Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: PA/03126/2017
PA/03128/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th January 2018	**On 6th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MR A P
(2) MRS S P
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mrs S Panagiiotopoulou (Counsel)
For the Respondent: Mr N Bramble (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge R L Walker, promulgated on 23rd October 2017, following a hearing at Hatton Cross on 16th October 2017. In the determination, the judge dismissed the appeal of the Appellants, who are husband and wife, whereupon the Appellants subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are both citizens of Ukraine and were born on [ ] 1980 and [ ] 1985 respectively. The essence of the appeal arises from the activities of the first Appellant, the husband, who had undertaken military service with the army in Ukraine in 1998, trained as a rifleman, and upon completion of his military service in 1999, had held the rank of a captain. His military service was fraught and distressing and he was subject to ill-treatment and bullying. In 2010 various military summonses were sent to his parent's home where he had been registered to stay, but he did not respond to them. The summonses requested that he report to the military commissariat. He assumed that he was required to complete further military service. He made arrangements for himself and his wife to leave the country which they did on 13th October 2010. After he left the Ukraine, he received another military summons requesting him to attend the court in Ukraine. He failed to do so. He was tried in absentia. He was convicted to five years' imprisonment. The appeal before Judge R L Walker, turned upon an expert report from Professor Mark Galeotti, who gave his opinion on documents provided by the Appellant, namely, a military identity card, service registration card, call up papers for 15th April 2010, 18th August 2010 and 20th October 2010, together with a court summons for 10th December 2010 and a court decision dated 10th December 2010. Professor Galeotti concluded that these were all genuine documents. In his decision, with respect to whether the claim had been made out by the Appellants, Judge Walker concluded that the expert's report could not be relied upon because it did not explore all the questions arising in relation to the documents submitted.

Grounds of Application

3. The grounds of application state that the judge erred in relation to the assessment of the court documents provided by the Appellants, and upon which the expert report was predicated, given that the expert had deemed those documents to be genuine.

4. On 15th November 2017 permission to appeal was granted by the First-tier Tribunal on the basis that the judge, in rejecting the expert report, had appeared to rely upon immaterial factors, such as the fact that comparison documents were not provided and that the reasons given were not sufficient to lead to a rejection of the report.

Submissions

5. At the hearing before me on 12th January 2018, Ms Panagiiotopoulou, appearing as Counsel on behalf of the Appellant, submitted that, although the judge sets out the Respondent's case (from paragraphs 23 to 30) which concludes that the Appellant had not raised a Convention reason for persecution, the fact was that this was not a Refugee Convention claim but one predicated upon the subjection of the Appellant to inhuman and degrading treatment, on the basis of Article 3 ECHR, because if the

Appellant, as the documents suggested, would upon return, be detained as a draft evader, then he would be imprisoned and the prison conditions were such that this would violate his Article 3 rights to be free from inhuman and degrading treatment.

6. She submitted that she would rely upon the country guidance case of **VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079**, and in particular the headnote at paragraphs 2 and 3. These stated that, although it is not reasonably likely that a draft evader avoiding conscription or mobilisation in the Ukraine would face criminal or administrative proceedings, if there were aggravating factors, then "there is a real risk of anyone being returned to Ukraine as a convicted criminal sentence to imprisonment in that country being detained on arrival" (paragraph 2). It was also stated that if this happened then "there is a real risk that the conditions of detention and imprisonment" would lead "to a breach of Article 3 ECHR" (paragraph 3).

7. Finally, Ms Panagiiotopoulou submitted that the judge did not make cogent and coherent findings in rejecting the court summons, the warrant, and the "determination against the Appellant, particularly as the expert report had already come to the conclusion that these documents were genuine."

8. For his part, Mr Bramble submitted that the judge had fully engaged with the expert report. This was because at the outset (at paragraph 33) the judge had stated that he had "considered the evidence in its totality". He had gone on to say that he would "focus upon the core and centrepiece of the claim" (paragraph 33). He accepted the Appellants' Counsel's submission that there was no Refugee Convention reason relied upon by the Appellants because their claim was based upon Article 3 ECHR. He had had regard to the case of **VB and Another**, which was the country guidance case. He had then gone on to say that the expert's report did not ask all the relevant questions before coming to the conclusion that the documents "appear genuine" (see paragraph 39). He was entitled, in this respect, to come to the conclusion that he would "attach little evidential weight to this report" (paragraph 41).

9. Finally, it could not be overlooked, as the judge found, that the Appellant in relation to the credibility of his claim, had not made a protection claim at all, until all other avenues had been closed off to him. It was only after he had been detained that he made a claim, and even then the claim he made was based upon family and private life on 24th August 2015. His fear of return to Ukraine was not mentioned until three months after his detention and this "reinforces my view that their claim has no merit" (paragraph 44) according to the judge. The judge was entitled to come to this conclusion.

10. In reply, Ms Panagiiotopoulou submitted that the judge was not the expert. It was not for him to say, or not to say, what he would have expected the expert to do. The expert was aware of his professional duties. He had, after all, made it quite clear that he had "handled some twelve such

similar call up summonses before, had seen and handled some 24 court summonses before and seen and handled more than twelve court determinations"(paragraph 39 of the determination). Accordingly, it was wrong for the judge to knit pick with the expert's assessment, and the matter ought to be remitted back to the First-tier Tribunal for a rehearing of the appeal.

No Error of Law

11. I have come to the conclusion, notwithstanding Ms Panagiiotopoulou's valiant and determined efforts to persuade me otherwise, that the judge did not err in law. My reasons are as follows.

12. First, the judge correctly identified the relevant issue at the outset (see paragraph 36).

13. Second, the judge was guided by the country guidance case of **VB and Another**. What this case makes quite clear is that it is not reasonably likely that a draft evader avoiding conscription or mobilisation in the Ukraine would face criminal or administrative proceedings. This is so unless such a draft evader can point to "aggravating matters". If that were to be the case then there would be a real risk for anyone being returned to Ukraine as a convicted criminal sentence to a term of imprisonment being detained on arrival. However, even if this were to happen, it was then likely that such a person, if he had been convicted in absentia, "would probably be entitled thereafter to a retrial..." The real risk of detention contrary to Article 3 ECHR only materialises after that.

14. The judge, in taking this step by step approach, assessed the evidence, prior to his coming to the expert report, and already concluded that there would be no risk of ill-treatment because prison sentences "are highly unlikely and are unusual for draft evading" (paragraph 38) and in this case, "there is no reference anywhere to any aggravating factors".

15. It was only after this that the judge then considered the court documents. He fastened upon the court judgment which appears at pages 19 and 20 of the Appellant's bundle and he noted, as he was entitled to do, that this refers "to the decision not to be appealable" and the judge here commented that,

> "This was curious given that the objective evidence states that anyone convicted in absentia would probably be entitled to a retrial in accordance with Article 412 of the Criminal Procedure Code of Ukraine. If the sentence was incapable of being appealed against then I would expect there to be some further legal references and explanation other than the basis comment that the sentence cannot be appealed" (see paragraph 38).

16. Nothing that I have heard today provides any reason for suggesting that the judge had erred in making such a finding of fact in relation to this court determination. The expert did not address this particular anomaly in the court determination. After all, Article 412 of the Criminal Procedure

Code of Ukraine provides for a retrial, and it was for the judge (in the absence of the expert commenting on this) to come to the view. This the judge did.

17. Third, as far as the expert report itself is concerned, the dicta of Lord Justice Wall in **Re M-W (Care Proceedings: Expert Evidence) [2012] EWCA Civ 12** bear consideration (at paragraph 39). It is said here that experts do not decide cases judges do. The expert's function is to advise the judge. The judge is fully entitled to accept or reject expert opinion. If the judge decides to reject an expert's advice, he or she must have a sound basis on which to do so, and must explain why that advice has been rejected. In this case, the judge has done exactly that. He has provided reasons.

18. Fourth, even insofar as criticism of Mr Galeotti's report is concerned (which Ms Panagiiotopoulou accepted as being a brief report) the judge takes issue with the fact that the summons or call up papers did not contain a warning regarding evasion of military service. Given that this was the case, the judge rightly queried why Professor Galeotti had not addressed this issue when it was raised in the refusal letter. The expert could have said whether or not such warnings are routinely given and whether he seen them in the various summons and court documents that he had seen in the past, given that he had said that he had handled some 25 court summonses prior to this particular summons.

19. For all these reasons, I do not find that the judge erred in law and cannot conclude that the strictures in the country guidance case of **VB and Another** had not been followed.

Decision

There is no material error of law in the original judge's decision. The determination shall stand

An anonymity order is made.

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 their 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.

The appeal is dismissed.

Signed Dated:

Deputy Upper Tribunal Judge Juss 26th February 2018