

# Refugees or Migrant Workers? A Case Study of Undocumented Syrians in Russia

*LM and others v Russia* (ECtHR 14 March 2016)

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## At a glance

When, in April 2014, Russian Federal Migration Service (FMS) raided a sweatshop in a town K, three Syrian men were arrested. They were found working without work permits and on expired tourist visas. The FMS promptly took them to the district court where they were charged with administrative offences against Russian immigration law and sentenced to expulsion (deportation). The men applied for asylum in Russia, but the domestic courts did not give much weight to this development and supported their deportation stressing that the men arrived in Russia as 'migrant workers' and not 'refugees'. Why were the Syrian men's claims to international protection rejected in Russia on account of their previous undocumented work?

This article argues that the answer to this question lies in the complex interplay of the historical factors pertaining to the separation of the category of 'work' from that of 'asylum', as well as judicial interpretation of these categories in the context of Russian legal culture.

This discussion also has important international legal consequences in the context of the current 'refugee crisis', as this case reached the European Court of Human Rights (ECtHR). The judgment of *LM and Others v Russia* (App nos 40081/14, 40088/14 and 40127/14, ECtHR, 14 March 2016) sets the standards of protection of Syrian refugees in all Council of Europe (and European) countries: suspending and making illegal any returns to Syria as deportation breaches Articles 2 and/or 3 of the European Convention. This paper traces the developments of this case before the Russian domestic courts.

## 1 Introduction – Syrian refugees in Russia

Russia, although an important political player in the Middle East, is not the most likely destination for Syrians fleeing the civil war (2011 – ongoing). According to the United

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Nations High Commissioner for Refugees (UNHCR) the cumulative figure of 'Syrian people of concern in Russia' up to December 2014 has not exceeded 10,000.<sup>1</sup> For comparison, the UNHCR estimates that 4,718,279 people have fled Syria (as of February 2016), 20 percent of them seeking safety in Europe (972,012 people as of February 2016).<sup>2</sup> Syrian refugees in Russia therefore constitute a little above one percent of all Syrians in Europe.

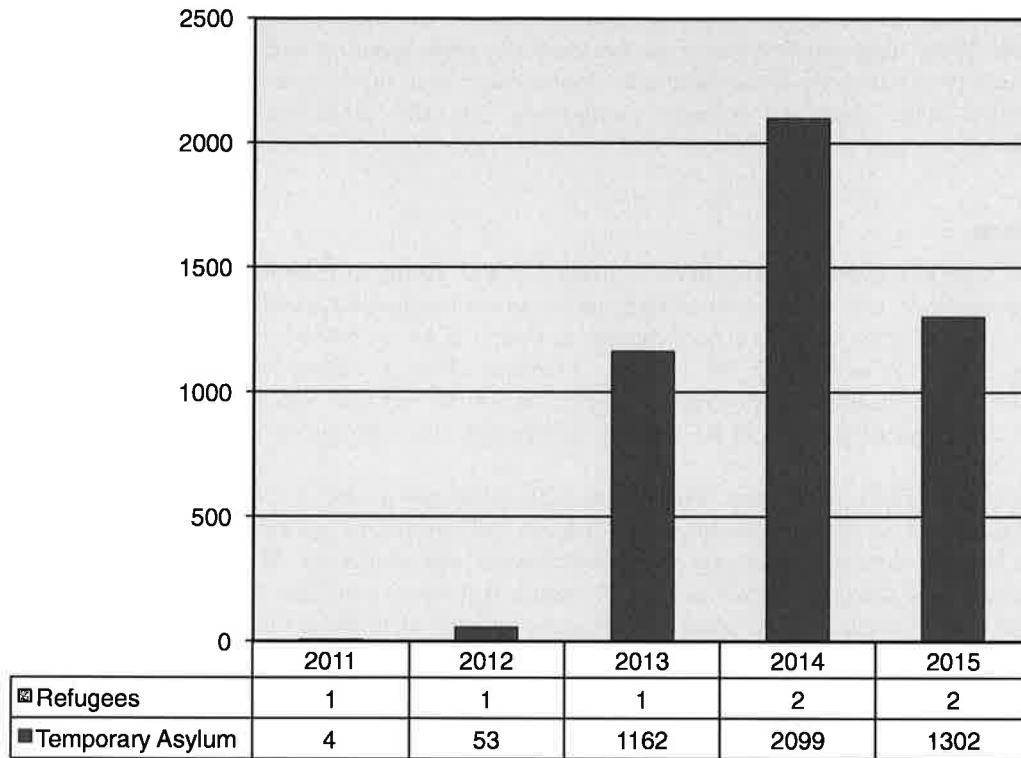
So, how did the Syrians find themselves in Russia? The majority fled Syria via the territorial border with Turkey and applied in Ankara at the Russian Embassy for a tourist or business visa. Then, holding the visa document, they arrived in Moscow. Those amongst the newly arrived Syrians who, via word of mouth, found out about the UNHCR went to the Civic Assistance Committee, a partner organisation to UNHCR in Russia (since 1998), and with the help of the case workers applied for refugee status or temporary asylum (*vremennyy ubezhishchy*).<sup>3</sup> According to the analysis of the primary sources,<sup>4</sup> the application procedure is formalistic:<sup>5</sup> one has to apply for asylum in person within the shortest possible time following arrival in the Russian Federation, by submitting a brief, written petition in Russian (art 4.1 Law on Refugees) in one of the field offices of the Federal Migration Service (FMS). The petition is followed by a personal interview (with a right to an interpreter) conducted by a FMS officer on duty and a decision (upon the examination of the application on its merits) is issued within three months (art 7.1 Law on Refugees).<sup>6</sup>

According to the Federal Migration Service statistics, out of the 2,111 people from Syria who had claimed refugee status in Russia between January 2011 and December 2015, only 2 had been granted it (see Figure 1).<sup>7</sup> However, due to the increasing number of Syrians arriving in Russia the authorities could not ignore this group and the FMS started issuing a subsidiary form of protection – the temporary asylum.<sup>8</sup> By the end of 2015, there were 1,302 Syrians in Russia with this type of subsidiary protection.<sup>9</sup> That rather modest number presented a decline from 2014, when 2,099 Syrians received temporary asylum. This represented about a tenth of

- 1 UN High Commissioner for Refugees (UNHCR) 'Cumulative Syrian asylum applications Apr 2011–May 2014' Report UNHCR, 28 June 2014, <[http://data.unhcr.org/syrianrefugees/documents.php?page=3&view=grid&Language\[\]=1&Country\[\]=501&asylum=1](http://data.unhcr.org/syrianrefugees/documents.php?page=3&view=grid&Language[]=1&Country[]=501&asylum=1)>, accessed 14 April 2016.
- 2 UN High Commissioner for Refugees (UNHCR) 'Syria regional refugee response. inter-agency information sharing portal, <<http://data.unhcr.org/syrianrefugees/asylum.php>>, accessed 14 April 2016.
- 3 Temporary asylum is a subsidiary form of protection defined in art 1, item 1 para 3 of the Russian Federal Law from 19.02.1993 N. 4528-I 'On Refugees' (as amended by Federal Law No 122-FZ of 22 August 2004). Temporary asylum can be granted to two categories of people (as defined in art 12 of the law 'On Refugees'). First, it can be issued to people who are eligible for refugee status, but wish to avail themselves of this form of temporary protection instead. Second, this form of protection can be extended to people who cannot be recognised as refugees under the Russian legislation, but for humanitarian reasons cannot be expelled (deported) from the territory of the Russian Federation. People with temporary asylum in Russia enjoy the same sets of rights as refugees. The temporary asylum is usually granted for one year and it needs to be periodically renewed (Government Resolution No 274 'On Granting Temporary Asylum in the territory of the Russian Federation' adopted on 9 April 2001).
- 4 Russian Federal Law from 19.02.1993 N. 4528-I 'On Refugees' with amendments, thereafter Law on Refugees.
- 5 Ahoura Afshar 'Refugees in Russia: the law on refugees and its implementation' (2005) 18 Journal of Refugee Studies 468; Adriano Silvestri and Olga Tchernishova 'The legal framework regulating asylum in the Russian Federation' (1998) 10 International Journal of Refugee Law 184.
- 6 It is important to stress that in practice the refugee status determination procedure is far from simple and fraught with bureaucratic and linguistic barriers. For the detailed analysis of the refugee status determination in Russia see Elena Burtina, Elena Korostaleva and Viktor Simonov 'Russia as a Country of Asylum. Report on the implementation of the 1951 Convention relating to the Status of Refugees by the Russian Federation' (2015) Civic Assistance Committee Report, <<http://refugee.ru/en/news/russia-as-a-country-of-asylum/>> accessed on 3 June 2016 (English translation).
- 7 Federal Migration Service Russia 'Asylum statistics for Russia 2011–2015' Report <[http://www.fms.gov.ru/about/activity/stats/Statistics/Predostavlenie\\_ubezhishha\\_v\\_Rossijskoj](http://www.fms.gov.ru/about/activity/stats/Statistics/Predostavlenie_ubezhishha_v_Rossijskoj)> accessed on 14 April 2016.
- 8 For explanation see n 3.
- 9 Federal Migration Service Russia (n 7).

the number of Syrians who had arrived in Russia fleeing the conflict. At face value, Russia perhaps does not differ that much from other European countries, given the rather modest, conservative response toward the Syrian crisis.

### Syrians in Russia 2011-2015



Source: Federal Migration Service Statistics [http://www.fms.gov.ru/about/activity/stats/Statistics/Predostavlenie\\_ubezhishha\\_v\\_Rossijskoj](http://www.fms.gov.ru/about/activity/stats/Statistics/Predostavlenie_ubezhishha_v_Rossijskoj) (Accessed on 20 March 2016).

However, the official numbers tell only part of the story. The situation of Syrian refugees should be looked at in a larger, structural context of refugee status determination in Russia, characterised by regional diversity (something to be expected in such a vast country as Russia) and specific dynamics. By January 2013 (that is, more than one year into the conflict), the Federal Migration Service (FMS), the state agency responsible for refugee status determination, finally recognised the UNHCR’s repeated recommendations from 2012 and started issuing temporary asylum status to Syrians. In spring 2015, according to Civic Assistance Committee legal aid workers, the FMS suddenly altered its position – the grants of temporary asylum (of a standard duration of one year) were not renewed and new applications were denied. Numerous decisions from various regions in Russia demonstrated that the FMS position had hardened; the decisions to reject systematically referred to the absence of individual grounds for asylum. FMS argued that:

'the events in Syria do not amount any more to a civil war but [constitute] a specific antiterrorist operation, (...) the main problem of the country is unemployment [which illustrates] that the situation in Syria is on the road to normality.'<sup>10</sup>

As of February 2016, the situation changed again. The FMS started to accept more appeals and overturn some of its earlier decisions of removing or not renewing the grants of temporary asylum. For the time being no clear pattern for the decisions can be detected; however, the recognition of at least some of the appeals was a welcome change to the mass refusals that characterised much of 2015.<sup>11</sup> It is important to stress that the FMS, while granting temporary asylum status to many Syrian nationals, at the same time continued to treat others as ordinary administrative offenders with regard to Russian immigration law and supported their deportations to Syria.

## Research question

This article grapples with the question: why have so many Syrians' claims to international protection been rejected in Russia on account of their previous undocumented work? This article uses the case study of three undocumented Syrians in Russia (*LM and others v Russia*, *Apps nos 40081/14, 40088/14 and 40127/14, ECtHR, 14 March 2016*) to pursue broader questions: that of the actors, origins, and processes of separation of the 'asylum' and 'work' categories, and how this separation came to be realised, interpreted and reproduced in the Russian socio-legal context.

The article consists of three main parts. First, it introduces the case study of *LM and others v Russia* in the context of their proceedings for 'ordinary' administrative immigration offences before the Russian domestic courts (undocumented work and residence). Second, drawing on comparative and historical developments, it argues that these particular Syrian men did not conform to the globally shaped 'ideal' of a refugee implicitly included in the 1951 Convention Relating to the Status of Refugees (thereafter 1951 Refugee Convention). This 'ideal' originates from the population movements after the Second World War: a refugee does not engage in paid labour, s/he is defined solely by humanitarian needs.<sup>12</sup> This binary approach has been challenged on numerous occasions by empirical practice and scholarly work.<sup>13</sup> The modest and cautionary attempts of the international refugee regime to re-engage with the questions of work and refugee livelihoods in the context of 'mixed migration flows' have been

10 Svetlana A Gannushkina 'The practice of refugee/temporary asylum status for Syrians in Russia' (Migration and Law seminar, Moscow, 22–23 May 2014).

11 After this article was submitted to the journal the Federal Migration Service (FMS) was disbanded by the Presidential Decree of 5 April 2016, No 156. The functions of the FMS have been transferred to the Main Directorate for Migration Affairs of the Russian Federation Ministry of Internal Affairs (*MVD*). It remains to be seen how the asylum and refugee applications will be considered there. This major institutional change does not, however, affect the conclusions of this article.

12 Rieko Karatani 'How history separated refugee and migrant regimes: In search of their institutional origins' (2005) 17 *International Journal of Refugee Law* 517; Katie Long 'When refugees stopped being migrants: Movement, labour and humanitarian protection' (2013) 1 *Migration Studies* 4.

13 Oliver Bakewell 'Conceptualising Displacement and Migration: Processes, Conditions and Categories' (2011) 32 *Forced Migration* 14; Katie Long and Jeff Crisp 'Migration, mobility and solutions: an evolving perspective' (2010) 35 *Forced Migration Review* 56; Nicholas Van Hear, Rebecca Brubaker, and Thais Bessa 'Managing mobility for human development: The growing salience of mixed migration' (2009) *Human Development Research Paper 2009/20(UNDP)* 1–41, < <http://hdr.undp.org/en/content/managing-mobility-human-development>> accessed on 14 April 2016.

fraught with challenges around the loss of legal protection<sup>14</sup> and the UNHCR's insistence on preserving the dichotomy of the two kinds of people: 'the special people – our people, refugees; and the other people – migrants'.<sup>15</sup>

However, the historical, institutional arrangements only address part of the puzzle. The third part of this article therefore turns to the local, legal and cultural arguments of how the law is interpreted in Russia in its social and cultural context. Since Russia acceded in 1993 to the 1951 Convention and the 1976 Protocol Relating to the Status of Refugees (Federal Law from 19 February 1993, N. 4528-I 'On Refugees' with amendments) this 'universal ideal' of a refugee has been strengthened and reinforced by the literal and strict interpretation of the law, long prevalent in Russian legal culture.<sup>16</sup> The *po zakonu* (meaning: literal, strict and direct) reading of the law, that is, paying attention to the exact wording of the black letter law, is derived from Russian civil law tradition. It does not encourage discretion and flexible interpretation of the law ('law as a living instrument') with reference to internationally established precedents or domestic judicial decisions, but rather strict, formal and narrow reference to the original text.<sup>17</sup>

### **A note on methods**

This article has been empirically informed by a qualitative socio-legal inquiry into the Russian immigration and refugee laws and how they are experienced in Russia in the everyday life context by a number of actors – the asylum seekers, their legal representatives and the social case workers.

The author spent over five months in Russia in 2014, and collected empirical data in a variety of settings. She conducted participatory observation and closely observed the work of a number of Russian NGOs and legal aid clinics that help asylum seekers in Russia with access to the refugee status determination procedure, residence documentation, and access to the labour market. The lawyers and members of these organisations also represent refugees in courts, in disputes with the state immigration agencies like the Federal Migration Service (FMS). Over the course of several months, the author observed the interactions between the lawyers, employees of the NGOs and their clients whilst volunteering in these organisations in a variety of roles.

One of the NGOs where the fieldwork was conducted was the Civic Assistance Committee in Moscow (part of Human Rights Centre Memorial, a partner to UNHCR). There, the author learned about the case of the three Syrian refugees – LM, AA and MA. She accompanied their lawyer to the K Regional Court for the appellate proceedings, observed their cases and took detailed notes. She later assisted the lawyer with writing submissions to the European Court of Human Rights, initially for the interim measures suspending the deportation and, later, responding to the Russian Government's memoranda once the case had been communicated by the Court. The proceedings before the ECtHR took twenty

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14 Jeff Crisp 'Refugees are not migrants: the international refugee regime, asylum and labour migration in historical perspective' (Lecture delivered at University of Oxford, 2 February 2016, on file with the author).

15 Jorgen Carling 'Refugees are also migrants. And all migrants matter' (*Border Criminologies Blog*, 3 September 2015), <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/09/refugees-are-also>> accessed 14 April 2016.

16 Denis J Galligan and Marina Kurkchian, *Law and informal practices: the post-communist experience* (OUP 2003); Marina Kurkchian 'Russian legal culture: An analysis of adaptive response to an institutional transplant' (2009) 34 *Law & Social Inquiry* 337.

17 Kurkchian (n 16) 338.

months (between May 2014 and October 2015). Through the involvement in the case, the author received access to a number of confidential primary sources including the judgments and protocols from the Russian domestic courts, a list of which can be found in Appendix 1. These, together with notes and observations from the hearings and discussions with the lawyer, constitute the bulk of the empirical material that informed the analysis contained in this paper.

## 2 Undocumented Syrians case study

In April 2014, the Federal Migration Service (FMS) raided a sweat shop in a town K near Moscow. Three Syrian men were arrested. They were found working without work permits, on expired tourist visas. The FMS promptly took them to the M District Court where they were charged with administrative immigration offences against arts 18.8 and 18.10 (lack of valid residence registration, lack of work permit, respectively) of the Russian Code of Administrative Offences (CAO). The local judge ordered a sentence prescribed by the Russian immigration law – a fine of 5,000 Roubles (approximately £70) and expulsion (deportation).<sup>18</sup> The case was referred to the Civic Assistance Committee in Moscow. The lawyer who took the case, filed an application for refugee status/temporary asylum with the FMS on behalf of the Syrians, in parallel with an appeal of their administrative offences to the regional court.

The defence strategy in the appellate proceedings was based on three pillars. First, the lawyer decided not to dispute the facts of the case – the men indeed were working illegally and lived above the sweatshop in contravention of the migration residence requirements, and their visas had expired. The defence, however, wanted to shift the main focus of the case from the administrative offences of contravening Russian immigration law toward the humanitarian arguments centred on the civil war in Syria.<sup>19</sup> This strategic shift was to help the lawyer petition the court to exclude the expulsion (deportation) from the sentence.

The second pillar of the defence rested on proportionality. In light of the evidence pointing directly and unequivocally to a massive, indiscriminate humanitarian crisis in Syria, the defence maintained that it would be disproportionate to go ahead with the deportation as a ‘punishment’ for simple administrative offences (18.8, 18.10 CAO). In support of this argument the defence invoked the UNHCR position on returning people to Syria (UNHCR *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update I*); which stated that:

‘[i]t is essential that protection provided to those fleeing Syria entails treatment which respects the fundamental humanity and dignity of the individuals concerned and guarantees minimum humanitarian standards, including: (...) b. protection from refoulement.’<sup>20</sup>

The appeal referred to other independent human rights’ reports on the hostilities in Syria (Human Rights Watch, Amnesty International, and UN Human Rights Council). Each

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18 Although the expulsion order as a complementary form of punishment for offences against arts 18.8 and 18.10 CAO falls within judicial discretion in the majority of jurisdictions of the Russian Federation, in Moscow, greater Moscow (oblast), St. Petersburg and Leningrad oblast by the amendments to the CAO in 2013 (No 207-FZ of 23 July 2013) the deportation follows automatically and constitutes the ‘minimum’ penalty.

19 UN High Commissioner for Refugees (UNHCR), *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, (Update I, December 2012)* <[http://unhcr.org/ua/attachments/article/739/Consider\\_SYR\\_Dec12\\_ENG.pdf](http://unhcr.org/ua/attachments/article/739/Consider_SYR_Dec12_ENG.pdf)> accessed 14 April 2016.

20 *ibid* 3.

applicant (MA, AA, and LM) had an individual assessment letter produced by the UNHCR Moscow office which supported the arguments of the defence for the non-expulsion of the men to Syria.<sup>21</sup>

Thirdly, although the principle of precedent is not binding in Russia (a civil law country), the defence asked the K Regional Court to add to the materials of the case a copy of a decision of L Regional Court (from 13 February 2014) where for an identical administrative offence (arts 18.8 and 18.10 CAO) committed by another Syrian national the expulsion had been excluded from the sentence, as it would mean returning a person to a place of grave conflict, amounting to a punishment disproportionate to the actual offence.<sup>22</sup> Although in Russian law this decision did not have the standing of a binding precedent, the defence lawyer wanted to employ it as an auxiliary mechanism to turn the judge's attention to how analogous cases had been decided elsewhere in Russia.<sup>23</sup>

To summarise: the defence was to not dispute the facts of the case but to present the defendants as refugees and not migrant workers (with asylum applications now pending before the territorial FMS offices) and therefore, reverse the logic of the proceedings before the lower court.

The K Regional Court rejected these appeals and affirmed the men's expulsion to Syria, stressing that 'these men came to Russia to work, earn money and support their families in Syria.'<sup>24</sup> They arrived in Russia as migrant workers, worked without documents and should therefore bear 'the full punishment' as prescribed by law. Presenting the decision the judge quoted the relevant passages of the Russian immigration law regarding the work permit for foreigners, and that asylum applicants/ refugees can work insofar as their legal status has been conferred and not when it is being determined (No 127-FZ of 5 May 2014, On Amendments to article 13 of the Federal Law 'On the Legal Status of Foreign Citizens in the Russian Federation'). The men did not use their time in Russia to regularise their status and comply with Russian immigration law. The appellate judge clearly did not deviate from the already 'legally established fact' (in the decision of the M District Court), that these men were ordinary immigration law offenders – migrant workers and not refugees.<sup>25</sup>

Having exhausted all domestic remedies the lawyer petitioned the ECtHR to halt the deportation until the men's case under art 2 (right to life) and art 3 (prohibition of inhuman and degrading treatment) of the European Convention of Human Rights (ECHR) could be heard.<sup>26</sup> The ECtHR granted a stay on the deportation,<sup>27</sup> yet the Syrian men's troubles were far from over. They were placed in administrative detention in K, where, without the possibility of judicial review, they awaited the judgment of the Court in Strasbourg.

The proceedings before the ECtHR focused around three main issues:

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21 Appendix 1/2 – UNHCR Support Letter (LM)

22 Appendix 1/3 – L Regional Court Judgment (13 February 2014).

23 In addition, a circular letter issued on 30 August 2013 by the Federal Bailiffs Service (No 12/01-24170-ТН) – the body responsible for the enforcement of the courts' decisions in Russia – was presented at the hearing, stating in clear terms the logistic impossibilities of 'safe return' to Syria due to 'war activities at the territory of Syrian state and the physical impossibility of entry.' The official position of the Federal Bailiffs Service therefore confirmed the impossibility of the enforcement of the expulsion order.

24 Appendix 1/4 – K Regional Court Judgment (AA, 27 May 2014)

25 Appendix 1/4 – K Regional Court Judgment (AA, 27 May 2014).

26 For the in-depth examination of the extraterritorial jurisdiction of the ECtHR, when a signatory state effectively controls an individual's ability to exercise fundamental Convention rights, see: Sarah Miller 'Revisiting extraterritorial jurisdiction: A territorial justification for extraterritorial jurisdiction under the European convention' (2009) 20 *European Journal of International Law* 1223.

27 Interim measures – r 39 of the Rules of the Court.

- (1) the quality of evidence adduced during the course of domestic proceedings capable of proving that there were substantial grounds for real and imminent threat to life and/or ill-treatment in an event of the applicants' return to Syria (*Saadi v Italy Apps no 37201/06*, ECtHR 28 February 2008 para 129);
- (2) the men's prolonged detention and its compliance with arts 5 §4 and 5 §1 (f); and
- (3) whether the applicants had at their disposal an effective domestic remedy for the complaints under arts 2 and 3 (seeking suspension of expulsion), and art 5 (challenging detention and seeking release), as required by art 13 of the Convention.

In the light of the proceedings before the ECtHR the question of 'work', so central for the domestic courts, became invisible and irrelevant. It no longer mattered whether the men were 'asylum seekers' or 'migrant workers'. The arguments of 'non-deservedness' of humanitarian protection due to the Syrians' prior engagement in work were also dropped by the government side.

The question however, remains – why did they play such a central role for the domestic courts in Russia? Is this specific to the Russian context, or can some broader, comparative tendencies of the alleged incompatibility of categories of 'work' and 'asylum' be observed? The following sections discuss these questions in more detail, paying attention to both the more global, historical developments around the categories of 'work' and 'asylum' and the judicial interpretation of these categories in the context of the Russian legal culture.

### **3 Separation of 'work' and 'asylum' categories**

Erika Feller, then Director of the Department of International Protection at the UNHCR, delivered a key note speech emphatically entitled 'refugees are not migrants'<sup>28</sup> at a 2005 conference on 'The Challenge of Identity and Integration.' She stated:

'confusing the two categories is conceptually and legally wrong (...) Where refugees are seen as little more than a sub-group of irregular migrants, the control of their movement is likely to take precedence over meeting their protection needs.'<sup>29</sup>

Whilst one may easily agree that 'the legal categorisation is of critical importance',<sup>30</sup> the separation between refugees and migrants has not always been so set in stone as it might appear today. Some even argue that it is 'history [that] separated refugee and migrant regimes.'<sup>31</sup> Even before the drafting of the 1951 Refugee Convention, at the end of the Second World War, the refugees, displaced people and migrant workers, using contemporary legal classifications, were 'muddled within a mass of Europe's so-called surplus population.'<sup>32</sup> Katy Long, in her paper 'When refugees stopped being migrants', goes even further back in history to demonstrate that the early twentieth century Nansen's refugee protection system was constructed around 'the admission of refugees to countries where they would be able to support themselves.'<sup>33</sup> The economic empowerment of refugees was seen as a sustainable solution to early refugee crises – that of Jewish, Russian, Spanish Republican and German refugees.

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28 Erica Feller 'Refugees are not migrants' (2005) 24 *Refugee Survey Quarterly* 27.

29 *ibid* 28.

30 Bakewell (n 13) 24.

31 Karatani (n 12).

32 *ibid* 541.

33 Long (n 12) 9.



## Historical parting of the refugee and migration regimes

The modern refugee regime took its root in the context of the end of the Second World War, as a consequence of the war's massive population displacement.<sup>34</sup> The activities of the first post-war refugee organisation – the International Refugee Organization (IRO), created in 1947 as a specialist agency of the United Nations (UN) to succeed the pre-war Intergovernmental Committee on Refugees, seemed at best to ignore the hard and fast conceptual and categorical distinctions of refugees and migrant workers that prevail today. The organisation focused on resettlement of over a million 'non-repatriable displaced persons' mainly of East European origin stranded in the Allied-occupied zones of Europe, who refused to go back to their home countries.<sup>35</sup> The IRO began to resettle these 'refugees' as 'manual labourers', or migrant workers in current terms, who could contribute to post-war reconstruction.<sup>36</sup> Karatani compares the workings of IRO to 'an international employment agency' which 'tried to match the skills of refugees with the needs of each receiving country in Europe, South and North America, and Australia.'<sup>37</sup> This demonstrates that the categories of refugees and work were very much institutionally (thereby legally) intertwined at the emerging stages of the contemporary refugee regime.

A good example of this blurring between refugees and migrant workers as legal categories could be seen in the UK's response to the 'refugee population' in Europe after the Second World War. Between 1946 and 1951, the UK ran a European Voluntary Worker (EVW) scheme of recruiting displaced persons to 'work in a number of industries and services deemed essential for economic recovery and suffering from labour shortages.'<sup>38</sup> By recruiting refugees to fill labour shortages, the scheme demonstrated how in the post-war period the now accepted conceptual boundaries between refugees and migrant workers were highly porous. The EVW scheme was presented as an opportunity to many stranded in the displacement camps in Europe, but as Long observed 'the bargain was explicit: refugees were to work for their eventual right to settlement.'<sup>39</sup>

The EVW scheme was perhaps the most vivid, albeit an extreme, example of the post-war conflation between refugee and migrant worker categories and it 'engendered a number of tensions in government policy between economic and humanitarian criteria.'<sup>40</sup> As an extreme, it also demonstrated the potential and significant problems and dangers of this approach:

'refugees were selected and landed in Britain largely according to an explicit criterion of economic utility and not [...] according to an articulated humanitarian concern to harbour a refugee from persecution.'<sup>41</sup>

The deliberate reliance on the 'ability to work' led to situations where 'EVWs with medical needs – including pregnant women – were returned to the displaced persons' camps in Germany.'<sup>42</sup> Kathy Long, following Gilbert Jaeger, estimated that by 1950, there were around 150,000

34 Guy Godwin-Gill *The Refugee in International Law* (Clarendon Press 1998); James Hathaway *The Law of Refugee Status* (Butterworths 1991); Gill Loescher *The UNHCR and World Politics* (OUP 2001).

35 Tommie Sjoeborg *The Powers of the Persecuted: the Refugee Problem and the Intergovernmental Committee on Refugees* (Lund University Press 1991).

36 Karatani (n 12) 530.

37 *ibid* 530.

38 Diana Kay and Robert Miles 'Refugees or migrant workers? The case of the European volunteer workers in Britain (1946–1951)' (1988) 1 *Journal of Refugee Studies* 214.

39 Long (n 12) 14.

40 Kay and Miles (n 38) 214.

41 *ibid* 231.

42 Long (n 12) 15.

'unwanted' (read: unable to work) refugees stranded in Europe – those who due to disability, age or gender, could not be resettled on the current prevailing terms.<sup>43</sup> This eventually led to transformation of refugee resettlement from a dual migration and work focused activity into 'one centred on humanitarian needs.'<sup>44</sup>

The next iteration of the refugee protection regime, that took shape during the drafting of the 1951 Refugee Convention, focused on the humanitarian exception of refugees' rights to be granted admission and prohibition of forcible return (the principle of *non-refoulement*). The prerogative of the UNHCR, which, in 1950, inherited most of the IRO mandate, was to 'promote admission of refugees, not excluding those in the most destitute categories, to the territories of States'.<sup>45</sup> The socio-economic and work considerations, earlier incorporated in the Nansen and post-war refugee resettlement programmes, have lost importance due to the potentially extreme forms they could have taken, as illustrated by the British EVW scheme. In the years following the 1951 Convention, the 'work' category gradually faded away to disappear completely from the agenda, with the UNHCR preoccupied with refugee resettlement, not in terms of labour recruitment, but as objects of humanitarian concern first and foremost.<sup>46</sup> The institutional refugee and migration regimes became separated.<sup>47</sup>

### **Mixed migration**

However, this strict and duly observed parting between the categories of 'asylum' and 'work' has also indirectly led to a political climate that seems to be disconnected from the current empirical reality. In an era of a growing salience of 'mixed' flows of people in a situation of conflict<sup>48</sup> and mixed migratory processes,<sup>49</sup> the strict reliance on a clinical difference between refugees and migrant workers is unattainable.<sup>50</sup>

Mixed migration flows occur when refugees are moving alongside other categories of people – migrants, victims of human trafficking, unaccompanied minors, etc – often in an undocumented manner, using the same means of transport (including boats, lorries, trains, etc) and relying on the services of the same human smugglers or migration brokers.<sup>51</sup> The concept of mixed migration also pertains to peoples' motivations to move: fleeing a war, seeking employment, or joining a family, are commonly understood motivations for migration. The challenge, of course, is that those motivations can be blurred and overlapping, defying neat categorisation: 'mixed migration is not a checker-board of black and white, but a jumble of different histories, resources, and entitlements.'<sup>52</sup>

Mixed migration may also indicate a continuous onward movement, when the economic restrictions or security situation faced by refugees in their first country of asylum – for example

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43 Gilbert Jaeger, *The Refugee Convention at 50: A view from Forced Migration Studies* (Lexington Books 2003) 10 quoted in Long (n 12) 15.

44 Long (n 12) 15.

45 United Nations General Assembly 1950: Annex, quoted in Long (n 12) 16.

46 Long (n 12) 20.

47 Karatani (n 12).

48 Van Hear et al (n 13); Anna Lindley 'Leaving Mogadishu: Towards a Sociology of conflict-related mobility' (2010) 23 *Journal of Refugee Studies* 2.

49 Bakewell (n 13); Alexander Betts *Survival Migration. Failed Governance and the Crisis of Displacement* (Cornell University Press 2013); Julia O'Connell Davidson 'Troubling freedom: Migration, debt, and modern slavery' (2013) 1 *Migration Studies* 176; Roger Zetter 'Labelling refugees: Forming and transforming a bureaucratic identity' (1991) 4 *Journal of Refugee Studies* 39.

50 Long (n 12) 22.

51 Crisp (n 14).

52 Carling (n 15).

limited protection, highly segmented access to the labour market, or in some cases prohibition on free movement within the country (eg away from the displacement camps) – lead many individuals whose asylum claims are valid, to pursue secondary migration in search of better life, economic conditions or physical security.<sup>53</sup> The last scenario explains what happened to the three Syrians from the case study who, like many others, had left Turkey, not in boats *en route* to Greece, but in search of a better life and protection in Russia.

The contemporary scholarly discussion on the mixed migration flows has intensified in recent years in the context of the so-called ‘European refugee crisis’ and arrivals from Northern Africa and the Middle East.<sup>54</sup> It poignantly illustrates the artificial character of the historical 180 degrees turn in how the category of ‘work’ shifted from a sign of deservedness, to becoming an attribute of non-deservedness of refugee status (even though the shift was inspired by good intentions). It demonstrates how the decoupling of asylum from securing an economic livelihood is detached from the empirical reality.

This is not to say that the international refugee regime has been completely oblivious to the possibilities offered by regularised labour migration as a solution to refugee crisis.<sup>55</sup> The UNHCR’s 2007 10-Point Plan for providing refugee protection in mixed migration flows suggested that ‘alternative temporary migration options (...) to move to a third country for humanitarian reasons, or for the purposes of work, education or family reunion’ should also be developed at a policy level.<sup>56</sup> However, these initiatives under the current political climate of shrinking asylum and migration spaces have been fraught with challenges.<sup>57</sup> Some of these challenges stem from an ambiguous position within the UNHCR itself, in the persistent ‘two kinds of people’ rhetoric identified by Carling: ‘migrants are the residual after refugees have been identified’, implying that they are of a lesser importance, of a lesser priority.<sup>58</sup>

It is under this legal shape and its corresponding interpretative framework, that the 1951 Refugee Convention has been adopted in Russia and transposed in its 1993 ‘Law on Refugees’. Until very recently the question of access to the labour market for asylum applicants in Russia was not explicitly regulated. In practice the authorities were actually known on many occasions to ‘turn a blind eye’ to asylum seekers engaged in paid labour, who could prove they were in a status determination procedure. However, the alignment of the Russian refugee law with international standards that took place in 2014 has changed the situation completely.

The issue of access to the labour market for asylum applicants is still nowhere to be found in the ‘Law on Refugees’; however, by the legislative changes No127-FZ of 5 May 2014, access to labour has been explicitly forbidden in the Federal Law ‘On the Legal Status of Foreign Citizens in the Russian Federation.’ This significant change toward the alignment

53 Long (n 12) 3. For more mixed migration examples see Crisp (n 14), on file with the author.

54 Carling (n 15); Heaven Crawley, Nando Sigona and Franck Duvell ‘European policy is driving refugees to more dangerous routes across the Med’ (*The Conversation Blog*, 29 March 2016), <<https://theconversation.com/european-policy-is-driving-refugees-to-more-dangerous-routes-across-the-med-56625>>, accessed on 6 June 2016; Heaven Crawley ‘Crisis or opportunity? How European countries use refugees for political gain’ (*The Conversation Blog*, 25 February 2016), < <https://theconversation.com/crisis-or-opportunity-how-european-countries-use-refugees-for-political-gain-55351>>, accessed on 6 June 2016.

55 Long and Crisp (n 13) 57.

56 UN High Commissioner for Refugees (UNHCR) ‘Refugee protection and mixed migration: a 10-point plan of action. (UNHCR 2007), <<http://www.unhcr.org/4d52864b9.pdf>> accessed on 14 April 2016. For a review of existing initiatives on how labour migration policy might benefit refugees see Katie Long ‘From Refugee to Migrant? Labor Mobility’s Protection Potential’ (Migration Policy Institute, Transatlantic Council on Migration 2015), <<http://www.migrationpolicy.org/research/refugee-migrant-labor-mobilitys-protection-potential>>, accessed on 14 April 2016.

57 Long (n 56).

58 Carling (n 15).

of the Russian legislation with the current international standards has thereby also symbolically moved the question of the asylum applicants engaged in paid labour from the discursive sphere of 'refugees', to the broader sphere of 'foreign citizens' aka 'migrant workers.' This could partially explain why, when applying the international refugee regime standards, both the district and appellate judges in the LM, AA and MA cases were so adamant in seeing the Syrian men working in Russia as being in contravention of the immigration law, and therefore as migrant workers and not refugees.

However, turning for explanations solely to legal-historical, internationally developed norms and practices for the separation of categories of 'work' and 'asylum', and how they were implemented in Russian law, tells only part of the story. In order to obtain a fuller picture, one should turn to the local and more legal-cultural factors around specific interpretation of the law in Russia.

#### 4 'Po zakonu' judicial interpretation or *dura lex sed lex*

The term *po zakonu* could be translated as 'dura lex', or 'by the law', meaning a strict, narrow, direct and literal interpretation of the law. It figures prominently in the everyday life and popular legal consciousness in Russia, designating almost complete reliance on black-letter law and extremely high expectations that Russian people have of the law as the main social regulator. During the author's fieldwork in Moscow in 2014, the implicit or often explicit dichotomy of *po zakonu* versus 'what really happens in practice' was constantly present in many, even benign conversations. When faced with a question of how to interpret a particular legal paragraph or nuance, respondents would often say – 'well, *po zakonu*' you should do this and that – giving a direct and literal interpretation of the written law. However, this expression was equally often followed by the characteristic 'however, in practice...'. In the second part of the response, interviewees would focus on the inability of acting *po zakonu* due to the specific circumstances on the ground, for example long queues, backlogs, administrative delays, management inefficiency, established unwritten practices, and sometimes – plainly – the corruptibility of civil servants.

The popularity of the *po zakonu* phrase should not, however, be viewed as a sign of Russian cynicism about the law;<sup>59</sup> on the contrary, it is an expression of the very high regard for the written law. Marina Kurkchiyan in her works on the Russian legal culture explained how the normative idea that the *zakon* – the written law – should be considered a paramount and treated with respect, contributed to the very strict and definitive ideas in the society of what is legal and what is not.<sup>60</sup> The written law, the *zakon*, defines what is legal. Thereby any, even small derogations from, or transgressions of the literal application of, the law are considered to be non-legal, and in some cases 'illegal' in the popular legal consciousness.<sup>61</sup> With such high normative standards for the written, textual law, how is it that according to many analyses Russia lacks the rule of law<sup>62</sup> and is considered a place where the law is routinely and consciously abused?<sup>63</sup>

59 Galligan and Kurkchiyan (n 16); Kurkchiyan (n 16); Marina Kurkchiyan 'Researching Russian Legal Culture' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005) 259–278.

60 Kurkchiyan (n 59) 263–4.

61 Kurkchiyan (n 16)

62 Kathryn Hendley 'Telephone law' and the 'rule of law: the Russian case' (2009) 1 Hague Journal on the Rule of Law 164; Jeffrey Kahn 'In search for the rule of law in Russia' (2006) 37 Georgetown Journal of International Law 353.

63 Vadim Kononenko and Arkady Moshes *Russia as a Network State. What Works in Russia When State Institutions Do Not?* (Palgrave Macmillan 2011); Alena Ledeneva *How Russia Really Works: Informal Practices in the 1990s* (Cornell University Press 2006).

Peoples' experiences of the ways in which the law is being implemented in everyday practice by the bureaucracy, civil servants or the police often significantly deviate from their cherished ideal *po zakonu*. These experiences often indirectly lead to the 'spoiling of the law' and the development of the culture of 'legal nihilism'<sup>64</sup> among the Russian citizens: 'the (written) law does not work; we need to bypass it to get things done' (Interview 5, male, professional researcher, 6 April 2014). In the words of Kurkchiyan:

'this tension between expectation of how things should be (life regulated by rules that are strict and just) and how it is (life in which law does not serve the purpose for which it was produced) generates contradictory feelings; on the one hand, a strong belief that things should be brought under control, and on the other hand, a sensation of intense disappointment at the persistent and repeated failures of all the controlling agencies.'<sup>65</sup>

In the Soviet times, the *avant garde* of socio-legal scholars in Russia observed the irreducibility of law to *zakon* due to the 'astonishing inconsistency between the high and humane ideals of a socialist society and the content of specific laws'.<sup>66</sup> This critique embodied the high expectations about law as the ideal regulator of social relations and later framed the discussion about the protracted relationship between the *zakon*, and 'law in practice' in the post-Soviet context:

'we have *zakon* which is unjust, incorrect in substance, and contrary to the interests of people, and we also have *zakon* which is good in substance but for various reasons is not implemented. There is also *zakon* (indeed, the majority are such) in which progressive logical norms are neighbours of (sic) obsolete and conservative norms.'<sup>67</sup>

However, at a broader jurisprudential and philosophical level, can the law be ever applied literally, word-by-word? How about flexibility and discretion in the implementation of the law? How about the distinction between the 'law in the books,' the 'law in practice'<sup>68</sup> and the 'spirit of the law'?<sup>69</sup> The very high regard for the *po zakonu* strict and literal legal interpretation means that the question of judicial discretion is treated very ambiguously in Russia. In the recent history of the Soviet Union, judicial discretion was under immense pressure often easily confused with politically motivated legal decisions. The Communist Party controlled the judiciary, which struggled to exercise its normative functions.<sup>70</sup> Kathryn Hendley explored in detailed the phenomenon of 'the telephone law', where outcomes of cases were allegedly issued over the phone by those with political power rather than through the application of the law.<sup>71</sup> These conditions were not particularly conducive to the emergence of judicial independence, or for consensual agreements within the professional body of judges about the boundaries of legal interpretation (and thereby the degree of judicial discretion) to be established.

64 Kurkchiyan (n 59).

65 Kurkchiyan (n 16) 356.

66 Robert Livshits 'Jus and Lex: Evolution of Views' in W.E. Butler (ed), *Perestroika and the Rule of Law: Soviet and Anglo-American Perspectives* (IBTauris 1991) 22–36.

67 *ibid* 25.

68 Roscoe Pound 'Law in books and law in action' (1910) 44 *American Law Review* 12.

69 Doreen McBarnet and Christopher Whelan 'The elusive spirit of the law: Formalism and the struggle for legal control' (1991) 54 *The Modern Law Review* 848.

70 Tatiana Kyselova 'Dualism of Ukrainian commercial courts: Exploratory study' (2014) 6 *Hague Journal on the Rule of Law* 178, 183.

71 Kathryn Hendley 'Assessing the rule of law in Russia' (2006) 14 *Cardozo Journal of International and Comparative Law* 347.

This tendency was prevalent in all of the countries of the Soviet bloc.<sup>72</sup> Not surprisingly therefore, upon the collapse of the Soviet Union, the question of discretion was not looked at favourably by many civil and criminal judges. Galligan and Matczak's research on Poland, for example, demonstrated how the administrative judges in the post-1989 legal environment considered themselves to be the 'mouthpieces of law' and were proud of their strict, direct application of the written code.<sup>73</sup> Yet in Russia, the extreme rigidity of the literal formalistic preference 'goes far beyond the technical necessity that a law must be exact.'<sup>74</sup> It encourages a mainstream thinking that 'any good law always accurately and literally represents the reality and that there can be no legitimate requirement for negotiation, flexibility, or adjustment when the time comes to implement the law'.<sup>75</sup> This is consistent with the conclusion that a good law is 'always capable of providing a single answer', thereby any discretion must be regarded either as a 'violation of the law, or, at best, a manipulation'.<sup>76</sup>

## **5 How did the Russian judges interpret the law in the Syrian case?**

If we now return to the court room in the cases of LM, AA and MA one can see that the judges, both at the district and regional level, treated the law very literally. The Syrian men found themselves in court charged with offences against the immigration law under arts 18.8 and 18.10 of CAO. The protocols from the trials describe that they arrived in Russia on visas in 2013, they stayed nearly a year, and two of them had not taken any significant steps to regularise their immigration status (eg apply for asylum).<sup>77</sup> As, at the time of the FMS raid, they were working without the required work permits, clearly the conclusion was that they were workers, migrant workers to be exact. From the narrow perspective of the Russian immigration law this was a clear-cut case of simple offences against CAO. The judgments – at the M District Court and K Regional Court levels – reflect that, for the courts, the priority was to consider the Syrians as 'regular' immigration law offenders above recognising their potential human rights claims, so as to protect the domestic migration and refugee law from potential 'abuse' and manipulation, and to enforce the literal interpretation of the law.

### **Syrians as ordinary immigration law offenders**

The protocols from the M District Court (each approximately three pages long) reflect this *po zakonu* formalistic logic. From the quantitative perspective, the largest share of the protocol seems to be devoted to a) formal explanations of the rights and duties of the interpreter (from Syria) who was present at the trial, b) personal information on the offenders (their age, place of birth, places of residence in Syria and in Russia), c) the explanation of the formal and procedural rights and obligations to the defendants for the duration of the trial, and d) the list of the documents included in the case file. These formal explanations (confirmed by the signatures

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72 Martin Krygier 'Is There Constitutionalism after Communism? Institutional Optimism, Cultural Pessimism, and the Rule of Law' (1996/7) 26 *International Journal of Sociology* 17.

73 Denis J. Galligan and Marcin Matczak 'Formalism in Post-Communist Courts: Empirical Study of Judicial Discretion in Polish Administrative Courts Deciding Business Cases' in R. Coman and J-M De Wade (eds), *Judicial Reforms in Central and Eastern European Countries* (Vanden Broele 2007), 226–250.

74 Kurkchiyan (n 16) 355.

75 *ibid* 355.

76 *ibid* 355.

77 Appendix 1/5 – M District Court Protocol (15 April 2014).

of the interpreter and the defendants) take approximately two pages of the official protocol (about 70 percent of the text). That leaves a little less than one page for the actual examination of the facts of the case and the presentation of the evidence.

It is only in the final part (approximately a quarter of a page) that the judge assumes her inquisitorial position, characteristic for the civil law trial, and asks the men a few questions: 'When did you arrive in Russia? Why you did not leave Russia when your visa expired? Why you did not legalise your status?' In response, the men say (or what was at least evident from the protocols): they arrived in Russia to earn money; they did not legalise their status and have not obtained the required work permits as they did not know how to proceed; they promised to sort out their documents and asked the court not to deport them to Syria as 'there is no work there and it is a dangerous place to live due to the war'.<sup>78</sup>

Also, from the qualitative perspective, the protocols provide very succinct and telling evidence. They are to convince the reader that these Syrian men indeed arrived in Russia as migrant workers and, as migrant workers in breach of the immigration law, they stood a fair trial. The case of the Syrian men was treated as a 'typical' administrative and immigration offences case with little attention to the place these 'migrants' came from (and where they obviously did not wish to return). The only time where a different type of argument was invoked – alluding to the men's potential humanitarian claims – was at the end of the transcript where the defendants, upon pleading guilty, asked the judge not to deport them due to the war in Syria:

'Please do not deport me from Russia as I am afraid of my life. I need to help my parents and there is no work in Syria.'<sup>79</sup>

Even when the men asked the court not to return them, the arguments about civil war and 'fear for their lives' were intertwined with livelihood arguments such as 'there is no work in Syria'. But there is a visible imbalance between the two types of considerations in the protocols. The judge clearly decided not to pursue the humanitarian type of inquiry, namely what might happen to the men outside of Russia should they be returned to Syria. The goal seemed to be to process their case quickly and efficiently, leaving as little doubt as possible about the men being found guilty of the administrative offences in question.

### **Prioritising domestic law over human rights considerations**

In the K Regional Court (appellate level), the question of the pending refugee applications was perhaps complicating the overall picture, but the judge was adamant that it should not be given central stage in the proceedings – the men filed their applications via their legal representative, only upon their arrests, after the M District Court's judgments had already been delivered. They were certainly a long way from receiving asylum.

The judge asked the men: why did you come to Russia? How did you arrive in Moscow and the town K? Did you know anyone in Russia? The most pertinent questions were about work permits and regularisation of status: 'did the accused know that when coming to a different country one requires a work permit to work? Why did the accused not secure a work permit?'<sup>80</sup> This was followed by a series of questions revealing the judge's sincere preoccupation

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78 Appendix 1/5 – M District Court Protocol (15 April 2014).

79 Appendix 1/5: M District Court Protocol, p 3 (15 April 2014).

80 AA case, Minutes (handwritten by author) from K Regional Court 27 May 2014.

to enforce the formal requirements and protect Russian immigration law from abuse: 'if you do not speak the language, you do not have a work permit, how would you support yourselves here if I do not expel you?'<sup>81</sup> The judge prioritised the domestic law and again focused on the nature of the immigration administrative offences committed, rather than on the Syrian men's refugee and human rights claims (non-refoulement and arts 2 and 3 ECHR, respectively).

As the role of the K Regional Court was to decide about the legality of the lower court judgment, the new developments around the men's pending asylum applications could be deemed irrelevant in evaluating the lower court's decision from the formal, strict legal interpretation point of view. In a similar vein, considerations of the civil war in Syria (calling for judicial discretion, based on the concepts of proportionality, equity, justice and fairness), were left out from the final judgment. The *po zakonu* interpretation of the law took precedence over other, particularly humanitarian, considerations – these men were migrant workers, not refugees:

'Military operations conducted on the territory of Syria (...) cannot serve as grounds for the change of the court's decision regarding expulsion as M.L. arrived in Russia in order to seek employment and not in relation to military actions in Syria.'<sup>82</sup>

It is also the *po zakonu* strict and narrow interpretation of the law that made the appellate judge refuse to include the case file, or even consider the decision of L Regional Court.<sup>83</sup> In the said decision, the L Regional Court judge had excluded the expulsion from the sentence (for identical administrative offences committed by another Syrian national) as it would mean returning the man to a place of grave conflict, amounting to a punishment disproportionate to the actual offence. The appellate judge instructed the defence that, as a civil law judge, she had no obligation to consult or pay attention to judicial practice prevalent elsewhere in the Russian Federation, and she had to make the decision in this particular case 'according to the law' or *po zakonu*.<sup>84</sup>

### Literal reading of the law – response to ECtHR

It is argued that it is also the *po zakonu* logic and interpretation of the law that characterised the Russian domestic court's response to the ECtHR indication of interim measures (r 39 of the Rules of the Court) in the *LM and others v Russia* case. Interim measures are urgent measures which are applied only in a limited number of areas and mostly concern expulsion, deportation or extradition.<sup>85</sup> They usually consist of a suspension of the applicant's removal from the country – party to the Convention – for as long as the case is being examined before the ECtHR. The Court grants such requests only on an exceptional basis, when the applicants would otherwise face a real risk of serious and irreversible harm.<sup>86</sup>

Upon the receipt of the interim measures, the K Federal Bailiff Service petitioned the M District Court to stay the execution of the expulsion of the Syrians – the application of r 39 by the ECtHR meant that the expulsion was impossible to carry out. The M District Court, however, dismissed this petition and in its judgment referred to the very literal reading of the

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81 Judge AA case, Minutes (handwritten by author) from K Regional Court 27 May 2014.

82 Appendix 1/4 – K Regional Court Judgment (AA, 27 May 2014).

83 Appendix 1/3 – L Regional Court Judgment (13 February 2014).

84 MA case, Minutes (handwritten by author) from K Regional Court 27 May 2014.

85 European Court of Human Rights Press Office 'Factsheet – interim measures' (ECtHR, 2016) <[http://www.echr.coe.int/Documents/FS\\_Interim\\_measures\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf)> accessed 14 April 2016, 1.

86 *ibid.*



Code of Administrative Offences (CAO). Whilst the CAO (art 31.5) provides a mechanism for the suspension of the payment of fines (which are typical penalties for petty administrative offences) it did not contain a mechanism of suspension of the expulsion (deportation).<sup>87</sup> As a result of this direct reading of the law – no suspension provision in the CAO *ergo* suspension is impossible – the three Syrian men formally remained in the deportation proceedings. They have been detained in the detention centre for foreign nationals in town K.<sup>88</sup>

One may ask, for how long? Other than the requirement that the expulsion order be executed within the two-year time-limit (art 31.9 §1 CAO), the CAO again did not contain any provisions governing the length of detention pending expulsion. The courts in Russia came to interpret this provision of the Code as a two-year detention (see *Kim v Russia* App no 44260/13, ECtHR, 17 July 2014). This could be contrasted with the fact that the maximum penalty for deprivation of liberty for an administrative offence under the CAO is thirty days under art 3.9 CAO; and that according to the Russian Constitutional Court detention, with a view to expulsion, should not be punitive in nature and should be accompanied by appropriate safeguards (Ruling no 6-P of 17 February 1998). In practice, the Syrian men remained in administrative detention for 20 months – from 14 April 2014 to 21 December 2015 – the entire time of their proceedings before the Strasbourg Court.

## 6 Conclusion

On 15 October 2015, the ECtHR delivered the judgment in this unprecedented case concerning the deportation of Syrian refugees from Europe. The ECtHR found that the forced return of the applicants to Syria would give rise to a violation of art 2 (right to life) and/or art 3 (prohibition of inhuman and degrading treatment) of the Convention. The Court also found that the prolonged detention of the Syrian men in Russia was unlawful (violation of arts 5 §4 and 5 §1 (f)). With regard to the enforcement of the judgment, following the principle of subsidiarity, the Court usually leaves it to the state party to ‘right the wrong.’<sup>89</sup> In this judgment, however, the Court, having found ‘an urgent need to put an end to the violation of the Convention’ (*at* para 169 of the judgment) directly ordered the respondent State to immediately release the Syrian men. Although Russia appealed the judgment to the Grand Chamber, the M District Court, in a closed session on 11 December 2015 (on the basis of the Russian translation of the ECtHR judgment prepared by UNHCR and Civic Assistance Committee), released the Syrian men from detention.<sup>90</sup> Their applications for temporary asylum and legal status in Russia are pending.

This article has used the *LM and others v Russia* (Syrian nationals) case study to consider broader questions about the actors and the processes of the persisting separation of the categories of ‘work’ with that of ‘asylum’. The answer to the research question – why were the Syrian men’s claim to international protection rejected in Russia on account of their previous undocumented work? – lies in the complex interplay of the historical factors pertaining to the global development of international refugee law, and the legal culture arguments of how the law operates in its social and cultural context in Russia.

87 Appendix 1/6 – M District Court judgment (MA, 30 June 2014.)

88 In Russian: *Spetsial'noye uchrezhdeniye dlya vremennogo soderzhaniya (prebyvaniya) inostrannykh grazhdan i lits bez grazhdanstva – SUVSIG.*

89 Alastair Mowbray ‘Subsidiarity and the European Convention on Human Rights’ (2015) 15 Human Rights Law Review 313.

90 Russian Federation’s appeal to the Grand Chamber has been rejected and the ECtHR judgment became final on 14 March 2016.

The historical comparison with the refugee regime developments in Europe at the end of the Second World War, reveals that the parting of these categories is not specific to Russia only. The legal separation of these empirically porous categories took place in the 1951 Refugee Convention in response to the earlier historical instances of refugee exploitation for labour purposes in the receiving countries (*vide* European Volunteer Worker scheme). It is in this form that the international refugee protection regime stressing humanitarian exceptionalism,<sup>91</sup> and arguably ignoring livelihood needs of asylum claimants, was implemented in Russia, when the State became a party to the 1951 Refugee Convention and its protocols.

But the historical, institutional factors solve only one part of the puzzle. The very strict, narrow and literal (*po zakonu*) interpretation of the law considered as an ideal in Russia, and the corresponding lack of judicial discretion, contributed to ‘locking’ the Syrian men in the legal categories of migrant workers and not recognising them as refugees. The judges’ *po zakonu* interpretation of the immigration and refugee law prioritised the treatment of the Syrians engaged in undocumented work in Russia as ‘ordinary administrative offenders’ (and justified their expulsion to Syria) over recognising their human rights claims. This also explains why only about one tenth of the Syrians who have arrived in Russia fleeing the conflict were granted temporary asylum.<sup>92</sup>

Finally, this article was also crucial for setting the scene for the analysis of the refugee and migration cases from Russia concerning the risks of human rights violations before the European Court of Human Rights. It demonstrates the potential trajectory and development of a case at the domestic level prior to its challenge at the international level in Strasbourg.

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## Appendix 1

### List of Documents – Primary Sources

- 1 M District Court Judgment (MA, 15 April 2014)
- 2 UNHCR Support Letter (LM, 27 May 2014)
- 3 L Regional Court Judgment (13 February 2014)
- 4 K Regional Court Judgment (AA, 27 May 2014)
- 5 M District Court Protocol (15 April 2014)
- 6 M District Court Judgment (M., 30 June 2014)

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91 Karatani (n 12), Long (n 12).

92 Gannushkina (n 10).