Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07099/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
on 9th February 2016	**on 24th February 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

[O S]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Duheric, Solicitor
For the Respondent: Mr M Matthews, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Ukraine, born on 21st October 1981. He has not asked for an anonymity order. He came to the UK in 2002 on a working visa which expired that year, but did not return. On 10th October 2014 he sought asylum, based on the risk that as a reservist he might be mobilised into the Ukrainian Army.

2. The respondent refused the appellant's claim by a decision dated 10th April 2015, for these reasons. The appellant completed his national service with the prospect of being called upon to serve in conflict, and has not asserted that he refused to do so due to religious or any other beliefs. He is not a conscientious objector to military

service. It is noted that in Ukraine conscientious objection applies only to specific religious groups. It is also noted that the appellant has not asserted that the conflict is such that he might be required to act in breach of basic rules of human conduct generally recognised by the international community, or that disapproval of such military methods is his reason for refusing to serve (paragraph 10). He is a draft evader, liable to prosecution not persecution.

3. The decision letter goes on to analyse the appellant's account of call up papers being received at his home, and finds it vague and self-contradictory. The claim that he has been called upon again to report for military service is rejected. There has been a high incidence of draft evasion in Ukraine, and the evidence does not suggest that sentences of imprisonment are being imposed (paragraph 43). Country guidance and background evidence regarding prison conditions are analysed, and the conclusion reached that even if the appellant were to be imprisoned current prison conditions are not of such severity to attract protection (paragraph 48).

4. The appellant's claim is also rejected on various other grounds which are not now in dispute.

5. First-tier Tribunal Judge Fox dismissed the appellant's appeal by determination dated 21st September 2015. At paragraph 23 the judge found that the appellant had not been called up as claimed, and was not liable to prosecution. He also found that mobilisation into the Ukrainian Army would not be an act of persecution (paragraph 26).

6. In his grounds of appeal to the Upper Tribunal the appellant contends:

- that he did claim asylum immediately upon learning from his parents that call up documents had been received, which was the earliest opportunity, "as soon as he realised that he might be drawn into the conflict and that his life would be in danger", and that the judge's findings are perverse;
- that the documentary evidence regarding his call up was in the respondent's bundle and was "not disputed";
- that evidence of the extent of the call up relied upon by the respondent and the judge was out of date, the appellant having produced evidence of a presidential decree on 16th January 2015 extending mobilisation to reserve servicemen aged 25 to 60, leading to further perverse findings; and
- that the judge confused service in peace time and during civil war, so that the appellant's lack of objection during his service in 2002 was irrelevant to his objection later.
- An unreferenced case citation is taken from the textbook by Symes and Jorro, *Asylum Law and Practice*:
- "… simply forcing someone to take part in a war where the basic rules were not adhered to, or to punish him if he did not, would be sufficient to constitute persecution."

- The judge's interpretation of conscientious objection is therefore "far too simplistic" and his conclusions are perverse, irrational and unfair.

7. On 19th October 2015 Designated Judge Manuell refused permission, on the view that the judge was entitled to find that the appellant was positively dishonest in claiming to be a conscientious objector and to have been called up, which was the end of the appellant's case, and that no arguable error of law had been shown.

8. The appellant renewed his application, on the same grounds, to the Upper Tribunal. UT Judge Bruce granted permission on 12th November 2015, on the view that it was arguable that the FTT failed to take into account material showing that the class of persons being enlisted had considerably widened since the asylum claim was rejected by the respondent and that "in apparently equating conscientious objection with pacifism the FTT failed to address the appellant's principal argument that the Ukrainian Army was engaging in activity contrary to the basic rules of human conduct."

9. (The second part of the UT's grant of permission unfortunately falls into an error, brought about by misleading citation of case law in the grounds. The submission in the Upper Tribunal strayed at first into the same misapprehension, as emerges further below. It is *not* sufficient for the appellant to show that he may be required to take part in a war where fatalities are being suffered on both sides. It was conceded on his behalf in the UT that there had been no evidence of the Ukrainian Army failing to adhere to the basic rules of war, or of requiring servicemen to engage in atrocities. There was no such "principal argument" for the FtT to address.)

10. Under cover of a letter of 6th December 2015 the appellant sought the consideration of additional evidence under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. This comprises a Ukrainian court judgment, which is attached with a certified copy translation. The judgment (or purported judgment) says that on 23rd June 2015, following a public hearing which took place on 23rd May 2015, the appellant, "a native and resident of Khlibychyn … responsible for the maintenance of two young children, no previous convictions, a Ukrainian national" was convicted of evasion of call up and sentenced to two years' imprisonment.

11. At page 2 the judgment takes account of the mitigating circumstances that this is a first conviction and that the appellant "has positive references from his community and is responsible for the maintenance of two young children and an elderly mother".

12. Mr Duheric firstly applied to rely upon the new evidence. I enquired whether it was intended to show error of law, or to be relevant only in the event of remaking the decision. Mr Duheric said that he accepted that the evidence could not show that the judge made any error in law, because it was not before the FtT.

13. I noted that the proceedings date from well prior to the FtT hearing, which took place on 13th July 2015, and asked if it could be explained why the information had not been before the FtT.

14. Mr Duheric said that his understanding was that the appellant first became aware of the sentence when the document was sent to him from Ukraine by his parents. Mr Duheric had no evidence of when that took place. There was no statement from the appellant about what he had known of the Ukrainian proceedings, and when.

15. I observed that it seemed from the document that there had been information provided by or on behalf of the appellant to the Ukrainian Court, which was rather inconsistent with the present assertion that he had no contemporaneous knowledge of the proceedings.

16. Mr Duheric acknowledged that no information was offered as to how the mitigating circumstances came to be before the Ukrainian Court.

17. Mr Duheric next referred me to the materials to show that call up was being extended to reservists, which might include the appellant. He said that was the essence of the case for the appellant, and that the First-tier Tribunal's findings were all based on him not being liable to mobilisation, when such was not the up-to-date information.

18. I observed that in principle it appeared to be insufficient for the appellant merely to show that he was liable to be mobilised. Some consideration would have to be given to his reasons for refusing to serve, or alternatively to the nature of the conflict.

19. Mr Duheric referred to the appellant's witness statement, where he says "conflict does not resolve anything", and said that implied that he is a pacifist. As to what the law requires to show conscientious objection, Mr Duheric referred me to the citation above. I enquired whether there was any evidence of the Ukrainian Government not adhering to the basic rules. Mr Duheric suggested that the Ukrainian conflict is a "dirty war", but he accepted that there was no evidence to that effect in the bundle or to show that the Ukrainian Government has been guilty of such conduct. He submitted that Ukrainian law is defective in international terms in that it extends conscientious objection only to fixed religious groups. There was evidence that various human rights groups have pointed out that Ukrainian law in this respect is in need of amendment. He also said that country guidance states that any prison sentence in the Ukraine may result in Article 3 ill-treatment and require protection to be granted.

20. Mr Duheric submitted finally that there was a legal error of overlooking the appellant's liability to be called up; that the determination should be set aside; and that a decision should be substituted, allowing the appeal, based on the Article 3 risk arising from prison conditions.

21. Mrs O'Brien submitted thus. The appellant had accepted that the new documentary evidence could not be relied upon to show error of law by the First-tier Tribunal. In any event there was no basis for admitting it, because there was nothing to show why it had not been before the First-tier Tribunal. No error was shown in the judge's finding that the appellant had not in fact been called up. Even if he had achieved a favourable finding on that point, his statements fell well short of showing him to be a

genuine conscientious objector. The judge was correct also to find against him on that respect. The appellant seemed to think that it was sufficient simply to say that he did not wish to engage in a lethal conflict, but that does not by itself attract any protection. There was no information before the Tribunal by which it could conceivably have been held that the Ukrainian Army was not observing the basic rules of warfare. There was no case for protection based simply on the nature of the conflict. The judge had correctly taken a section 8 credibility point against the appellant, who had a very poor immigration history and who made his asylum claim only after overstaying for a lengthy period, after unsuccessfully seeking to remain based on human rights, and long after he appeared to have known that he might be called up. All of this undermined the genuineness of any claimed principled objection. The background evidence, even as updated, did not clearly classify who might be liable to recall as a reserved serviceman. The determination was entirely sound, based on the evidence which was before the judge. The new evidence presented its own difficulties for the appellant, but if he sought to rely upon it he could do so only by way of a fresh claim. The submission on Article 3 and prison conditions was based on country guidance, but there was a substantial analysis in the refusal letter to show that the guidance was outdated. There was no reason to find that such an Article 3 risk would apply, even if he had succeeded in showing that he was likely to be imprisoned.

22. Mr Duheric in response accepted that the question of who is classified as a reservist was not specifically dealt with at the hearing in the FtT, but he said that it was most likely to apply to all those who had served previously.

23. I reserved my determination.

24. The information about reservists liable to call-up is not crystal clear, but I accept for present purposes that call-up is likely to apply to all who have completed military service and who fall within the age group. That would include the appellant.

25. That is as far as any findings favourable to his case may properly go. The judge was entitled to find that he had not in fact been called up, for the various reasons he gave, in which no legal error has been shown.

26. Even if the appellant had persuaded the judge that he received call up documents, his case faced a formidable series of further difficulties.

27. There was not even a scanty basis for accepting that the appellant has any *principled* objection to serving in the military.

28. There was nothing to show that the nature of the conflict was of a nature such as by itself to make out his case.

29. Nothing was produced to refute the respondent's careful analysis, based on background evidence, that even if the appellant had shown that he was liable to imprisonment that by itself would not entitle him to protection.

30. The appellant's fundamental misconception was that if he proved he had been called up, and said that he did not wish to serve, that without more entitled him to protection.

31. The appellant did not prove his call-up, but if he had, his case would still have failed to clear the further series of hurdles mentioned above.

32. The decision of the FtT shall stand.

Upper Tribunal Judge Macleman

16 February 2016