Upper Tribunal
(Immigration and Asylum Chamber)

PK (Draft evader; punishment; minimum severity) Ukraine [2018] UKUT 241 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 14 March 2018	
	……

Before

UPPER TRIBUNAL JUDGE GRUBB
UPPER TRIBUNAL JUDGE BLUM

Between

PK
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Norman, Counsel, instructed by Sterling & Law Associates LLP
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

(i) A legal requirement for conscription and a mechanism for the prosecution or punishment of a person refusing to undertake military service is not sufficient to entitle that person to refugee protection if there is no real risk that the person will be subjected to prosecution or punishment.

(ii) A person will only be entitled to refugee protection if there is a real risk that the prosecution or punishment they face for refusing to perform military service in a conflict

that may associate them with acts that are contrary to basic rules of human conduct reaches a minimum threshold of severity.

(iii) *VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC) did not consider whether the Ukrainian conflict involved acts contrary to basic rules of human conduct.*

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Frankish (the judge), promulgated on 25 October 2017, dismissing the appellant's appeal against the respondent's decision dated 5 September 2017 refusing his asylum claim.

Factual Background

2. The following is a summary of the material elements of the appellant's protection claim, as developed before the First-tier Tribunal, necessary for determining whether the First-tier Tribunal's decision contains material errors of law.

3. The appellant is a national of Ukraine, date of birth 30 January 1981. He is Catholic and worked as a carpenter. He and his wife left Ukraine in December 2013. They illegally entered the UK on an unknown date and were arrested on 23 December 2014 and granted Temporary Admission.

4. A military call-up notice issued by the Ukrainian authorities was delivered to his parents' address requiring the appellant to present himself to the military in October 2016. A further notice was similarly delivered requiring him to present himself in February 2017. The appellant maintains that the military authorities have been enquiring about his whereabouts.

5. The appellant, with his wife as a dependant, claimed asylum in March 2017. He feared that he would be subjected to serious ill-treatment as a draft evader and because his political activities as a supporter of the Party of the Regions. We need say no more in relation to the 2nd basis of the protection claim as the political landscape in Ukraine has materially changed since the appellant departed. The appeal before the First-tier Tribunal concentrated almost exclusively on the consequences of the appellant's draft evasion.

The First-tier Tribunal decision

6. The judge accepted that conscription call-up papers had been delivered to the address of the appellant's parents, which was his official address. The judge found that the appellant's conscription had been deferred in the past on account of an illness (cerebral arachnoiditis).

7. The judge then considered whether any military service undertaken by the appellant would associate him with acts that are contrary to basic rules of human conduct as defined by international law. This was identified by the judge as 'Question One'. Whether the appellant would go to prison if he refused conscription and, if so, whether the conditions were such as to breach article 3, was identified by the judge as 'Question Two'.

8. In answering these questions, the judge relied on the Upper Tribunal Country Guidance decision in VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC). The headnotes of VB reads,

> 1. *At the current time it is not reasonably likely that a draft-evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings for that act, although if a draft-evader did face prosecution proceedings the Criminal Code of Ukraine does provide, in Articles 335, 336 and 409, for a prison sentence for such an offence. It would be a matter for any Tribunal to consider, in the light of developing evidence, whether there were aggravating matters which might lead to imposition of an immediate custodial sentence, rather than a suspended sentence or the matter proceeding as an administrative offence and a fine being sought by a prosecutor.*
>
> 2. *There is a real risk of anyone being returned to Ukraine as a convicted criminal sentenced to a term of imprisonment in that country being detained on arrival, although anyone convicted in absentia would probably be entitled thereafter to a retrial in accordance with Article 412 of the Criminal Procedure Code of Ukraine.*
>
> 3. *There is a real risk that the conditions of detention and imprisonment in Ukraine would subject a person returned to be detained or imprisoned to a breach of Article 3 ECHR.*

9. At [28] the judge briefly mentioned three human rights reports adduced by the appellant's representative in order to demonstrate that the situation in Ukraine had deteriorated since the promulgation of VB and that both Ukrainian and Russian forces were committing atrocities in the Crimean conflict.

10. At [29] the judge stated,

> Reverting to the issue of the status of country guidance case law, it is long established that it is to stand until found to be wrong in law (OM (AA(1) wrong in law) Zimbabwe CG [2006] UKAIT 00077). In this case I do not, in common with the UT determination, find that Question One is made out. That is, that the threshold reached by which the appellant, if returned, may be compelled to engage in acts contrary to basic rules of human conduct.

11. In relation to Question Two, the judge had this to say at [30],

> Finally, we have the issue of imprisonment and article 3. With the appellant having complied with call-up and being deferred as unfit, thereafter not receiving his call-up papers as he was out of the country, I conclude that he falls under (1) of VB, above. He is likely to be dealt with by way of fine. The UT determination allowed the appeal under Question Two …. However, that appellant was found to be liable to lengthy detention pending trial. He was also likely to receive particularly harsh treatment

because he was an ethnic Ukrainian Russian who sympathies were with the Russian side. Neither of these factors apply to this appellant.

12. The judge consequently dismissed the appeal.

The challenge to the First-tier Tribunal's decision

13. The appellant challenges the judge's decision on two principal grounds.

14. Firstly, the judge misdirected himself in holding that VB dealt with the issue whether those conscripted or mobilised were at risk of being associated with breaches of International Humanitarian Law (IHL), and failed to make any express finding on this point in light of the further country evidence. In her grounds Ms Norman referred to this as the 'IHL point'.

15. Ms Norman relied on paragraphs 6 and 7 of VB. These read,

> 6. It was agreed with the parties that this decision would also seek to provide Country Guidance on the following issues:
>
> (i) What are the likely punishments for draft evasion in Ukraine?
> (ii) Are prison conditions for draft evaders in Ukraine contrary to Article 3 of ECHR, or has there been a significant and durable change in Ukraine such that the country guidance decision of PS (prison conditions; military service) CG [2006] UKAIT 00016 should no longer be followed?
> (iii) Are draft evaders who have been imprisoned under Article 336 of the Ukrainian criminal code required thereafter to undertake military service during periods of mobilisation? If so what are the conditions to which they will be exposed during such military service?
>
> 7. At the hearing however it was agreed by both parties and the Panel that it is only possible to address the first two issues with a view to providing country guidance and that there was simply insufficient country of origin material available to make any informed guidance decision on the third issues as to whether those conscripted or mobilised into the Ukrainian army were at real risk of being required to commit acts contrary to international humanitarian law or whether they would be at real risk of persons such as the appellants being subject to "dedovshchina", which means violent bullying or initiation within the army, which might in turn put those recruited or mobilised at risk of serious harm.

16. In her Grounds Ms Norman submitted that the judge erred in law in regarding VB as being authoritative on the IHL point, and in failing to assess the further evidence provided relating to breaches of IHL. At the 'error of law' hearing, and in written submissions received from the parties following the 'error of law' hearing, Ms Norman developed her second ground. She contends that the relevant law provides as follows:

> A person is a refugee if he faces non-optional recruitment, or penalty for refusal, to a military which is committing acts, with which he may be associated, contrary to international humanitarian law.

17. In her submission the mere fact that there is 'non-optional recruitment' or a 'penalty' for refusing conscription, regardless of the nature or seriousness of the penalty, would entitled a person to refugee status if he would, as a result of conscription, face a real risk of being associated with acts contrary to basic rules of human conduct. In support of her submission Ms Norman relies on Sepet v SSHD [2003] UKHL 15, Krotov v SSHD [2004] EWCA Civ 69 and BE (Iran) [2008] EWCA Civ 540.

18. Secondly, the grounds contend that the judge failed to determine whether the appellant would be subject to pre-trial detention on return to Ukraine. The judge was asked to make a finding as to the prospects of the appellant facing pre-trial detention on return, even if the eventual sentence was likely to be non-custodial. His failure to do so rendered the decision unsustainable.

19. Following the 'error of law' hearing the Tribunal gave both parties an opportunity to supplement their oral submissions with further written submissions in respect of the IHL issue. We are grateful to the representatives for the further submissions.

Discussion

The pre-trial detention issue

20. In her written grounds Ms Norman accepts that the judge's finding that the appellant "… is likely to be dealt with by way of fine" is "unassailable" in light of the conclusions reached in VB. She contends however that the judge failed to determine whether the appellant would nevertheless face the prospect of pre-trial detention on being returned to Ukraine.

21. In the skeleton argument before the judge the issue of pre-trial detention on return to Ukraine was specifically raised. The judge failed to engage with this issue. This failure constitutes an error of law. We must nevertheless be satisfied that the error is material.

22. Ms Norman contends that the error was material as it was open to the judge to find that there was a real risk that the appellant would face pre-trial detention. She relies upon paragraph 103 of VB.

> Whilst there have been submissions about the pressure under which the Ukrainian government currently finds itself from war and economic problems it remains a member of the Council of Europe, and it has not been contended by anyone that Ukraine is a failing state without an operating criminal justice system. In these circumstances we find the evidence of Professor Bowring that the appellants would be checked against computer systems and found to be convicted offenders without any appeal against sentence and with prison sentences outstanding on re-entry to Ukraine compelling. We also accept Mr Symes' submission that the appellants cannot be required to lie in response to standard questioning on re-entry which might reasonably be expected to include issues regarding criminal convictions or military service. We note the view of the Australian Refugee Review Tribunal in their Country

Advice Ukraine decision dated 11th December 2009 at page 3 of the document where it is said: "If a person has broken the law by evading the draft, their return to Ukraine is likely to attract the attention of the authorities – particularly if they enter Ukraine through official channels." This is also consistent with the Guardian newspaper report of 10th February 2015 which refers to draft-dodgers being arrested at border checkpoints in the context of a government decree regulated foreign travel for those subject to mobilisation. It is also consistent with the observation by UNHCR in their September 2015 report at paragraph 34 which records fears of being mobilised at official border crossings. We therefore accept Professor Bowring's evidence that as a result it is highly likely that the appellants would be taken into detention on arrival in Ukraine. We find it highly unlikely that there could be any other response given their return as convicted criminals with outstanding prison sentences.

23. While accepting that the two appellants in VB had been convicted in absentia, Ms Norman submits that the same process of re-entry and questioning about military service would apply to the appellant in view of the judge's findings that he had received and failed to answer call-up papers.

24. We accept that the appellant cannot be expected to lie about his failure to answer the call-up papers, and that he is likely to come to the attention of the authorities if returned in Ukraine. We proceed on the basis that there is a real risk that he will be questioned concerning his failure to answer the call-up papers. We are not however persuaded that there is a real risk that he will face pre-trial detention.

25. The two appellants in VB had been prosecuted and convicted of draft evasion and sentenced to 5 years and 2 years imprisonment respectively. They had not appealed against their sentences. They were facing return to Ukraine as convicted criminals with outstanding custodial sentences. The Tribunal found there was a real risk that anyone being returned as a convicted criminal sentenced to a term of imprisonment would be detained on arrival, and that conditions of detention and imprisonment risked breaching article 3 (headnotes 2 & 3). It was for these reasons that the Tribunal allowed their appeals on article 3 grounds.

26. The appellant, by contrast, has no convictions and there is no evidence that any prosecution has been mounted against him or any charges laid against him. His circumstances are materially different to the appellants in VB.

27. We remind ourselves of the 1st headnote of VB. Given the findings that a draft evader avoiding conscription is not reasonably likely to face criminal or administrative proceedings, we see no basis for concluding that the appellant would be at risk of pre-trial detention, or indeed any period of detention on his return to Ukraine. If there is no real risk that the appellant would face any such proceedings, there would be no reason for the Ukrainian authorities to detain him. Nor was Ms Norman able to draw our attention to any background country evidence suggesting that draft evaders returning to Ukraine who were not subject to any criminal or administrative proceedings for their avoidance of military service have been detained. We additionally note the absence of any

aggravating features such as being an ethnic Russian or leaving Ukraine in order to avoid call-up (the appellant left Ukraine before he received any call-up papers).

28. We are reinforced in our conclusion by reference to the presumption of bail in Ukraine. The new Criminal Procedural Code, which came into force on 19th November 2012, provides for automatic bail rather than pre-trial detention in the majority of cases (VB, at [19]). There is therefore a presumption in favour of bail for those awaiting trial and the removal of criminal penalties for minor matters (VB, at [77]). We can find no reason why the presumption in favour of bail, even if the Ukrainian authorities do manifest an adverse interest in the appellant, would not apply to him.

29. For the reasons given above we are satisfied that even if the judge had engaged with the issue of pre-trial detention he would not have been entitled to conclude that there was a real risk of such detention. The appeal would inevitably have failed on this basis.

The IHL issue

30. In her skeleton argument before the First-tier Tribunal Ms Norman raised, as an issue which it was submitted required determination, the question whether there was a real risk that the appellant would be called upon to undertake military service in circumstances where such service might associate him with internationally condemned acts. It was argued that if there was such a risk any penalty for refusal to be conscripted was persecutory. The skeleton argument referenced various human rights reports in support of the proposition that there was now a conflict in Crimea where the Ukrainian forces were committing atrocities.

31. The judge acknowledged these submissions but his conclusion [paragraph 10 *supra*] that VB had determined the issue whether military service may associate a conscriptee with acts that are contrary to basic rules of human conduct was inaccurate. VB did not address the issue whether conscriptees were at risk of being associated with breaches of IHL. This is apparent from paragraph 7 of VB [paragraph 15 *supra*].

32. VB did not consider whether the Ukrainian conflict involved acts contrary to basic rules of human conduct and the judge misdirected himself in assuming otherwise. We additionally accept that the judge failed to satisfactorily engage with the background documents before him relating to breaches of IHL, or to make any reference to an Office of the High Commissioner of Human Rights (OHCHR) document, despite the fact that this document was specifically identified in the appellant's skeleton argument before the First-tier Tribunal.

33. Once again, we must determine whether the misdirection by the judge and his failure to engage with the background evidence constitutes a material legal error.

34. In her oral submissions at the 'error of law' hearing Ms Norman submitted that the existence of a legal requirement to undertake military service renders a person a refugee if they refuse to be conscripted, regardless of the nature of any penalty, including a fine, if the military service would associate that person with acts contrary to the basic rules of human conduct. She relied on the authorities of Sepet v SSHD [2003] UKHL 15 and Krotov v SSHD [2004] EWCA Civ 69, although neither authority was served on the Tribunal. She additionally drew our attention to the respondent's Country Policy and Information Note on Ukraine: Military Service, version 4.0, April 2017, and in particular, to 3.1.2.

> 3.1.2 Compulsory national/military service is a prerogative of sovereign states. A requirement to undertake – or punishment for failing to complete – national/military service will only constitute persecution where:
>
> • military service would involve acts, with which the person may be associated, which are contrary to the basic rules of human conduct;
> • the conditions of military service would be so harsh as to amount to persecution; or
> • the punishment for draft evasion or desertion is disproportionately harsh or severe.
>
> None of those conditions are generally met in respect of service in Ukraine.

35. Ms Norman submitted that, as the appellant was required to undertake military service, his refusal to do so entitled him to refugee status.

36. Although neither party drew our attention to the terms of the Refugee Convention itself, or Directive 2004/83/EC (the Qualification Directive) or the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, 2006 No. 2525 (the 2006 Regulations), we consider it necessary to frame our deliberation by reference to these provisions.

37. Under Article 1(A)(2) of the 1951 Convention relating to the Status of Refugees, as amended by the New York Protocol dated 31 January 1967, the term 'refugee' is to apply to any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

38. The United Nations Handbook on Procedures and Criteria for Determining Refugee Status, reissued in December 2011, states, at paragraph 51,

> There is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is

always persecution. Other serious violations of human rights-for the same reasons-would also constitute persecution.

39. Paragraphs 167 to 174 of the Handbook deal with deserters and persons avoiding military service. Paragraph 171 of the Handbook reads,

> Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to the basic rules of human conduct, punishment for desertion or draft evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

40. The reference in the Handbook to "punishment" for desertion or draft evasion suggests it is a necessary element in determining refugee status for someone who may be associated with military acts contrary to the basic rules of human conduct, and that such "punishment" could be regarded as persecution "in the light of all other requirements of the definition." The Handbook is otherwise silent as to the nature of the "punishment".

41. The Qualification Directive prescribes minimum standards for the qualification and status of individuals as refugees or otherwise in need of international protection. Article 9 of the Directive, entitled 'Acts of persecution', defines those acts in its first and second paragraphs, as follows:

> 1. Acts of persecution within the meaning of Article 1(A) of the Geneva Convention must:
>
> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).
>
> 2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:
>
> ...
>
> (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
>
> (c) prosecution or punishment, which is disproportionate or discriminatory;
>
> ...

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2) [emphasis added]

42. Article 12(2) deals with those who are excluded from being a refugee because they have committed a crime against peace, a war crime, or a crime against humanity, or have committed a serious non-political crime or have been guilty of acts contrary to the purposes and principles of the United Nations.

43. The 2006 Regulations came into force on 9 October 2006, after the decisions in Sepet and Krotov. The 2006 Regulations, together with amendments to the immigration rules, were intended to transpose the Qualification Directive into UK law.

44. Regulation 5 of the 2006 Regulations is headed 'Acts of persecution'. Regulation 5 reads, in material part,

(1) In deciding whether a person is a refugee an act of persecution must be:

(a) sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation cannot be made under Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) an accumulation of various measures, including a violation of a human right which is sufficiently severe as to affect an individual in a similar manner as specified in (a).

(2) An act of persecution may, for example, take the form of:

(a) an act of physical or mental violence, including an act of sexual violence;

(b) a legal, administrative, police, or judicial measure which in itself is discriminatory or which is implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) **prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under regulation 7**. [emphasis added]

45. Regulation 7 deals with those excluded from refugee status. It includes those who, by reference to Article 1F of the Refugee Convention, have committed a crime against peace, a war crime, or a crime against humanity, or have committed a serious non-political crime or have been guilty of acts contrary to the purposes and principles of the United Nations.

46. We are satisfied, having regard to Article 9(2) of the Qualification Directive, and its counterpart in Regulation 5(2) of the 2006 Regulations, that prosecution or punishment for refusal to perform military service in a conflict, where performing military service would associate a person with breaches of IHL or action contrary to the basic rules of human conduct, is distinct from prosecution or punishment which is disproportionate or discriminatory (Article 9(2)(b) and Regulation 5(2)(c)). It is therefore not necessary for the prosecution or punishment for refusing to perform military service which may associate a person with action contrary to the basic rules of human conduct to be either disproportionate or discriminatory. We note however that the definition of persecution in Article 9(1) of the Qualification Directive and its counterpart in Regulation 5(1) of the 2006 Regulations requires the act of persecution to be sufficiently serious so as to constitute a severe violation of a basic human right. The structure of both the Qualification Directive and the 2006 Regulations suggests that the definition in Article 9(1) and Regulation 5(1) conditions the examples given of acts of persecution in Article 9(2) and Regulation 5(2). In other words, any prosecution or punishment for refusing to perform military service must still reach a minimum threshold of severity.

47. The issue in the House of Lords decision in Sepet, handed down on 20 March 2003, was whether the Turkish applicants were entitled to asylum on the basis of their conscientious objection to military service. Charges relating to draft evasion were very likely to be levelled against both applicants and their fear that they would be liable to imprisonment for between 6 months and 3 years was well founded ([1], [3], [4], [5] & [8]).

48. At [8] Lord Bingham stated,

> There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment… But the applicants cannot, on the facts as found, bring themselves within any of these categories…. The crucial question is whether the treatment which the applicants reasonably fear is to be regarded, for purposes of the Convention, as persecution for one or more of the Convention reasons.

49. As the military service in Turkey would not associate the applicants with acts offending the basic rules of human conduct, the House of Lords was not required to examine in any further detail the circumstances in which a person who refused to undertake military service which may involve such conduct would be recognised as a refugee. It is important to note that both applicants faced the deprivation of their liberty if they refused conscription, and that, at [9], Lord Bingham described persecution as a 'strong word'.

50. We also note what was said by Laws LJ in the Court of Appeal decision in Sepet and Bulbul [2001] EWCA Civ 681, at [62],

> Next I should emphasise that it is plain (indeed uncontentious) that there are circumstances in which a conscientious objector may rightly claim that punishment for draft evasion would amount to persecution: where the military service to which he is called involves acts, with which he may be associated, which are contrary to basic rules of human conduct; where the conditions of military service are themselves so harsh as to amount to persecution on the facts; where the punishment in question is disproportionately harsh or severe.

51. The observation by Laws LJ focuses on "punishment" for conscientious objectors where the military service may associate them with inhuman conduct. The Court of Appeal did not consider the nature or the degree of the punishment that would entitled a person to be recognised as a refugee.

52. The issue with which the Court of Appeal had to grapple in Krotov was whether a particular conflict required international condemnation before a refusal to participate in military service entitled a person to refugee status. The case concerned a deserter from the Russian army who objected to fighting in Chechnya. The deserter was facing a term of imprisonment for his desertion (at [3]) and the appeal was advanced by his representatives on the basis that he would face punishment for desertion (see [9] & [21]).

53. The Court of Appeal did not comment on the nature of the punishment faced by the deserter, but the anticipation that there would be punishment permeated the submissions made by the parties and the Court's own assessment (e.g. [27], [37], [39], [45], and especially [51]).

54. In her further written submissions, Ms Norman relied on BE (Iran) [2008] EWCA Civ 540, and in particular Lord Justice Sedley's conclusion at [40]

> In our judgment, on the limited facts before the tribunal, this appellant was entitled to succeed in his claim for international protection. It is common ground that, once it is established that the individual concerned has deserted rather than commit a sufficiently grave abuse of human rights, whatever punishment or reprisal consequently faces him will establish a well-founded fear of persecution for reasons of political opinion.

55. BE concerned a regular soldier in the Iranian army who deserted rather than plant landmines in a populated area. He previously deserted for the same reason and had been sentenced to 3 months imprisonment. There was therefore a strong likelihood that he would face actual punishment, and that the penalty was serious as it involved the deprivation of his liberty. The Court of Appeal were concerned with whether there was a difference of approach to refusals to participation in military service during peace time and times of war (see [11] & [13]). In his references to Krotov Lord Justice Sedley noted, at [32], that the Court of Appeal,

> … held that the prospect of punishment for a genuine conscientious refusal to participate in inhumane acts was sufficient to attract international protection as a refugee.

56. His Lordship then set out an extract from paragraph 37 of the judgment of Potter LJ in Krotov.

> In my view, the crimes listed above, if committed on a systematic 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 Convention relating to the Status of Refugees (1951).

57. VB found that there was no real risk that a draft evader would be imprisoned for refusing to be conscripted. At paragraph 67 the Tribunal noted, after considering the background and expert evidence before it, that only a couple of persons appeared to have actually been sent to prison for conscription or mobilisation evasion, with evidence of suspended sentences, probation or fines in only tens of other cases. On the basis of the information before the Tribunal, the overwhelming majority of over 100,000 draft evaders have faced no consequences at all for their actions (paragraph 69). This is reflected in the first headnote to VB.

58. Based on the detailed assessment carried out in VB, and applying that guidance to this appellant's particular circumstances, we find it is not reasonably likely that he will face any criminal or administrative proceedings for avoiding conscription. There is therefore no real risk that he will be prosecuted or that a penalty will be imposed on the appellant for his draft evasion. None of the authorities relied on by Ms Norman can be properly understood as entitling a draft-evader or deserter to refugee status if there is no real risk that they will be subject to prosecution, punishment or penalty. In Sepet, Krotov and EB there was a real risk of punishment. The higher Courts were not dealing with a situation where the prospect of punishment was as remote as it is in the context of Ukraine. There is no authority to support the appellant's contention that the mere existence of a legal requirement of conscription or the existence of a mechanism for the prosecution or punishment of a person refusing to undertake military service is sufficient to entitle them to refugee status. It is not sufficient that national legislation makes provision for the imposition of a penalty, whether it be custodial or financial, if there is no real risk of that penalty actually being imposed. While Ms Norman relies on a UNHCR report from September 2015 suggesting there had been a stepping up of prosecutions for draft evaders, this document was already considered by the Tribunal in VB. Having regard to all the evidence that was before the judge, we find that the appellant does not have a 'well-founded fear of being persecuted' because he does not face a real risk of being subject to a penalty for his draft evasion. The judge's failure to consider the 'IHL point' is therefore not material as there was simply insufficient evidence that the appellant faced a real risk of being punished.

59. Even if we are wrong in the above assessment, we doubt whether a fine, probation or a suspended sentence would be sufficiently serious to amount to persecution. The concept of persecution for the purposes of the Geneva Convention (and indeed the Qualification Directive) requires that the harm

feared must attain a substantial level of seriousness. Although persecution is not defined in the Convention Lord Bingham described it as a 'strong word' in Sepet (see also MI & Anor v Secretary of State for the Home Department [2014] EWCA Civ 826, and Amare v Secretary of State for the Home Department [2005] EWCA Civ 1600, at [27]). Article 9(1) (a) & (b) of the Qualification Directive (paragraph 41 *supra*) makes plain that the feared ill treatment must be at a sufficiently serious level so as to constitute a severe violation of basic human rights. We read Article 9(1) as informing and conditioning the nature of the acts that may constitute persecution, including the prosecution or punishment identified in Article 9(2)(e). The same must apply in respect of Regulation 5 of the 2006 Regulations. Thus understood, a person will only be entitled to refugee protection if there is a real risk that the prosecution, penalty or punishment they face for refusing to perform military service in a conflict that may associate them with gross human rights abuses will result in a severe violation of their basic human rights. A deprivation of liberty may be a sufficiently serious violation, depending on its length and the person's particular characteristics, but a suspended sentence, probation or fine will generally not be a sufficiently serious violation. There was no evidence before the judge suggesting that any of these punishments would be applied in a disproportionate manner to the appellant.

60. We find that any other result would frustrate the fundamental principles underlying the Refugee Convention and the Qualification Directive, that of surrogate protection. There is no need for surrogate protection if there is no real risk that a person will face serious ill-treatment sufficient to amount to persecution.

61. On the basis of the detailed assessment undertaken in VB, we find there is no real risk that the appellant will be prosecuted or face any penalty, but that even if he is, there is no real risk that the punishment or penalty he is likely to face, considered on the lower standard of proof, will attain a substantial level of seriousness sufficient to amount to persecution.

62. In reaching our decision we have also considered the judgment of the CJEU in Andre Shepherd v Bundesrupublik Deutschland C-472/13, which analysed Article 9(2)(e) of the Qualification Directive in the context of an America soldier who sought asylum in Germany on the basis that he would be required to participate in the Iraqi conflict which he considered to be both illegal and one involving the commission of war crimes. While the CJEU judgment provides guidance on the operation of Article 9(2)(e) it does not deal with the specific issues posed to us.

63. The grounds additionally criticise the judge for stating that the appellant "is not a well man" and that he may get another medical deferral, given that his medical condition was regarded as temporary and was treated between 2004 and 2008. Any error of law by the judge in applying the historic deferral of military service to the role the applicant may be given if mobilised clearly falls away in light of our assessment above.

Notice of Decision

The appeal is dismissed

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1 May 2018

Signed
Upper Tribunal Judge Blum

Date