Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08415/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 October 2017	**On 18 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

[V S]
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms P Solanski, of counsel
For the Respondent: Mr D Mills, a Home Office presenting officer

DECISION AND REASONS

Details of the Appellant

1. The appellant is a citizen of Ukraine, who was born on 1st of February 1970.

The Appellant's Immigration and the history of the appeal proceedings

2. The appellant entered the UK 1999 on the back of a lorry. It appears that he was initially detained but subsequently released. In August 2011 was convicted of fraud and sentenced to six months imprisonment. On 6 November 2012 he applied for leave to remain, but this was refused on 3 June 2013. On 7 August 2015 he was detained whilst reporting. On 13 August 2015 a temporary admission request was received but refused on 17 August 2015. On 21 August 2015 he applied for EEA Residence Permit. This was also refused, on 3 September 2015.

3. Appellant applied for asylum on 20 September 2015. On 19 October 2015 the asylum claim was refused by the respondent, as was his application for humanitarian protection and / or for protection under the ECHR articles 2 and 3. A judicial review application was made in relation to that decision which resulted in reconsideration on 27th of July 2016. However, the respondent still refused the application. This provided the appellant with a right of appeal to the First-tier Tribunal (FTT).

4. The appellant appealed against that refusal to the FTT on 10 August 2016.

5. Following a hearing at Hatton Cross on 21 March 2017 Immigration Judge Coutts (the Immigration Judge) decided to dismiss the appeal to the First-tier Tribunal (FTT).

6. The appellant appealed that adverse decision on 8 August 2017.

7. An 11 September 2017 Upper Tribunal Judge Nadine Finch decided that the grounds were arguable in that she considered the Immigration Judge had failed to consider adequately the country information and the expert evidence called on behalf of the appellant from a Dr Rano Tureva-Hehne.

8. Finally, the respondent provided a response to the appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the Procedure Rules) indicting that the Upper Tribunal ought to uphold the decision of the FTT. The respondent pointed out that the appellant's account had not been found to be credible by the tribunal and full reasons had been given for its decision. In any event, the appellant would not be at risk on return to the Ukraine.

The Upper Tribunal hearing

9. The appellant's representative, Ms Solanki of counsel, submitted that the assessment of credibility by the FTT was fundamentally flawed and that the Immigration Judge had failed to deal adequately with the risk on return.

10. She drew my attention to paragraphs 52-54 of the decision which state that the Immigration Judge did not accept the evidence that the "Ukrainian authorities" had been in contact with the appellant's former wife in the Ukraine as there was "no need for them to do so". The Immigration Judge had found it not to be plausible to think that the authorities would "waste their resources" in looking for the appellant. Moreover, he went on to find

that there was no evidence to establish that the appellant had gone through court proceedings to divorce his wife in 2012. The Ukrainian authorities not have a record of such proceedings as the appellant was living in the UK rather than his former matrimonial home in Ukraine. In fact, divorce proceedings were conducted by him in the U K.

11. The appellant claims to be at risk of being drafted into the military in Ukraine.

12. The Immigration Judge had mistakenly concluded that the appellant's account was incredible because he considered those responsible for enforcing the draft would not have gone searching for the appellant via his former wife. Ms Solanki considered there was no/no adequate evidence as to the basis for this assertion. Her understanding was that no questions were asked at the hearing as to the requirements for a divorce in Ukraine. The suggestion, by the appellant, had been that the authorities had visited his home on two occasions. I was referred to C 15 in the respondent's bundle, was a copy of the appellant's military service card. It states that the appellant had done military service previously. Ms Solanki also said that it was known that the authorities were particularly keen to draft into the military those with driving experience; the appellant was one such person. The appellant had been deemed fit for military service in the past and the maximum age at which persons were accepted for that had been gradually extended upwards. This was supported by documentary evidence. Ms Solanki argued that her client's documents were authentic and therefore could be relied on.

13. I was referred to the country guidance in relation to increases in the draft age in 2014 and 2015. Ms Solanki said that the objection to military service by her client related to his Russian orthodox religion and his unwillingness to take part in, what Ms Solanki called, "atrocities". Ms Solanki was unimpressed by the Immigration Judge's analysis as to whether the appellant's wife was approached in 2015 as had been claimed. At this point I was referred to paragraph 8.1.4 of the Country Information Report (at D88 of the appellant's bundle filed in advance of the Upper Tribunal hearing). That report suggests that:

> "… War weary Ukraine is struggling to recruit soldiers the fight pro—Russian separatists in the East, there are reports of ill-equipped troops and ill-treatment of families of missing soldiers".

14. The appellant may be identified for mobilisation again therefore.

15. The appellant's representative went on to comment that it was by no means implausible for the appellant's former wife to be approached many years after the appellant's departure for the UK considering he was a potential draft evader and that there was a great need for his skills (driving). I was then referred to paragraph 56 of the decision which states that the appellant's situation is distinguished from that in the case of **OK** (PA/01943/20) and to the country guidance case of **VB** [2017] UKUT 00079

(at tab E in the appellant's latest bundle). I was referred to paragraphs 53 and 62 of that decision, which state that in that case the appellant have been prosecuted under Article 409 of the Criminal Code of Ukraine and according to the Canadian Refugee Board, a request to undertake military service can be by written instruction to attend a commissary. All further instructions, such as a medical check-up, will follow. A notice of call up is hand delivered to the recipient, who must sign his call-up papers to confirm receipt. As UTJ Finch had suggested, when she gave permission two appealed to the Upper Tribunal to, it was wrong of the Immigration Judge to criticise the appellant for not producing signed call up papers when it was known that a large number of recipients ignore such notices, even though they ought to be signed for. It was also pointed out that the Immigration Judge had been referred to the relevant background material. The appellant's representative concluded her criticism of the Immigration Judge by stating that "all findings are fundamentally flawed". The Immigration Judge failed to consider uncontested evidence over the risk to the appellant on return of having to undertake military service. The Immigration Judge had been wrong to conclude on the evidence that the appellant was not at risk on return. Miss Solanki again referred to the case of **VB** and pointed out that the head note (at E 1) dealt with the risk on return of individuals such as the appellant. In that case both appellants had their appeals allowed under article 3 of the ECHR. Next, I was referred to paragraph 71 of that decision, where the Upper Tribunal which identified certain aggravating circumstances. In this case the Immigration Judge had not considered the risk on return adequately or at all.

16. Ms Solanki then went on to deal with the appellant's moral entitlement to object to having to "commit atrocities". She made extensive reference to her lengthy skeleton argument before the FTT. She pointed out that there was a state of armed conflict where atrocities were committed by the Ukrainian government. I was referred to an Amnesty international report (C 10) which evidence this. I was also referred to a decision from New Zealand and the leading case of **Septet and Bulbil** [2003] UKHL 15.

17. The appellant was an Orthodox Christian, in addition. He would therefore be required to carry out acts of violence be contrary to his religious beliefs. He had expert evidence to support his case. He had produced the expert report at the FTT. Notwithstanding that evidence Immigration Judge had gone on to make adverse credibility findings. Because those findings were unsustainable, for the reasons submitted by the appellant which went to the heart of the case, I was invited to set aside the entire decision and remit the matter to the FTT for a fresh hearing before a different immigration judge.

18. The respondent on the other hand did not accept that there were any significant flaws in the Immigration Judge's approach, pointing out that the absence of expertise on the divorce laws of Ukraine did not prevent the Immigration Judge reaching a common-sense view of the matter. The assumption would be that there would be no record of the appellant's divorce from his wife and since the divorce had taken place some years

previously it was not perverse of the Immigration Judge to find that the appellant would not now be sought. It was curious therefore that the authorities had gone in pursuit of the appellant's wife. These findings were perfectly open to the Immigration Judge as were findings over the appellant's military record. The appellant had never done military service in the Ukraine but only in the former Soviet Union.

19. Mr Mills also referred me to paragraph 71 of the case of **VB**. Mr Mills did not accept that simply leaving Ukraine would give rise to a suspicion on the part of the authorities. Finally, the respondent did not accept that the appellant was a conscientious objector. In addition, the two cases where individuals had been arrested for being conscientious objectors appeared to be in very different circumstances from those of the appellant. There was no information in possession of the respondent which suggested that the appellant would be at risk. Mr Mills also submitted that, by and large, members of the Orthodox faith were accepted in the Ukraine and it was for the appellant to show his Russian Orthodox Church membership placed him at any risk. Credibility findings were for the Immigration Judge and insufficient material had been placed before the Upper Tribunal to reopen the case. No material error of law had been established therefore.

20. Ms Solanki provided a lengthy reply, pointing out that the respondent had not examined the appellant's credibility in the light of the documents. The appellant's expert had done this in his report and have fully gone into the nature of military service in the Ukraine. Ms Solanki launched a further criticism of the Immigration Judge, pointing out that large parts submissions made had not been covered in the decision. The decision produced had been below the level required and there had been no proper analysis of the country guidance. The two individuals who had been identified as having been subject to sanctions for not undertaking the draft should also have been considered by the Immigration Judge. Ms Solanki also referred to the New Zealand case at E 29 -ED47 of her bundle. When combined with the expert evidence there was more than enough information for the case on conscientious objection to be made out.

21. At the end of the hearing I reserved my decision as to whether there had been a material error of law and if there had been what steps the Upper Tribunal should take to address that error. Both parties agreed that if I found material deficiencies in the credibility findings I would have to set aside the decision remit the matter to the FTT or a fresh hearing a different judge. However, Mr Mills pointed out that if I were simply concerned as to the analysis of the risk on return, this could be a matter for fresh findings by the Upper Tribunal.

Discussion

22. The issues before the Immigration Judge were:

    (i) Whether the appellant is a conscientious objector on religious or political grounds?

(ii) Whether he would be at risk of being forced to commit acts which would be contrary to international law?

23. It was not disputed that the appellant was a Ukrainian national who was born on 1 February 1970. Nor was it disputed that the appellant was an Orthodox Christian, who had served in the military between 1988 and 1990, whilst Ukraine still formed part of the USSR. During that period, he had served in a private-aircraft station in Kazakhstan. According to the appellant's skeleton argument before the FTT, it was also accepted by the respondent at page 8 of her refusal that the appellant had a "genuine subjective fear on return Ukraine" (paragraph 22 of the respondent's decision). The appellant had come to the UK in 1999, claiming that his involvement with an opposing political party (RUKH) placed him at imminent risk on return. Although the appellant had been away from Ukraine for more than 18 years at the date of the hearing in the FTT he argued he would nevertheless be liable to undertake military service.

24. The appellant has a poor immigration history having been detained for an offence of fraud by using a false instrument. All his applications had been rejected in the past and it was not, as I understand it, until he had tried a number of bases for remaining UK rejected that finally claimed asylum. In particular, he had applied in 2012 to stay based on long residence (10 years) and made an application for an EEA residence permit in 2015. As I understand it, the application for asylum was not advanced until 20 September 2015, after these applications had failed. The appellant's ex-wife was contacted in Ukraine in January and July 2015 (see paragraph 26 of the decision). Therefore, the timing of these approaches appears very convenient for the appellant. The respondent certified that application as being "clearly unfounded". This resulted in a judicial review application and the subsequent hearing before the Immigration Judge.

25. It is against this background that the Immigration Judge dismissed the appeal before him.

Conclusions

26. I share much of the Immigration Judge's scepticism as to the credibility of the appellant's account. Given his poor immigration history and conviction for fraud in addition to the long delay in advancing his claim, the credibility of that claim was highly questionable. In addition, Immigration Judge had substantial experience of this area, having been the judge in the earlier case of **OK**. He clearly demonstrated a knowledge of the issues. He also applied the correct standard of proof and was entitled to come to adverse credibility findings in relation to the appellant's account in oral evidence of the approaches by the authorities which had been made to his former wife.

27. However, unfortunately, there is insufficient consideration of the objective evidence and the extent of the appellant's moral objection to undertaking military service. I am not satisfied Immigration Judge fully took account the

gravity of conditions within Ukraine or the apparently significant risk that the appellant would be required to undertake military service. Unfortunately, his reference to Dr Rano Tureava-Hoehne's report dated March 2017 at paragraph 13 of his decision, was cursory only. There is no analysis and consideration of the picture that the expert paints in relation to the appellant's case. Were the Immigration Judge to have given any consideration to issues raised in that report I would undoubtedly upheld his decision. However, in the absence of such analysis of the issues, regrettably, I consider that there was a material error of law and that is necessary to remit this matter the FTT for a *De Novo* hearing. Both parties agreed that this was the correct course for me to take on finding such an error.

28. I find that there was a material error of law decision of the FTT failing to have adequate regard to the expert evidence and accordingly, for the purposes of the Tribunals, Courts and Enforcement Act 2007 s.12(2)(b)(i), I have decided to set aside that decision and direct a fresh hearing in the FTT at which none of the findings of the Immigration Judge stand.

29. I make the following directions:

    (i) I direct that the appeal be remitted to the FTT for a fresh hearing before a judge other than First-tier Tribunal Judge Coutts;

    (ii) At that hearing none of the findings of fact by the FTT shall stand;

    (iii) Directions for the future listing of this matter including any case management directions and for a hearing in the FTT are to be dealt with by that tribunal.

Notice of Decision

The appeal is allowed. The decision of the FTT is set aside. The case is remitted to the FTT for a fresh hearing in accordance with the directions above.

I continue the anonymity direction made by the FTT.

Signed Date 15 December 2017

Judge Hanbury
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Dated 15 December 2017

Judge Hanbury
Deputy Upper Tribunal Judge