AK (Russia-Chechnya deserter) Russia [2004] UKIAT 00294

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 18th May 2004
Date Determination notified:
..29th October 2004....

Before:

The Honourable Mr Justice Ouseley (President)
Mr J Barnes (Vice President)

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

For the Appellant: Mr M Gill QC and Mr R Alomo, instructed by Bart Williams & Co, Solicitors
For the Respondent: Mr J McGirr, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a Russian citizen born in 1977. He came to the United Kingdom in February 2000 and claimed asylum immediately. He had deserted from the Russian Army in Grozny, in Chechnya, shortly after being sent there. He was serving in a combat surveillance unit and deserted his post at night whilst his unit was on a search for rebels who were thought to be threatening an attack. He had been called up for service after deferments and had received three months training. He objected to serving in the war in Chechnya on a variety of grounds: he saw no reason to fight the Chechens or to risk his life unnecessarily in doing so; he objected to the war as politically motivated and although he had no in principle objection to war in circumstances such as those of the Second World War, he objected to one in which he said that he would be required to "kill innocent civilians and destroy property in a reprehensible manner". He had other fears about the poor conditions of service and the treatment which he would receive as a deserter who was likely to be imprisoned for a disproportionately long term in bad conditions.

2. The Adjudicator, Mr D J Boyd QC, dismissed his appeal in a determination dated 20th December 2001. He accepted the Appellant's account as credible but pointed out that he had no objection to war in general and could only qualify for refugee status if he could show that the war in Chechnya had been condemned by the international community as contrary to the basic rules of human conduct, but that there was no evidence to that effect. He accepted that the Appellant would be sentenced to a term of imprisonment were he to be prosecuted for desertion which the Adjudicator did not regard as disproportionate nor did he think that the conditions of imprisonment would breach the Appellant's human rights.

3. On appeal to the Tribunal, Mr Freeman and Mr Hamilton dismissed the appeal. It disagreed with the earlier Tribunal decision in Foughali, holding that it was necessary for a conflict to have been internationally condemned before punishment for refusal to participate in it could be a ground for seeking asylum. The Court of Appeal rejected that approach, [2004] EWCA Civ 69. It preferred Foughali and the subsequent analysis by the Tribunal in B (Russia) v SSHD [2003] UKIAT 00020, paragraphs 42-48, subject to modest qualification. Potter LJ said in paragraph 37:

> "In my view, the crimes listed above, if committed on a systemic basis as an aspect of deliberate policy, or as a result of official indifference to the widespread actions of a brutal military, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate will constitute persecution within the ambit of the 1951 Convention."

4. The crimes which he had listed from various international Conventions related to those who were not taking any active part in hostilities, whether civilians or prisoners. The Conventions applied to internal conflict. They covered violence to the life, health and well-being of civilians or prisoners, taking them hostage, collective punishments, acts of terrorism and outrages upon their personal dignity such as humiliating and degrading treatment and rape. The deliberate killing and targeting of the civilian population was prohibited.

5. The qualification to the test propounded in B is reflected in paragraph 37 of Potter LJ's judgment. The words "in which he may be required to participate" should be used instead of "with which he may be associated" because that emphasised:

> "that the grounds should be limited to reasonable fear on the part of the objector that he will be personally involved in such acts, as opposed to a more generalised assertion of fear or opinion based on reported examples of individual excesses of the kind which almost inevitably occur in the course of armed conflict, but which are not such as to amount to the multiple commission of inhumane acts pursuant to or in furtherance of a state policy of authorisation or indifference."

6. Although the question of whether a conflict had been internationally condemned would be evidence of the commission of crimes prohibited by basic rules of human conduct, the existence of such condemnation or its

absence was not crucial to the answering of the relevant question. Potter LJ said in paragraph 51:

> "If a court or tribunal is satisfied (a) that the level and nature of the conflict, and the attitude of the relevant governmental authority towards it, has reached a position where combatants are or may 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 will be punished for refusing to do so and (c) that disapproval of such methods and fear of such punishment is the genuine reason motivating the refusal of an asylum seeker to serve in the relevant conflict, then it should find that a Convention ground has been established."

7. Rix LJ emphasised the need for the Claimant to show that he would be required to participate in the condemned acts because in certain instances a soldier might be able to stand back from participation without being punished.

8. Accordingly, the appeal was remitted to the Tribunal for rehearing on the correct legal basis.

9. Mr Gill QC for the Appellant submitted that the framework for our consideration of the appeal should be as follows. First, was the Appellant or may he have been required to participate in actions which violated the basic rules of human conduct during service in Chechnya had he stayed? Second, would he be punished for any refusal to do so? Third, was his refusal to serve motivated by his disapproval of such actions and by his fear of punishment for that refusal?

10. We accept that those are the relevant questions. We accept Mr Gill's point that the first question has to be answered by reference to the way in which the conflict was being carried on in 1999-2000, the period when the Appellant was in Chechnya. It is not relevant to examine how the conflict is now being carried on save to the extent that that provides evidence as to how it was then being carried on. It is against what the Appellant experienced or anticipated at the time when he refused to continue serving that the fear and risk of punishment must be judged. For he would be punished for that refusal, not for refusing to serve in the war in the way in which it is currently being carried on. There is no evidence that desertion is dealt with in this sort of case by returning a soldier to the front without more ado, even though service in Chechnya may be used in other circumstances as a military punishment.

11. The Tribunal decision in B, although upheld in its legal analysis by the Court of Appeal in Krotov, does not constitute an analysis, let alone one which that Court adopted, of the conditions of war in Chechnya at the time relevant for this case; B relates to a period two years later and it was not necessary for Mr Gill to take prolonged issue with its conclusion that the evidence did not identify that the scale of abuses then was or was likely to become widespread and endemic. There was also a compelling lack of international condemnation. We accept that the Tribunal decision in B does not preclude a different conclusion in relation to this Appellant in the light of his combat role, unlike the communications function of B, and having regard to the time at

which this Appellant made his decision to desert, which was early on in the second Chechen war, when the major part of the more conventional fighting was undertaken.

12. We also accept Mr Gill's point that if the answers to the three questions are all in his favour, it does not matter that the conditions of imprisonment may not themselves breach Article 3. It is the fact of punishment which matters, apart from anything which could fairly be described as insignificant.

13. Mr Gill's submissions and the Secretary of State's response focused on the nature of the conflict and whether or not it was being conducted in breach of the basic rules of human conduct. It was not at issue on the second question but that the Appellant would be likely to be punished for his desertion. It was not really at issue on the third question but that, thin though the evidence of the Appellant as to his motivation on this aspect was, at least a significant part of his motivation for desertion was his disapproval of the actions and methods of fighting of the Russian forces and by his fear of punishment. We say that the evidence was thin because the Appellant disapproved of the war itself regardless of how it was conducted and did not want to die in its cause; his disapproval of the manner of its conduct was expressed only in the brief terms which we have summarised in paragraph 1 and was clearly only part of his thinking. His evidence relied on what various organisations said about the conduct of the war, without elaboration of his rejection of those methods. We make that point because no specific finding was made by the Adjudicator on the significance of those matters for the Appellant's thinking. It cannot be assumed, because a war may be conducted in breach of the basic rules of human conduct, that desertion without more evidence as to the particular attitude of the Claimant, shows that a Claimant is a refugee. However, in the light of the stance taken by the Secretary of State before us which focused on the conduct of the war, we accept that it should be inferred that a significant part of the motivation behind the Appellant's desertion was disapproval of the way in which the war was conducted and his fear of punishment for refusal to participate in such actions.

14. That brings us to the first question. This contains two parts: did the actions of the Russian forces breach the rules of human conduct at the relevant time? If so, was the Appellant required or may he have been required to participate in them? We emphasise that there are those two aspects because the second was to a large extent glossed over by both parties before us, with the focus of both submissions being on the first part.

15. The evidence of the conduct of the war in Chechnya in late 1999 and early 2000 is the important period for this case in view of the Appellant's service there; but it is also the period which covers the large-scale operations of what has been called the second Chechen War. As the 2001 US State Department Report on Russia for 2000 put it:

> "Attempts by government forces to regain control over Chechnya were accompanied by indiscriminate use of air power and artillery, particularly in the fall of 1999 campaign to retake the capital, Grozny. There were numerous reports of attacks on civilian targets, including the bombing of schools and

residential areas. In early 2000, a large-scale offensive military campaign by government forces continued against the separatists. That offensive campaign largely ended following federal occupation of most of Chechnya by late spring, although federal forces remained engaged in an intensive anti-insurgency campaign against separatist guerrillas."

16. That report pointed out that independent observation of conditions and confirmation of reports of atrocities was very difficult because of restrictions imposed by the Government; but nonetheless there were numerous credible reports of human rights abuses and atrocities committed by federal forces. Despite Government claims:

> "A wide range of reports indicated that government military operations resulted in many civilian casualties and the massive destruction of property and infrastructure. The number of civilian fatalities caused by federal military operations cannot be verified, and estimates of the total number of civilian dead vary from the hundreds to the thousands.
> ...
> In addition to casualties attributable to indiscriminate use of force by the federal armed forces, many atrocities reportedly were committed by individual federal servicemen or units. Command and control among military and special police units often appeared to be weak, and a culture of lawlessness, corruption and impunity flourished. This culture fostered individual acts (by government forces) of violence and looting against civilians. For example, according to HRW and press reports, on February 5, Russian riot police and contract soldiers (men hired by the military for short-term service contracts) executed at least 60 civilians in Aldi and Chernorechiye, suburbs of Grozny. The perpetrators reportedly raped some of the victims and extorted money, later setting many of the houses on fire to destroy evidence.
> ...
> According to human rights NGOs, federal troops on numerous occasions looted valuables and foodstuffs in regions they controlled. Many internally displaced persons (IDPs) reported that they were forced to provide payments to, or were otherwise subjected to harassment and pressure by, guards at checkpoints. There were also widespread reports of the killing or abuse of captured fighters by federal troops, as well as by the separatists, and a policy of 'no quarter given' appeared to prevail in many units. ... Federal forces reportedly beat, raped, tortured, and killed numerous detainees. ... Federal forces reportedly ransomed Chechen detainees to their families.
> ...
> There were some reports that federal troops purposefully targeted some infrastructure essential to the survival of the civilian population, such as water facilities or hospitals."

17. The Report also refers to the brutal treatment which new recruits may receive although in this case, the Appellant gave no direct evidence of such experiences himself. This treatment is relevant to the climate of informal control and punishment which may have operated in fighting units in and around Grozny.

18. The CIPU Reports of April 2000 and 2001 contain much the same material. Amnesty International's Report for 2000 claimed that the Russian forces were directly targeting civilians, attacking hospitals and bombing indiscriminately. Human Rights Watch, in its 2000 Report, made much the same allegations. There were specific incidents referred to.

19. The UN Human Rights Commissioner visited Chechnya in Spring 2000 and expressed concern at the allegations of mass killings, summary executions, rape, torture and pillage. The scale of serious allegations of gross human rights violations warranted international concern, she said. At this stage, the Government response was that it was carrying out an anti-terrorist campaign against ruthless and brutal enemies. The Commission on Human Rights adopted a resolution in April 2000 expressing concern at the reports which it was receiving.

20. The scale and gravity of the allegations prompted the Council of Europe to request Russian to provide explanations as to the conduct of the war in Chechnya. In what was seen by the Council as an unsatisfactory reply, Russia said that the circumstances in Chechnya were exceptional and recognised that there were "problems" with regard to respect for human rights. This may be seen as an admission of sorts. Much of the then and later criticism of Russia related to its failure to investigate the allegations of abuses or to assist anyone else to do so. The Parliamentary Assembly of the Council of Europe passed a resolution in January 2001 expressing concern about the continuing violations and the lack of effective investigation. As other reports recognised, such international condemnation as there was related not to the war in principle but to the disproportionate force used in its conduct.

21. There are later reports which in part deal with what was alleged to have happened in 2000 and 2001, but which also reflect what would have been happening at earlier stages, eg with the discovery of mass graves.

22. Human Rights Watch Report for 2001 referred to continuing disappearances, torture and extra-judicial executions and to continued large scale and targeted sweep operations involving arbitrary detentions, ill-treatment, looting and disappearances with some of those being found dead later.

23. In 2001, as in 2000, the UN Commission on Human Rights adopted a resolution expressing grave concern about the violations of human rights in Chechnya and condemning the use of disproportionate force and human rights violations by Russia. Russia continued to be condemned for its failure to investigate the allegations or to co-operate with those who were seeking to do so. The USA accused Russia of failing to abide by international Conventions on the conduct of war through the use of indiscriminate force against civilians. Russia contended that by the start of 2001 operations were only on a small scale.

24. Mr McGirr for the Secretary of State referred us to the US State Department Report for 2003 and Mr Gill relied on it to argue that the appraisal of the conflict in B was wrong. It contains much that was said in the Report for 2000 and it is not apparent how much relates to the later position. We are, however, concerned only with the position at what we have identified as the relevant time and do not find it necessary to express a view about the later or current position. For that reason, we do not need to refer to the material which the Appellant submitted after the conclusion of the appeal in response to the Secretary of State's submission of that later US State Department Report.

25. Our conclusions on this evidence are as follows. The period with which we are concerned covered the large-scale operations in Chechnya including those to capture Grozny and to establish Russian military control over Chechnya as a whole. It would have been the period of intense conflict where artillery bombing of civilians and contact with civilians on a large scale would have occurred. The reports need to be read bearing in mind that direct reporting was limited and still is and that there was no real effort then by the Russians to investigate widespread and serious allegations of breaches of basic rules of human conduct. So there is substance in the point that the reports would inevitably be generalised and dependent on allegations which could not always be more precisely verified. Although certain practices are likely to have been committed by camp guards rather than the ordinary frontline soldier, and the Appellant was not in such a unit nor in any other identified special unit nor in an artillery, mine-laying or bomber unit, the evidence of breaches of those basic rules shows that they were not confined to such units but were more widespread and likely to have occurred at that time in frontline units, regardless of any particular function. Some of the breaches would have occurred as a result of specific tactics deployed regardless of impact on civilians or even deliberately to cow and intimidate them. Others would have occurred as a result of the brutalising experience of that whole war, as deliberate reprisals by individuals or groups, or through hatred for or indifference to civilian or prisoner well-being from soldiers lacking in training, self-control and discipline, all in a climate of impunity. The soldiers themselves would often have experienced a brutal training and it is not difficult to envisage that operations were conducted with a complete indifference to normal rules of behaviour, in a war such as this.

26. We conclude that at least during this period of large scale conflict the evidence shows that breaches of those basic rules were widespread. They probably had elements of deliberate policy as well as of the random, but not isolated, acts of many soldiers behind them. We think it necessary to adopt a realistic approach to the implications of the limited investigations by the Russians, the imposed absence of independent observation and investigation and to give some weight to the various resolutions passed. The evidence suggests that the Russians had something to be ashamed of and, knowing that, sought to preclude outside scrutiny. (We point out, however, that most of the resolutions relate to the quality of investigation and do not assert that the allegations are made out, whatever the suspicions may be. Nor is the war itself condemned; the condemnation relates to the absence of investigations and to the manner of the conduct of the war. This perhaps adds to the sense of not having a specific test of international condemnation for these purposes.)

27. We turn to the second part of the first question. It does not follow from the fact that the actions of the Russian forces may have breached basic rules even on a widespread basis, as was Mr Gill's case, that a soldier was or may have been required to participate in them during his service. The Appellant's evidence on the risk of being required to participate in such actions was slight. He gave no evidence of having participated in any way in or even having merely seen such actions or of having refused to participate in them and of having then suffered any consequences; he gave no evidence that he

had ever come across or heard of anyone suffering such consequences nor of having heard of such actions in his service in Chechnya, short though that was.

28. Mr Gill relied on the range of documents, which the Tribunal is familiar with, as country evidence. But none of those dealt with the consequences of refusal to participate in the variety of such actions. It is plain from them that there are different military units and different circumstances in which actions which breach the basic rules of human conduct in war are undertaken. These can cover orders to bomb or shell civilian areas, to kill or mistreat civilians or prisoners in combat areas and orders to mistreat prisoners, whether taken legitimately or not, held in camps for one purpose or another. Artillery units and camp guards, however, may face very different pressures and punishments for a refusal to obey orders, from those who engage in casual brutality in units where the conduct of soldiers is governed by the prevailing morality and outlook, overlooked higher up and enforced through the informal powers which older or more senior men may impose without the formal support of higher authority. The position of a new conscript may be very different from that of an older NCO or an officer. Yet, on all of this, the Appellant's evidence is silent as to any personal experience or knowledge. Mr Gill essentially relied on the asserted widespread nature of the inhuman conduct as demonstrating the reality of the requirement to participate.

29. It is convenient here to say a few words about the concept of "participation". As Mr Gill said, it is not one with clearly defined edges; presence at an atrocity without actually committing any of the acts may or may not be "participation" in a particular case, even if the presence was repugnant to the Claimant and whether or not any active steps to prevent the atrocity or to dissuade the perpetrators were taken. Although Rix LJ pointed out that soldiers may be able to decline to participate actively in atrocities without punishment and it may be that they would escape punishment for war crimes on that account, it is not necessarily so clear that those who are not punished for not actively participating in repugnant activities should be regarded as not persecuted, where their presence is unavoidable and they cannot achieve a transfer to a less malevolent unit. We also do not regard it as impossible for there to be policies eg for the killing or torture of civilian resistance workers, which are not formally laid down and breaches of which do not lead to punishment but which can lead to ostracism by fellow soldiers or non-promotion; those constitute pressures which should not be ignored in the assessment of the requirement to participate and the consequences of not doing so. It should not be assumed that the only basis for showing a "requirement" to participate is a formal or informal punishment system. So Mr Gill is correct to affirm the lack and the necessary lack of clear definition about the edges of the relevant concepts; there are too many and varied circumstances for precision to be desirable.

30. This second part is more problematic in the absence of any direct evidence from him on that matter drawing on his own experiences, and in the absence of evidence in the background material which addresses that issue specifically, as opposed to pointing out that these breaches occurred on a significant scale. As we have said, the concept of "participation" in this context has no clear definition. We think that it can cover those who have no

real choice but to stand by and watch without interference, dissent or complaint to superiors, whatever their personal contrary inclinations might be, as well as those who feel obliged to assist in those acts to avoid the consequences which their comrades might inflict on them. The Russian forces in Chechnya do not appear on the evidence to have been strictly disciplined and controlled by an effective and responsible command structure. There is also no evidence which suggests that in this conflict, resistance to orders of debateable legality or to atrocious conduct from officers or NCOs or indeed the ranks generally is accepted and carried no consequences in terms of formal punishment or informal ill-treatment by other members of the unit. Given what is known about the Russian forces in Chechnya, we would require positive evidence to establish that such resistance carried no adverse consequences. We do not think that a fairly raw conscript would be in any position to resist an order, especially given the evidence as to the sometimes brutal nature of the treatment which such conscripts receive. He would be at the receiving end not just of formal orders given by officers, but those given by NCOs in the absence of officer control. He would also be less able to resist the pressures of more senior privates to engage in the activities which they did. He would also be at risk of informal but potentially severe treatment from them for any such refusal. The evidence of widespread breaches warrants the inference that a raw recruit could very well in reality be required to participate, at least to the extent of being required to stand by and not prevent or inhibit others.

31. In the light of those considerations and on the evidence which we have had as to the position at what we have taken as the relevant time, we have concluded that the evidence shows that breaches of the basis rules of human conduct are sufficiently widespread that it should be inferred that the Appellant was at a real risk of being required to participate in such acts in the broad sense described, that he would have been formally or informally punished for any refusal to do so and that fear of the consequences was a significant part of his claim for asylum.

32. Accordingly, this appeal is allowed. It is reported for what it says about Chechnya and Russian deserters from 1999-2000.

MR JUSTICE OUSELEY
PRESIDENT