Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11257/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th June 2017	**On 30th June 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

D V
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Norman, Counsel, instructed by Sterling & Law Associates LLP
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Ukrainian national born on [ ] 1990. He entered the UK on 27th January 2013 as a student in a Tier 4 category, had his leave to remain extended as a student and then made an in time application outside the immigration rules. He noted that his partner was awaiting a decision on her own application and that he had received call-up papers to

the Ukrainian Army. He initially appealed the Secretary of State's refusal of his application on human rights grounds. He subsequently instructed Sterling & Law Associates, who obtained permission to amend his grounds of appeal to rely on asylum as well as human rights grounds on the basis of Article 3.

2. The claim is made on the basis that his mobilisation which would leave him with a choice of non-compliance which carries a real risk of imprisonment and following the country guidance of **PS (prison conditions:military service)Ukraine 2006 UKAIT 00016** would leave him at risk of prison condition in breach of Article 3.

3. The appeal was heard before First-tier Tribunal Judge Fletcher-Hill, who dismissed his appeal in a determination promulgated on 2nd November 2016, finding, inter alia, i) that he was eligible for mobilisation to the Ukrainian Army and ii) that refusal to comply could lead to his imprisonment and iii) that compliance created a possible risk that he would be compelled to engage in acts contrary to international standards.

4. The judge, however, found that prison conditions no longer breached Article 3 and that the possible risk of engaging in acts contrary to international standards did not discharge the standard of proof.

5. On dismissing that appeal the appellant made an application for permission to appeal:

Ground (i)

An erroneous approach to Article 3 in the context of prison conditions.

6. It was submitted that the judge should have followed **PS (prison conditions:military service) Ukraine**. The Country of Origin Information Report on prison conditions January 2016 was not expert evidence but a statement of the Secretary of State's policy and the judge in relying on that COI relied on selected pieces of evidence from the European Committee for the Prevention of Torture Report 2015 (CPT) which favoured the respondent's approach and was not a balanced document.

7. The CPT report which formed the basis of the COI did not support the conclusion that the prison conditions in Ukraine had improved.

Ground (ii)

There was an erroneous approach to the standard of proof in the context of Refugee Convention.

8. There was no requirement that persecution must be inevitable, merely that it might indeed take place. The evidence of the expert was that the Ukrainian military had indeed been implicated in acts that violated international humanitarian law. It was submitted that there was

nevertheless a risk for there to be a real risk that the appellant might be involved in such acts.

Ground (iii)

Failure to consider relevant evidence in relation to Article 8. The judge merely dismissed this on the basis that it was the same factual matrix as Article 3.

9. At the hearing before me Ms Norman and Mr Tufan appeared to agree that the conclusions in relation to the Article 3 risk were unsustainable in the light of **VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC)**. The appellant was eligible for conscription and mobilisation.

10. Ms Norman submitted that the judge dealt briefly with the Ukrainian military and the judge rather overstated the test in relation to the appeal on asylum grounds. The correct test was that as set out in **Sepet and Bulbul v the Secretary of State for the Home Department [2001] EWCA Civ 681** and acts with which the appellant "may be associated".

11. In conclusion Mr Tufan conceded that there was an error of law and both representatives considered that there needed to be fresh findings in the light of **VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC)**. This decision was, I note, promulgated on 2nd November 2016, having been heard at Hatton Cross on 19th July 2016. **VB** confirmed at head note 3 that there is a real risk that the conditions of detention and imprisonment in Ukraine would subject a person returned to be detained or imprisoned to a breach of Article 3 but was promulgated after the determination was promulgated. Nonetheless a judge needs strong reasons to depart from country guidance and the judge does not appear to have taken this approach in the decision and **VB** confirms that the prison condition difficulties persist.

12. I note that the judge did refer at paragraph 7.15 of the decision to it being 'possible but unlikely that the appellant would be ordered to partake in committing warcrimes'. I accept that the judge did not appear to have considered, as Ms Norman pointed out, the concept of whether he may be 'associated with' gross human rights abuses. As I pointed out to Ms Norman, that test has been somewhat diluted by **Krotov v the Secretary of State [2004] EWCA Civ** 69 which refers to 'participation' but nonetheless is a matter which should have been considered and the reference to 'possible but unlikely' does indicate an erroneous approach to the standard of proof.

13. As such the Article 8 findings remain at large.

14. Both representatives concurred that this matter should be returned to the First-tier Tribunal in the light of the errors as disclosed. I therefore

remit the matter back to the First-tier Tribunal for fresh findings without preserving any of the findings.

15. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 30th June 2017

Helen Rimington

Upper Tribunal Judge Rimington