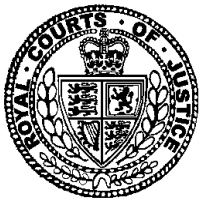

Neutral Citation Number: [2019] EWCA Civ 1756

Case No: C5/2018/1657

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(Immigration and Asylum Chamber)
Upper Tribunal Judge Grubb and
Upper Tribunal Judge Blum
PA/09094/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2019

Before:

LORD JUSTICE PATTEN
LADY JUSTICE ASPLIN
and
SIR RUPERT JACKSON

- -

Between:

PK (Ukraine)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -
- -

Mr Anthony Metzer QC and Ms Julian Norman (instructed by **Sterling Lawyers Ltd**) for the **Appellant**
Mr Zane Malik (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 10th October 2019

- -

Approved Judgment

Sir Rupert Jackson:

1. This judgment is in three parts, namely, Part 1 - Introduction, Part 2 – The Facts and Part 3 – The Appeal to the Court of Appeal.

Part 1. Introduction

2. This is an appeal by a Ukrainian national against the decision of the Upper Tribunal that he is not entitled to asylum as a refugee under the Refugee Convention.

3. The principal issue in this appeal is whether the Upper Tribunal properly analysed a) the background evidence concerning military service in Ukraine and b) the consequences which the appellant would face as a draft evader upon return to Ukraine.

4. In this judgment, I shall use the abbreviation "IHL" for International Humanitarian Law.

5. After these introductory remarks I must now turn to the facts.

Part 2. The Facts

6. The appellant is a citizen of Ukraine, born on 30 January 1981, now aged 38. He and his wife left Ukraine in December 2013 and came to the United Kingdom. They entered this country clandestinely, but were discovered and arrested in December 2014.

7. The appellant claimed asylum on a number of grounds, only one of which is now relevant. The appellant's wife also claimed asylum, but her claim is parasitic upon that of her husband. So I need say no more about the wife's separate position.

8. The relevant ground of the appellant's appeal was this: he had received two call-up notices to serve in the Ukraine Army. The first call-up notice was dated 5 October 2016. The second call-up notice was dated 24 February 2017. The appellant said that he had not complied with either call-up notice. He was therefore a draft evader and likely to suffer ill-treatment.

9. The Secretary of State rejected the appellant's asylum claim on all grounds. She characterised the purported call-up notices as fraudulent documents. See paragraph 5 of the Home Office letter dated 5 September 2017.

10. The appellant appealed to the First Tier Tribunal. He contended, *inter alia*, that he should not be required to serve in an army that was committing breaches of IHL. The hearing took place on 19 October 2017 at which the appellant gave oral evidence. The First Tier Tribunal delivered its decision on 25 October 2017. First Tier Tribunal Judge Frankish treated the country guidance given in *VB v SSHD* [2017] UKUT 79 as authoritative. He accepted that the call-up notices were genuine. He then formulated the two questions which he had to answer as follows: first, could the military service to which the appellant is called involve acts with which he may be associated which are contrary to basic rules of human conduct as defined by international law? Secondly, would the appellant go to prison, and, if so, are conditions such as to involve Article 3 of the European Convention on Human Rights?

11. In relation to question one, Judge Frankish said this at paragraph 27:

> "As to the first of the foregoing questions, Ms Norman had, as here, referred to Krotov-v- SSHD (2004) EWCA Civ 69 along with background material, during the course of submissions leading to the UT determination. Krotov was presented as authority for the fact that an affirmative answer to Question One, above, would amount to persecutory conduct, likewise the New Zealand case of AC (Ukraine) NZIPT 80074952. However, the UT determination refers to the expert report opining that the appellant having to engage in such acts as "unlikely, but not impossible". The UT concluded that the requisite threshold had not been reached to answer Question One in the affirmative. That argument is renewed before me on the basis that matters have become worse, as evidenced by background material."

12. Judge Frankish then referred to reports by Amnesty and the US State Department. He said that the appellant's case on question one was not made out.

13. In relation to question two, Judge Frankish found that the appellant was likely to be dealt with by way of a fine for draft evasion. Therefore, he said, there would be no breach of ECHR Article 3.

14. Having made those findings, First Tier Tribunal Judge Frankish dismissed the appellant's appeal.

15. The appellant appealed to the Upper Tribunal on two grounds: first, the First Tier Tribunal erred in treating *VB v SSHD* [2017] UKUT 79 as conclusive on the risk of the appellant being associated with breaches of IHL. The judge failed to make any findings on the further, more recent, country evidence submitted. Secondly, the judge failed to consider whether the appellant would be at risk of pre-trial detention on return to Ukraine.

16. The Upper Tribunal, comprising Upper Tribunal Judge Grubb and Upper Tribunal Judge Blum, heard the appeal on 14 March 2018 and delivered its decision on 2 May 2018. It dealt with the grounds of appeal in reverse order. In relation to Ground 1, the Tribunal held that the First Tier Tribunal Judge did fall into the error which was alleged. At paragraph 32 the Upper Tribunal said this:

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

17. The Upper Tribunal did not then go on to analyse the country evidence upon which the appellant relied. Instead, the Upper Tribunal analysed the authorities about the consequences of draft evasion generally and in Ukraine. At paragraph 58 the Upper Tribunal said:

> "Based on the detailed assessment carried out in VB, and applying that guidance to this appellant's particular circumstances, we find it is not reasonably likely that he will face any criminal or administrative proceedings for avoiding conscription. There is therefore no real risk that he will be prosecuted or that a penalty will be imposed on the appellant for his draft evasion. None of the authorities relied on by Ms Norman can be properly understood as entitling a draft-evader or deserter to refugee status if there is no real risk that they will be subject to prosecution, punishment or penalty."

18. At paragraph 59 the Upper Tribunal added:

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

19. Turning to the second ground of appeal, the Upper Tribunal held, at paragraph 24:

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

20. Accordingly, the Upper Tribunal dismissed the appeal. The appellant was aggrieved by the decision of The Upper Tribunal. Accordingly, he has appealed to the Court of Appeal.

Part 3. The Appeal to the Court of Appeal

21. By an Appellant's Notice filed on 16 July 2018 the appellant appealed to the Court of Appeal on two grounds. The first ground of appeal was that the Upper Tribunal made an error of law in considering whether punishment for draft evasion must reach a minimum severity in addition to the draft being to a military committing acts contrary to international standards. The second ground of appeal was that the Upper Tribunal's approach was wrong in law because it was inconsistent with the Secretary of State's published guidance. That second ground of appeal relied upon the country policy and information notes about Ukraine published by the Home Office in April 2017 and April 2018.

22. On 11 January 2019 Sir Stephen Silber granted permission to appeal.

23. The hearing of the appeal took place on 10 October 2019. Mr Anthony Metzer QC, leading Ms Julian Norman, appeared for the appellant. Mr Zane Malik appeared for the respondent. I am grateful to all counsel for their assistance in this case.

24. Mr Metzer concentrated his attention on Ground 1, somewhat reformulated. He accepted that if he failed on Ground 1 he could not succeed on Ground 2.

25. I therefore turn to Ground 1. Mr Metzer's first complaint is that despite what the Upper Tribunal said at paragraph 32, the Upper Tribunal made precisely the same error as the First Tier Tribunal Judge. It did not satisfactorily engage with the background documents before the Tribunal relating to breaches of IHL.

26. Mr Metzer, in his skeleton argument, set out the background documents on which the appellant sought to rely. Among these were an Amnesty International report entitled "Breaking Bodies", a report by the US State Department and a long report by the Office of the United Nations High Commission of Human Rights, dated 2017.

27. I accept that submission. The Upper Tribunal did fail satisfactorily to engage with the background documents which, as the Upper Tribunal said, the First Tier Tribunal Judge had failed properly to consider.

28. Mr Metzer next criticises the Upper Tribunal's finding at paragraph 58. He points out that this does not sit comfortably with paragraph 24 where the Tribunal had said that the appellant was likely to come to the attention of the authorities upon return to Ukraine and was likely to be questioned about his failure to answer the call-up papers. More importantly, said Mr Metzer, paragraph 58 of the Upper Tribunal decision contradicts the First Tier Tribunal Judge's finding of fact that upon return, the appellant would probably be prosecuted and fined.

29. Mr Malik has valiantly striven to uphold the Upper Tribunal's finding at paragraph 58. He says that the finding of fact made by the Upper Tribunal was one with which the Court of Appeal should not interfere. That finding, moreover, is restated later in the Upper Tribunal's decision at paragraph 61. Indeed it is. But there is no explanation by the Upper Tribunal as to how or why it is reversing the First Tier Tribunal's finding of fact on this point. Furthermore, the First Tier Tribunal, unlike the Upper Tribunal, heard oral evidence. In my view, this question at the very least requires to be looked at again.

30. I now come to the Upper Tribunal's alternative analysis set out at paragraph 59. This conclusion is expressed in tentative terms. Paragraph 59, which I have already quoted, begins:

> "Even if we are wrong in the above assessment, we doubt whether a fine, probation or a suspended sentence would be sufficiently serious to amount to persecution."

31. The question whether a draft evader facing a non-custodial punishment for failing to serve in an army which regularly commits acts contrary to IHL is entitled to refugee status, is one of overarching importance. We spent much of the hearing on 10

October looking at authorities which touch on that question, or which address it *obiter*. See, in particular: *Sepet v Secretary of State for the Home Department* [2003] UKHL 15 at paragraph 8; *Krotov v Secretary of State for the Home Department* [2004] EWCA Civ 69; *Davidov v Secretary of State for the Home Department* [2005] 1 SC 540 at paragraph 17; *BE (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 540 at paragraph 40.

32. This question has not received proper analysis. The Upper Tribunal's conclusion is expressed in tentative terms, because the Upper Tribunal regarded that question as academic in the present case. Moreover, that question has not yet been addressed on the basis of a proper analysis of i) the post-*VB* country evidence concerning military service in Ukraine or ii) what is likely to happen to the appellant in the event of return to Ukraine.

33. Mr Malik submitted that if we are against him on the first ground of appeal, the Court of Appeal should not decide the issues itself, but rather should remit the case to the Upper Tribunal. I accept that submission. Indeed, Mr Metzer did not submit otherwise. In those circumstances, I consider that this appeal should be allowed and the case remitted to the Upper Tribunal.

Lady Justice Asplin:

34. I agree.

Lord Justice Patten:

35. I also agree.