Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13373/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th May 2017	**On 17th May 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MS HALYNA BRYKAILO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Karia instructed by Sterling Law Associates
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ukraine and she claimed asylum on the basis of a fear of her ex-husband and her fear of being called to military service as a nurse within the armed forces in Ukraine.

2. Her claim for international protection which included protection under the ECHR was dismissed by First-tier Tribunal Judge Metzer and permission was granted on the basis that it was arguable the judge had misdirected himself as to a fundamental part of the claim, had failed to engage with material that was before him and had arguably failed to give adequate reasons for his findings.

Permission to Appeal

3. It was first, in Ground 1, argued that the judge had, at paragraph 15, not applied the correct test from **Sepet and Bulbul v the Secretary of State for the Home Department [2001] EWCA Civ 681** and **Krotov v the Secretary of State [2004] EWCA Civ 69**. It was submitted that the test was not whether the military service itself would contravene international standards but whether the appellant may be 'associated with' a military which is engaged in acts which contravene those standards.

4. It was submitted that although it was accepted in **Sepet and Bulbul** that there was no extant legal rule or principle derived from treaty or customary international law which vouched a right of either absolute or partial conscientious objection without more it had been conceded by the Secretary of State and emphasised by the court per Laws LJ at 402, paragraph 61 that

> *"It is plain (indeed un-contentious) that there are circumstances in which a conscientious objector may rightly claim that punishment for draft evasion would amount to persecution: where military service to which he was called involves acts, with which he may be associated, which are contrary to basic rules of human conduct: where the conditions of military service are themselves so harsh as to amount to persecution on the facts; where the punishment in question is disproportionately harsh or severe".*

It was submitted that a nurse may well be associated with a type of military action described in ground 2 below and the fact that doctors or nurses did not fight did not excuse their participation in war crimes.

5. In relation to ground 2 it was submitted that the judge had failed to engage with the evidence and given adequate reasons. He had not taken into account the background evidence and pleadings which referred particularly the findings in the New Zealand case of **AC Ukraine [2015] NZIPT 800749-52**. It was accepted that this was not binding on the Tribunal but was nevertheless an application of the same legal principles and the Tribunal was invited to place significant weight on those findings, such that international organisations, NGOs including Amnesty International, Human Rights Watch and the UN High Commission of Human Rights had issued periodic reports of human right abuses committed in the Donbas region by separatist government forces.

6. Although **PS** remained authoritative with regard prison conditions in Ukraine and that they contravened Article 3, it predated the current conflict and the new approach to conscription. There was ongoing evidence that the Ukrainian forces were engaging in acts of torture, disappearances, extrajudicial killing and abuse with apparent impunity. The judge had failed to reject this evidence and if he did so to give reasons for rejecting it. It was submitted that it was not adequate in those circumstances simply to rely upon **PS** which is now over a decade old.

7. There was thus a failure to give reasons and the thrust to the appellant's was that if conscripted she would be associated with the military which was currently engaging in acts contrary to international standards and that conscription in the circumstances was persecutory.

The Hearing

8. Mr Karia submitted a skeleton argument in which he expanded upon the written grounds and alluded to the recent Upper Tribunal country guidance authorities **VB and Another (draft evaders and prison conditions) CG [2017] UKUT 79**. It was argued that Judge Metzer after noting that the appellant was a nurse applied an erroneous test of "would be required to undergo …" in relation to military service. The judge concluded that as she would not be actually involved in the conflict owing to being a *nurse* in the military, the service she would be required to undergo would not be contrary to the basic rules of human conduct and therefore she would not be persecuted. Mr Karia submitted, however, treating war criminals providing medical support for detained hostages were military acts with which she would be associated. Further the judge should have considered the evidence in **AC**.

9. Mr Kotas relied on the recent case of **VB**.

Conclusions

10. Putting aside for one moment the debate as to whether **PS,** should no longer be followed in the light of **AC Ukraine** on the basis of the contravention of the basic rules of human conduct, I note that at paragraphs 32, 33 and 34 of **Krotov v SSHD [2004] EWCA Civ 69,** the grave breaches or inhuman conduct were set out as Article 3 to the four Geneva Conventions 1949, Article 147 of Convention (IV), and, additionally Protocol II of the 1949 Geneva Convention relating to the Protection of Victims of Non-International Armed Conflicts (adopted 1977) under the heading "Humane treatment under Article IV (Fundamental Guarantees).

11. As stated at paragraphs 32 to 34 of **Krotov**

> *32. Common Article 3 to the four Geneva Conventions of August 12 1949 ,to which 191 States are party, provides:*
>
> > *In the case of armed conflict not of an international character occurring in a territory of one of the High Contracting Parties,*

each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, should in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;"

33. *Article 147 of Convention (IV) proscribes as "grave breaches":*

Any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person x taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

34. *Additional Protocol II of the 1949 Geneva Convention relating to the Protection of Victims of Non-International Armed Conflicts (Adopted 1977) , under the heading "Humane Treatment" under Article IV (Fundamental Guarantees) provides:*

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

> (a) *violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatments such as torture, mutilation or any form of corporal punishment;*
>
> (b) *Collective punishments;*
>
> (c) *Taking of hostages;*
>
> (d) *Acts of terrorism;*
>
> (e) *Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assaults x"*
>
> *156 States are parties to Additional Protocol II .*

In addition, as stated at paragraph 37 of **Krotov**, the crimes listed above if committed on a systematic basis or as a result of official indifference to the widespread actions of a brutal mitlitary would qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate would constitute persecution within the ambit of the 1951 Convention.

12. It is clear that the Conventions require the authorities to treat those who have 'laid down their arms and those placed hors de combat by sickness and wounds (inter alia) to be treated humanely. If the authorities in Ukraine did not having nursing facilities it is difficult to see how those governments could comply with the Geneva Convention. As such I do not accept that the 'nursing' would be associated with war crimes. In fact the lack of such facilities may suggest the opposite. I am not aware that the evidence produced indicated that nurses in Ukraine had to engage in any services other than humane nursing.

13. Further, it should be noted that the paragraph 40, Lord Justice Potter observed that

> *"In respect of the test propounded in **B and the Secretary of State for the Home Department** is that I would substitute the words 'in which he may be required to participate' [my emphasis] for the words 'with which he may be associated' as emphasising that the grounds should be limited to reasonable fear on the part of the objector that he will be personally involved in such acts, as opposed to a more generalised assertion of fear or opinion based on reported examples of individual excesses of the kind which almost inevitably occur in the course of armed conflict, but which are not such as to amount to the multiple commission of inhumane acts pursuant to or in furtherance of a state policy of authorisation or indifference."*

14. I would therefore conclude that the words "with which he may be associated" has been qualified to the extent that the appellant would have been required to actively participate in the crimes as identified above. The Appellant expected to be recruited as she stated as a nurse and that was the grounds on which her papers (which I note have not been accepted as valid) were served for conscription. As a nurse on the evidence as provided it is difficult to see how activities as a nurse in Ukraine could be described as anything other than humane.

15. Even if that were not the case, I turn to the point in relation to the case of **AC Ukraine v the Immigration and Protection Tribunal New Zealand. PS**, which held that there was no question of persons in the military being required to perform acts contrary to international law. The case of **AC** referenced independent and international reports such as the Amnesty International Report at paragraph 77 and the UN Office of the High Commissioner for Human Rights Reports at paragraph 78. Those in turn identified allegations of violations of international human rights law and international humanitarian law by the Ukrainian law enforcement agencies in the security operation area and those in military uniform (79). Although Mr Kotas argued it was a New Zealand first instance case, I nonetheless find it was open to the judge to consider the case. However, the judge did take into account of **AC** but in the particular circumstances of this case found the appellant was not at risk. It was open to the judge to approach and consider the appellant's appeal in the way that he did. He noted that the appellant would return as a nurse, even assuming she would be eligible for conscription, finding that her service would not be contrary to the basic rules of human conduct, a point which I have addressed above.

16. The judge's decision was not in conflict with the subsequent country guidance promulgated in March 2017 which in effect is declaratory. **VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079** albeit promulgated after the First-tier Tribunal Judge's decision (19th January 2017) identified in the head note

> *"1. At the current time it is not reasonably likely that a draft evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings for that act, although if a draft evader did face prosecution proceedings, the criminal code of Ukraine does provide in Articles 335, 336 and 409 for a prison sentence for such an offence. It would be a matter for any Tribunal to consider in the light of developing evidence whether there were aggravating matters which might lead to imposition of an immediate custodial sentence, rather than a suspended sentence or the matter proceeding as an administrative offence and a fine being sought by a prosecutor."*

17. Although there was no in depth assessment of whether there would be a detention on return in **VB**, the assessment of Judge Metzer at paragraphs 11 to 13 reflected essentially the findings in **VB** , albeit promulgated later,

such that it is unlikely that in the majority of cases, the consequences of a person's general unwillingness to serve the armed forces or objection to enter a combat zone would be such that they could make a well-founded claim for protection although each case must be determined on the individual facts. Judge Metzer looked at the particular and individual facts relevant to the present case and indeed noted at [15] that he applied the Country Guidance.

18. It is abundantly clear from the Country Information and Guidance Ukraine on Military Service (November 2016) that there is specific provision for conscientious objection under Ukraine law and specifically conscientious objection for recognised religious groups. That is the basis upon which, confirmed in the skeleton argument, that the appellant objected to participation as a nurse. The specific provisions for conscientious objectors are identified at 6 of the CIG, Country Information and Guidance Ukraine Military Service which was evidence before the parties. As recorded as 6.3.1, for example in practice, in relation to a Jehovah's Witness the requests for "alternative service are 'generally respected, and few witnesses have faced prosecution'".

19. Following **VB** it is not reasonably likely that the draft evader avoiding conscription or mobilisation in the Ukraine would face criminal or administrative proceedings. This adds weight to the decision of Judge Metzer. Although the findings of Judge Metzer were economical, this does not necessarily indicate a material error of law and **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC)** confirms

> *Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.*

20. Close analysis reveals that there was no material error of law in Judge Metzer's decision and it shall stand.

No anonymity direction is made.

Signed Date Signed 15th May 2017

Upper Tribunal Judge Rimington