Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/05772/2015**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
on 8th March, 26th April, 6th June and 21st July 2016	**On 27th July 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MYKHAILO CHORNYI

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: on 8 March and 26 April, Mr D Byrne; on 6 June, Mr A Devlin; and on 21 July Mr J Bryce; Advocates, instructed by Berlow Rahman, Solicitors

For the Respondent: on 8 March, Mrs S Saddiq; on 26 April and 21 July, Mr M Matthews; and on 6 June Mrs M O'Brien; Senior Presenting Officers

DETERMINATION AND REASONS

1. The appellant is a citizen of Ukraine, born on 7th July 1966. He sought asylum in the UK on or around 17th September 2014. He has not sought an anonymity direction.

2. The appellant has not disputed the summary of his claim set out in the respondent's refusal letter dated 13th March 2015, which is along the following lines. He undertook a year's military service in 1984 (while the Ukraine was still part of the Soviet Union) which ended for health reasons. He continued to attend weekly military training while at university. In 1990, on completion of his studies, he became a reserve military officer. Over the period 1995 to 1998 he became a Jehovah's Witness. He was required to report to the military in May and in August 2014. In spite of explaining his religious beliefs, which include conscientious objection to military service, he was told that he might be called up for service when necessary. While on a visit to the UK he learned of Russia sending troops into Ukraine. He thought that increased the risk of his being mobilised. He sought asylum.

3. The respondent refused the claim, giving the following reasons. At first sight, the respondent was unable to decide whether or not the appellant is a Jehovah's Witness (paragraphs 17 to 20). His claim that he might be mobilised was contradictory and implausible (paragraphs 21 to 28). Delay in stating the claim was adverse to credibility in terms of section 8 of the 2004 Act (paragraphs 29 to 31). Returning to the question whether the appellant is a Jehovah's Witness, the respondent therefore declined to give him the benefit of the doubt (paragraphs 32 to 36). It was not accepted that he was in any genuine subjective fear (paragraph 38), or that as a reservist he would be at risk of mobilisation, given that he has no combat experience. Coupled with his age and previous release from military service, he was found not be at risk if returned to Ukraine (paragraph 39). While it was accepted that the claim was related to the appellant's religion and imputed political opinion (paragraph 42) he had shown no well-founded fear of persecution.

4. The appellant appealed to the First-tier Tribunal. His form of appeal notice states that his grounds are to be found in a "paper apart". There does not appear to be anything which might properly be described as a statement of grounds, but there is a commentary by the appellant running to 46 paragraphs over eight pages, partly a statement, partly citation of background evidence, and partly disagreement with the refusal decision. At the end the appellant says that in Ukrainian law if he refuses mobilisation he might be imprisoned for a term of two to five years, as has happened to another Jehovah's Witness.

5. First-tier Tribunal Judge Clough heard the appeal on 6th July 2015. The appellant was represented by Ms J Berlow-Rahman, Solicitor. The respondent was not represented. The appellant and two witnesses gave evidence.

6. In her decision dated 29th October 2015 the judge found that the appellant is a Jehovah's Witness and now a member of a congregation in Glasgow; that he was conscripted into the then Russian Army in 1984 to 1985; that he left after a year for health reasons; and that after attending university he was in 1990 given the rank of senior lieutenant.

7. At paragraph 13 the judge narrated the appellant's evidence that he attended in response to a summons in May and August 2014, and that despite explaining a health problem he was told he was being enlisted in a defence battalion. He was to stay at home and to attend when needed. She notes the appellant's evidence that he had not since been called up. At paragraph 15, she goes on:

> Having accepted that the appellant is a Jehovah's Witness I also accept that his faith will prevent him serving in the army and that he would be faced with imprisonment if he refused. However, the fact that the appellant has not been called up strongly suggests that the situation in the Ukraine … has calmed down and I consider … there is no real risk that the appellant will be called to serve in the armed forces [or] that he would be considered a deserter because of his stay in the UK. The appellant's asylum claim therefore falls …

8. The appellant's grounds of appeal to the Upper Tribunal complain firstly of a lack of reasoning for the conclusion that the appellant will not be called to serve or be considered a deserter. The grounds go on to refer to background evidence regarding punishment of deserters, and state that there is still a real risk that the appellant might be called upon to serve.

9. On 30th November 2015 permission to appeal to the Upper Tribunal was granted, on the view that the judge arguably gave insufficient reasons for concluding that there was no real risk of being required to serve, and so failed to address the consequences of the appellant's departure from the Ukraine and refusal to serve on account of his religion.

10. In a rule 24 response dated 23rd December 2015 the respondent submits that the judge gave "a perfectly good reason for concluding the appellant did not face a real risk … the judge notes that the appellant has not been called up … as the evidence suggested that the military situation had calmed down". The implicit point was that the fear "remains speculative rather than a real and present risk".

11. Mr Byrne submitted that the reasoning in paragraph 15 of the determination was inadequate, and that the determination should be set aside. The judge's findings that the appellant is a Jehovah's Witness should be retained. There should be a further hearing, restricted to the question whether the appellant was likely to be called upon to serve in the military, if returned to the Ukraine. He said that there was evidence, which had been before the First-tier Tribunal, that punishment for refusal to serve or for desertion went further than imprisonment and included provision that deserters might be shot.

12. Mrs Saddiq said that it was unfortunate that the respondent had not been represented in the First-tier Tribunal and that there appeared to have been no reference to the respondent's Country of Origin Information Report. The report dealt with the legal provisions which exist in the Ukraine for recognising conscientious objection to military service, including objection on religious grounds. Mrs Saddiq conceded, however, that paragraph 15 of the determination is inadequate. The only reason the judge gives for finding that the military situation in the Ukraine has calmed down is that the appellant has not been called up. That is not a logical basis for the

conclusion reached, which should have turned on background evidence about what was going on in Ukraine. The judge failed to deal with the background evidence, some of which was referred to in the refusal decision and some of which was filed by the appellant. The judge had not given good reasons for finding that the appellant would not be called up. Even if he were liable to be called up, that would not be the end of the case. The factual and legal consequences of the call up would have to be explored. There appeared to be possible exemptions for the appellant not only on conscientious objection but on health grounds.

13. Mr Byrne in response pointed to the evidence which had been before the judge, from the appellant and from two witnesses, entirely uncontradicted, to justify her finding that he is a Jehovah's Witness.

14. My decision on error of law and directions for further hearing were issued along the lines of paragraphs 15 – 28 which follow (reproduced not word for word, but in substance).

15. The grounds of appeal to the UT identify an error, as conceded by the respondent. The finding that the appellant was not likely to be called up was not underpinned by a sensible reason. The absence of a further call-up did not logically show that any military need had gone away and that no future call-up was likely. Any finding of a change in the military situation should have been based on the background evidence.

16. If the appellant was not likely to be called up (for whatever reason) that was the end of his case. The respondent in her decision dated 13 March 2015 found that he was not likely to be called up, and did not choose to analyse the case in the alternative.

17. The appellant had so far assumed that if he were likely to be called up, then he had to show no more, or very little more, to qualify for asylum. That was a mistaken assumption.

18. It was far from sufficient for the appellant to prove that he is liable to serve in the military, and that there is punishment for deserters. There is no general right to international protection against such possibilities, which are provided for in the law of most if not virtually all the countries of the world. States are entitled to require compulsory military service of their nationals, and to prosecute and punish non-compliance.

19. Parties were referred, as a starting point, to the general discussions in *Macdonald's Immigration Law and Practice* 9th ed., vol 1, paragraphs 12.77 to 12.79 and in *Symes and Jorro*, Asylum Law and Practice, 2nd ed., paragraphs 3.35 to 3.43. The appellant had not yet attempted to show with any clarity why his claim might fall within a protection category, as explained in these outlines.

20. It was plain, even from brief reference to the background materials on the file, that the law of Ukraine recognises conscientious objection to military service on religious grounds. If the appellant fell into the category of

persons who might avail themselves of such legal protection, that would be the end of his claim.

21. The appellant as a young man engaged health grounds so as not to complete his year of military service. He says that he mentioned inability on health grounds when summonsed in 2014. He had not specified his past or current health grounds are. The background materials, on a brief perusal, include reference to exemptions on health grounds. If the appellant were exempt on such grounds, that was another answer which would be the end of the case.

22. On one view, the error by the First-tier Tribunal was not one which merited the decision being set aside, because the appellant had his chance, and failed to set out a case whereby he might be entitled to asylum. However, I thought that the preferable view was that he had said (just) enough to merit a fully considered further decision.

23. I saw no reason why the setting aside of the decision should extend to the judge's findings at paragraph 12. Although the refusal decision declined to give the appellant the benefit of the doubt on whether he is a Jehovah's Witness, he made an ample case at the hearing. The respondent did not suggest in her rule 24 response to the grant of permission that she sought to rely upon any grounds on which she had been unsuccessful. There was no good reason why these matters should be put back into dispute.

24. The evidence about whether the appellant is a Jehovah's Witness did not need not be revisited. Nor did his military history up to the point in 1990 when he was given a reserve rank appear to be subject to any serious dispute.

25. There might be a need to reach further conclusions on whether the appellant was, as he says, put on notice of liability to possible further service in a territorial defence battalion.

26. Since the decision needed to be remade not entirely afresh, but on a restricted basis, it was suitable for retention in the Upper Tribunal. The further answer seemed likely to depend less on disputes of primary fact than on background evidence and legal analysis.

27. If the appellant could find a viable argument based on conscientious objection he should be able to outline it (in writing, in advance of the next hearing) by reference to the background evidence and legal principles. If he failed to do so, he might expect his claim to fail.

28. I also indicated that it would also be useful if the SSHD were to outline in writing, in advance of the next hearing, any argument, similarly referenced, that the appellant, taking his claim "at highest", did not qualify for international protection on the basis of conscientious objection on religious grounds.

29. The case next came before me on 26 April 2016. Mr Byrne and Mr Matthews concurred in requesting a further adjournment in order to

research and bring materials before the tribunal on (a) whether the civil war in Ukraine involves participants on the government side in acts contrary to the rules of human conduct and (b) whether country guidance, stating that prison conditions in Ukraine breach article 3 of the ECHR, remains valid.

30. No further formal directions were given after that hearing, but it was anticipated that parties would exchange any further written submissions and be ready to proceed without delay.

31. Mr Devlin was instructed not long before the hearing on 6 June 2016. By reference to cases noted below, he added a new argument. He said that while the House of Lords held in *Sepet and Bulbul v SSHD* that there was as yet no authority for the contention that the imposition of any sanctions for conscientious objection might infringe article 9 of the ECHR, and thereby amount to persecution, such authority does now exist.

32. The written submission provided by the respondent for the hearing on 6 June 2016 was based on *Sepet and Bulbul*, as expressed through a current Asylum Policy Instruction, to the effect that "punishment for draft evasion or desertion on conscientious grounds does not, without more, amount to persecution".

33. Mrs O'Brien asked for time to consult and to make a further submission on this new point. Mr Devlin readily agreed that the request was reasonable. Directions were made for further written submissions.

34. Final written submissions from both sides were before me by 21 July. I reserved my further decision.

35. The core positions finally taken by the parties are in outline as follows.

36. For the appellant:

- Risk of persecution arising from religious belief is to be determined by whether the appellant might be compelled to undertake actions contrary to the rules of human conduct *or* conditions of punishment for draft evasion are so harsh as to amount to persecution.

- The conflict in the Ukraine meets the standard for establishing an armed conflict contrary to the rules of human conduct, based on a New Zealand authority, *AB* (Ukraine) [2015] NZIPT 800742, and on UNHCR reports.

- Any active military service in Ukraine gives rise to a real risk of participating in executions, torture and human rights abuses.

- A UNHCR report of 2015 states that although the law in Ukraine provides for conscientious objection, the beliefs of those "summoned in the course of waves of emergency mobilization…are reportedly often ignored by conscription offices".

- The appellant "has made out his case that he is a conscientious objector to a conflict which perpetrates acts contrary to the law of human conduct, the respondent has failed to rebut the case with cogent evidence that he would in fact be eligible for an exemption that would obviate that risk".

- An application for alternative service might have to be submitted in advance of call up, and so might not now be available to the appellant.

- The House of Lords held in *Sepet and Bulbul v SSHD* [2003] Imm AR 428 at paragraph 17 that there was as yet no authority for the contention that the imposition of sanctions might infringe article 9 of the ECHR [and thereby amount to persecution], but such authority does now exist: *Bayatyan v Armenia* ECtHR 23459/03, 7 July 2011, *Shepherd v Federal Republic of Germany*, CJEU [2015] QB 799, and *AN and another v Refugee Appeals Tribunal* [2014] IEHC 388.

- Despite the existence of an alternative to compulsory military service, there was a real risk on the evidence that a conscientious objector who refused to perform military service would be subjected to imprisonment of one to five years. The existence of such a penalty was contrary to the right of conscientious objection and was designed to cancel or nullify the appellant's right to freedom of conscience. Removal to Ukraine would breach his rights under Article 1A of the refugee Convention, Article 9 of the Qualification Directive and Articles 3 and 9 of the ECHR.

37. For the respondent:

- Having left the army in 1985 for health reasons and having had nothing to do with the army since, save for being given the rank of second lieutenant in 1990 after completing university, it is unlikely that the appellant is a "reserve officer" for purposes of mobilisation.

- The background evidence is that the appellant is not liable to conscription or mobilisation on grounds both of age and of exemption after graduation.

- Any wave of mobilisation which might have applied to the appellant has come to an end.

- Alternatives on conscientious objection grounds are available. There is some evidence of those entitled being refused, but that is challengeable in the courts.

- Even if the appellant has evaded call-up, so have tens of thousands of others. There is no real likelihood of action being taken, or that he would be prosecuted, rather than dealt with administratively.

- *AB* does not establish violations of the laws of war in Ukraine on a widespread and systematic basis or that the appellant would be required to be an active participant. A decision by a single judge in New Zealand was of no authority.

- The background evidence did not reach the standard of showing that the appellant might be compelled to take part in an armed conflict contrary to the rules of human conduct.

- *PS* (prison conditions; military service) Ukraine CG [2006] UKAIT 00016 found no question of persons in the military being required to perform acts contrary to international law, and that conditions of military service did not give rise to a real risk of treatment contrary to Article 3.

- The maximum punishment for draft evasion was not disproportionately harsh.

- Most cases were dealt with by fines or suspended sentences.

- *PS* had found that prison conditions were likely to breach Article 3. However, if the appellant did show a real risk of imprisonment, the evidence of improved conditions was cogent enough to depart from that guidance.

- The cases cited for the appellant do not show that there is yet international consensus on a right to refuse military service which might bind the UK to an approach different from that taken in *Sepet and Bulbul*.

The decision remade.

38. The only point which it is necessary to consider as a matter of credibility is whether the appellant was subject to notice of liability to possible further service in a territorial defence battalion (paragraph 25 above).

39. The appellant produced in an inventory of productions in the FtT (at page 31) a translation of an undated notice of his liability to the draft. Paragraph 13 of the FtT decision refers.

40. The respondent argued that the appellant was not likely even to have been put on notice of possible service. However, the appellant was found to be a generally credible witness and I see no reason not to accept, as did the FtT, at least a realistic possibility that the notice is genuine.

41. Paragraph 14 of the FtT decision records that the appellant said that he had not been called up as at the date of the hearing, which was 6 July 2015. He has not sought to introduce any further evidence on the point. He insisted somewhat vaguely that the notice might be followed by mobilization. The respondent was more specific.

42. The respondent's Country Information and Guidance, Ukraine: Military Service, was updated in November 2015. Paragraphs 4.2.2 – 4.2.7 cite evidence of various waves of mobilisation. By way of (a) age and (b) rank having conferred by graduation (rather than by service), the appellant is exempt.

43. The appellant does not fit into any of the categories likely to be called up unless as a last resort. There is no indication that stage has been reached or is likely to be reached.

44. The FCO advised the respondent on 17 November 2015 that obligatory mobilization had been stopped, and only conscripts obliged to serve for 1.5 years were currently mobilized.

45. The evidence is that although the appellant may have been put upon notice, the Ukraine's military mobilization is unlikely to touch him further.

46. The law in Ukraine respects religious freedom, and provides for conscientious objection to military service on religious grounds. The

appellant's case was not that there no such provisions, but that they might not be respected in practice.

47. At his interview (Q/A75-76) the appellant said that he was aware from the internet of a fellow believer being prosecuted for refusal to join the army. This appears to be the case of which details have since emerged, noted below.

48. The US State Dept International Religious Freedom Report for Ukraine for 2014 says at pages 10 – 11:

> In August the military called up three Jehovah's Witnesses for military service following military mobilisation. Jehovah's Witnesses reported that V Shalaiko … [and two other named persons] were denied the right to conscientious objection and accused of evading the military call up, a claim punishable by five years in prison. Jehovah's Witnesses stated that each had reported to the military office on the day specified and had filed applications for alternative civilian service. On November 14, the Novomoskvosk district court acquitted Shalaiko. At the end of the year pre-trial investigations continued in the other two cases.

49. The following is excerpted from a report by the Jehovah's Witnesses, Jw.org, "Watch Tower Bible and Tract Society of Pennsylvania":

> Ukraine Courts Recognise Right To Conscientious Objection During Military Mobilisation.
>
> Civil unrest and war in eastern regions of Ukraine moved the President to decree a partial military mobilisation in the summer of 2014. V Shalaiko, a former soldier in the Ukrainian army and now one of Jehovah's Witnesses, answered his summons issued under the decree. Appearing before the local military commissariat, Mr Shalaiko stated that he was a conscientious objector and expressed his willingness to perform alternative non-military service.
>
> The military office rejected Mr Shalaiko's claim to the right of conscientious objection and pressed criminal charges… This was the first indictment in Ukraine for objection to mobilisation based on religious convictions…
>
> On November 13, 2014 the Novomoskovsk district court … heard the criminal charge… The court determined that Mr Shalaiko "has the right to substitution of military duty, including military service during mobilisation, for alternative service, because it belongs to a religious organisation whose religious teachings do not allow the use of arms."
>
> Additionally, the district court confirmed that Mr Shalaiko's right to alternative service is "guaranteed by the constitution of Ukraine". It further acknowledged that the European Convention on Human Rights and the judgements of the European Court of Human Rights protect religious freedom. The judge acquitted Mr Shalaiko… The prosecutor filed an appeal.
>
> In his appeal, the prosecutor argued that the constitutional duty to defend the country overrides the right to religious freedom and to alternative non-military service. He reasoned that the relevant decisions of the ECHR did not apply during periods of mobilisation.
>
> On February 26, 2015, the Appeal Court of the D region determined that "objection to mobilisation for conscientious reasons is not avoidance of mobilisation without valid reasons"… The court took note of Mr Shalaiko's religious convictions and

> referred to ECHR judgement stating that "such religious convictions attract the guarantees of article 9… to freedom of thought, conscience, and religion".
>
> The court concluded that Ukraine's law on the right to alternative service applies even during times of mobilisation.
>
> …
>
> Nonetheless the prosecutor has appealed, providing the High Specialised Court of Ukraine for civil and criminal cases with the same arguments examined and dismissed by the appeal court. On April 30, 2015, legal counsel for Mr Shalaiko filed objections to the prosecutor's appeal.
>
> Mr Shalaiko is one of thousands of Ukrainian Witnesses called up for military service. They respectfully respond to the summons and request alternative service that does not conflict with their deeply held religious beliefs. These requests are generally respected, and few Witnesses have faced prosecution. It is now in the hands of Ukraine's High Court to provide assurance that Ukraine will honour the witnesses request for recognition as conscientious objectors.

50. The evidence above comes from a concerned source, with good reason to know what is going on, and with no reason to minimise any problems faced by Jehovah's Witnesses in Ukraine. I consider it to be a source anxious to tell the truth.

51. I am satisfied on all the evidence that Ukraine upholds the right to conscientious objection in general, and the rights of Jehovah's Witnesses in particular. There have been many claims to exemption, mainly granted without much demur, and a tiny number of prosecutions, or attempted prosecutions. Full details are known of only one instance of prosecution. It was unsuccessful at the district and regional levels of jurisdiction. Whether it went any further than an attempted further appeal is unknown, but it is clear that legal rights may be vindicated through the courts. There are in the background evidence some references to Jehovah's Witnesses as conscientious objectors meeting with disapproval and harassment, but no details of any instances of persecution.

52. The appellant's case does not succeed because (a) his mobilisation is not likely and (b) if he were to be mobilised, his conscientious objection to military service on religious grounds will be respected.

53. Either of those reasons would be enough, so I may state my conclusions on the other issues raised, interesting though they were, quite briefly.

54. On the nature of the civil conflict, there is evidence of abuses, but they have been much worse on the rebel side. In my opinion, the judge in *AB* reached the view too readily, and on a flimsy basis, that violations of human rights were sufficiently widespread as to be occurring across most, if not all, Ukrainian military units (paragraphs 78 and 79). The appellant failed to show that service on the government side might involve him in such systematic violation of the rules of war as to entitle him to protection.

55. I do not think that the law outside the UK has reached a stage where a tribunal might decline to follow *Sepet and Bulbul*.

56. The appellant did not show that he might be imprisoned, but if the case had come to turn on prison conditions, the respondent's detailed evidence would have justified a finding that those conditions did not by themselves entitle the appellant to protection under Article 3.

57. The decision of the FtT has been set aside, but the fresh decision is to the same effect: the appeal is **dismissed**.

Upper Tribunal Judge Macleman
25 July 2016.