CHAPTER FIVE

IN SEARCH OF JUSTICE

Migrants' Experiences of Appeal in the Moscow City Court

Agnieszka Kubal

This chapter moves up a level in the Russian justice system hierarchy and focuses on the district and regional courts of general jurisdiction which pronounce on immigration law cases. It is primarily based on the observations of what are the most typical immigration law cases – offences against Articles 18.8 and 18.10 of the Code of Administrative Offences (CAO). The said offences concern not having a valid residence registration (18.8 CAO Part 3) or working without a work permit (18.10 CAO Part 2). Based on long-term ethnographic observations in courts and on interviews with the different parties to the process, this chapter discerns the most common trends in the adjudication of these immigration cases. This examination serves to open up a broader question: What do immigrant experiences tell us about the Russian justice system? Through the prism of the immigration law cases, this chapter particularly studies the mechanisms of decision-making in Russian courts and investigates the potential new role for Russian judges – as immigration law enforcers.

The main idea behind this chapter is to understand and shed light on immigration cases in Russia beyond the standard arguments of, 'This is how the law does not work in Russia.' It develops an alternative understanding of the everyday processes of immigration law cases, migrants' experiences of the court and the role of judges as immigration law enforcers. This alternative understanding is based on two different and competing logics that unfold in the courtroom: the case file logic and the humanitarian logic. The former refers to a very heavy, if not exclusive, reliance on written submissions in rendering

judgments – what could be termed 'a trial by paper'. Here I refer to the scrupulous attention given by the judge to the written evidence contained in the case file – protocols from the immigration and workplace raids, reports by immigration law enforcement agencies, affidavits signed by migrant defendants – often at the cost of human interaction in the courtroom or examining the witnesses. I argue that case file logic is employed by the judge as a way for him or her to cope with, but also often to circumvent, the messy, empirical reality of immigration rules and regulations that are open to interpretation (cf. Kubal 2016a). Case file logic also allows a judge to sidestep the question of how this paper evidence has been gathered by the Federal Migration Service (FMS) – a state agency responsible for enforcing immigration law and hence a party to the proceedings.[1]

Case file logic by far determines the great majority of immigration law cases. In other words, almost all the decisions rendered by appeal judges in the 18.8 and 18.10 CAO cases before Russian domestic courts were file-driven. In certain exceptional circumstances, however, humanitarian logic could be applied to understand the infrequent deviations from how a majority of immigration law cases are adjudicated. Here the judge does not strictly follow the case file, but focuses more on the attenuating circumstances derived from the international human rights obligations to which Russia is a party (e.g., the European Convention on Human Rights, ECHR). This occurs particularly in situations where the right to family life and family reunification (as derived from Article 8, ECHR), the prohibition of torture and degrading treatment (Article 3 ECHR) or humanitarian considerations (medical treatment) are involved. As one direct consequence of the majority of judgments in immigration cases is deportation (expulsion), the humanitarian logic provides a limited opportunity to soften these arguably unduly harsh sentences.

Taking a step back, and looking analytically at the two logics asymmetrically unfolding in the courtroom, begs the question of whether the *prima facie* 'paper cases' (resulting from the application of

[1] It is important to mention that the Federal Migration Service (FMS) was disbanded by Presidential Decree No. 156 of 5 April 2016. The functions of the FMS have been transferred to the Main Directorate for Migration Affairs of the Russian Federation, Ministry of Internal Affairs (GUVM, MVD). This major institutional change does not significantly affect the argument or the conclusions of this chapter, as MVD officials now perform the functions of the FMS officials.

case file logic) more resemble 'trouble cases', as conceptualised by Austin Sarat *et al.* (1998) in the introductory chapter in their edited volume, *Everyday Practices and Trouble Cases*. Using Blumberg's (1967) definition, they see trouble cases as ostensibly resting on impeccable legal rationale yet providing a lens through which to interrogate more pertinent questions relating to the wider legal system. The trouble cases metaphor helps to observe how the law shapes experiences, interpretations and understandings of social life, and how legal rules are used, re-enacted and remade to colonise everyday life and give it substance, to 'capture it and hold it in its grasp, to attach itself to the solidity of the everyday and, in doing so, to further solidify it' (Sarat *et al.* 1998: 3). As Yngvesson (1993) notes, trouble cases can become 'a vehicle for extended or situational analysis rather than a means for deriving a corpus of legal rules' (Yngvesson 1993: 8). Trouble cases may be the starting point in the study of legal consciousness, language, ideology and legal pluralism, but they also enable reflection upon the instrumental power of law – to serve a particular purpose and interest.

This chapter proceeds in three parts. Firstly, it provides the legal background to the immigration law cases under study and explains the recently observable surge in these cases, particularly in Moscow and St Petersburg, based on empirical statistical data. Secondly, on the basis of a number of case studies from the courtroom, the chapter discerns the two logics according to which the decisions in these cases are rendered. It concludes with a discussion on the potential relationship between the 'paper cases' and the 'trouble cases'.

METHODOLOGY

My investigation of the Russian justice system, leading to the development of an interpretative framework of a case file and a humanitarian logic (which follows in the later part of this chapter), was empirically informed by a qualitative and ethnographic inquiry into the Russian courts and how the legal process intersects with migrants' livelihoods. I spent over five months in Russia in 2014 collecting empirical data in a variety of settings.

The empirical material presented in this chapter primarily comes from a three-month ethnographic study of a sample of low-level courts in Moscow (District Courts, Moscow City Court, and Moscow Oblast Court). I entered the court building as a researcher and observed the cases once I had received permission from the judge hearing the cases.

I usually sat at the back of the room facing the judge, on the benches reserved for the audience. Normally I would be the only person not involved in the proceedings who would be occupying this place, as immigration cases are not particularly spectacular or known to attract a public audience. The immigration cases in the Moscow City Court are organised so that the court's president allocates them to a selected number of judges who, with time, specialise in immigration questions. When I was observing cases in the Moscow City Court there were two or three judges who, throughout the morning or afternoon sessions of the court's working day, would be hearing solely immigration law cases. Each judge would be allocated approximately five to seven of the 18.8 and 18.10 CAO cases per session. He or she usually heard the cases alone; there were no clerks or assistants present in the courtroom. As a result the proceedings had to run swiftly, with about five to ten minutes being spent per case. What was initially peculiar for me to observe was that sometimes, for one time slot, there were two or three cases allocated. The judge explained that this happens as sometimes the parties do not show up in court, so these additional allocations help to reduce the judge's waiting time. However, the other side of the coin was that, when all the parties did actually show up, these overbookings led to delays in cases being heard, and inspired derisive comments about the (dis)order of justice in Russia among the parties waiting in the corridors of the courts of justice.

The courtroom proceedings were organised as follows. An usher normally called the party – consisting of the defendant, with or without legal representative – to enter the room. He showed them to their place in front of the court's bench, facing each other. When required, this place would also be occupied by an interpreter – either ordered by the court or brought in by the defendant. Shortly afterwards, the usher ordered the parties to stand and the judge (dressed in a black robe) entered the courtroom from the adjacent office and sat on a raised platform behind the bench. In this appeal stage, the Federal Migration Service was absent. The FMS was present only in the District Court – the first level of the immigration proceedings – to provide evidence from the investigation (i.e., that the migrant was working without a work permit, or had no residence registration). The defendant or his/her legal representation usually kept silent until requested to speak by the judge. It was evidently the judge who was in charge of the room.

Every case hearing would follow a similar script. First the judge would check all the documents submitted by the FMS, the decision

of the lower court and the appeal, as contained in the case file, including the power of attorney (*doverennost'*) for the defence lawyer. S/he would inspect the passports of the defendant and his or her legal representative to confirm their identity. The judge then opened the proceedings by introducing him or herself and asking the defendant if s/he trusted the judge to hear the case. Upon an affirmative response, the judge quickly read out the procedural rights of the defendant under an administrative process (including the right to an interpreter), which the defendant would be requested to acknowledge in writing. Only after seeing to these formal procedures would the judge move on to the facts of the case, hear the arguments of the defence and finally render a judgment.

These ethnographic observations in the courtroom were informative about the nature of cases when migrants or their representatives mobilised the law – either by challenging the alleged immigration law violations resulting in deportation or expulsion orders, or appealing against the decisions of the Federal Migration Service. Observation of the interactions in the courtroom gave me first-hand information on the type and volume of immigration law cases, on how the migrants were treated in court and about their ability to defend themselves. Through informal conversations with judges and the opposing parties (FMS legal representatives) I learnt how the justice system views migrant litigants and how it responds to their grievances.

In addition to the court observations, I gathered empirical material for this chapter through participatory observation in a number of Russian non-governmental organisations (NGOs), legal aid clinics and migrant organisations that help immigrants in Russia with problems of legal status, residence and access to the labour market. The lawyers and members of these organisations also often represent migrants in courts, especially in the aforementioned 18.8 and 18.10 CAO cases and in disputes with employers or with state immigration agencies like the Federal Migration Service. Over several months, I volunteered in these organisations in a variety of roles. I sometimes accompanied the clients during their reluctant visits to state immigration agencies like the FMS, either to attend an interview or to clarify questions regarding their residence permits. I also shadowed the lawyers when they represented clients in domestic courts and assisted with writing submissions to the European Court of Human Rights in more serious cases.

THE BACKGROUND TO IMMIGRATION LAW CASES IN RUSSIA

The great majority of the immigration cases that take place in Russian courts are, respectively, offences against Articles 18.8 (Part 3) and 18.10 (Part 2) of the Code of Administrative Offences (CAO) – the lack of residence registration (legacy of the Soviet *propiska* system) – and working without a work permit. Until relatively recently (2013), the sanction for both these offences, according to the CAO, was a fine of up to 5,000 roubles (approximately £70), together with a discretionary expulsion order. These terms of sentencing prevail in the majority of jurisdictions (subjects) of the Russian Federation; however, following amendments to the CAO in 2013 (No. 207-FZ of 23.07.2013) in Moscow, Moscow Oblast, St Petersburg and Leningrad Oblast, the expulsion (deportation) now follows automatically and the removal order is included in the 'minimum' sentence.

Making the administration of deportation non-discretionary in the places of greatest concentration of immigrants, like Moscow or St Petersburg, suggests that the judges and courts have been called upon to be important enforcers of Russian immigration law because of their special role in the immigration management and control system.

The court statistics demonstrate that, as a result of this new legislation, the number of immigration administrative cases increased by 100 per cent between 2012 and 2013. The record year thus far was 2014 with 249, 303 Article 18.8 and 18.10 CAO cases. This translates into nearly 250,000 foreigners brought to trial, with potential expulsion orders issued against their names (see Figure 5.1). The sheer volume of the 18.8 and 18.10 CAO cases puts a lot of pressure on judges to resolve these cases in the courts of first instance – the District Courts – quickly and unequivocally.

In these first-level courts, immigrants generally lose the majority of the proceedings, as the evidence presented to the judge is mainly based on reports and protocols from the immigration raids prepared by a party to the proceedings – the office of the Federal Migration Service. This strategy, however, encourages all-too-frequent procedural irregularities – human mistakes in assessing the evidence – and opens up loopholes in the facts of the case. For example, practice has it that migrants caught in the raid by the FMS are often taken straight to the District Courts after a night at a police station. Due to pressure to process these cases 'quickly and effectively', the migrants are often

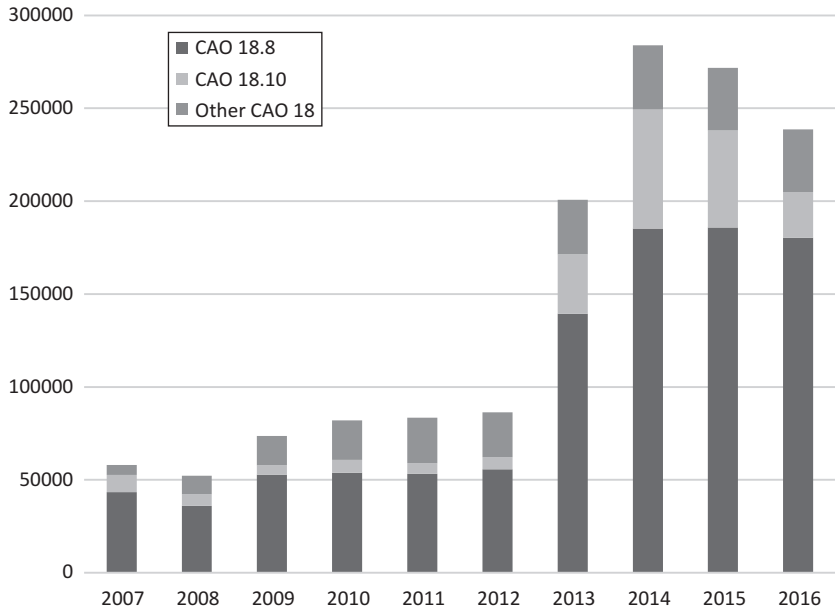

Figure 5.1 Immigration law cases in District Courts in Russia, 2007–2016.
Source: Judicial Department of the Supreme Court of RF Statistics source for courts' activity in RF: www.cdep.ru/index.php?id=79.

asked to sign a document declining their right to legal counsel, which many of them do (some under duress). As many of the younger immigrants from Central Asia do not speak good Russian, and if the court lacks an interpreter *in situ*, one of the accused who seems to speak the language is called upon to interpret for the others. These procedural irregularities have been contained in many court monitoring reports, recently by an NGO, Civic Assistance Committee (Troiskiy 2016).

The project of court monitoring conducted by the Civic Assistance Committee in 2014–15 investigated the different dynamics behind the sentencing in immigration law cases in the domestic courts of the Russian Federation. According to the statistics of the Judicial Department of the Supreme Court of the Russian Federation, the decisions in these administrative cases in 2014 were different in St Petersburg and in Moscow – in the latter, the District Courts reviewed 68,200 cases and imposed a penalty in 65,817 cases (96 per cent), whereas, in the

same year in St Petersburg, 13,898 cases were considered and penalties were imposed in 9,618 cases (69 per cent).

What sort of administrative penalties were issued? In Moscow, 87 per cent of all decisions resulted in expulsion. In St Petersburg, the judges relied on a more diversified array of administrative penalties. In the same period only 46 per cent of decisions resulted in expulsion, 18 per cent of defendants were sent on remand and 13 per cent dismissed.

Immigrants, however, have a right of appeal against the decision of the District Court in a court of the second instance – the Regional Court – such as Moscow City Court or a specific Oblast Court. According to the Code of Administrative Offences (CAO), the appellate level reviews the case in full, in relation to both the facts and the law. In other words, the court conducts a review of the evidence, examines case materials and may look at the lawfulness of the decision of the court of first instance in relation to substantive or procedural law. Here, the ratio between cases won and cases lost is more complex, as the defendants, especially if supported by a legal professional, can demonstrate that their papers were in order or that a particular immigration law enforcement agent or low-level judge incompetently or too hastily assessed the evidence before them.

The following sections present the empirical material that supports and illustrates my thesis on the two logics of decision-making in immigration law cases before the Russian courts of appeal in Moscow: the case file and the humanitarian logic. These two logics – albeit used in an asymmetrical manner – hold the key to a broader understanding of the everyday life of immigration cases in Russia.

CASE FILE LOGIC

Some of the typical cases that I observed – relating to Article 18.8 of the CAO (the lack of residence registration) – resulted from raids by the Federal Migration Service on premises occupied by migrants. The charges put forward by the state agency were that migrants lived in those places and at addresses without valid residence registration. In other words, they lived there in contravention of the immigration law that requires a person to be registered (*propisan*) in the place of actual abode. From an observer's perspective, these types of cases could potentially be very difficult to adjudicate: how does one prove, without long

evidence gathering and cross-examination of witnesses (e.g., neighbours), that the person actually lived in one place, rather than just 'visited' (when the FMS raid happened) or 'stayed a couple of nights'? In order for the appeals court to process the large case load relating to immigration offences of this nature, the judge could not allow the launch of a new, full investigation into the facts of the case. The judge was not expected to call on, question or examine witnesses. To arrive at a decision, the judge instead turned to evidence contained in the case file and to the facts already established by the lower court. The judge, during the course of the case before the Moscow City Court, resorted to strict reliance on existing documentary materials; the result of the appeal would, therefore, rarely go against the evidence already included in the case file as established by the court of lower instance. In other words, the result of the appeal would rarely overturn the decision of the lower court, which would be the basic operation of case file logic.

Nevertheless, a number of questions remain: How to establish that a person actually lived at one address and was not merely visiting? What documents were usually contained in the case file for the judge to rely on as evidence? How was this evidence approached and potentially challenged by the defence?

The Federal Migration Service would supply the lower court with (1) protocols from the immigration raids, each accompanied by (2) a collection of photographs taken on site and (3) elaborate affidavits, signed by migrants, confirming that they actually lived at the raided addresses. This type of evidence was then debated and reviewed by the appeals court.

For instance, in the case of M., an Uzbek national facing charges against Article 18.8 of the CAO, the defence lawyer's strategy in the appeals court was based on the fact that a photograph is not evidence of actual abode. The lawyer went on to explain that the place raided by the FMS was not in a suitable condition to be lived in *usloviya prozhivaniya*. The lawyer presented a believable story: the man was found at this address during the raid by an unlucky accident – he actually went there to discuss work opportunities. The lawyer presented his client as a law-abiding person: M. had a patent (a type of work permit), he was clear of any offences and was not doing anything illegal in visiting a place that happened to be raided by the FMS. The lawyer then moved on to present the personal situation of his client: he had two small children and a wife back in Uzbekistan. If he were to be deported, he could not support

them financially; he needed to stay in Russia and work to provide for his family.

In considering the appeal, the judge immediately turned to the written evidence contained in the case file and asked the defence about the protocol from the raid, where M. was listed as indeed 'living at the address':

> Any comments on the Federal Migration Service's protocol? M. had signed it and confirmed its validity with his signature.

The lawyer replied:

> Yes, your honour, I am familiar with the materials of the case. My client did not fully understand what document he was signing and the questions the FMS asked of him, as he doesn't speak Russian very well. Now, during the appeal trial, he also requires an interpreter and his friend here is able to help.

This argument by the defence regarding the procedures of evidence gathering would have potentially left any judge with a number of questions. In order to process this case within the limited time frame, the judge could not allow herself to cast any doubt on the legality of the pre-trial procedures of evidence collection (already affirmed by the lower court), otherwise it would have meant reopening the case and a potentially long and protracted process of assessing the particular FMS officers' actions and professionalism in the field. The judge, when delivering her judgment, could not allow herself to be diverted by the fact that the arguments of the appeal went against the evidence already included in the case file. She upheld the decision of the lower court, arguing:

> The defendant, M., confirmed with his signature that he understood the FMS protocol from the raid, where he admitted that he indeed lived at the raided address. That leaves me with no choice but to sentence M. to a fine of 5,000 roubles and expulsion (deportation) from the Russian Federation. This is the minimum sentence that I can order in these circumstances.

The case above is a direct example of the application of case file logic. When faced with the messy empirical reality of potentially unenforceable laws of residence registration and multiple possible scenarios about what really happened on the day of the raid at the said address (including the style of evidence gathering by FMS), the written

documents contained in the case file and signed by the accused were the only 'stable and solid' pieces of evidence, according to which the judge seemed able to manage the reality and adjudicate the case. With complex legal rules and their haphazard enforceability by the FMS, the judge had to make a choice according to which s/he could take control over the volume of cases that still awaited decisions.

This observation is consistent with previous research on formalism as an inseparable trait of Russian legal culture. Bryan Garth (1982) defines legal formalism with reference to Weber's ideal type of formal legal rationality: law legitimated by reference to criteria intrinsic to a refined legal system, where 'facts which are neither stipulated nor alleged and proved, and facts which remain undisclosed by the *recognised* methods of proof (. . .) do not exist as far as the judge is concerned' (Weber 1954: 61–64, 227, quoted in Garth 1982: 184, my emphasis). In Russia, the recognised methods of proof are limited to formal paper evidence. The extreme rigidity of literal formalistic preference encourages a mainstream thinking that 'there can be no legitimate requirement for negotiation, flexibility or adjustment when the time comes to implement the law' (Kurkchiyan 2009: 355). What follows is the conclusion that any discretion in the kind of evidence that is admitted – beyond documentary evidence – must be regarded either as a 'violation of the law or, at best, a manipulation' (Kurkchiyan 2009: 355).

In the second type of case, I observed the defence attempting to challenge more fiercely the whole process of evidence gathering by the FMS, even going so far as to allege that the evidence was fabricated. Take this case of another Uzbek migrant worker, B., charged with offences against Article 18.10 of the CAO – working without a permit. He did not come to the trial, but his lawyer was there to represent him. The appeal was based on the fact that there was no substantive proof that the defendant was actually working on the construction site that was raided by the FMS; the defendant did not speak Russian and must have signed the protocol under duress. The defence challenged the evidence as fictitious – the FMS officers made the defendant pose for photographs which merely showed him holding different construction tools and materials, rather than actually reflecting his genuine work on the site:

> Your Honour, look at the evidence. Take this picture, for example. Look at the defendant's face – he is imitating work. There is no other CCTV material except for this one doubtful picture – no proofs of contract, no

> payment and no witnesses. I am saying that he [my client] went there to ask for work, and that he had not actually been working there.

The judge seemed genuinely puzzled by this open and bold statement by the defence. She pondered for a minute on the need to interrogate the actual labour relationship. However, with the grey sphere of employment being part of the legal environment not only for migrants but also for Russian citizens, and with a number of cases still to be adjudicated that same day, the judge decided to again resort to the formal written evidence contained in the case file. On delivering the judgment of upholding the lower court's decision and dismissing the appeal, the judge turned to the lawyer and said:

> Look, in the protocols from the FMS raid, it says black on white that B. was working there. There is his signature. And there is another signature that he understands Russian. He himself, according to the protocol, explained that he was working there based on an oral contract. He has been in Moscow since 2009 – should he not know by now what one goes to a construction site for? In the lower court, B. pleaded guilty to the offence. It would not be prudent to go against this evidence.

These cases have to be understood in their systemic context, defined by regular violations of residence registration requirements by migrants and Russian citizens alike. Similarly, the general labour conditions in large part rely on informal arrangements: people (again – migrants and Russian citizens alike) are used to working without contracts or formal payslips or with contracts that cover only part of their duties. In this type of environment it is difficult for the FMS to obtain conventional evidence like copies of employment contracts or salary slips. The FMS therefore resorts to a different type of evidence – photographs, together with ready-prepared affidavits, which the migrant workers are then made to sign. This constitutes the bulk of the case file, based on which the decision is made. These written pieces of evidence, with all the correct stamps and signatures, give an impression of formality in an otherwise largely informal environment that defines working and living conditions in migrant Moscow (Reeves 2013, 2015). Shortly before concluding these cases and rendering judgments according to case file logic, the judge would often turn to the defendant with a series of cautionary statements such as, 'Look, this is your testimony. You signed it. It is printed out but you signed it. How come you are now not agreeing with it?'

Subsequently, in the majority of 18.8 and 18.10 CAO cases, the affidavits signed by the accused – whether printed or handwritten – served as the primary evidence. The court of appeal did not enquire into how they were composed, whether the defendant was made to sign them under duress or even whether the defendant really understood what was written there. The affidavits were examples of defendants' submissions to FMS allegations in light of the lack of stronger substantive evidence. Formally they were, however, deemed sufficient by the court to deliver the sentence.

The third type of cases I observed were therefore the legally ambiguous or factually problematic cases in which the court decision had been rendered mainly (or solely) on the basis of affidavits signed by the defendants at the pre-trial stage. These affidavits often simply worked as self-incriminating evidence. They were prepared in order to push the case through the courts, even though, in the course of the proceedings, multiple questions about the facts of the case could (and would) emerge.

The importance of written affidavits as primary evidence was stressed by yet another case following allegations of working without a permit. A., a migrant worker from Tajikistan, was found guilty of offences against Article 18.10 of the CAO by the lower court on the basis of a photograph provided by the FMS in which he was sitting in a car behind the steering wheel, and an elaborate affidavit where he confirmed that he had been working as a driver. He attempted to clarify this evidence before the appeals court saying that he *was* sitting in the car but he was waiting for a friend, who he also took with him to testify in court. The judge did not seem to give much credibility to this explanation and again brought everyone's attention to the signed affidavit already contained in the case file:

JUDGE: But I have an affidavit signed by you, saying you were hired to work by company X., you were supposed to drive and deliver a package from this place to this place, it was an oral contract and you were to be paid 4,000 roubles per day. . .

A: [interrupting] But I have never earned that much, anywhere in Moscow. This is not a day's going rate of pay, it is far too high!

The man was not trying to be disrespectful to the judge – he, indeed, interrupted the judge but actually made an important observation about the artificiality of the affidavit-only-based evidence. He was

genuinely astonished by the figure quoted in the testimony. He was attempting to challenge the affidavit for what it was: a piece of paper with all the correct signatures and official stamps to make it look like formal evidence, but which was in no way connected to the reality of the situation. It did not account for what had happened on that particular day, nor was it true in general when it described the context of going wages for migrant workers in Moscow. The judge responded, 'But you have signed it. This is your signature. I have to expel you, as this is the minimum penalty.'

In these ambiguous and borderline cases, the judges all seemed eventually to turn to the case file, as they saw no reason to go against the written evidence that had already been scrutinised and legitimised by a decision of the lower court. When faced with the empirical reality of shadow work performed to an equal degree by migrants and Russian citizens, the appeal judges had to adhere to the formal written evidence, otherwise they ran the risk of opening a Pandora's box and having to actually scrutinise the abstruse and often confusing facts of the case.

The judges therefore followed case file logic as the most effective way of processing the appeals and managing the case load in front of them. The collateral effect – particularly vocal in the corridors of justice immediately after the trial – was that the appeals court was often blamed for the procedural injustices of the pre-trial stage and that all the different (arguably autonomous) elements in the law enforcement hierarchy were conflated into one big, oppressive and unjust institution. As one legal expert told me:

> The structure of the process makes it impossible to win the case. There is no FMS representative present at the appeal stage. Only the defendant's legal representation is present, if at all. The result? Due to this imbalance, the court is often compelled to assume the double function of an arbiter and a prosecutor [for the FMS].

'It is all one and the same . . . we are just simple people, we only work and get punished', concluded one migrant defendant.

This is not to say, however, that case file logic meant that no decisions of the lower court could ever be overturned by the Moscow City Court. Case file logic has also been successfully relied on by the defence in challenging lower court decisions and in casting doubt on the evidence gathered by state law enforcement agencies.

Take the case of P., a migrant worker from Tajikistan, as an example of a successful appeal. One day P. was stopped by the police near the metro entrance in Moscow and accused of possessing false residence registration papers. The police brought charges against him in the lower court on the basis of Article 18.8 of the CAO. The court agreed with the police charges and sentenced P. to a 5,000 rouble fine and expulsion (deportation) from Russia.

However, the police, whilst gathering the evidence, failed to check – or to check diligently enough – the status of P.'s residence registration on the Federal Migration Service database, the main state agency responsible for the enforcement of immigration law. Whilst preparing the appeal, P. sought help from a *pro-bono* immigration lawyer, who advised him to go to the local field office of the FMS and ask for a printout from their database on the exact status of his residence registration. P. waited in a long queue but finally received the information he was after. The FMS officer confirmed that his registration *had* been put onto the database, and that it was valid and legitimate. The FMS officer himself expressed concerns over the lower court's decision in a private chat with P. and provided the Tajik migrant with a printout from their database confirming the validity of his registration with a stamp certifying its legality. Based on this evidence, P.'s lawyer prepared an appeal which she then filed with the Moscow City Court.

In the Moscow City Court the judge, upon checking the formal documents and reading out excerpts from the lower-court decision where the facts of the case had been established, proceeded to familiarise herself with the appeal and the defendant's reasons for contesting the court's decision. She then asked the defendant, 'So the FMS did not have your registration in their database?' He responded, 'They had. I have a copy of it with me here, and you also have a copy attached to my [case] file. It was the police['s mistake]. They did not provide any proof that my registration was invalid.' 'Understood', replied the judge and ruled a verdict in the Tajik migrant's favour, acquitting him and annulling his removal order. The case lasted no longer than seven to ten minutes. The judge struggled to balance the overwhelming evidence added to the case file by the defence lawyer (documents from the FMS certifying P.'s rightful residence) with the at first sight formal but not actually accurate documents provided by the police on the basis of which the lower court had rendered its judgment. The judge, following case file logic, could make no other decision.

Formal, written (paper) evidence is therefore highly scrutinised and relied on by both parties to a case. 'Everything is in the case file' (*vse v materialakh dela*), one lawyer told me as a way to explain this logic. An FMS lawyer representative rather jovially recalled the following anecdote to reiterate the importance of written case materials:

FMS OFFICER: It is not really about the trial. The case mostly depends on what is in the case file. The quality and type of documents; if they are strong – no worries, the case will be won.

AK: Who gives strong documents?

FMS OFFICER: It is as if Manchester United played a local football team from Kaluga. . . The FMS being Man United, to be exact. We hardly ever give decisions that are not confirmed in documents that are not based on legal ones. Surely, sometimes, there are mistakes. We put that someone is a male rather than a female, but these are printing, trivial mistakes. If you issue a hundred decisions a day, you can make such a mistake. In the great majority of cases, our decisions are legal (zakonnyye); the lawyers cannot disprove these during the trial.

The idea behind the presentation of this empirical material was not to justify why the judge nearly always agrees with the lower-court judgment or fails to agree with the appeal. Case file logic, as an analytical instrument, is helpful in understanding how and on the basis of what evidence the judge arrives at the given ruling and decides the outcome of the case. Given the unequal power relations between state law-enforcement agencies and migrant workers, in the majority of cases it is the evidence provided by the former that plays the most crucial role in deciding their outcome. This is not to say, however, that migrants have absolutely no chance of obtaining formal evidence to counter that provided by state agencies. The routes for obtaining such evidence are, of course, limited and necessitate considerably more effort, given the administrative backlogs and delays in, and understaffing of, the FMS offices. But in principle, they are available.

HUMANITARIAN LOGIC

Case file logic is particularly difficult to understand and reconcile with the principles of proportionality, justice and equity if one approaches immigration law cases from a human rights' perspective. The arguably harsh penalty – deportation – meant disrupted livelihoods, severed

family ties and on many occasions, a contribution to a growing undocumented migrant population in Moscow. Not in all cases, however, was the court impervious to human rights arguments.

Humanitarian logic was primarily extended to asylum seekers in Russia who could not be expelled to their home countries for committing offences against immigration law, as that would mean returning them to places of grave conflict where their lives could be at risk. So why did the asylum seekers even find themselves in court on charges of administrative offences? Due to backlogs and administrative delays in the processing of their asylum applications (Burtina *et al.* 2015), many asylum seekers would try to work to support themselves and their families. Until relatively recently, the question of access to the labour market for asylum applicants in Russia was not explicitly regulated. In practice, the authorities had actually been known, on many occasions, to 'turn a blind eye' to asylum seekers engaged in paid labour who could prove they were subject to a status determination procedure (either waiting for a decision or appealing a refusal of refugee status (Kubal 2016b: 275). However, following legislative change No. 127-FZ of 5 May 2014, their access to the labour market has been explicitly forbidden in the Federal Law 'On the Legal Status of Foreign Citizens in the Russian Federation'. As a result, the Federal Migration Service could take them to District Courts as casual immigration law offenders and charge them with working without a permit or patent (Article 18.10 CAO).

In such cases, appeal judges would usually uphold the decision of the lower court but exclude the deportation from the administrative penalty, leaving only the fine to be paid. In the written decisions, the judges argued that the expulsion would have contravened Russian humanitarian obligations with regard to Articles 2 and 3 (the right to life and the prohibition of inhumane and degrading treatment) of the European Convention of Human Rights and Decision No. 4 of the Constitutional Court of the Russian Federation of 14 February 2014, which urged judges to apply the principles of justice and humanity in issuing penalties for administrative offences. This operation of humanitarian logic was particularly observable in the courts of appeal located in the two main Russian cities of Moscow and St Petersburg,[2] in cases

[2] This, however, could not be said for the courts operating in the different regions of Russia; see Kubal (2016b) and the analysis of the *LM and Others* v. *Russia* case, ECtHR 2017, demonstrating that the Russian legal environment is geographically not only vast but also patchy and inconsistent.

against Syrian asylum seekers who had arrived in Russia after fleeing the Syrian civil war (2011–) and against citizens of Eastern Ukraine who were escaping armed conflict (2014–).

There was, however, a significant imbalance in how these two logics – case file and humanitarian – operated and were relied on by judges in the decision-making process. As already indicated in the introduction to this chapter, not only was humanitarian logic used in exceptional and very limited circumstances, but it was also quite often deemed subservient to case file logic, demonstrating that paper ruled supreme in Russian courts even when humanitarian arguments were involved.

As an illustration, we can take the case of K., who was apprehended by the FMS during a raid on an apartment and charged with offences against Article 18.8 of the CAO for not being formally registered at the said address. His appeal was based on the fact that he had never actually lived at that address but went there to seek advice from his family on the medical condition of his son and discuss his treatment in Russian hospitals:

> I came to this address as my family members live there; I came to consult with them about the medical treatment of my son, as I don't know this town very well. My son has heart failure; he is often short of breath.

The judge initially did not give much consideration to these arguments, instead raising a formal point that K.'s migration card[3] stated that he came to Russia to seek employment and not medical treatment. However, K. continued his complaint:

> As I was taken by the police and spent a night at the police station I missed my son's medical appointment. When I finally arrived in the hospital with him, the doctor said that I had missed my appointment but gave me some medication and told me to monitor my son's condition. But I will treat my son here as I do not believe the doctors in my country.

The judge seemed compelled as the man weighed in with an important humanitarian argument: the urgent medical treatment of a minor. She decided to adjourn K.'s appeal hearing in order to enable him to collect more formal evidence from the hospital both confirming that he had

[3] The migration card is a form of landing card filled in by all foreign citizens arriving in Russia. It states the reason for their travel.

missed his appointment and providing more information about his son's condition. At the same time, the judge was firm and official:

> I am adjourning the hearing for four days, to give you the chance to bring more evidence [spravki] that your son is being treated here. But I am warning you: if you do not come or bring any written evidence, the case will be heard without you.

Whilst I was not able to wait until the conclusion of this case, this particular hearing illustrates that the judges, in more complex cases involving humanitarian arguments (beyond those of asylum seekers from the regions currently affected by armed conflict or civil war), would give due consideration to such arguments only in tandem with the strict application of case file logic. Ultimately, we do not know whether the man's expulsion or deportation order was cancelled or whether he was allowed to stay in Russia to continue his son's medical treatment, but the very fact of adjourning the hearing revealed that the judge was willing to do just that, once given the opportunity to examine more formal, written evidence.

The type of case where I was able to observe the application of humanitarian logic the most clearly, pertained to the presence of Ukrainian citizens from the areas affected by armed conflict in the Lugansk and Donetsk oblasts. My fieldwork in Moscow coincided with the arrival of Eastern Ukrainian asylum seekers following the aftermath of the Euromaidan revolution in Ukraine (2013). Whilst the barriers to access to refugee or temporary asylum status for Eastern Ukrainians were on a par with the experiences of asylum seekers from other countries in Russia (Burtina *et al.* 2015), the situation of Eastern Ukrainians was more complex. It resulted from an existing multifaceted relationship between Eastern Ukraine and Russia embodied in long-established migration patterns and family ties with Russian citizens (Malynovska 2004, 2007). Many Ukrainians, when faced with the bureaucratic barriers to the obtention of asylum, would therefore seek different ways of regularising their stay in Russia. Many would avail themselves of the routes accessible to regular migrant workers from the CIS republics,[4] and apply for work permits or special out-of-quota

[4] The Commonwealth of Independent States (CIS) formed when the former Soviet Union (now called Russia) dissolved in 1991. At its conception it consisted of ten former Soviet Republics: Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

work permits – patents (Davé 2014; Kubal 2016c). Some would slip through the procedural net and often – through no fault of their own – become undocumented or have a precarious semi-legal status (Kubal 2016c; Reeves 2013). At the same time, the Federal Migration Service – during raids on apartments or workplaces – would apply the immigration law in an indiscriminate fashion towards all foreign workers, regardless of their nationality. As a result many Eastern Ukrainians – *de facto* refugees but *de iure* migrant workers – found themselves before the Russian courts, facing charges of contravening Russian immigration law.

For example, two Ukrainian women were charged with offences against Article 18.10 of the CAO – working without a permit. They both arrived from areas of Eastern Ukraine affected by armed conflict. They went to the appeals court without legal representation, spoke for themselves and were very respectful to the judge, who heard their cases individually though both of them were present in the courtroom. In their appeal, they asked for the expulsion order to be withdrawn from the administrative penalty. The first woman explained that she and her sister had come to the shop that had been inspected by FMS officers to ask for work. As she and her sister looked very similar, the shop manager put ID badges on them, so as to be able to distinguish them whilst he was interviewing them. This is when the FMS raid took place. The FMS officers wrongly understood the two sisters to be working in the shop, due to their ID badges. The two women also supported their appeal with the fact that both were married to Russian citizens and included their marriage certificates (*svidetel'stvo o brake*) in the appeal documentation.

The judge accepted their appeal and overturned the decision of the lower court by excluding the expulsion order from the penalty. In announcing the sentence, the judge relied directly on Article 8 of the European Convention of Human Rights – the right to private and family life. The women had close family ties with Russian citizens which they had formally proven by appending their marriage certificates to the case file. Their removal to Eastern Ukraine would have been disproportionate to the offence with which they had been charged and would have been in contravention of international human rights obligations.

This case seemed a clear example of the application of humanitarian logic. In a private conversation with me after the trial, however, the judge added: 'You see, the shop manager put ID badges on them

because they looked so alike. The FMS mistook them for workers. Things like that happen, it's easy for a misunderstanding to occur.'

I was positively surprised by the judge's comment, which seemed reasonable and based on common sense. It departed from her somewhat formalistic style of rendering decisions which I had become used to whilst observing her previous cases and style of reasoning. The judge's comment after the case made me realise that she was, indeed, aware that 'there was a mess out there' when it came to immigration law enforcement on the ground and evidence gathering by FMS officers. It was an implicit recognition that FMS officers can and do get things wrong, even if the documents they submit to the lower courts (photographs, protocols and affidavits confirming their version of events) would appear to make the cases clear and simple to adjudicate.

In the case of the two Ukrainian women, the removal of deportation from their sentence and the reversal of the lower court's judgment were based on international legal obligations to which Russia was a party, as both women had close family ties to Russian citizens. This is ultimately what the written judgment overturning the decision of the lower court had said. However, the judge's personal comment about the case in a private conversation afterwards made me realise that my initial impression of judges as being locked in some sort of ivory tower and being unaware of the empirical reality of everyday life law enforcement was actually misguided. The judges knew perfectly well what was going on – after all, when they removed their robes and left the court, they were also part of this broader legal environment. By rendering extremely formalistic decisions and making the whole process dependant on formal documents, they were adopting a strategy for coping with the messy empirical reality and for managing their case load.

PAPER CASES OR TROUBLE CASES?

This staggering asymmetry between the application of quite simple case file logic and the limited recourse to humanitarian logic in deciding immigration law cases in Russia presents itself as potentially problematic due to the consequences involved – non-discretionary expulsion (in Moscow and St Petersburg and their respective oblasts) with a five-year entry ban (*zapret na v'ezd*). These harsh repercussions result in the disruption of livelihoods for many individual migrants, who do not have at their disposal even limited human rights' grounds

of appeal but who have, nevertheless, established lives and families in Russia. Often, due to no fault of their own, they simply fall through the cracks of the complex and ever-changing immigration laws. When migrants do not comply with the judgment and do not physically leave the country after the judgment enters legal force, their subsequent presence in Russia becomes illegal. They are prevented from renewing their immigration documents – either residence or work permits – and live the precarious lives of irregular migrants. The human face of these immigration cases therefore involves acute personal loss and disrupted livelihoods that are barely visible from under the stack of case file evidence.

Due to the harsh and detrimental consequences for human lives of an unsuccessful appeal, my chapter actually queries whether *prima facie* 'paper cases' actually bare a close resemblance to 'trouble cases', in the way that they have been conceptualised by Sarat *et al.* (1998). Following Blumberg (1967: 16) these authors define trouble cases within the contextual realities of social structure, where: 'a particular decision may rest upon a legally impeccable rationale; at the same time, it may be rendered nugatory or self-defeating by contingencies imposed by aspects of social reality of which the lawmakers are themselves unaware'. This conceptualisation of trouble cases goes beyond dispute resolution. These cases are conceived around a broad range of law and society scholarship concerned with normative violations, deviance, conflict and challenges to accepted practices and routines (Sarat *et al.* 1998): 4). The everyday life, intuitive interpretations of trouble cases focus on their potential non-conclusiveness, on difficulties with interpretation of the facts or on the specific challenges that they pose to the law or established legal practices.

The metaphor of 'trouble cases' attaches itself to the crucial question of how the case file is actually put together in the pre-trial stage in Russia. Whilst, at a distant appeal level, the decision might indeed rest upon a 'legally impeccable rationale', it exacerbates the power of the paper in creating an alternative reality. This approach confounds and confuses the different procedural irregularities that may and often do take place at the pre-trial stage. The irregularities range from the FMS creatively interpreting reality in the statement of facts contained in their protocols to making immigrants sign self-incriminating affidavits under duress. This takes place whilst law enforcement officers try to discern – from the messy legal environment of shadow working and the general disregard for residence registration – convincing evidence

enabling them to secure a strong case against the defendants and eventually an administrative conviction.[5]

A comparative look at the role of documentary evidence under different jurisdictions demonstrates that the case files are treated by some courts with more caution and criticism. A study by Max Travers on British immigration courts stressed adjudicators' own evaluation of the evidential value of reports produced by different immigration law enforcement agents – in other words, the Home Office (Travers 1999: 124). Whilst the immigration courts studied by Travers dealt with appeals following the rejection of asylum claims – therefore different in substance from the immigration law cases I observed in Russia – I draw on them because the repercussions under both jurisdictions were of a grave nature, meaning deportations, disrupted livelihoods and often the broken lives of the defendants.

Adjudicators interviewed by Travers critically approached the documentary evidence presented before them by the Home Office; some went as far as to express the view that the 'Home Office often presented a rosy view of political problems in particular countries' and stressed that it was necessary to be discriminating when reading reports, including those submitted by the defendant (Travers 1999: 124). The critical evaluation of the documentary evidence was considered by the adjudicators as an intellectual exercise – a metaphor I struggled to find in the reasoning of Russian judges.

In the cases that I observed in Russia, the attitude to paper evidence went beyond the general idea that the written word reflects the reality in a more-or-less accurate manner. The relationship between the protocols produced by the FMS and the reality was not a matter of opinion for Russian courts. The accuracy of the reports was not questioned by the judges, giving the impression that they were an exact representation of the facts and reality. In fact, however, these reports or protocols actively constructed 'reality', an alternative reality that put a seemingly orderly structure on the complexity of everyday life. In the most extreme cases, they falsified the reality. The courts, in not critically scrutinising the paper evidence, became inherently part of a wider societal phenomenon: the lack of a system of checks and balances on 'paper production' in Russia.

[5] For more discussion on the various specificities of the pre-trial stage in Russia, see the chapters by Solomon and by McCarthy in this volume.

CONCLUSION

Immigration law cases in Russia are experienced in everyday life by migrants, lawyers and immigration judges alike, through a number of core characteristics. These include the very high volume of such cases, the high sentencing rate, the quick processing times and the strict adherence to the formal legality of how the cases are adjudicated. The decisions in these cases are made on the basis of formal documents, protocols from immigration raids, printouts from FMS databases and affidavits signed by the accused. However, what really matters is the quality of the written, formal evidence produced by the Federal Migration Service or other law enforcement bodies.

The main conclusion from this chapter is therefore that the majority of these cases are adjudicated according to case file logic. The role of the judge in these immigration administrative cases does not seem to be to establish the facts of the case by examining both parties to the trial. The facts appear to be already agreed and contained in the written documents – the case file. The trial itself is not too important, colloquially speaking – it is hardly likely that the trial will be a 'game changer'. Unless the defendant submits a new written piece of formal evidence that disproves the documentary evidence presented by the FMS, the way in which the case can develop during the trial is somewhat limited.

At the appellate level, the 'life' of these cases gets more complex. From my observations and my interviews with immigration lawyers I determined that there are certain, though limited, grounds for appeal that are admitted by the judge, and these are primarily derived from the human rights obligations to which Russia is a party. Aside from Article 8 of the ECHR in certain exceptional circumstances, Articles 2 and 3 have been successfully called upon to reverse the expulsion of asylum seekers, particularly those from Syria and Eastern Ukraine, who were found working without documents in Russia or who lived in Moscow without valid residence registration.

From a legal point of view, the immigration law cases are therefore very straightforward. The law is simple, there is enough evidence in the case file and therefore the decision can easily be made on the basis of the written material. The volume of these CAO cases is quite high; hence there was enough practice for patterns of judgments to be established.

From the wider, societal point of view, however, the matter appears much more complex. It remains an open question whether these 'paper

cases', adjudicated according to case file logic, are actually more like 'trouble cases'; this could inspire more research into the role, production and evaluation of documentary evidence in the Russian justice system.

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