmates being empowered to ill-treat others. In the 2015 CPT report inmates in correctional colonies no 25 and 100 were found to be subject to ill-treatment by both staff and "duty prisoners" delegated to maintain order resulting in a "climate of fear and intimidation", with frequent allegations of corruption and economic exploitation of prisoners. It is appreciated however that the material we have on correctional colonies and other provision for convicted prisoners is not as wide in scope as that for pre-conviction detainees and so whilst this evidence is of a very serious nature it may not be a reflective of the situation across all facilities for convicted prisoners.

80. There is significant evidence of improvements for Ukrainian inmates in the ability by the Ukrainian authorities to take, in the words of the CPT in their 2015 report, "decisive action" to "combat the phenomena of ill treatment and intimidation of prisoners in colonies" when presented with evidence of breaches of Article 3 ECHR in their prison estate in Colonies No 25 and 100. There is also evidence of Ukraine working with the EU and Council of Europe on smaller projects to improve their penal system in an on-going programme started in 2015 and the establishment of the Ombudsman with a mandate to inspect prisons and report on their condition since 2012, which has also led to decisive action in dismissing staff when ill-treatment has been found.

81. However, this evidence of cooperation with international and national human rights bodies to improve the prison estate and bring about conformity to human rights norms has to be placed in the balance with evidence that Ukraine has very recently, in May 2016, prevented access to detained facilities by the United Nations Subcommittee on Prevention of Torture (SPT), thus breaching their obligations as a state party to the Optional Protocol to the Convention against Torture. Further evidence of a less positive attitude to Ukraine upholding prisoners' human rights standards is also found in a report on prisoners' rights by the Ukrainian

Helsinki Human Rights Union dated 25th April 2016 that says that the heads of Colonies 25 and 100, sacked as part of the government "decisive action" against breaches of Article 3 found in these institution, have apparently both been reinstated in Colony 43, where human rights abuses are contended to continue. We note that issues with intimidatory action and retaliatory action against prisoners prior to, during and after CPT visits also arose in the context of both the CPT reports of 2014 and 2015, and were said to have been persistent problems since the CPT's first visit in 1998. When the totality of the evidence is considered we are not satisfied that as yet the Ukrainian authorities have acted so as to mean that there is not a real risk of ill-treatment in detention and prison facilities.

82. What is very clear from all of the reports on prison conditions in Ukraine is that in the pre-trial facilities, particularly SIZOs, there is evidence that the required Article 3 compliant standard of basic space (3 square metres per detainee in multi-occupancy accommodation) is regularly not being met. This results in, we remind ourselves, a presumption of a breach of Article 3 ECHR. The required national standard in Ukraine is only 2.5 square metres which is not in conformity with Article 3 ECHR. The evidence of the Ombudsman, from her September 2016 inspection, regarding insufficient space at Kiev SIZO No 1, the largest such facility in Ukraine, is that even the national standard is not being met. It is also clear from this report that other aspects of the provision of accommodation support a breach of Article 3 rather than rebut the presumption based on inadequate space: the SIZO accommodation inspected had in part had no windows, was damp, had dangerous electrical fittings, had insufficient ventilation, lacked sanitation and access to drinking water and had no night-lighting so lighting was kept on continually.

83. This very recent report of the Ombudsman on SIZOs is, of course, to be placed in the context of the conditions found by the CPT in the 2014 and 2015 report. In the 2014 report localised overcrowding was found in SIZOs visited, and it was noted that no decisive action had been taken to upgrade material conditions in the majority of SIZOs visited; there were inadequate numbers of health care professionals available to inmates; and a failure by the authorities to introduce programmes of meaningful out-of-cell activities for adult remand prisoners.

84. We also find it consistent with this picture of poor detention/prison conditions contravening human rights norms that the Ukrainian prison population has a high death rate amongst inmates: there were 35 self-inflicted deaths and 321 disease deaths in 2015 which gives a rate of 0.586% compared to 0.315% across all 47 Council of Europe countries (data taken from the Council of Europe Annual Penal Statistics Report for 2015).

85. We conclude that there has been no significant or durable change in prison conditions in Ukraine so as to mean that it would not be a breach of Article 3 ECHR to return someone to detention in that country. The combined evidence of lack of space, poor material conditions, and lack of meaningful

out of cell activity means that pre-trial detention in Ukraine poses a real risk of being inhuman and degrading treatment on return. The evidence of a real risk of serious ill-treatment in certain penal colonies, combined with the lack of sustained evidence of corrective action to allegations of such treatment, is such that we find return to these institutions also poses a real risk of such treatment too.

86. We believe that this conclusion is consistent with the FCO letter of 20th September 2016 which states that "Conditions in certain prisons can be considered to violate human rights" despite some improvements, including fewer reported cases of torture and ill-treatment and aspirations for future reforms to "bring conditions more in line with European standards". Our conclusion is also in line with that made by the Administrative Court in relation to the extradition request made in 2013 in Igor Lutsyuk v Government of Ukraine; and the conclusion of the 2016 US State Department Country Report for Ukraine on Human Rights Practices for 2015 which summarises the situation as: "Prison and detention centre conditions remained poor, did not meet international standards, and at times posed a serious threat to the life and health of prisoners. Physical abuse, lack of proper medical care and nutrition, poor sanitation, and the lack of adequate light were persistent problems."

Conclusions – Country Guidance

87. At the current time it is not reasonably likely that a draft-evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings for that act, although if a draft-evader did face prosecution proceedings the Criminal Code of Ukraine does provide, in Articles 335, 336 and 409, for a prison sentence for such an offence. It would be a matter for any Tribunal to consider, in the light of developing evidence, whether there were aggravating matters which might lead to imposition of an immediate custodial sentence, rather than a suspended sentence or the matter proceeding as an administrative offence and a fine being sought by a prosecutor.

88. There is a real risk of anyone being returned to Ukraine as a convicted criminal sentenced to a term of imprisonment in that country being detained on arrival, although anyone convicted in absentia would probably be entitled thereafter to a retrial in accordance with Article 412 of the Criminal Procedure Code of Ukraine.

89. There is a real risk that the conditions of detention and imprisonment in Ukraine would subject a person returned to be detained or imprisoned to a breach of Article 3 ECHR.

Conclusions - Appellants

Evidence VB

90. The agreed facts in relation to the first appellant, VB, are that he is a citizen of Ukraine born on 29th July 1981. He completed his military service during the period 1999-2001 when he was a communications operator and driver. He suffered serious bullying and injury in the army. He entered the UK clandestinely on 5th January 2013, to join his wife who was already in the UK, and his daughter was born on 1st October 2013. Whilst in the UK call up papers were issued requiring his attendance with the military commissar in April 2014 and again in May 2014.

91. It is accepted by the respondent that these summonses are consistent with the recall of reservists during mobilisation in Ukraine in the refusal letter, and their validity is also attested to by Professor Galeotti (see below) who confirms not merely that they are in the correct format but also that they are signed by the person who was the correct military commissar and have the appropriate seal for the particular military commissariat.

92. The respondent does not accept that VB has been convicted and sentenced to five years imprisonment on 9th July 2014 for failure to answer to this draft in accordance with Article 409 of the Criminal Code of Ukraine by the Bogorodchanskyy Court as set out in the document produced by him. The respondent says that enquiries with the Ukraine criminal database did not reveal any positive returns for the claimed criminal sentence, and she produced a document verification report stating she had been told that that VB's document did not exist in the Register database; that it had a number which did not relate to decisions in July (which were in the range 388-389 – and this document was number 344); and that the secretary said the judge, prosecutor and lawyer in the document had not been employed as court staff.

93. VB's solicitor (as set out in her witness statement provided to the Tribunal) found that the telephone number given on the respondent's verification report did not work but located another which did and called the Court, and was told that information verifying VB's document could not be given out and that given the current country situation it was likely individuals employed by the Court would have moved on after a year. An expert, Professor Galeotti Professor of Global Affairs at New York University with a background of research in Russian and Eurasian crime who has had professional and personal links with Ukrainian police and judiciary since 1991, provided an expert report which expresses the opinion that the sentencing document is genuine due to the language, lay-out and sentence imposed being consistent with his experience of such documents.

94. VB claimed asylum on 19th May 2014, and his claim was refused by the respondent on 27th November 2014 as his criminal conviction was not believed for the reasons set out above, and therefore the respondent said he did not face imprisonment for draft evasion, and also it was not accepted

that he faced a real risk of dedovshchina or other treatment contrary to Article 3 ECHR whilst doing his military service.

95. Before moving on to decide VB's appeal we must first decide whether or not we accept to the lower standard of civil proof he was convicted of the offence of draft-evasion.

96. We heard oral evidence from VB, given as a result of examination in chief, cross-examination and questions from the Panel, through the Tribunal interpreter whom he confirmed he understood. VB also confirmed his two statements were true and correct and that he wished these also to stand as his evidence to the Tribunal.

97. The pertinent evidence of VB can he summarised as follows. VB was challenged by Mr Wilding as to whether his summonses (notwithstanding the agreed facts) and his court sentencing document are genuine. He maintained that all documents are genuine and were received by his mother, the summonses being served upon her at the family home and the sentencing document having been collected by her from the village council after she had been notified by an official it was waiting for him to collect there. He did not know why the summonses came from two different military commands. VB did not believe that his mother signed anything when she took the summons although she did ask why she was being served with papers when VB was not in the country, and was told that the authorities had a list of people to whom they had to serve summonses. He gave evidence that prior to knowing about the April 2014 summons he had fully intended to return to Ukraine with his wife, and had been in the process of obtaining a passport from the Ukrainian embassy and inoculations for his daughter to achieve this. VB said that his parents had gone to see a Ukrainian solicitor after receiving the court sentencing document but were told no appeal could be made without VB being present in Ukraine. He had taken one month to claim asylum after receiving information about the first summons in April 2014 from his mother via Skype, although he did not intend to return to Ukraine from this time. This was because he had first consulted a solicitor in the UK to obtain advice about making an asylum claim.

98. The Panel are satisfied to the lower civil standard of proof that the military service call up papers for VB were sent to him in the way he describes for the following reasons. We find him to be a credible witness who gave his evidence in considerable detail; in a serious and heart-felt manner; and answering all questions put to him to the best of his ability, thus doing his best to assist the Tribunal. We note that two experts believe the call-up papers to be genuine, and that the respondent also accepts that they appear to be so. Although the Immigration and Refugee Board of Canada information dated June 2015 says that such call-up papers "are hand delivered and require the signature of the recipient", it is unclear whether recipient means simply the person who takes the summons rather than the addressee of the summons. It is noted that the source of this information is a

senior program officer for Europe and Eurasia at the National Endowment for Democracy (NED), a US-based private non-profit foundation. No doubt the information was given in good faith, and might generally be correct but it is not sufficient, particularly given the ambiguity as to acceptable signatories, to mean that we do not find the call up paper to have been genuinely served on VB's mother in the way he describes. It is quite possible that the signature part of the official procedure was overlooked or that VB's mother simply did not tell him she had signed for it. The fact that VB received two different notices with different "Command Nos" is not obviously significant either when considering whether the documentation is genuine: it could simply mean that two different units under "VOS No 92" had inadvertently dealt with him and sent out duplicate notices.

99. The Panel are also satisfied to the lower standard of proof that the sentencing document is genuine and was received by VB in the way he describes. As set out above we find him to be a generally credible witness. Again we have the opinion of two experts that it appears genuine due to its format. It is the opinion of Professor Bowring in oral evidence that the Article of the Criminal Code chosen (Article 409) was one potentially available for the evasion of mobilisation, and interestingly the Immigration and Refugee Board of Canada information dated June 2015 sources cites this as the relevant provision for evasion of military service. Even if Article 336 of the Criminal Code might seem ultimately to all before our Tribunal to be the more appropriate provision given the apparent lack of ability of the Ukrainian government to address the draft evasion problem in all ways and the decentralised way in which military service is dealt with it is not implausible that this potentially relevant and perhaps overlapping charge was brought, and given the lack of any defence for VB that it was maintained, and used to convict and sentence VB.

Evidence IS

100. The agreed facts in relation to the second appellant, IS, are that he is a Ukrainian citizen born on 25th March 1986. He is married to a Ukrainian citizen who is presently in the UK, and has a daughter born in the UK on 9th February 2013. He entered the UK unlawfully in the back of a lorry with his wife in January 2013. He claimed asylum on 13th August 2015 on the basis of his having evaded military service, having been prosecuted and having been sentenced to two years' imprisonment on the 7th July 2015 by the Ternopil City Court in accordance with Article 335 of the Criminal Code of Ukraine.

101. IS's claim for asylum was refused on 9th October 2015, and his asylum appeal was dismissed on 25th February 2016 by the First-tier Tribunal, whilst accepting the facts as set out above, on the basis that the poor prison conditions which the appellant would experience would not "equal a breach of Article 3 ECHR". On 29th April 2016 Deputy Upper Tribunal Judge Chapman set the decision of the First-tier Tribunal aside as it was conceded by the respondent that the First-tier Tribunal had unlawful failed to follow the country guidance in PS. The matter was to be reheard on the basis of the factual findings accepted by the respondent and the First-tier Tribunal, and

it was to be assessed whether there were significant and durable changes in Ukraine which meant that PS should not be followed.

102. As a result of the above findings both VB and IS are found to face return to Ukraine as convicted military service evaders, VB avoiding mobilisation and IS conscription, and both facing terms of imprisonment following their convictions. There is no material difference therefore in the facts before us when considering whether their return to Ukraine will result in a breach of Article 3 ECHR, the only basis of appeal relied upon by both appellants.

Conclusions – Both Appellants

103. Whilst there have been submissions about the pressure under which the Ukrainian government currently finds itself from war and economic problems it remains a member of the Council of Europe, and it has not been contended by anyone that Ukraine is a failing state without an operating criminal justice system. In these circumstances we find the evidence of Professor Bowring that the appellants would be checked against computer systems and found to be convicted offenders without any appeal against sentence and with prison sentences outstanding on re-entry to Ukraine compelling. We also accept Mr Symes' submission that the appellants cannot be required to lie in response to standard questioning on re-entry which might reasonably be expected to include issues regarding criminal convictions or military service. We note the view of the Australian Refugee Review Tribunal in their Country Advice Ukraine decision dated 11th December 2009 at page 3 of the document where it is said: "If a person has broken the law by evading the draft, their return to Ukraine is likely to attract the attention of the authorities – particularly if they enter Ukraine through official channels." This is also consistent with the Guardian newspaper report of 10th February 2015 which refers to draft-dodgers being arrested at border checkpoints in the context of a government decree regulated foreign travel for those subject to mobilisation. It is also consistent with the observation by UNHCR in their September 2015 report at paragraph 34 which records fears of being mobilised at official border crossings. We therefore accept Professor Bowring's evidence that as a result it is highly likely that the appellants would be taken into detention on arrival in Ukraine. We find it highly unlikely that there could be any other response given their return as convicted criminals with outstanding prison sentences.

104. It is accepted by all as probable that on return to Ukraine the two appellants would be entitled to a retrial in the light of Professor Bowring's evidence. Given that they would both undoubtedly request this as a preliminary to challenging their prison sentences we find it probable that they would be held during the process of decision-making by the authorities on this issue in a pre-trial detention facility, or SIZO. We accept the evidence of Professor Bowring that this would likely take a matter of weeks or perhaps months: it is not an entirely clear-cut legal issue and not one which arises routinely and the context is one of a recent large turn-over of judges and the chief prosecutor being new and inexperienced in this field. We do not see that the appellants could possibly apply for bail until the issue of entitlement to a re-

trial had been determined as they would until this point simply be convicted offenders with sentences of imprisonment.

105. Whilst it seems highly likely the issue of retrial would be eventually determined in their favour even at this point whether the appellants would be granted bail cannot be a forgone conclusion. There is a presumption in favour of bail under the current criminal procedural code, however the appellants have shown themselves persistent avoiders of military service and the Ukrainian justice system, and it might be that the authorities have chosen to make examples of them in the context of their previous harsh sentences. We find a real risk that the period of detention in the SIZO would, in this context, extend beyond the initial period of weeks or months taken to determine the issue of the retrial in their favour.

106. We do not find that there is evidence to support the idea that ultimately, on a retrial, the appellants would be sentenced to serve a period of imprisonment. At the current time this is clearly a very rare occurrence. We find it is more likely that they would receive an administrative penalty in the form of a fine or if a criminal penalty were pursued that this would ultimately result in a suspended sentence of imprisonment or be converted to probation. From the material before the Tribunal at the current time this is clearly the way proceedings for failure to do military service are generally dealt with in the few cases which have reached this stage.

107. The question then arises as to whether the probable period of several months in a SIZO on return to Ukraine, that we find that the appellants are likely to experience prior to this retrial, would amount to a real risk of a breach of their Article 3 ECHR rights. We find that this would be the case following the country guidance set out above, most particularly due to the high likelihood that they would be held in a SIZO in overcrowded and materially poor detention conditions.

Decision:

1. The making of the decisions of the First-tier Tribunal involved the making of errors on points of law.

2. The decisions of the First-tier Tribunals are set aside

3. The decisions are remade allowing both appeals on Article 3 ECHR grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellants. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We do so in order to

avoid a likelihood of serious harm arising to the appellants or their families from the contents of their protection claims.

Signed: Date: 1 March 2017

Fiona Lindsley

Upper Tribunal Judge Lindsley

APPENDIX A

DOCUMENTARY EVIDENCE BEFORE THE UPPER TRIBUNAL

Expert Report and Enclosures

Date	Description
Not dated	Expert's Report of Professor William Bowring

Documents before the Upper Tribunal

Date	*Source*	Description
Undated		
Undated	*Valeriya Lutkovska Ukrainian Parliament Commissioner for Human Rights* http://www1.ombudsman.gov.ua/en/index.php?option=com_content&view=article&id=1116&Itemid=29	Resume of Valeriya Lutkovska Ukrainian Parliament Commissioner for Human Rights
Undated	*Council of Europe Parliamentary Assembly* **http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20712&lang=en**	Council of Europe Recent developments in Ukraine: threats to the functioning of democratic institutions
Undated	*Institute for criminal policy research - World Prison brief*	World Prison Brief – statistics Ukraine

	http://www.prisonstudies.org/country/ukraine-	
Undated	*Ukrainian Helsinki Human Rights Union* http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/UKR/INT_CAT_CSS_UKR_24508_E.pdf	Alternative interim report by Ukrainian Helsinki Human Rights Union on implementation of recommendations, provided by the Committee against Torture based on the consideration of the sixth periodic report of Ukraine (CAT/C/UKR/6)
Undated	*Criminal Procedure code of Ukraine* https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802f6016	Criminal Procedure Code of Ukraine
Undated	*Criminal Procedure code of Ukraine* http://zakon3.rada.gov.ua/laws/show/4651-17	Criminal Procedure Code of Ukraine
Undated	*Moscow Times* https://themoscowtimes.com/articles/poroshenko-signs-law-allowing-ousted-yanukovych-to-be-tried-in-absentia-40642 -	Poroshenko Signs Law Allowing ousted Yanukovych to be Tried in Absentia
Undated	*The Ukrainian Ombudsman for Human Rights* http://censor.net.ua/photo_news/404244/novye_fakty_narusheniyi_prav_cheloveka_zafiksirovany_v_kievskom_sizo_ofis_om	New facts of Human Rights violations were fixed in the Kiev Sizo

	budsmena_fotoreportaj	
2016		
13 October 2016	*Inquest: Working for truth, justice and accountability* www.inquest.org.uk/statistics/deaths-in-prison	Deaths in Prison
15 September 2016	*Office of the UN High Commissioner for Human Rights* http://www.ohchr.org/Documents/Countries/UA/Ukraine15thReport.pdf	UHCHR report on the human rights situation in Ukraine 16 May - 15 Aug 2016
4 September 2016	*ICPS Report* http://www.yagunov.in.ua/?p=444	Prison reform in Ukraine: some analytical notes and recommendations
September 2016	*UK Visas and Immigration* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/556433/CIG_-Ukraine_-_Military_Service_v2_0__September_2016_.pdf	Country Information and Guidance - Ukraine – Military service
29 August 2016	*Amnesty International* https://www.amnesty.org/en/latest/news/2016/08/ukraine-authorities-must-commit-to-a-	Ukraine: authorities must commit to a thorough investigation after 13 people released from secret detention

	thorough-investigation-after-13-people-released-from-secret-detention/	
28 August 2016	*Human Rights Watch* https://www.hrw.org/news/2016/08/28/ukraine-new-research-corroborates-secret-detentions	Ukraine: new research corroborates secret detentions
1 August 2016		Letter of instruction to Professor Bowring dated 1st August 2016
18 July 2016	*Human Rights in Ukraine: Information website of the Kharkiv Human Rights Protection Group* http://www.khpg.org.ua/en/index.php?id=1468417337	Ukraine's legislators refuse to part with repressive soviet era norm
July 2016	*Amnesty International* https://www.amnesty.org/en/documents/eur50/4455/2016/en/	Ukraine: "You don't exist": Arbitrary detentions, enforced disappearances and torture in eastern Ukraine
25 June 2016	*Correspondent.net* http://korrespondent.net/ukraine/3703204-poroshenko-rasskazal-kak-ostanovyl-mobylyzatsyui	Poroshenko explained how he stopped the mobilization
20 May 2016	*Human Rights in Ukraine: Information website of the Kharkiv Human Rights Protection Group* http://www.khpg.org/en/pda/index.php?id=1463690153	Soviet-era norm allows revenge prosecution of prisoners who assert their rights

5 May 2016	*Correspondent.net* http://korrespondent.net/ukraine/3678669-v-ukrayne-startoval-vesennyi-pryzyv	The spring call up started in Ukraine
25 April 2016	*Ukrainian Helsinki Human Rights Union* http://helsinki.org.ua/en/prisoner-s-rights/	Prisoner's Rights
6 April 2016	*Correspondent.net* http://korrespondent.net/ukraine/3663540-na-uklonystov-ot-sluzhby-otkryly-15-tysiach-del	15 thousand cases opened on draft dodgers
April 2016	*US Department of State* http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252911wrapper	US Department of State Report – Human Rights Practices for 2015
28 January 2016	*En Reporter* http://en.reporter-ua.ru/that-interpol-was-looking-for-yanukovych-and-his-associates-poroshenko-proposed-to-change-the-law-on-in-absentia-justice.html	That Interpol was looking for Yanukovych and his associates, Poroshenko proposed to change the law on in absentia Justice
January 2016	*UK Visas and Immigration* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/491411/CI	Home Office: Country Information and Guidance - Ukraine prison conditions

	G_-_Ukraine_-_Prison_Conditions_v_1_0__2_.pdf	
2015		
23 December 2015	*Council of Europe* http://wp.unil.ch/space/files/2016/05/SPACE-I-2014-Report_final.1.pdf	Council of Europe (CoE) Annual Penal Statistics Survey 2014
15 December 2015	*Council of Europe* http://www.cpt.coe.int/en/working-documents/cpt-inf-2015-44-eng.pdf	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment CPT
November 2015	*Refworld* https://www.refworld.org/docid/56eade5a4.html	Country Information and Guidance - Ukraine – Military service
11 October 2015	*Ukraine articles* https://ukr.media/ukrain/244992/ and http://tyachivnews.in.ua/novini/tyachyvschina/susplstvo/3070-yak-v-ukrayin-karayut-uhilyantv-vd-moblzacyi.htm 334 - 337	Are there any penalties for Draft Evaders in Ukraine Article (11 October 2015) Are there any penalties for Draft Evaders in Ukraine Article (11 October 2015)
September 2015	*Refworld* http://www.refworld.org/docid/56017e034.html	UNHCR International protection considerations related to developments in Ukraine – Update III

27 August 2015	*Kyiv Post* https://www.kyivpost.com/article/content/ukraine-politics/draft-dodgers-396690.html	Draft Dodgers
August 2015	*US Department of Justice* www.bjs.gov/content/pub/pdf/mljsp0013st.pdf	Mortality in Local Jails and State Prisons, 2000–2013 - Statistical Tables
22 May 2015	*Amnesty International* https://www.amnesty.org/en/documents/eur50/1683/2015/en/	Breaking bodies: Torture and summary killings in Eastern Ukraine
22 May 2015	*Amnesty International* https://www.amnesty.org/en/latest/news/2015/05/ukraine-new-evidence-prisoners-tortured-and-killed-amid-conflict/	Ukraine: Overwhelming new evidence of prisoners being tortured and killed amid conflict
29 April 2015	*Refworld* http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=5542096b4	Council of Europe Committee for the prevention of torture (CPT): report to the Ukrainian government on the visit to Ukraine carried out by the European Committee for the prevention of Torture and inhuman or degrading treatment or punishment from 9 to 16 September 2014.
April 2015	*US Department of State*	US Department of State Report - Human Rights Practices for 2014

	http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252911	
18 February 2015	*Foreign Policy* http://foreignpolicy.com/2015/02/18/the-draft-dodgers-of-ukraine-russia-putin/ 295	The Draft Dodgers of Ukraine
1 December 2014 - 15 February 2015	*Office of the UN High Commissioner for Human Rights* http://www.un.org.ua/en/publications-and-reports/un-in-ukraine-publications/3592-un-reports-on-human-rights-situation-in-ukraine	UN Report on the human rights situation in Ukraine
12 February 2015	*Internet Article* http://tsn.ua/politika/ukrayinciv-budut-karati-5-rokami-v-yaznici-za-uhilennya-vid-mobilizaciyi-408862.htm	Ukrainians will be punished to 5 years imprisonment for avoiding mobilization. Polityka
3 February 2015	*Reuters* http://www.reuters.com/article/us-ukraine-crisis-army-idUSKBN0L71PW20150203	Bravado, resentment and fear as Ukraine called men to war
February 2015	*The Guardian* https://www.theguardian.com/world/2015/feb/10/ukraine-draft-dodgers-jail-kiev-struggle-new-fighters	Ukraine: Draft Dodgers face jail as Kiev struggles to find new fighters

22 January 2015	*Internet Article* http://tsn.ua/ukrayina/yak-ukrayinciv-pokarayut-za-uhilennya-vid-mobilizaciyi-shtrafi-ta-tyurma-404376.html	How Ukrainians will be punished for evasion of mobilization: fines and prison Ukrayina
21 January 2015	*Vinnysya News Article* http://vn.20minut.ua/kriza-v-ukrayini/ne-sluzhat-i-ne-nadto-sidyat-ti-hto-zabiv-na-mobilizatsiyu-10432708.htm	Those who do not care less about Mobilisation
January 2015	*Refworld* http://www.refworld.org/pdfid/54c639474.pdf	UNHCR International Protection Considerations related to developments in Ukraine – Update II
2015	*Council of Europe* http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20873&lang=en	United States State Department Human Rights Report Ukraine
2014		
21 October 2014	*Tass Russian News Agency* http://tass.com/world/755635	Poroshenko Signs Trial in Absentia law for those charge with corruption
20 October 2014	*Human Rights Watch* https://www.hrw.org/news/2014/10/20/ukraine-widespread-use-cluster-munitions	Ukraine: widespread use of Cluster Munitions

30 September 2014 (Revised)	*US Department of Justice* https://www.bjs.gov/content/pub/pdf/p13.pdf	Prisoners in 2013
9 to 16 September 2014	*Council of Europe* http://www.cpt.coe.int/documents/ukr/2015-21-inf-eng.pdf	Council of Europe Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)
29 April 2014	*Council of Europe* *http://www.cpt.coe.int/documents/ukr/2014-15-inf-eng.pdf*	Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 21 October 2013
9 April 2014	*US Department of State* *Country Reports on Human Rights Practices for 2015* http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252911	Recent developments in Ukraine: Threats to the functioning of democratic institutions report from the Parliamentary Assembly
2014	*Statistics Canada* http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14163-eng.htm	Adult correctional statistics in Canada, 2013/2014
2014	*Correctional Service Canada* http://www.csc-scc.gc.ca/publications/005007-	Annual Report on Deaths in Custody 2013/2014 (Canada)

	9002-eng.shtml	
2014	*Australian Government – Australian Institute of Criminology* http://aic.gov.au/media_library/publications/facts/2014/facts_and_figures_2014.pdf	Australian crime: Facts & figures 2014
	2013	
2013	*Australian Government – Australian Institute of Criminology* http://aic.gov.au/publications/current%20series/mr/21-40/mr26/05_prison.html	Deaths in Custody, 2011-12 and 2012 - 13
	2012	
6 April 2012	*Global Voices* https://globalvoices.org/2012/04/05/ukraine-lukyanivska-prison-where-people-are-kept-as-animals/	Ukraine: Lukyanivska prison - where people are kept like animals
	2011	
15 July 2011	*Unian Information Agency* http://www.unian.info/politics/519147-trial-adjourned-until-july-18.html -	Trial Adjourned until 18th July

2009		
11 December 2009	*Amnesty International* https://www.amnesty.org/en/countries/europe-and-central-asia/ukraine/report-ukraine/	Annual Report: Ukraine 2015/2016
2005		
15 May 2005	*War Resisters' International* http://www.wri-irg.org/programmes/world_survey/country_report/en/Ukraine	Country Report and updates: Ukraine
2001		
2001	*Legislation Line* http://www.legislationline.org/documents/action/popup/id/16257/preview	The Criminal Code of Ukraine of 2001 as amended

Annex B: Error of Law Decision VB

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Ukraine born in 1981. He arrived in the UK on 5th January 2013, and claimed asylum on 19th May 2014. His claim for asylum is based on fear of being imprisoned, and suffering treatment contrary to Article 3 ECHR as a result of such imprisonment, for failing to respond to papers requiring him to attend to be re-conscripted into the Ukrainian army. He also says he would suffer treatment contrary to Article 3 ECHR including hazing, bullying and physical abuse if he were forced to do such service as he had suffered treatment during his first period of military service between 1999 and 2001. His application for asylum was refused on 17th November 2014. His appeal against the decision to refuse him leave to remain on asylum and human rights grounds was dismissed by First-tier Tribunal Judge Roopnarine-Davies in a determination promulgated on the 9th November 2015.

2. Permission to appeal was granted by Upper Tribunal Judge Southern on 19th January 2016 on the basis that it was arguable that the First-tier judge had erred in law for the reasons set out in the grounds of appeal.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions

4. Ms Panagiotopoulou relied upon the grounds of appeal and argued in oral submissions that the First-tier Tribunal materially erred in law in the following ways.

5. Firstly the Tribunal failed to properly assess risk on return.

6. The Tribunal accepted that the appellant had been bullied in the army during his first period of military service and that he had been called up for a second time in 2014. It was also accepted by all that he had failed to comply with this call up and was therefore a draft evader, and could be imprisoned for that offence under Ukrainian law.

7. In accordance with PS (prison conditions: military service) Ukraine CG [2006] UKAIT 00016 the appellant was at real risk of treatment contrary to Article 3 ECHR in prison. Ukraine is currently at war and in a state of military mobilisation. As such Article 336 of the criminal code prescribes a prison sentence of between two and five years for such draft evasion. There is no evidence that the law is not being applied in practice (although the respondent has suggested this is the case).

8. The Tribunal appears however to have found at paragraphs 25 and 26 of the decision that there was a risk of a 6 month sentence for the appellant. In the light of this finding it ought to have been found that the appellant was at risk of treatment contrary to Article 3 ECHR. However the finding that the sentence would only be for 6 months is in fact contrary to the country of origin evidence which is that it would be for a minimum of 2 years (as set out above). It is also possible from what is said that the Tribunal believed that the appellant was not actually at risk of imprisonment at all, even for a 6 month period, as they believed he had a defence to any charge of draft evasion because he was not in Ukraine when the summons recalling him to the army was issued, see paragraph 26 of the decision. However the existence of this defence is not supported by any country of origin evidence, and so is a further material error by the Tribunal. Also even if such a defence existed it is very unlikely that the appellant would benefit from it as he had been called up over two years ago, and had clearly remained in the UK claiming asylum precisely to avoid doing his military service. Any suggestion that he could avoid prison by complying with the draft is also untenable because as a matter of historical fact he failed to comply with it and there is no country of origin evidence that those who evade the draft are simply made to complete their military service, and this is not logically likely as it would not assist the authorities in ensuring the draft was complied with.

9. Secondly the Tribunal errs in law as at paragraph 27 of the decision the Tribunal finds that the appellant has been subjected to "hazing and bulling" in the Ukrainian army but this is not sufficient to meet the Article 3 ECHR standard of ill-treatment. This conclusion is contrary to PS (prison conditions: military service) Ukraine CG which finds that it may be treatment contrary to Article 3 if it is sufficiently persistent. As the appellant has suffered this treatment in the past it is more likely to reoccur with him and to have a more pronounced affect upon him, and thus ought to be properly to be seen as treatment contrary to Article 3 ECHR.

10. Mr Tarlow argued that the decision of the First-tier Tribunal was entirely lawful and was in line with the country of origin materials and what was said in PS (prison conditions: military service) Ukraine CG.

11. At the end of the hearing I informed the parties that I found that the First-tier Tribunal had erred in law but would set out my full reasons in writing. I asked if they would support the remaking becoming a country guidance or country point case. Both were happy for this to happen. Ms Panagiotopoulou said that another of her instructing solicitor's client's, a Mr I S, had an appeal before the First-tier Tribunal which had also been identified as a potential country guidance case on a similar point by Deputy Upper Tribunal Judge Chapman, and a CMR hearing in that case was awaited. Her solicitors were therefore already collating relevant country of origin materials.

Conclusions

12. I find that the First-tier Tribunal has erred in law in the assessment of the risk the appellant faces on return to Ukraine.

13. The findings are not clear as to whether the First-tier Tribunal accepted that the appellant would face a real risk of six months imprisonment on return to Ukraine but could produce a defence relating to being in the UK, which would appear to be the position at paragraph 25, or that he would face no risk of prison at all because he could opt simply to do his military service, which appears to be the position at paragraph 26. In either scenario the First-tier Tribunal errs for want of adequate reasoning on this key issue as there is no evidence identified in the decision that supports either that the appellant could defend proceedings and thus not end up in prison by saying he was in the UK claiming asylum or that he could simply opt to perform his military service rather than face prosecution and imprisonment.

14. The Tribunal's finding at paragraph 25 of the decision, that the appellant faced a potential prison term of six months, is also contrary to the evidence before them that the relevant statute states that this term of imprisonment would be for a period of two to five years. This at least had to be considered by the Tribunal, together with the other evidence of practice with sentencing of draft evaders as set out at paragraph 22 of the decision, in coming to a lawful conclusion as to the real risk the appellant faced of imprisonment.

15. At paragraph 26 the First-tier Tribunal found the appellant would not be at real risk of facing prison conditions which breached Article 3 ECHR due to his "personal circumstances and current country conditions" whilst finding that "prison conditions are harsh and may engage article 3". This statement is not lawful for want of proper and clear reasoning. If it is a statement that there is not a real risk of Article 3 ECHR breaches if the appellant is at real risk of imprisonment it is contrary to the country guidance in PS (prison conditions: military service) Ukraine CG with insufficient reasoning to depart from the conclusions in that case.

16. At paragraph 27 of the decision the First-tier Tribunal found that the appellant had suffered bulling and hazing whilst doing his first period of military service. The finding that he would not now be at risk of such treatment due to being older is also not founded in any country of origin evidence. It is clear from PS (prison conditions: military service) Ukraine CG at paragraph 112 consideration ought to have been given as to whether this might constitute a real risk of serious harm in the context of the appellant's history of such treatment and the context of the draft evasion which would have proceeded his undertaking any further military service. Failing to give consideration to these factors is a further material error of law in the decision of the First-tier Tribunal.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal with no findings preserved.

3. I adjourn the remaking decision.

Directions

1. The case will be listed for a CMR hearing on Wednesday 29th June 2016 inter alia to consider the remaking of this decision as a country guidance decision. The parties should attend this hearing.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: *Fiona Lindsley* Date: 27th June 2016

Upper Tribunal Judge Lindsley

Annex C: Error of Law Decision

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01993/2015

THE IMMIGRATION ACTS

Heard at Field House
On 25 April 2016

Decision & Reasons Promulgated

……

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR I S

(ANONYMITY ORDER MADE)

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ERROR OF LAW DECISION

Representation:

For the Appellant: Ms S Panagiotopoulou, counsel instructed by Yemets Solicitors

For the Respondent: Mr D Clarke, Home Office Presenting Officer

1. The Appellant is a national of Ukraine, born on 25 March 1986. He last entered the United Kingdom in January 2013 with his wife, who was pregnant. Their daughter was subsequently born in the United Kingdom on 9 February 2013. The Appellant eventually claimed asylum on 13 August 2015 on the basis that he had evaded military service as a result of which he had been prosecuted and sentenced to 2 years imprisonment. Upon return he would be required to serve that sentence in prison conditions, which were contrary to Article 3 of ECHR. In a decision dated 9 October 2015, his application was refused by the Respondent.

2. The Appellant appealed to the First tier Tribunal and his appeal came before Judge of the First Tier Tribunal Mill for hearing on 16 February 2016. Expert evidence was submitted in the form of two reports by Professor Mark Galeotti, confirming the authenticity of the documents submitted *viz* Court summonses and a decision by a Ukrainian Court dated 7 July 2015. The Appellant also sought to rely upon the Country Guidance decision in PS (prison conditions; military service) CG [2006] UKAIT 00016, where the Upper Tribunal had expressly found that prison conditions are likely to breach Article 3 of ECHR. At [39] First tier Tribunal Judge Mill noted the effect of the decision in PS but at [47] having considered more recent evidence e.g. the Home Office Country Information & Guidance on prison conditions in Ukraine dated January 2016, he held that "*poor prison conditions, such as those described, do not in my view equal a breach of article 3 of ECHR*." Consequently, he dismissed the appeal.

3. Permission to appeal to the Upper Tribunal was sought on the basis *inter alia* that the First tier Tribunal Judge had materially erred in that the evidence before him did not justify departure from the existing CG case of PS as no durable or significant change in the prison conditions was established by the evidence before him.

4. Permission to appeal was granted by Judge of the First tier Tribunal Pooler on the basis that it was arguable that the Judge erred by failing to follow a country guidance case.

Hearing

5. At the hearing before me, Mr Clarke on behalf of the Respondent accepted that the Respondent had not challenged the findings that the Appellant has been convicted and sentenced to 2 years imprisonment. Therefore, the only issue is whether the First tier Tribunal Judge was warranted to depart from the country guidance decision and whether there was an Article 3 risk arising from the conditions in prison and that he was unable to argue that the decision has been made in accordance with the Practice Direction on departing from country guidance decisions. He invited me to find that there had been a material error of law and that the hearing should be adjourned for submissions only on the issue. The Respondent's position is that the Country Information and Guidance report of January 2016 on prisons indicates that there is a marked change. Ms Panagiotopolou on behalf of the Appellant agreed.

6. In light of Mr Clarke's helpful concession that First tier Tribunal Judge Mill erred materially in law in failing to follow the country guidance case, I find that there is a

material error of law. The appeal is adjourned to a resumed hearing on the issue of whether prison conditions in Ukraine are contrary to Article 3 of ECHR or whether there has been a significant and durable change in Ukraine such that the country guidance decision in PS (prison conditions; military service) CG [2006] UKAIT 00016 should no longer be followed.

Deputy Upper Tribunal Judge Chapman 25 April 2016