PS (prison conditions; military service) Ukraine CG [2006] UKAIT 00016

Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Glasgow (Eagle Building)	**Determination Promulgated**
On 30 November 2005	**On 22 February 2006**
Prepared	

Before

Mr N H Goldstein - Senior Immigration Judge
Mr M E Deans - Senior Immigration Judge

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A J Bradley, Solicitor.
For the Respondent: Mr R Pattison, Home Office Presenting Officer.

Prison conditions in the Ukraine are likely to breach Article 3 of the ECHR.

This determination supersedes TV (Ukraine – Prison conditions) Ukraine [2004] UKIAT 00222.

There is insufficient evidence to establish a real risk of Article 3 ill-treatment to conscripts and new recruits from the practice of dedovshchina (hazing) in the Ukrainian armed forces.

DETERMINATION AND REASONS

1. The Appellant is a citizen of the Ukraine. He arrived in the United Kingdom on 14 December 2001 having been issued with a work permit.

He was granted an extension of his work permit until 16 December 2003. He went back to the Ukraine on 10 January 2004 and returned to the United Kingdom on 31 January 2004. He was granted entry clearance to enter the United Kingdom on 21 January 2004.

2. It was subsequently discovered that the Appellant had lied in order to obtain further entry clearance and the Immigration Officer served him with Home Office Form IS81 curtailing his leave to enter.

3. The Appellant appealed against this decision and his appeal came before Mrs I A M Murray, Adjudicator, on 6 September 2004 and was dismissed. Mrs Murray, however, on that occasion did not hear the Appellant's asylum appeal.

4. The Appellant appealed that decision to the Immigration Appeal Tribunal and on 30 December 2004, Mr D J Parkes an Acting Vice-President, granted permission to appeal on the basis of the third ground that Mr Parkes referred to as arising "from what might be described as a somewhat half-hearted asylum claim".

5. Mr Parkes continued:

> "The Claimant had returned to the Ukraine when his work permit expired. On 31 January 2004 he signed to the effect that he had no other grounds but those relating to the refusal of entry for deception. It was only in the Notice of Appeal to the Adjudicator on 10 February that the Claimant said that he wished to apply for asylum. Then on 5 April 2004 he signed a statement of additional grounds pursuant to Section 120 of the Nationality, Immigration and Asylum Act 2002. This was now treated as an application by the Secretary of State upon which a decision was given, appealable to an Adjudicator prior to the hearing before the Adjudicator. The 2002 Act, however, had come into force on 1 April."

6. Mr Parkes then described how the Claimant's representative before the Adjudicator informed her that the Appellant had an outstanding asylum claim and he considered it arguable that the Adjudicator ought to have dealt with the asylum claim. Having expressed the view that the case was thus suitable for a remittal to Mrs I A M Murray and there being no objection to this proposal raised by either party to the appeal, an appropriate determination to that effect was then issued.

7. It was in such circumstances, that on 17 March 2005, this matter came back before Mrs I A M Murray, Adjudicator, in order for her to hear and determine the Appellant's asylum appeal.

8. In a determination promulgated on 7 April 2005 the Adjudicator dismissed the Appellant's appeal on asylum and human rights grounds.

9. Following an application to the Tribunal by the Appellant, a reconsideration was ordered on the basis, as expressed by Mr Richard Chalkley, Senior Immigration Judge, that:

> "The Adjudicator may have erred in law in failing to separately consider the Appellant's Article 3 claim and failing to consider whether, if the Appellant chooses to refuse to serve in the Military, any term of imprisonment he might receive would amount to Article 3 mistreatment."

10. A reconsideration hearing took place before the Tribunal on 23 September 2005, the Panel, comprising Miss B Mensah, Senior Immigration Judge, and Mr C J Hodgkinson, Immigration Judge.

11. The Tribunal decided there was a material error of law and it directed that the case be set down for a second-stage reconsideration hearing:

> ".. so that unequivocal and clear findings can be made with respect to the Appellant's military service and prison conditions claim."

12. The Tribunal's reasons for the decision that there was a material error of law in the determination were set out as follows:

> "This appeal has had a long history having first begun as an immigration only appeal (paragraph 5 of the determination), that was dismissed, as was an asylum claim. In respect of the asylum claim the sole basis of the claim was the question of military service and the Appellant's unwillingness to undertake it. The Adjudicator dismissed the asylum claim. This was an appeal in which the Article 3 claim did not necessarily stand or fall with the asylum claim; the Article 3 claim was in respect of prison conditions in the Ukraine. The Adjudicator did not deal with that aspect of the claim. The first question we have to decide is whether there was any error of law on the part of the Adjudicator.
>
> Having considered the determination and heard submissions from Mr Mullen on behalf of the Appellant and Mr Matthews on behalf of the Respondent, we are satisfied that the determination contains an error of law. The Adjudicator rejected the Appellant's claim that he is a conscientious objector and therefore that he will face any period in prison (paragraph 37 and first 2 sentences of paragraph 35). However she also states that if he does not undertake military service he will be imprisoned (last sentence of paragraph 35). It is unfortunate that she does not then go on to consider the consequences of imprisonment. The reference in paragraph 35 introduced a hint of uncertainty into the Adjudicator's decision (that may be the danger of considering matters on an 'even if' basis).
>
> We are satisfied that the error of law lay in the Adjudicator's conclusion that the asylum and Article 3 claim stood or fell together (when they clearly did not in this case) and her failure to give the

Article 3 claim any consideration. Had that been the only matter we were satisfied that we could have considered the objective material ourselves. However, the Adjudicator's lack of clarity as to the possibility of the Appellant being imprisoned meant that we were unable to decide a basis on which to proceed. Her failure to consider the Article 3 prison claim in the light of the lack of clarity as to the possibility of the Appellant being imprisoned (paragraph 35) also amounted to an error of law."

13. For the avoidance of any doubt, at the outset of the hearing, we sought and obtained the agreement of the parties' representatives in light of the Tribunal's reasoning upon the First Stage Reconsideration Hearing, as set out above, that the Second Stage Reconsideration Hearing related solely to Article 3 ECHR, issues.

14. The parties further agreed with us, that the Tribunal were entitled in such circumstances to proceed on the basis of the Adjudicator's findings of fact, as contained in her determination that related to the Appellant's asylum appeal.

The Appellant's evidence relating to whether he would refuse to carry out military service.

15. The parties' representatives further agreed with us however, that it remained necessary for the Tribunal to make findings inter alia, as to whether the Appellant would refuse to carry out military service, if he was called upon to do so by the Ukrainian authorities upon return. We were mindful that at paragraph 8 of her determination the Adjudicator had recorded:

> "The Appellant was asked why he did not want to do military service in the Ukraine. He stated that he does not believe in war and that the army teaches you to kill people and that is against his principles. He said life in the army is violent even if there is no conflict."

16. At paragraphs 9 and 10 of her determination the Adjudicator continued:

> "9. The Appellant was asked if he knew about *dedovshchina*. He said that he did and he was asked what it is. He said that when new recruits are sent to the army, soldiers who have been in the army for one year are supposed to look after these recruits, but what happens to the new recruits is that they get subjected to violence. He said that the new recruits are subjected to degrading treatment and violence. The Appellant was asked what effect this has on the new recruits and he said that it makes them believe in violence and when they have been in the army for a year they in turn treat the next batch of new recruits badly. He said that this treatment makes the new recruits to the army mentally unstable.

10. He told the story of a soldier who saw other soldiers stealing. It was his duty to report this but when he did this he was found hanged. He said that this was not a suicide as the soldier had been beaten black and blue before he had died. The Appellant said that he did not wish this to happen to him and he did not wish to join the army in the Ukraine."

17. Mr Bradley for the Appellant, agreed that the Adjudicator's recording of this evidence could properly be taken into account by the Tribunal as their starting point and this meant that he did not intend to ask the Appellant any questions about the practice of *dedovshchina*.

18. There was before us a further signed statement of the Appellant dated 24 November 2005 in relation to which we gave leave at Mr Bradley's request for a further paragraph 7 to be added.

19. For the sake of completeness, we set out below the details of that further statement (paragraphs 1 and 2 simply being formal and relating to the Appellant's name, date of birth, place of origin and current address):

"3. I left the Ukraine because I wished to avoid carrying out military service. I do not believe in war and I do not believe I should be forced to join the army. If I refuse to join the army I will be arrested and taken to the army by the police. Once I am there, if I refuse to follow orders I will be imprisoned. I also believe that if I protest against and refuse to undertake military service I will be subjected to violence.

4. My brother MS was forced to undertake military service and his hands were permanently damaged while undertaking military service. He suffered from frostbite as a result of not being provided with adequate clothing equipment. Many people who are forced to undergo military service return with their health badly affected. I do not wish to be forced into the army where there are very poor standards and conditions and where the standards and conditions will put my life and my health at risk and in danger. I believe that if I am returned to the Ukraine I will be called to undertake military service, arrested by the police and taken to the army and imprisoned and ill-treated if I refuse to carry out military duties. The conditions in military service itself are poor and dangerous.

5. If I am returned I will refuse to carry out military service and I believe this will result in me being imprisoned, ill-treated and kept in life threatening conditions.

6. I confirm that I have read through and signed this statement and I adopt it as my evidence for the court today.

7. I am scared about the practice of hazing, the classmate of my friend was killed as a result of this practice".

20. In relation to paragraph 7 of the Appellant's statement, Mr Pattison initially sought an adjournment on the basis that he had not been given notice of this further claim, but promptly withdrew it when we reminded him that these were matters in relation to which the Appellant had given evidence before the Adjudicator as reflected in paragraphs 8, 9 and 10 of her determination.

21. Insofar as this second stage reconsideration hearing relates solely to Article 3 ECHR issues, we agreed with the parties that it was necessary for the Tribunal to make credibility findings as to the Appellant's intentions if returned to the Ukraine as regards the undertaking of military service. The Appellant having adopted his amended statement (to which we have made earlier reference in this determination), and his evidence in chief, he was then subject to cross-examination by Mr Pattison. There was a brief re-examination on the part of Mr Bradley. We have given that evidence our most careful consideration.

22. The Appellant told us that he had decided that he did not wish to undertake military service before returning to the United Kingdom. He could not recall the date of his return but thought it was February 2003. In fact upon checking his immigration history it is apparent that he returned to the United Kingdom in January 2004. The Appellant claimed that he had not given any thought to the matter of his call up for military service prior to his first visit to the United Kingdom in December 2001 because at that stage he was studying at a college in Ukraine. On 14 December 2001, he arrived in this country under a programme of student exchange. He subsequently obtained an extension to his work permit that enabled him to remain in the United Kingdom for two years. The Appellant explained that when his extended permit was coming to its end, he realised that if he returned to the Ukraine and stayed there for any length of time he would be subjected to military service. It was for that reason that he decided to return to the United Kingdom. The Appellant maintained that he had not previously appreciated in the course of his first visit to this country, that he could apply for asylum. The Appellant recalled being interviewed by an Immigration Officer at Gatwick Airport upon his return in January 2004 and indeed being asked questions about his student visa.

23. Significantly, the Appellant agreed, that he was also asked at interview if there was any other reason as to why he wished to be in the United Kingdom and acknowledged that his answer as recorded in his interview record was "No". However, the Appellant repeated that he had returned to the United Kingdom because he did not wish to undertake military service in the Ukraine and that he had reached his decision prior to his departure.

24. When asked to explain as to why in such circumstances, he had not informed the Immigration Officer at Gatwick Airport as to this matter, the Appellant maintained that he was unaware that he could discuss such

matters at that stage, "as before when I arrived in the UK I did not know I could apply for asylum in this country". The Appellant confirmed that in such circumstances he did not inform the interviewing officer of his true intentions or seek to claim asylum.

25. Mr Pattison drew to the Appellant's attention, that in an earlier statement he had provided to the Tribunal, the Appellant had stated:

> "I told the interviewer that I did not want to undertake military service".

26. The Appellant accepted that this was distinctly different from the oral evidence that he was now giving. The Appellant was shown a copy of his Statement of Additional Grounds (SAG) completed on 31 January 2004. He accepted that it bore his signature.

27. The Appellant was reminded that the evidence showed that he claimed asylum on 12 February 2004. In such circumstances, the Appellant was asked as to why he had failed to record on the SAG that he wished to claim asylum in the United Kingdom. He responded:

> "What I believed this was – that it was just an additional reason, additional question because I had already submitted the main asylum form. I thought everything was in the main form and this document was just additional grounds for claiming asylum."

Mr Pattison reminded the Appellant that the SAG form was completed on 31 January 2004 and that the Home Office had never received the Appellant's claim for asylum until 10 February 2004. The Appellant's noteworthy response was:

> "I am confused now. I believe as I explained, that I thought it was just additional to the main claim for asylum.

28. The Appellant continued, that his brother had completed military service in the Ukraine but he was uncertain whether that was eight or five years previously.

29. When asked if he had had any contact with the Ukraine about being called up to do military service, the Appellant told us that:

> "I have not contacted them as I know because everyone knows in the Ukraine that every man aged eighteen to twenty five must do military service in Ukraine – that is compulsory".

When asked upon return to the Ukraine, whether he could delay being called up by reason of higher education studies, the Appellant responded that he did not have a sufficient level of secondary education that would enable him to go to a high education college in the Ukraine for this purpose.

The Background Evidence

30. There were before us three Inventories of Productions that we numbered bundles 1, 2, and 3 respectfully. It was apparent to us in the course of the hearing that bundles 2 and 3 were not properly paginated, that accordingly created unnecessary difficulties for us in the course of the hearing and in particular the parties' submissions, that could otherwise have been avoided.

31. Bundle 1 largely comprised papers that were previously before the Adjudicator and included CIPU Bulletins 1/2004 and 1/2005.

32. Bundle 2 contained what were described as Home Office Key Documents in relation to the Ukraine, a War Resisters International Report entitled "Refusing to Bear Arms" of 2005 and a number of newspaper and internet articles.

33. Bundle 3 contained a US State Department Report of 2003 and report of the Ukraine's first Ombudsman's visit to the Ukrainian Free University dated 26 May 2004.

34. The Appellant's representatives had provided a further bundle of objective material that included the Annual Report of Amnesty International of 2005 in relation to the Ukraine; a World Report 2005 and an Amnesty International Report of 2004.

35. In addition the bundle included transcripts of the decisions of the Tribunal in:

> **VB (Desertion – Chechnya War – Hamilton) Russia CG 2003 UKIAT 00020.** (To which no reference was made by Mr Bradley in his closing submissions);and
>
> **TV (Ukraine – Prison Conditions) Ukraine [2004] UKIAT 00022**.

36. Before turning to evaluate the Appellant's case, it is first necessary to consider the background evidence relating to prison conditions and military service.

37. Whether this particular Appellant will be at real risk of imprisonment, is something we will have to decide. But before we do so, we need to examine whether for persons who do face a real risk of imprisonment, the conditions they will experience would be contrary to Article 3.

38. We also need to consider the conditions in military service, so as to decide whether performing military service would place this Appellant at risk.

39. Both these tasks, require us to look at general categories for persons in Ukrainian prisons and persons in Ukrainian military service. By virtue of the fact that we had before us as much relevant background evidence as seems to be available, we have decided that our conclusions on these two issues can stand as country guidance.

40. The Tribunal were mindful that the Appellant could succeed under the Human Rights Convention, were he able to establish a real risk of breach of his protected human rights in Ukraine. Indeed, where a prospective breach of Article 3 is alleged the standard of proof is the same as in asylum appeals. The question is, has the Appellant established there is a real risk that his rights under Article 3 will be breached.

41. We further remind ourselves that under Article 3:

> "No-one shall be subjected to torture or to inhuman or degrading treatment or punishment".

42. Such ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3.

43. The Tribunal's examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one in view of its absolute character.

44. As held in **Soering [1989] 11EHRR 439:**

> "The ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative: it depends on all the circumstances of the case, such as the nature and context of the treatment and punishment, the manner and method of its execution, its duration, its physical or mental effects and in some instances the sex, age and state of health of the victim."

45. It follows that the minimum level of severity requirement means a high threshold to establish Article 3 jurisprudence.

46. In this regard we are mindful of the guidance of the Court of Appeal in **Krotov [2004] EWCA Civ 69** that, whilst conscientious objection to military service, cannot ion general found a claim under the Refugee Convention, it may do so when it leads to punishment for refusing to participate in a type of military action condemned by the international community as contrary to the basic rules of human conduct. This does not require specific condemnation of an international conflict by United Nations or National Governments, but does require evidence of gross and systematic violations of humanitarian norms, which the Appellant would reasonably likely to find himself participating in.

47. In **Krotov** Potter LJ who gave the leading judgment considered that if a Court or Tribunal was satisfied:

> "a. That the level and nature of the conflict and the attitude of the relevant governmental authority towards it, had reached the position where combatants were or might be required on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognised by the international community;
>
> b. that they would be punished for refusing to do so, and;
>
> c. that disapproval of such methods and fear of such punishment was the genuine reason motivating the refusal of an asylum seeker to serve in the relevant conflict;
>
> then it should find the Convention ground had been established".

48. In **TV**, the Tribunal referred to the judgment of the Court of Appeal in **Hariri [2003] EWCA Civ 807**, in which the Court drew extensively upon the decision of the Tribunal in **Muzafar Iqbal [2002] UKIAT 02239**, where the Tribunal stated in paragraph 57:

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

49. This passage was approved by Laws LJ in **Hariri** as reflecting no more or no less than the reality of the situation; the fact that ill-treatment or misconduct might be routine or frequent would not be enough. Laws LJ stated in paragraph 8:

> "At this stage the Appellant's argument before the IAT was that he was at risk of ill-treatment if returned as a member of a class, rather than on account of facts especially put to him. His essential complaint and the point on which Ward LJ granted permission to appeal, is that the IAT in paragraph 10 applied a standard of proof for the establishment of a risk of persecution or treatment contrary to Article 3 which is higher than, and at variance from, the standard established in the jurisprudence. In short it imposes greater burdens on an applicant than should be imposed having regard to the test set out in **Sivakumaran [1988] 1 AC 958,** in their Lordship's House, namely: 'a reasonable degree of likelihood' of relevant ill-treatment. This requires proof of a real, that is, not a fanciful, risk; but its perceived incidence may well be less, perhaps a good deal less, than a formal probability of 51 per cent or more.

It is common ground that the **Sivakumaran** standard applies as surely in appeals brought under the European Convention on Human Rights as it does in refugee appeals as such. The Appellant's target in this argument is the requirement, adopted at paragraph 10 of the IAT determination which I have read, to show 'a consistent pattern of gross and systematic violation of fundamental human rights' by way of punishment for draft evasion or unauthorised departure from the country, before a case of persecution or Article 3 ill-treatment could be accepted…

In my judgment however, the Appellant's arguments all forget one simple but central fact in this case. It is that the points concerning the Appellant's individual circumstances had all fallen away. When it came to paragraph 10 of the IAT determination, his case depended entirely upon it being established that there was a real risk that he would suffer unlawful ill-treatment, as I have said, as a member of a class or perhaps two classes: draft evaders and those who had left the country without authority. In those circumstances, as it seems to me, the 'real risk' – the conventional **Sivakumaran** standard – could not be established without it being shown that the general situation was one in which ill-treatment of the kind in question generally happened: hence the expression 'gross and systematic'. The point is one of logic. Absent evidence to show the Appellant was at risk because of his specific circumstances, there could be no real risk of relevant ill-treatment unless the situation to which the Appellant would be returning was one in which such violence was generally or consistently happening. There was nothing else in the case that could generate a real risk. In this situation, then, a 'consistent pattern of gross and systematic violation of fundamental human rights', far from being at variance with the real risk test is, in my judgment, a function or application of it".

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

"37. I want to add a word, however, about the evaluation of conditions which are alleged to create a real risk of inhuman treatment. The authority of this court has been lent, through the decision in **Hariri** to the formulation that ill-treatment which is 'frequent' or even 'routine' does not present a real risk to the individual unless it is 'general' or 'systematic' or 'consistently happening': see paragraphs 9 to 10 in the previous judgment.

38. Great care needs to be taken with such epithets. They are intended to elucidate the jurisprudential concept of real risk, not to replace it. If a type of car has a defect which causes one vehicle in ten to crash, most people would say that it presents a real risk to anyone who drives it, albeit crashes are not generally or consistently happening. The exegetic language in **Hariri** suggests a higher threshold than the IAT's more cautious phrase in **Iqbal**, 'a consistent pattern', which the Court in **Hariri** sought to endorse.

39. There is a danger, if **Hariri** is taken too literally, of assimilating risk to probability. A real risk is in language as in law something distinctly less than a probability, and it cannot be elevated by lexicographic stages into something more than it is."

51. It was no doubt with this, amongst other matters in mind, that the Tribunal in the appeal before us at the first stage of its reconsideration, realised that the Adjudicator had not approached the case by considering whether there was inter alia, a consistent pattern of violations of the human rights of those in detention in the Ukraine sufficient to engage Article 3 and indeed this reinforced their conclusion that the Adjudicator's error of law related to her failure to appreciate in such circumstances, that the Appellant's asylum and Article 3 claim did not stand or fall together, as a consequence of which, she failed to give the Article 3 claim any consideration.

52. In considering whether the Appellant has established a reasonable likelihood that upon return to the Ukraine he will face a violation of his Article 3 rights, we begin by considering the objective material before us.

53. For this purpose it is necessary to revisit the findings of the Tribunal in that regard in **TV**, (incidentally a case not mentioned in the Adjudicator's determination) bearing in mind that it appears to be the last reported case of the Tribunal relating to prison conditions in the Ukraine.

Conditions in Ukraine Prisons

54. In that regard, we are further mindful of the Tribunal's concluding remarks at paragraph 23 of their determination, that the material before them was "relatively out-of-date" and that "in that sense the decision may be historical".

55. The Tribunal continued:

> "For this reason we do not consider the findings we have made should necessarily be regarded as of continuing relevance in future cases. Nevertheless, the material before us, establishes a reasonable likelihood that the Claimant faces a violation of his Article 3 rights".

56. The Tribunal in **TV,** in considering the background material, took account of the US State Department Reports for 2000 (published in March 2001) and 2002 (released on 31 March 2003), which they noted were "not substantially different" and referred to the following passages beginning with the State Department Report for 2000 and continuing with the 2002 Report:

> "The Government's human rights record was poor in some areas; however, the Government continued to respect the rights of its citizens in other areas. In previous years, police and military committed extrajudicial killings; however, there were no reports of such incidents during the year. Police and prison officials regularly tortured and beat detainees and prisoners, sometimes resulting in death. Prison conditions are harsh and life-threatening. There were instances of arbitrary arrest and detention. Lengthy pre-trial detention in very poor conditions was common and detainees often spent months in pre-trial detention for violations that involved little or no prison time if convicted. Long delays in trials are a problem. The government rarely punishes officials who commit abuses. The SBU, Police and Prosecutor's Office have drawn domestic and international criticism for their failure to take adequate action to curb institutional corruption and abuse in the Government.
>
> There was no improvement during the year in prison conditions, which are harsh, life-threatening and do not meet minimum international standards. Prison officials intimidated and mistreated inmates. Due in part to the severe economic crisis, prisons and detention centres were severely overcrowded and lacked adequate sanitation and medical facilities. According to official statistics, funding for prisons decreased by almost 14 per cent over the last 3 years. During the year, the Government announced a general amnesty for 34,800 inmates intended to relieve overcrowding. Because the country lacks a well-developed system of suspended sentences and the law does not differentiate between misdemeanours and felonies, at least one-third of inmates were convicted of only minor violations.
>
> Conditions in pre-trial detention facilities routinely failed to meet minimum international standards. Inmates sometimes were held in investigative isolation for extended periods and subjected to intimidation and mistreatment by jail guards and other inmates. Overcrowding is common in these centers. For example, the pre-trial detention centre in Kiev, houses 3,500; it was constructed to hold 2,850 persons.
>
> According to official sources, information on the physical state of prison walls and fences as well as pre-trial detention blocks is considered to be a government secret. However, the press reported freely about harsh prison conditions. In 1998 there were 1,901 deaths in prisons and detention facilities, which was more

than 3 times the death rate of the general population. Poor sanitary conditions resulted in deaths from diseases such as tuberculosis and dysentery. There are frequent incidents of murder by fellow inmates and suicide. "

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

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

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

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

57. The Tribunal in **TV** noted that the source of some of this material was found in the Country Assessment prepared by CIPU. The Tribunal in **TV did not specify the date of** the CIPU report under consideration, but proceeded to quote the relevant paragraphs as follows:

"**Prisons and Prison Conditions**

5.22 Prison conditions are harsh and do not meet minimum international standards. Due in part to severe economic conditions, prisons and detention centres are severely overcrowded and lack adequate sanitation and medical facilities. In June 1999, official statistics put the prison population at 223,900 including 42,600 in pre-trial

detention, twice that of 1992. In addition prison officials intimidate and mistreat inmates, who are subject to regular beatings as well as torture, which has sometimes led to death. According to official statistics of the Penal Department, in the first 6 months of 2001, there were 865 deaths in the prisons. Poor sanitary conditions resulted in 300 deaths from diseases such as tuberculosis and 13 from dysentery during the first half of 2001. There were frequent killings by fellow inmates, and in the first half of 2001, 13 individuals were reported officially to have committed suicide.

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

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

58. It was noted by CIPU that the 1996 Constitution provided a legal framework for protecting civil and human rights that reflected the Ukraine's commitments as a member of the Council of Europe and signatory to a number of international human rights instruments, including the European Convention on Human Rights. However, many constitutional provisions still awaited the passage of enabling legislation while many areas of life were still regulated by Soviet law and practices, that meant that actual human rights practices often did not conform to constitutional requirements.

59. CIPU noted that during 1999 there was limited progress in some areas of Ukraine's human rights record although serious problems persisted and the government had made little effort to punish officials who had committed or abetted human rights abuses or to end such abuses. A wide variety of domestic and international human rights groups operated in the Ukraine without government restriction, investigating and publishing their findings on human rights cases. Government officials were generally co-operative and responsive to their views but enquires into penal conditions, which were a significant human rights concern, were limited by their status as state secrets and human rights groups reported increased difficulties in investigating in this area. Over January 1998 the President signed a law creating Parliamentary Commissioner on Human Rights, which was a constitutionally mandated independent human rights Ombudsman and Parliament elected the first Ombudsman in April 1998. However the law did not provide any significant

enforcement authority or provide penalties for obstructing the Ombudsman's enquiries. However, the Office of Human Rights Ombudsman has still been active in investigating human rights violations and stated that most of the complaints he had received involved abuses by law enforcement personnel. Citizens had the right to file appeals about alleged human rights violations with the European Court of Human Rights in Strasbourg. According to one human rights expert some 13,000 appeals had been made to the court in 1998 and some 200 cases were accepted for review.

60. The Ukrainian Constitution prohibits torture but there had been numerous reports of torture and ill-treatment of suspects in police custody and prisons throughout the Ukraine, in contravention of its commitments as a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the International Covenant on Civil and Political Rights.

61. CIPU continued at paragraph 6.4 of their report as follows:

> "Police and prison officials regularly beat detainees in prisons and there have been persistent reports that Berkut (special militia units or riot police) troops beat and torture inmates as part of regular training exercises. Two forms of torture reported are the 'swallow' method, whereby the detainees placed on his stomach and his feet are tied to his hands behind him, forcing his back to arch, and the 'baby elephant' method, whereby a gasmask is placed on the victims head and the flow of oxygen is slowly reduced. Another form of torture employed is called the 'monument' method, whereby the detainee is suspended from his hands on a rope and beaten. Some detainees were beaten until they waived their right to a lawyer. There is no effective mechanism for registering complaints about mistreatment or for obtaining redress for such actions. Prisoners may address complaints to the Human Rights Ombudsman, who has received widespread reports of torture in pre-trail detention, but this avenue is limited by the Ombudsman's lack of enforcement authority. Prisoners' fears of punishment for initiating complaints, and insufficient effort on the part of the government to end such practice or to punish those responsible. One positive step is a new Criminal Code that came into effect on 1 September 2001 mandating 40 to 10 years imprisonment for torture and on 28 May 2002, in the first case brought by the Ombudsman against law enforcement agencies, the Frankivskiy District Court in Lviv ordered the Lviv Prosecutor's Office and the Security Service of Ukraine to pay damages to the parents of a man tortured to death in prison.
>
> 6.5 Ukraine committed itself to a moratorium on the death penalty on joining the Council of Europe in November 1995. However, subsequent reports indicated that at least 212 people were executed between then and March 1997, which led the Council of

> Europe to adopt a third resolution, in January 1998, condemning the continuing executions in Ukraine and threatening it with expulsion should more executions be carried out. Reports indicate that at least 345 prisoners remained under sentence of death at the end of 1998, which caused further international concern and doubts over Ukraine's commitment to ending the death penalty. However, in February 2000 the ADA passed amendments to the Criminal Code which abolished the death penalty in the Ukraine and signed a special Protocol of the European Convention on Human Rights to this effect on 3 May 2002. Crimes previously punished by the death penalty are now punishable by life imprisonment".

62. The Tribunal in **TV,** took account of the Amnesty International Report of 15 October 2001 that stated that allegations of torture and ill-treatment of detainees by police officers persisted and appeared to be widespread and that prison conditions continued to fall below international minimum standards and were frequently cruel, inhuman and degrading. Allegations of torture and ill-treatment by police officers continued and only very limited progress was made in improving conditions in pre-trial detention centres and prisons that fell below international minimum standards.

63. In that latter regard, Amnesty International noted inter alia that:

> "Endemic overcrowding was exacerbated by a general policy of remanding criminal suspects in custody and the infrequent use of non-custodial punishments. Delays in the administration of justice resulted in prolonged period of pre-trial detention".

64. Amnesty International had noted a visit to the Ukraine in 2000 when the European Committee for the Prevention of Torture (CPT) described conditions at a detention centre in Simferopel as characteristic of conditions often experienced by prisoners. They reported:

> "[The majority] of the prison population… was subjected to appalling material conditions. Inmates were crammed into severely overcrowded dormitories… with virtually no natural light, often poor artificial lighting and inefficient ventilation… Furthermore the establishment was unable to provide each prisoner with a bed; consequently, in many dormitories, many inmates had to take turns to sleep. While some dormitories had been freshly painted, many others were dirty and infested with cockroaches and other vermin."

65. The Tribunal in **TV** concluded on the basis of the background material, that they had considered it was established that prison conditions in Ukraine were:

> "… poor, with overcrowding and inadequate sanitation. There is a risk of intimidation and ill-treatment by prison officials. These conditions are caused in part by the huge prison population

compared with the size of the population (224,000 in custody out of a population of 49 million – of which some 43,000 were in pre-trial detention in 1999). The ECHR does not guarantee for this claimant that prison conditions will be of a particular standard or in accordance with European or British norms. Whatever the reference in the material to international standards may mean, Ukrainian prisons, like many others, fall below the European and United Kingdom standards. Nevertheless, the claimant is required to establish a consistent pattern of serious violations of the human rights of detainees of a severity to violate the threshold set by Article 3. it is only by establishing such a consistent pattern that he will satisfy the 'real risk' test that triggers the right not to be returned.

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

21. Against this evidence, there is some evidence that the government is taking steps to address some of the problems. Steps, for example, have been taken to reduce overcrowding. The figures for the Kiev detention centre, for example, whilst demonstrating an occupancy significantly beyond its design capacity (6,000 although designed for 3,500) may not be worse than overcrowding in some European facilities. Overcrowding is not, in itself, a violation of an inmate’s human rights. Similarly, the deaths in custody, although high, include deaths from natural causes and this may be a reflection of the poor state of the physical health of those prior to detention. It also appears that the government has taken steps to address the problem of torture, albeit under pressure from the Council of Europe, by introducing an amendment to the Criminal Code specifically aimed at criminalising it. In May 2002 a successful prosecution was brought".

66. As we referred to earlier, the Tribunal in **TV** emphasised that the material they had used was relatively out of date and that in that sense their decision which established on the material before them a reasonable likelihood that the claimant faced a violation of his Article 3 rights, might be historical and should not necessarily be regarded as of continuing relevance in future cases.

67. Mindful of the cautionary concluding remarks of the Tribunal in this regard, we have considered the further and more recent objective material before us.

68. We begin by pointing out that Bundle 2 of the Respondent's Inventory of Productions includes what can only be described as a compilation of various articles and extracts from other publications authored by individuals whose credentials are unknown and forwarded to War Resisters International by their supporters for collation. Indeed, the parties' representatives agreed with us that little weight could therefore be attached to them. Further many of the articles demonstrated that their authors lacked the necessary objectivity such that the Tribunal could place reliance on their content. Indeed, Mr Bradley accepted that they were "not reliably sound".

69. The CIPU Bulletin 1/2004 (which we note was in fact issued on 2 July 2004), deals with prisons and prison conditions in the Ukraine at paragraphs 5.33 to 5.44.

70. Account is taken of the US State Department Report of 2003 (issued in February 2004) that is not substantially different from the State Department Report for 2002 (released 31 March 2003), in that it is reported that:

> "Prison conditions remained harsh and life threatening … According to complaints received from the Office of the Ombudsman and Human Rights NGOs, prison officials intimidated and mistreated inmates. Due in part to severe economic conditions, prisons and detention centres were severely overcrowded and lacked adequate sanitation and medical facilities. Almost 25,000 individuals reportedly were held in prison cells with neither windows nor toilets …
>
> According to the State Department for Execution of Punishments, during the year [2003] There were 696 deaths in prison and 130 deaths in detention facilities (compared to a combined total of 1,381 in 2001), many due to harsh conditions. Officials attributed this reduction in the number of prison deaths to a concerted effort to improve prison conditions, including healthcare and nutrition…
>
> According to human rights groups a reorganisation of the Penal Department to ensure greater independence of the penal system did not affect the Department's practices, there was little civilian

> oversight of its activities … According to prison authorities, no criminal proceedings involving torture or mistreatment of prisoners were open during the year [2003] and no employee of the penitentiary system was disciplined for improper treatment of detainees…
>
> Prisoners were permitted to file complaints with the Ombudsman about the conditions of detentions, but human rights groups reported they were punished for doing so… The Ombudsman continued to draw attention to the state of the penitentiary system by visiting prisons and raising prison-related issues in public. Following a visit to a detention facility in Crimea, officials built a courtyard to provide inmates, who previously were unable to exercise out of doors, with an area where they could engage in physical activity…
>
> In 2001, the RADA ratified the first and second protocols of the European Convention on Prevention of Torture which mandates the inspection of prisons by international observers. While conditions remain below international standards, the media reported the monitors of the Council of Europe (COE) left with a 'good impression' after their visit to prisons in the Zaporizhzhya Oblast. Additionally, a new pre-trial facility has been built in Kharkiv, which reportedly meets European standards and several cells with modern comforts were offered in a detention centre in Dnipropetrovsk".

71. The CIPU, noted that the May 2003 International Helsinki Federation Report had stated that:

> "There are a total of 180 regular detention facilities in the country, including forty three pre-trial isolators (SIZOs), 131 labour colonies (VTKs) eleven juvenile penal institutions for prisoners under the age of twenty (ten for boys and one for girls). All these facilities are supervised by a special government department charged with monitoring detention conditions."

72. CIPU noted the subsequent IHF Report of 2004 reported that:

> "Ukrainian detention facilities were overcrowded. There were 45,000 pre-trial detainees while the official capacity of the facilities was only 36,000 places. Due to lack of beds and overcrowded cells, detainees often had to sleep in turn."

73. The IHF report continued:

> "It was estimated that 9,900 of the total of approximately 200,000 prisoners in all facilities were ill with tuberculosis. All diseases spread fast, speeded up by the fact that healthy persons were sometimes kept together with infected inmates."

74. The 2004 CIPU Bulletin, took account of Amnesty International's Annual Report on the Ukraine of May 2004 that reported:

> "In April [2003] the European Court of Human Rights ruled in favour of six men held on death row in various Ukrainian prisons in the 1990s who had lodged complaints about the cruel, inhuman and degrading conditions of their detention."

75. CIPU further noted a BBC report in October 2003:

> "… that one prisoner was beaten so badly by the guards that his feet had to be amputated. The prisoner is believed to have been attacked after refusing to obey his wardens' instructions. The attack is under investigation by the Prosecutor-General's office and the guards are under investigation for abuse of authority".

76. The CIPU Bulletin of January 2005 (released in May 2005), fails to provide any further and more recent information as to prisons and prison conditions in the Ukraine.

77. The most recent CIPU Report before us, states that it was last reviewed on 13 October 2005 and reflects the change of government and the fact that the new President, Viktor Yushchenko "has made stepping-up engagement with the EU a priority". No further or more recent information is provided as to the current state of prisons and prison conditions in the Ukraine, nor indeed as they relate to military prisons.

78. The most recent reports placed before us, were an Amnesty International Report 2005 (released on 25 May 2005) which covered events from January to December 2004. Within that report reference is made to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment published following its visit to the Ukraine in 2002. The report repeated the conclusion of previous reports of visits in 1998 and 2000, that people deprived of their liberty by the Militia ran a significant risk of being physically ill-treated at the time of their apprehension or while in custody. Conditions in temporary holding facilitates (ITT) run by the Ministry of the Interior were described as "intolerable and overcrowding remained a problem. Access to fresh air was limited with standards of hygiene inadequate high rates of infection with Tuberculosis were reported".

79. We have taken account of the Human Rights Watch World Report 2005 (issued on 13 January 2005) it reports that:

> "Ukraine has been plagued by numerous human rights problems that require a structural approach on the part of the government. While it has begun to act on some of these issues, many remain unaddressed.

> Torture and ill-treatment continues to be a significant problem in police detention and prisons in Ukraine. Ukraine's human rights Ombudsman receives numerous complaints of torture from criminal suspects and estimates that thirty percent of all detainees may become victims of torture or ill-treatment by law enforcement agents. Ill-treatment has resulted in permanent physical damage to many victims and in the most severe cases has resulted in death. In the vast majority of cases the perpetrators of torture are not investigated or prosecuted for their crime. Prison conditions in Ukraine continue to be poor. Prisons are overcrowded and prisoners have insufficient access to food and health care. As in many other former-Soviet nations, tuberculosis is widespread in prisons."

80. It was noteworthy that Mr Pattison for the Respondent began his submissions by properly recognising that the decision of the Tribunal in **TV** supported the proposition that prison conditions in the Ukraine crossed the Article 3 threshold.

81. Mr Pattison further recognised not least from the 2004 US State Department Report, that notwithstanding there being an indication that the Ukrainian authorities were taking some action against prison officials who committed abuses, "those may not be sufficient to deal with those who administer ill-treatment". Mr Pattison further recognised that although the objective material notably in 2004, revealed a reduction in the number of deaths in prison, that the figure concerned albeit reduced, remained unacceptable, but was, he submitted, nonetheless an indication of an improved situation.

82. We found wholly unpersuasive Mr Pattison's observation that as the objective material did not disclose an increase in the earlier reported 12,000 complaints of torture, this suggested that conditions in Ukrainian prisons had improved. It was indeed significant, that Mr Pattison concluded his remarks in this regard, by accepting that the only point that he could identify that demonstrated an improvement in such conditions, related to the reduction in the number of deaths.

83. Mr Pattison most fairly accepted that he could not assist us by way of any further or more recent objective material to demonstrate any significant overall improvement in Ukrainian prison conditions.

84. Having considered the limited amount of more recent objective material to that considered by the Tribunal in **TV**, we have concluded that it demonstrates little change and limited evidence that the Ukrainian Government is taking positive steps in effectively addressing the problem. Indeed, the Human Rights Watch World Report of 13 January 2005 is clear that torture and ill-treatment continues to be a significant problem in police detention and prisons in Ukraine and that prison conditions in the Ukraine continue to be poor.

85. We are mindful that in the US State Department Report of 2004, it was noted that the Ukrainian Constitution prohibited the use of torture and other cruel, inhuman or degrading treatment. However reports that the police regularly beat detainees and prisoners persisted.

86. Reference was made to Nina Karpachova, the Human Rights Ombudsman informing the media that:

> "… during her nearly seven year tenure she has received approximately twelve thousand complaints from persons who asserted they had been tortured in police custody. In an August 2 special programme on the opposition - owned Fifth Channel Television Network, Karpachova acknowledged that torture of citizens by police officers remained a major problem."

The report went on to exemplify such conduct.

87. The US State Department Report further noted that:

> "Prison conditions improved somewhat as a result of reforms in the penal system. Prison official reported that, due in part to the decriminalisation of many offences there was a reduction in the number of inmates in prison, which eased overcrowding. Nevertheless prisons were sometimes overcrowded or lacked adequate sanitation and medical facilities.
>
> Although information on the physical state of prison walls and fences, as well as on pre-trial detention blocks is officially considered to be a government secret, the press reported freely about harsh prison conditions.
>
> Conditions in pre-trial detention facilities were harsher than in low and medium security prisons. There were reports that inmates in pre-trial facilities were sometimes held in investigative isolation for extended period and subjected to intimidation and mistreatment by jail guards and other inmates. Overcrowding was more common in these centres; their total capacity was 36,000 with 39,021 detainees were held in them as of September 1 according to the State Penal Department (SPD).
>
> Human Rights Ombudsman Karpichova expressed indignation over conditions in temporary detention centres, particularly Crimea and in April it was reported that the Prosecutor General's office was concerned about poor conditions in pre-trial detention facilitates nationwide.
>
> The SPD in co-operation with the NGO community implemented some programmes for the professional development of prison and police officials. According to the SDP, as of September 1, no criminal proceedings involving torture or mistreatment of prisoners

had been opened against SPD employees; however, as of September 1, six criminal cases had been opened against employees for unspecified 'non human rights related' offences. No employee of the penitentiary system was disciplined for improper treatment of detainees; however 420 employees were disciplined in the first eight months of the year for 'serious flaws in their work in violation of work ethics' according to the SDP.

The 2003 Criminal Penal Code was intended to regulate prison life and provide safeguards against the mistreatment of prisoners. Officials stated that it was still too early to evaluate the code's effectiveness, but maintained that NGO's international experts, prisoners, and prison employees have reacted favourably to it. In accordance with the new code, all new inmates were required to undergo psychological screening and prison administrators were required to develop a plan for the rehabilitation and eventual release of inmates. Correctional institutions for adults were also sub-divided into three categories: minimum, medium and maximum security. Also in keeping with the new Code, deprivation of the right to receive a parcel is no longer used against prisoners as a punishment. Prisoners are permitted to receive much larger parcels than in the past, which may include food items, medicine, books, writing implements, clothing, shoes, and personal hygiene items.

According to official statistics from the SPD, there were 464 deaths in prisons during the year: 438 were due to illness, 20 suicides, 2 homicides (one murder and one manslaughter), and four lethal traumatic injuries. In addition there were eighty eight deaths in pre-trial facilities: eighty two due to illness and six to suicide. Tuberculosis in prisons continues to be of concern; however, officials stated that mandatory screening of all new inmates had reduced infection rates. Inmates with tuberculosis were isolated from the general population and treated at one main prison hospital complex in Kharkiv Obalst. Almost twenty five thousand individuals reportedly were held in prison cells with neither windows nor toilets. …

The Government continued to allow prison visits from human rights observers and generally granted full access to prison facilities; however, some monitors reported that at times it was difficult to obtain access to prisons to visit specific prisoners and there were instances in which they were not allowed full access to prison facilities. The SPD maintained however, that there had been no instances of domestic of international human rights groups being denied access to pre-trial detention facilities. Prisoners were permitted to file complaints with the Human rights Ombudsman about the conditions in detention, but human rights groups reported that prisoners were sometimes punished for doing so. …

> Legislation passed in July 2003 strengthened the role of the Human Rights Ombudsman and of MPs in investigating human rights violations, providing for the imposition of fines against individuals seeking to hinder there work."

88. It is apparent from the objective material that we have considered, (not least from that we have above quoted), that although the Ukrainian Constitution prohibits the use of torture and other cruel, inhuman or degrading treatment, adherence to this requirement is barely reflected in practice insofar as prisons and prison conditions are concerned, where for example, despite evidence of some improvement, reports that the police regularly beat detainees and prisoners have persisted.

89. The State Department Report referred to Nina Karpachova the Human Rights Ombudsman, informing the media that:

> "… during her nearly seven year tenure she has received approximately ten thousand complaints from persons who asserted they had been tortured in police custody. In an August 2 special programme on the opposition owned Fifth Channel television network, Karpachova acknowledged that torture of citizens by police officers remained a major problem."

90. We have borne in mind, not least upon a careful reading of the US State Department Report of 2004, that the Ukrainian Constitution prohibits the use of torture and other cruel inhuman and degrading treatment and that prison conditions have to some extent improved as a result of reforms in the penal system. Further, that the State Penal Department (SPD) were reported to be in co-operation with the NGO community in implementing some programmes for the professional development of prison and police officials.

91. We are not however, persuaded that these improvements suffice to outweigh the other evidence to the contrary to which we have referred. In reaching this conclusion we have of course borne in mind that the 2003 Criminal Penal Code had as its declared intention a wish to regulate prison life and provide safeguards against the mistreatment of prisoners but, as the report points out, officials stated that it was still too early to evaluate the code's effectiveness, although on the positive side, NGOs, international experts, prisoners and prison employees had reacted favourably to it.

92. Notwithstanding the positive improvements that we earlier identified, the overall material before us continues to demonstrate the 'catalogue of serious human rights abuses taking place in the Ukrainian prison system' to which the Tribunal in **TV** referred. It is also apparent that the Human Rights Ombudsman herself reported, that she received numerous complaints of torture from criminal suspects and estimated that 30% of all detainees might become victims of torture or ill-treatment by enforcement agents.

Strasbourg Cases

93. Bearing in mind the CIPU reference in our paragraph 59 above, to cases being taken to Strasbourg against the Ukraine in relation to their prison system, we have considered recent ECHR case law on prison conditions in Ukraine.

94. The most recent, **Salov v Ukraine (2005) Application No: 00065518/01 6/9/2005**, a decision promulgated on 6 September 2005 was a case concerning violations of Article 5(3) and Article 6(1) of the European Convention on Human Rights, where it was held that the applicant's detention for over seven days without any judicial control fell outside the strict constraints of time laid down by the Convention and that the criminal proceedings instituted against him were unfair.

95. In **Nevnerzhitsky v Ukraine (2005) Application No: 00054825/00 05/04/2005**, promulgated on 12 October 2005, the Court found there to be violations of Article 3 and Article 5 of the ECHR in circumstances where the conditions of the applicant's pre-trial detention and his treatment whilst detained, that included force-feeding, amounted to torture and degrading treatment and that his prolonged detention was unlawful and of an unreasonable duration.

96. In **Poltoratskiy v Ukraine (38812/97) (2004) 39 EHRR43 2003 WL 23508990**, promulgated on 29 July 2003, it was held, upholding the complaints, that there had been violations of Article 3, Article 8 and Article 9. As Ukraine only became a signatory to the Convention in September 1997, evidence relating to events before that date could only be considered by way of background. With respect to Article 3, the evidence of the alleged assault was weak and therefore no finding of a violation was appropriate. However, the Court found that there was a lack of a proper investigation by the Ukrainian authorities into the applicant's complaint and that as such, it breached the requirement for an effective investigation in terms of Article 3.

97. The Court found that the conditions of the applicant's detention, along with the mental anguish caused by being held on death row, amounted to inhuman and degrading treatment. There had been an interference with the claimant's right to family life and to respect for his correspondence, which had no basis in law. Although there was no direct evidence of the applicant asking to see a Priest, it was clear that he had not been allowed access to one.

98. In **Dankevich v Ukraine (40679/98) (2004) 38 EHRR 25 2003 WL 23192423,** promulgated on 29 July 2003, the Court held, upholding the complaint, that detention in cramped conditions without natural light, running water or adequate heating, constituted a violation of Article 3. Limiting the amount of parcels the applicant could receive violated Article 8(1) as the restriction was not set out with sufficient certainty, for him to

know whether it applied to him for part of his period on death row. The applicant had been denied an effective remedy in violation of Article 13 as he had not been given proper access to the prison rules and it had not been shown as to how he could gain access.

99. Finally, we have taken account of **Afanasyev v Ukraine (2005) Application No: 00038722/02 5/4/2005,** promulgated on 5 April 2005. The Court held, that there had been violations of Article 3 and Article 13 of the ECHR, in circumstances where the applicant had been a victim of violence during his detention in police custody and had not had effective recourse to a domestic remedy in the form of an adequate investigation or compensatory remedies.

Conclusions as to prison conditions in the Ukraine

100. We have thus concluded that imprisonment in the Ukraine is likely to expose a detainee to the real risk of inhuman or degrading ill-treatment that would cross the Article 3 threshold. We recognise that the background materials placed before us contain some lacunae, but equally that they are all that has been seen to be relevant after considerable efforts have been taken by the parties to gather evidence. Accordingly, we consider that on the general issue of prison conditions in the Ukraine, the conclusion we have just reached can stand as country guidance.

Military Service in the Ukraine

101. We could find no helpful reference within the US State Department Report 2004 in relation to conditions in military prisons in the Ukraine, nor was there any further reference to such matters within the most recent CIPU Bulletin 01/2005. Further the Bulletin of 1/2004 under the sub-heading "Military Service" notes that military service in the Ukraine is compulsory for males over eighteen years of age for a period of eighteen months in the ground forces and Air force and two years in the Navy. The upper age limit for conscripts is 25 years. The Armed forces were gradually reducing the number of conscripts and reduced the overall number of servicemen by one third by 2005.

102. The situation as it relates to conscientious objectors and deserters is set out at paragraphs 5.48 and 5.49 of the report as follows:

"5.48 A law on alternative service was adopted by the RADA in December 1991. It allows people who object to military service on religious grounds to 'perform works for the public good' instead. At present, the percentage of males allowed to take alternative military service is low, at around the region of between 1.2 and 1.5 percent. In March 1999 an amendment to the alternative service law reduced the period of alternative service from thirty six months (twenty four for those with a full higher education) to twenty seven months (eighteen months for those with a full higher education and

a Masters Degree, or specialists). Alternative service can be undertaken only when the authenticity of an individual's religious convictions has been established by a military commission.

5.49 Draft evasion, which became a common feature in Ukraine following independence in 1991, has since become widespread. This reflects less fear of the consequences on the part of draft evaders in a country more democratic and aware of human rights and their belief that the newly-formed Ukrainian military machine is less able than its Soviet predecessor to punish them. In theory, males avoiding military recruitment can be sentence to up to three years imprisonment. However, in July 1993, media reports cited a study, commissioned by the Ukrainian Procurator General, which predicted only one-third of conscription aged men would actually serve in the Ukrainian armed services. The study also revealed that evasion of military service; failure to turn up for military registration and absence without leave had become 'unprecedently widespread'. It stated that very rarely were officials and citizens of call-up age punished for violating the law. The study criticised existing legislation and the Procurator General urged the Ukrainian Minister of Defence to take necessary measures."

103. We found nothing in the most recent objective material to which we were referred, that dealt with the treatment of those detained in military prisons, such as to enable us to reach any conclusion as to whether conditions in military prisons would be materially different than or different from those in civilian prisons. Further in this regard, we are mindful that no evidence was brought to our attention as to where a draft evader/deserter, would upon conviction, serve his sentence.

104. We have however, noted a report of the Immigration and Refugee Board of Canada dated 13 October 2004 relating to military service in the Ukraine.

105. The subject of the report was to update a report of 4 October 2000 as to whether the hazing of the new recruits in the Ukrainian armed forces had caused serious injury or mental distress and if so whether measures had been taken by the victims of the armed forces to remedy such occurrences.

106. The report stated as follows:

"Hazing is described as the torture and ill-treatment of young conscripts at the hands of senior soldiers, including humiliation, beatings and murder (AI 15 October 2001; Country Reports 2003 25 February 2004, SEC. 1a, 1c; Country Reports 2002 31 March 2003, SEC 1a 1c). In November 2003 a Ukrainian serviceman was convicted of hazing thirty seven junior conscripts, one of who committed suicide…

Human rights reports indicated violent hazing of young recruits, also referred to as dedovshchina, is widely practised in the Ukrainian Army (HRW 2003; Country Reports 2003 25 Feb. 2004. SEC 1a, 1c; Country Reports 2002 31 March 2003, SEC 1a, 1c; Country Reports 2001 4 March 2002, SEC 1a, 1c; National Security and Defence 2002; UNHCR 25 Sept. 2002; ibid, 21 Nov. 2001; AI 2002; ibid 2001) and that approximately 10 to 20 soldiers' deaths are attributed to hazing each year in the Ukraine (AP 11 Nov 2003) and that 15 per cent of all cases brought to military courts deal with alleged hazing (IHF 2002).

In its analysis of the Ukrainian Armed Forces, the Razumkov Centre for Economic and Political Studies in Kiev notes that in 2000, 20.7 per cent of all military servant convictions in the Western Ukraine region were related to dodovshchina, and that this number rose to 23 per cent in 2001 (National Security and Defence 2002, 13). Further it is noted that there are repeated cases of violence against subordinates on the part of their commanders. In 2001 and the first quarter of 2002, court marshals of the Western Region convicted twenty four officers and NCOs for abuse of power with respect to their subordinates. Their criminal actions did harm the twenty nine military servants, twelve of them suffered bodily injuries.

Despite these reports, official data of the number of soldiers that are subjected to hazing or killed during violent hazing events is not systematically collected, reported or published (Defence and Security 3 Sept. 2003; Country Reports 2003 25 Feb. 2004, Sec 1a, 1c; Country Reports 2002 31 March 2003, Sec 1a, 1c; National Security and Defence 2002), and military officials have reported no deaths due to physical violence during the same period that human rights groups such as the Ukrainian Association of Soldiers Mothers in Kiev have reported widespread violent hazing (Country Reports 2003 25 Feb. 2004. Sec 1c). In a 3 September 2003 Defence and Security Article, Major-General Nikolai Feshchuk, Military Prosecutor in the Southern Ukrainian region, explains that:

> 'The quantity of crimes connected with hazing of young recruits has increased by a third in 2003… As a rule, Commanders conceal crimes committed in military units: 93% of criminal cases were started by military prosecutors' offices, and only 7% by Commanders. In addition many incidents are linked to beating of soldiers by their Commanders… Senior Commanders do not start criminal proceedings when their subordinates refuse to obey orders.
>
> According to [HRW] Country Reports 2003, official reporting and accounting of hazing-related deaths are further complicated by the tendency to label such events as suicide; …

> With regard to the issue of mental distress experienced by the victims of hazing, Amnesty International (AI 2001; ibid, 15 Oct 2001), the United Nations International Covenant on Civil and Political Rights (12 Nov. 2001), and the International Helsinki Federation (2002) indicate that each year a number of recruits are driven to suicidal desertion to escape their violent treatment by other soldiers and officers. In its 15 October 2001 report entitled 'Ukraine Before the United National Human Rights Committee', Amnesty International cites the case of a young recruit whose mental health problems were confirmed by medical examination after he deserted his unit in Zhytomyr because he was 'subjected to various forms of ill-treatment by other recruits'.

Measures Taken to Remedy the Situation of Victims

Notably, in 2001 and 2002, the United Nations Committee Against Torture recommended that those who commit hazing in the Ukraine be prosecuted and punished and that a more effective system be adopted in the Ukrainian Armed Forces to end hazing, through training and education (UNHCR 25 Sept. 2002; ibid 21 Nov 2001). However, no information could be found among the sources consulted about practices, policies or measures currently in place to prevent or remedy hazing in the Ukrainian Armed Forces. Rather, Country Reports 2003 indicates that complaints of physical harassment are often not investigated and punishment administered to senior officers for tolerating or participating in hazing has been insufficient to prevent continued practice (25 Feb. 2004, Sec 1c).

According to Amnesty International, some recruits who deserted the Ukrainian Army to escape hazing were subsequently sentenced to prison terms of five to seven years for desertion under Articles 240 and 241 of the Ukrainian Criminal Code (15 Oct. 2001). Amnesty International cites the specific case of a recruit who deserted his unit in Simferopol and subsequently appealed to a Kharkiv Military Prosecutor claiming he had been the victim of hazing:

> 'Although the Military Prosecutor's Office purportedly acknowledged that the recruit had voluntarily turned to them and there existed a medical report supporting the recruit's allegations of having been subjected to violent physical abuse, the Military Prosecutor's Office in Simferopel reportedly refused to consider the evidence and put pressure on the recruit to withdraw the allegations. In desperation, the recruit reportedly deserted again shortly afterwards (15 Oct 2001).

> This Response was prepared after researching publicly accessible information currently available to the Research Directorate within time constraints. This Response is not and does not purport to be, conclusive as to the merit of any particular claim for refugee protection'.

107. We are mindful, that as the report reflects, no information could be found among the sources consulted by the Canadian Immigration and Refugee Board "about practices policies or measures currently in place to prevent or remedy hazing in the Ukrainian Armed Forces".

108. The Board concluded their Response, by pointing out that it did not purport to be conclusive, in relation to any particular claim for refugee protection.

109. Bearing in mind this material and the case law to which we have above referred, we have concluded that although the evidence clearly shows that there are problems in relation to the practice of dedovschina (hazing of young recruits) in the Ukrainian Army, it is not such as to satisfy us, that the practice can be properly described as constituting a consistent pattern so as to amount to a real risk for each conscript. We emphasise however that we make this finding upon the evidence before us.

110. We have further taken into account in this regard, the US State Department Report of 2004 that notes that despite extensive legislation to protect the rights of service members and the existence of regulations governing relationships among military personnel, reports continued during 2004 of harsh conditions and violence against conscripts in the armed forces. The report continues:

> "Senior conscripts often beat recruits, sometimes into death and force them to give up money and gifts that they receive from home. According to the human rights associations, garrison prosecutors often did not investigate complaints of physical harassment. Punishment administered for committing or condoning such activities was insufficient to deter further abuses. Although military officials reported there were no deaths due to soldier on soldier physical violence, human rights groups, including the Association of Soldiers' Mothers, reported that violent hazing continued to be widespread. They reported in 2002 that the Office of the Prosecutor General opened one hundred and twenty nine criminal cases pertaining to violent hazing. It is unlikely that further information will be available on the progress, if any, in these cases"

111. The CIPU Bulletin reflects the concern expressed in the US State Department Report to which we earlier referred, as to conditions for conscripts and other military personnel.

112. Having examined the evidence relating to military service in the Ukraine, we consider the following conclusions can be drawn:

1. Firstly, there is no question of persons in the military being required currently to perform acts contrary to international law.

2. Secondly, the conditions of military service although far from ideal (with hazing remaining a serious problem) are not generally such as to themselves give rise to a real risk of treatment contrary to Article 3.

3. The material to which we have referred does not disclose evidence that those who refuse to perform military service face a real risk of imprisonment. That is because of two main considerations. One is, that persons who refuse military service on religious grounds are given an optional alternative service. The other is that only rarely do persons who seek to evade military service face punishment. The theoretical punishment available of up to three year's imprisonment, seems rarely to be applied in practice. Thus what risk there is, must be regarded as remote and not a real risk.

113. We have referred earlier to the situation as it relates to conscientious objectors and deserters by reference to in particular paragraph 5.48 and 5.49 of the CIPU Bulletin. It is further apparent that subject to the authentication of an individual's religious convictions before a military commission, alternative service is permitted to those who object to military service on religious grounds who 'perform works to the public good' instead. Although the evidence says that males avoiding military recruitment can in theory be sentenced for up to three years imprisonment for draft evasion, it would appear that in practice, only one third of conscription-aged men actually serve in the Ukrainian armed forces and that evasion of military service in terms of failure to attend for military registration and absence without leave, had become 'unprecedently widespread and that it was very rare for officials and citizens of call-up age to be punished for violating the law".

Conclusions on the Appellant's particular circumstances

114. We now turn to consider the Appellant's particular circumstances in the light of these general conclusions.

115. At the outset of the hearing before us we pointed out to the parties that the Tribunal were seized with an Article 3 case based on actual findings.

116. We were mindful that at paragraphs 35, 36, 37 and 39 of her determination Mrs I A M Murray (then an Adjudicator) stated as follows:

"35. The Appellant has not said that he will not join the army if he is returned to the Ukraine. He has stated that he does not want to join the army. The evidence does not show that he is a conscientious objector and I therefore find that if he returns to the Ukraine today and joins the army he will serve for the normal

period. If he does not join the army he may well be imprisoned for a longer period based on the background evidence but as I do not find that this man is a true conscientious objector or even partial conscientious objector I do not find that conditions of the prisons in Ukraine applies in this case.

36. The Appellant has not shown that the conditions of military service in Ukraine are so harsh as to amount to persecution on the facts.

37. The Appellant has not shown that the military service to which he will be called would involve acts which he may be associated with which are contrary to basic rules of human conduct. I do not find that the punishment in question is disproportionately harsh or severe were he to refuse to join the army and I find that if he is returned to the Ukraine and has to join the army he will do so although he may not believe in violence.

38. I have also considered the fact there is an alternative service to military service. This Appellant does not appear to fit into this category but it is something that could be explored by him on return.

39. I do not find that this Appellant is a conscientious objector. I do not find that his claim meets the categories brought out in **[2003] UKIAT 00020 B (Russia).**"

117. The Tribunal at the first stage reconsideration hearing, recognised upon a careful consideration, in particular of paragraph 35 of the Adjudicator's determination, that the Appellant's claim that he did not want to join the army was not the same as stating that he would not join and the Appellant never stated in unequivocal terms that he would not do so. The Tribunal were, however, satisfied that the material error of law lay in the Adjudicator's conclusion that the asylum and Article 3 claim fell together when they clearly did not in this case and her failure to give the Article 3 claim any consideration.

118. We have concluded with little difficulty, that so far as the Appellant's credibility is concerned, we are not satisfied that any of the account that he has given, as to his true intentions in relation to military service in the Ukraine, is credible. In reaching this conclusion we have borne in mind, the Adjudicator's findings of fact as contained in her determination insofar as they related to his asylum appeal.

119. We do not believe that the Appellant would have refused to undertake military service if conscripted, notwithstanding the attendant risk of prosecution and imprisonment. We do not believe the explanation he has given in evidence as to his reasons for so refusing.

120. We are persuaded that the Appellant clearly does not wish to do military service in the Ukraine and indeed does not wish to return to the Ukraine,

but we are wholly unpersuaded that it is for the reasons he has given, which we find to have been conjured up by him in the hope that it will prevent his return.

121. We now give our reasons in more detail.

122. We are satisfied that if of the Appellant's own volition, he refused to join the Ukrainian Army and were he to be prosecuted (although the objective material to which we have earlier referred suggests that 'very rarely are officials and citizens of call-up age punished for violating the law'), he could be imprisoned. However we consider that he is clearly not a conscientious objector. This of course was the finding of the Adjudicator, and we further note in this regard, that the Appellant's statement does not state in terms that he is a conscientious objector save that he claims not to believe in the law and thus not to believe that he should be forced to join the army. He also claimed that he hated killing. It is thus apparent, that his objection to military service is based on dislike rather than reasons of conscience.

123. In this regard, we are mindful that the current objective material demonstrates that the Ukrainian Armed Forces are not engaged in any overseas activities, their units having recently been completely withdrawn from Iraq and are not involved in any armed conflicts domestically. Further, the Appellant gave no oral evidence before us that adequately indicated he had a conscientious objection to joining the Army. Indeed, Mr Bradley in his closing submissions most clearly and candidly recognised this to be the case and acknowledged the observations of the Adjudicator at paragraph 35 of her determination, that the Appellant had **not** told her that he refused to join the Army. Mr Bradley summarised the Appellant's reasons for refusing military service to be essentially concerned with the practice of the Hazing of new recruits, he was scared of violence and derision as a conscript.

124. It was noteworthy, that when we asked Mr Bradley whether he took that to mean that the Appellant was simply in the United Kingdom to avoid military service, Mr Bradley confirmed that this was indeed the position. Mr Bradley pointed to the observations of the Adjudicator at paragraph 35 of her determination that the Appellant had told her that he would not join the army if he was returned to the Ukraine and stated that he did not want to join the army. Further, at paragraph 5 of his most recent statement, the Appellant had made it clear that if he was returned he would refuse to carry out military service and believed this would result in his being imprisoned, ill-treated and kept in life threatening conditions. That was the Appellant's case. It was not disputed that the Appellant would be called up as he was within the age range for this purpose, but the real risk to the Appellant would be that he would be persecuted as a result of his refusal to join up.

125. Mr Bradley maintained, that upon the Appellant's first visit to the United Kingdom he was not subject to military service but when he returned to

the United Kingdom in January 2004 and at the time of his interview, the Appellant had a visa and every reason to think that he would be allowed in. There was therefore no need to raise the Appellant's objection to military service at that stage.

126. Significantly in this regard, Mr Bradley however accepted, that the Appellant had lied to the Immigration Officer at Gatwick Airport when specifically asked (following questions about his student visa in the course of his interview) as to whether there were any other reasons as to why the Appellant wished to be in the United Kingdom. The Appellant had made it clear from his response that there were no other reasons.

127. In this regard, our adverse credibility findings in relation to the Appellant's account have been reinforced, by his admission in the course of cross examination, that before he left the Ukraine to return to the United Kingdom in January 2004, he had already made a decision that he did not want to return to the Ukraine to perform military service.

128. We found his explanation that he did not know that he could discuss these things here, to be lacking in all credibility. This is an intelligent young man who was asked a straightforward question at interview on his arrival at Gatwick Airport in January 2004 as to whether there was any other reason why he wished to come to the United Kingdom. On his own account, he was already aware as to the reason, namely that he did not wish to undertake military service in the Ukraine, yet when asked a clear unequivocal question in that regard, he chose to give a false but unequivocal reply. The Appellant was aware that this was the opportunity to make his true intentions clear, if indeed they were his true intentions, but he did not do so. The Appellant lied to the Immigration Officer and he has lied to the Tribunal in terms of his explanation.

129. We believe the truth of the matter is that this Appellant simply does not like the idea of undertaking military service with all its hardships, in the Ukraine.

130. As reflected in the objective material and described as the "unprecedentally widespread" reluctance of so many others to attend for military registration, this Appellant simply wants to avoid it and stay here. The claims that he has conscientious objections to military service are no more than false attempts to give credence and respectability to what is in reality, an attempt to stay here and thus avoid, in common with so many others, military call-up in the Ukraine.

131. We further note, as pointed out to the Appellant in the course of cross-examination by Mr Pattison, that in an earlier statement the Appellant provided to the Tribunal, he stated: "I told the interviewer that I did not want to undertake military service". Such a claim differed from the evidence that he gave before the Tribunal and was at variance to his response at interview at Gatwick Airport in January 2004 that there were no other reasons as to why he wished to be in the United Kingdom.

132. We found it further noteworthy, that as revealed in the Explanatory Statement of the Immigration Officer, Mr Sutcliffe, on 14 February 2004 at paragraph 17:

> "His other ground of appeal is that he wishes to claim for asylum. This is another material fact he failed to disclose to the visa officer. Furthermore he failed to disclose his asylum application on the Home Office form IS76(One Stop Notice) and at the interview despite having the opportunity to do so when I had asked him if there were any other reasons for him to stay in the UK".

133. The Appellant confirmed that he recalled being handed and completing a Statement of Additional Grounds form on 31 January 2004. He confirmed that his signature appeared below it. When asked as to why he would not have recorded in the form, that he wished to claim asylum in the United Kingdom, the Appellant's response was weak and unimpressive. He told us:

> 'What I believed - this was just an additional question because I had already submitted the main asylum form. I thought everything was in the main form and this document was just additional grounds for claiming asylum.
>
> Q. But this form was completed on 31 January 2004. The Home Office never received your claim for asylum until 10 February 2004.
>
> A. I am confused now. I believe as I explained that I thought it was just additional to the main claim for asylum. My brother had completed military service in the Ukraine. He completed it about eight years ago. No, sorry, I think five years ago.'

134. It was apparent to us from the Appellant's responses that he was struggling for a credible explanation on a matter about which he had been caught out.

135. We cannot ignore the fact that this is an Appellant who failed to claim asylum on two occasions when he came to the United Kingdom and even at interview at Gatwick Airport in January 2004 in response to a clear question as to whether there were any other grounds, failed to give a truthful response. He failed to take the opportunity of declaring what he now claims were his true intentions, even though he was already aware of them when he left the Ukraine. It is apparent to us that the Appellant's concerns centred upon his obtaining a student visa and thus gaining entry clearance. We cannot ignore the late disclosure of his asylum claim. As Mr Pattison rightly submitted the Appellant in such circumstances could not be held to be a credible and reliable witness.

136. What are the implications of our assessment of the Appellant's evidence for the issue of risk to him on return?

137. Firstly, we do not consider that he would in fact refuse to perform military service if called upon to do so and as we have seen in the Ukraine, performing military service does not in itself place a person at real risk of serious harm.

138. We would add that in our view this is a situation where, even if he did refuse to perform military service, it would be a matter of choice on his part which would not impact upon his basic human rights, since he has no conscientious objections.

139. As to those consequences, we have pointed out that whilst there is a remote risk of a punishment of imprisonment that it is not a real risk.

140. If the Appellant upon return chooses to refuse to undertake military service, any harm that he would bring upon himself would be less than serious harm.

141. It is the Appellant, who has the choice of either undertaking military service or facing the consequences of not doing so. It is a balancing act for him as to which he might find the least bearable, if indeed (which we do not believe) he refuses to enlist when required to do so.

142. Upon our factual findings, there is no real risk to the Appellant. Indeed on his own account, he is not a wanted man in the Ukraine. He has not been called up so far for military service. If he is called up, he has the option to answer the call up or refuse. As we have made clear, we do not believe the Appellant would refuse to join the military if required to do so. This is an Appellant who was willing to lie to a visa officer about his course of study before re-entry and one who did not immediately claim asylum after he returned to the United Kingdom. Indeed, in evidence he sought to mislead us as to the timing of his claim.

143. A reluctance to perform military service is not necessarily to be equated with a refusal to do it.

144. It was noteworthy, that when we asked Mr Bradley to draw our attention to any objective material as to the number of people avoiding the draft in the Ukraine, who were prosecuted as a consequence, he was unable to do so and recognised that there was a "dearth of recent objective material" in this regard. We find there to be no cogent and recent evidence to suggest that those avoiding military service are subject to prosecution.

145. Given our findings on the facts in this particular case the Appellant is not at such risk in any event.

Decision

146. The appeal is dismissed on human rights grounds.

Signed Date

N H Goldstein
Senior Immigration Judge

APPENDIX

Cases and Background Materials Before the Tribunal

Soering [1989] 11 EHRR 439

Muzafar Iqbal [2002] UKIAT 02239

Batayav [2003] EWCA Civ 1489

Hariri [2003] EWCA Civ 807

Dankevich v Ukraine (40679/98) (2004) 38 EHRR 25 2003 WL 23192423

Krotov [2004] EWCA Civ 69

Poltoratskiy v Ukraine (38812/97) (2004) 39 EHRR43 2003 WL 23508990

TV (Ukraine – Prison Conditions) Ukraine [2004] UKIAT 00222

Afanasyev v Ukraine (2005) Application No: 00038722/02 5/4/2005

Nevnerzhitsky v Ukraine (2005) Application No: 00054825/00 05/04/2005

Salov v Ukraine (2005) Application No: 00065518/01 6/9/2005

US State Department Report on Ukraine, March 2001.

Reports of the United Nations Committee Against Torture – Ukraine, November 2001.

Reports of the United Nations Committee Against Torture – Ukraine, September 2002.

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment - 2002

US State Department Report on Ukraine, March 2003.

US State department Report on Ukraine 2004

Immigration and Refugee Board of Canada relating to Military Service in the Ukraine, October 2004

CIPU Bulletins 1/2004 issued 2 July 2004 and 1/2005 released May 2005 on Ukraine.

Report of Ukraine's first Ombudsman's visit to the Ukrainian Free University dated 26 May 2004.

Human Rights Watch World Report on Ukraine, January 2005.

Amnesty International Report on Ukraine, May 2005