Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05925/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 October 2018	**On 31 October 2018**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

V K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Fisher, Counsel instructed by Sterling Lawyers Limited
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. The Appellant is a citizen of Ukraine. His date of birth is 5 February 1978. I make an anonymity direction because of the nature of his claim. He made a claim on protection grounds. His application was refused by the Secretary of State on 19 April 2018. The Appellant appealed. His appeal was dismissed by First-tier Tribunal Judge M P W Harris in a decision promulgated on 23 July 2018 following a hearing on 28 June 2018. Permission was granted to the Appellant by Designated First-tier Tribunal Judge Macdonald on 23 August 2018.

2. The Appellant's claim can be summarised. In 2003 in Ukraine he was involved in a road traffic accident whilst employed as a bus driver. A car involved in the accident contained two important men. One of the men died as a result of the accident. The Appellant received threats following the incident. The Appellant was unsuccessfully prosecuted on account of having a good legal representation. In 2004, when the Appellant was in the UK, his wife in Ukraine received calls by someone asking of his whereabouts. These calls ceased in 2005. The Appellant returned to Ukraine in 2007. In 2010 a person was knocked down in the Appellant's village. The Appellant was held responsible and in 2010 wrongly convicted. He believes that this is linked to the incident in 2003 and the threats that he received. The Appellant was sentenced to three years suspended sentence and prohibited from leaving the country. He was required to report regularly to the police. However, he was given permission by the police to leave the country six months later. He came to the UK in 2011 with the help of people smugglers. In 2013 an acquaintance told the Appellant that he had been seen on a website for wanted people in the Ukraine. The Appellant checked this website and learned from it that the suspended sentence had been revoked and he was now liable to serve a prison sentence. He made a claim for asylum in June 2013. In 2014 officials came to his parents' home looking for him. In January 2017 his parents' home was firebombed. A relative's car was damaged and the police did not do anything to help. The Appellant has already completed military service in Ukraine. The Appellant received mobilisation call up papers in May and October 2017. He fears imprisonment resulting from the criminal sentence. In addition he fears having to serve in the army where he will be forced to carry out human rights abuses.

3. The Appellant was represented by Ms Fisher at the hearing before Judge Harris. The judge had before him a skeleton argument. The Appellant gave evidence through an interpreter. He relied on his witness statement. There was also a witness statement from the Appellant's solicitor, Nadia Pylypchuk.

The Decision of the FTT

4. The judge set out the Appellant's immigration history. He came to the UK in 2004 with limited leave as a work permit holder. He overstayed before returning to Ukraine in 2007. He returned to the UK entering illegally in 2011. In 2013 he was encountered and served with liability to remove as an illegal entrant. He was convicted and sentenced for motoring offences in the UK on 13 June 2013. On 17 July 2013 he claimed asylum. The Respondent's case is that he absconded and his claim was treated as withdrawn. He was encountered on 8 February 2018 and detained. He made a fresh asylum claim on 14 February 2018.

5. The judge made findings at paragraphs 40 through to 100. The judge directed himself in relation to Tanveer Ahmed [2002] UKAIT 439 and the applicable country guidance VB Ukraine CG [2017] UKAIT 00079. There is no challenge to the judge's self-direction. The judge turned to credibility and engaged with the documentary evidence that the Appellant submitted in support of his claim.

6. The Appellant relied on an extract from a website to establish that he was wanted in Ukraine and that the suspended sentence had been revoked. He submitted this with his application for asylum along with a Google translation. He produced a proper translation and at the hearing his solicitor, Ms Pylypchuk submitted a witness statement. The judge stated as follows in respect of this document:-

> "46. One document central to the appellant's claim is an extract from a website, said to be from the Nadvirna police, listing criminals wanted by the Ukrainian authorities upon which the appellant's photo and details appear. Its importance is said to be that it shows the appellant is at real risk of immediate detention by the Ukrainian authorities on return to Ukraine.
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> 47. It can be seen that the details of the appellant appearing on the website extract assert that he disappeared on 8 July 2013. This is clearly at odds with the appellant's account that he left Ukraine in 2011; it is also at odds with Court documentation produced by the appellant suggesting that the occasion when the appellant first failed to register as required with the Nadvirna police was August 2011 and that the court order cancelling the suspension of his prison sentence was made on 6 March 2013 (see p.4 of the appellant's supplementary bundle). There is no satisfactory explanation before me about why an official website of the Ukrainian authorities should list the appellant has having disappeared in July 2013. This inconsistency on such a central matter raises significant doubt in my mind about the appellant's claim.
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> 48. It is explained in her witness statement by Ms. Pylypchuck, the appellant's solicitor, that she google translated into English the version of the wanted list submitted to the respondent at the time of the asylum claim and which appears in the respondent's bundle. Another version in Ukrainian with formal translation, which is produced in the appellant's main bundle at pages 41 to 47, contains similar content. I see no reason to doubt the explanation of Ms Pylypchuk (although I observe that it would

have assisted if she had explained this to the respondent at the time of the document's submission).

49. However, what Ms Pylypchuk does not explain in terms of what precise website she visited and on what basis, if any, she could say this was a reliable witness run by the Ukrainian authorities. Nor is there any expert evidence produced about the reliability of this website.

50. In the circumstances, I am not satisfied it is demonstrated that either the mere heading asserting the webpage lists people wanted by the Nadvirna police or the web link at the bottom of the website page are enough of themselves to demonstrate this is actually a reliable website containing information upon which I can place weight.

51. I remind myself that there is no requirement in law for an asylum appellant to produce documentary corroboration for his claim. Nevertheless, where documentary evidence is produced, it has to be assessed in the round. This includes consideration of the issue of the provenance of the documents in question. In the end it is the word of the appellant rather than any other source of evidence that the website showing him as wanted by police is reliable. Thus any assessment of the reliability of the website will involve also consideration of the reliability of the appellant as a witness. That consideration I will undertake later in this decision."

7. There were other documents on which the Appellant relied and in respect of these the judge stated as follows:-

"52. It is in his supplementary bundle that the appellant produces what are said to be certified copies of:

- the court order dated 19 November 2010 including a sentence against him of 3 years imprisonment 'with discharge from sentence with probation of 2 years';
- the court order dated 6 March 2013 determining that the appellant has breached the conditions of his probation and cancelling the discharge from sentence.

The appellant has explained in his oral evidence that he asked his Ukrainian lawyer to obtain these court documents.

53. There is no letter or witness statement from any Ukrainian letter produced in support of this claim. The appellant in cross-examination says that he did not realise that this might be material evidence. Be that as it may notwithstanding that the appellant has been legally represented in this appeal, the consequence is that when considering in the round what weight to place on these documents it is again the word of the appellant alone that he has produced certified copies of reliable court documents.

54. The appellant produces in the main bundle what he says are the two mobilisation call up notices in his name. The address for service on both notices has the appellant residing at Tumenivka Street in the village of Ptsiv: see translations at pages 33 and 37 of the bundle. It is said by the appellant in his full interview at

q.73 and in his oral evidence that they these notices were sent to the address of his parents. Other documentation produced by the appellant indicates that his parents' home is at 26 Humenivka Street, Pniv: see for example the police document regarding the complaint of arson at D17 of the bundle. Moreover, the documentation in respect of the pre-trial investigation of mobilisation evasion (at pages 49 to 59 of the appellant's main bundle) clearly identifies the appellant as resident at 26 Humenivka Street, Pniv. The serving of call up notices for the appellant at an address in Ptsiv rather than the address of his family home in Pniv, which is known to the Ukrainian authorities, has not been satisfactorily explained before me. I find it raises serious doubts in my mind about the reliability of the call up notices.

55. The appellant also has produced police/register documentation relating to mobilisation evasion and the complaint made by his father about the 2017 arson attack. As mentioned above they identify the authorities treating the appellant's family home as 26 Humenivka Street, Pniv, the address where his parents still live.

56. However, this is at odds with the 2010 and 2013 court documentation produced which identifies the appellant as a resident at another address: 3 Humenivka Street, Pniv. This is another inconsistency which has not been satisfactorily explained before me by the appellant and leads to the raising of further doubt against the reliability of documentation produced by him."

8. The judge on to consider the Appellant's evidence about a YouTube video but concluded that he had not provided either the footage with translation or a transcript of the video contents which limited any weight that could be placed on it. The judge took into account the Respondent's submission of widespread problem with the reliability of documentation said to originate in Ukraine. In respect of the documentary evidence he stated as follows:-

"58. The respondent has submitted there is a widespread problem with the reliability of documentation said to originate from Ukraine and relies on the 'Cheating Nation' article produced. However, I am not satisfied it is the case that I must treat any document said to originate from Ukraine as automatically unreliable. I consider that the appellant's documents must be assessed in their own right. For the reasons given above, in my assessment I have serious doubts about the reliability of the police and court documentary evidence produced by the appellant. I am not satisfied that this documentary evidence is of such strength that by itself I am able to treat it as reliable and adding weight to the appellant's claim."

9. The judge indicated at paragraph 59 that he was going on to assess the personal evidence of the Appellant and at paragraph 60 he raised issues about the Appellant's screening interview. He stated as follows:-

"60. In his first screening interview on 13 September 2013 at sections 4.1 and 4.2 the appellant provided a brief description of why he

came to the UK and why he could not return to Ukraine. He gave these answers:

> [Section 4.1] I came for help. I was being hassled and threated by the police. This is because when the revolution took place, I was taking people in my van to Kiev to take part in the demonstrations. The police said they would give me a lot of problems.
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> [Section 4.2] The police have given my details to the court and I have been convicted and sentenced to my absence for an unknown crime which I didn't commit. I know this because they have visited my parents and brother to look for me. I have only found out about the court case recently.

61. I bear in mind that this was a screening interview where only brief details of his claim was required from the appellant. Nevertheless, the appellant's assertion that he was convicted of an unknown crime in his absence is inconsistent with the details of the account he now seeks to rely upon in this appeal that before he left Ukraine he had undergone the 2010 court proceedings, in which he was convicted, albeit the appellant says wrongly, for a driving offence relating to his car hitting a person.

62. In his witness statement the appellant says that he did not refer to the 2003 accident in the 2013 screening interview because he was not completely sure that it was related to the 2010 incidents – he says it was only after the 2017 arson attack on his parents' house that he felt sure. However, that does not explain why the appellant refers in 2013 to there being a conviction in his absence for an unknown crime. At the time of his interview the appellant knew, and had known for approaching 3 years, about the details of the November 2010 conviction. I find this is a significant inconsistency in the appellant's account that damages his credibility.

63. It also does not help the appellant in terms of reliability that his September 2013 screening interview at section 6.3 he says that he last saw his wife in Ukraine in 2011 when his evidence now is that in 2011 he joined his wife who was already in the UK."

The judge went on to find at 64 that he could not ignore the Appellant having returned to Ukraine in 2007 and living openly there whilst his claim was that he was targeted by members of the Ukraine authorities who were friends of the men involved in the traffic accident in 2003. The judge took into account that the Appellant's enemies waited until 2010 to seek revenge on him by framing him with a road traffic accident. The judge took into account that the Appellant had given an account of his wife having received menacing calls about him after he first came to the UK in 2004 which would be indicative, according to the judge, of people knowing where he and his family lived and that they were eager to show animosity towards him. The judge took into account that the Appellant's enemies waited until after his departure in 2011 until 2017 to target his family members. The judge found that the delay was "at odds with the Appellant's claim that he is at real risk from powerful elements in the

Ukrainian authorities or security forces who can act with impunity against him". The judge found that this raised doubt about the credibility of his claim.

10. The judge took into account that the Appellant's wife, although present in the UK and available to appear as a witness was not called to give evidence in support of his claim whilst she had had direct experience according to the Appellant of the threatening calls said to have been received in 2004 and 2005.

11. The judge took into account that the Appellant's claim was that since 2013 he had known that his 2010 suspended sentence had been cancelled for breach of conditions and that he faced imprisonment should he return to the UK. The judge took into account the Appellant's evidence that the police permitted him to take actions which the court found in breach of his sentence conditions. He took into account that although the Appellant stated he had a lawyer in Ukraine with whom he retains contact, he had made little or no attempt to approach the Ukrainian courts to appeal or review the decision to activate his prison sentence. The judge concluded that he would have expected someone facing imprisonment in Ukraine to have been more active in resolving his case before the Ukrainian Courts. The judge found that this raised doubts about the Appellant's credibility. The judge took into account that since 2013 when the Appellant was able to access legal advice during his detention he has been aware of the existence of the asylum process in the UK. The judge took into account the Appellant's evidence that he believed that he had an outstanding asylum claim that he had heard nothing about it; however the judge observed that in March 2018 the Appellant made no mention of this in his screening interview.

12. The judge took account that the Appellant's evidence was that it was the targeting of his family in the Ukraine at the start of 2017 that made him sure it was members of the Ukrainian authorities who had been friends with the two men killed in 2003 and that they were responsible for targeting him. However, the judge found that it would appear from the Appellant's account that in 2017 he was aware, through his wife and her parents, about being treated as an evader of mobilisation and yet he waited until after his arrest in 2018 to add these important matters to his claim. The judge concluded that his actions were not consistent with those of someone who fears return to Ukraine. The judge concluded that since 2017 the Appellant had reasonable opportunity to raise the central parts of his claim but did not do so until 2018 when he was arrested. The judge found central parts of the Appellant's account to be problematic as well as significant parts of the documentary evidence. He said at, paragraph 70, considering matters in the round he was not satisfied that the documentary evidence was reliable. He concluded that the Appellant was not credible. He did not find it credible that the Appellant had been sentenced to imprisonment as he claimed in 2010 and that he would face imprisonment on return to Ukraine as a result. He was not satisfied that

the Appellant had been called up for mobilisation as claimed. He rejected his account in its entirety.

The Grounds of Appeal

13. There are three grounds of appeal. Ms Fisher expanded on grounds 1 and 2 in oral submissions.

14. Ground 1 is that unfairness issue arose as a result of the judge's engagement with the Ms Pylypchuk's evidence. She drafted a handwritten statement regarding the issues relating to the translation of the website. She was not asked to give evidence, nor was she asked to address the specific issues raised by the judge. The judge did not put the discrepancies in the call up papers to the Appellant. The case of the Secretary of State for the Home Department v Maheshwaran [2002] EWCA Civ 173 is relied upon.

15. Ground 2 is in reality an extension of ground 1. It focuses on the documentary evidence and the judge's treatment of it. It is asserted that at paragraph 51 the judge having stated previously that there was no legal requirement to corroborate evidence seemed to require it after all. It is asserted that if the First-tier Tribunal thought that further corroboration was needed this should have been put to the Appellant so that he could either have sought an adjournment or have obtained the necessary documentation. The different addresses in the documentary evidence was an issue that was not put to the Appellant. In addition, the judge failed to consider the country guidance which establishes that there have been a number of military call ups through waves of mobilisation. It was not clear why the Appellant, who has already done military service and who is a reservist, would not be called up.

16. Ground 3 relates to the credibility of the Appellant and the judge's findings. It is asserted that the judge conflated issues. The Appellant falls within VB. The FTT relied on the screening interview. The case of YL (Rely on SEF) China [2004] UKAIT 00145 is relied upon.

17. Ms Fisher in oral submissions went beyond the grounds asserting that the judge had applied a too high standard of proof. She submitted that the documentary evidence that the judge rejected was described as central to the case. The inconsistencies in the address were as a result of mistakes in the documents and the Appellant could have given evidence about this but did not have the opportunity to do so. Ms Everett submitted that it was for the Appellant to deal with inconsistencies in his evidence. The reliability of the documents was not a new issue. The judge was not unreasonable in requiring evidence of the provenance of documents. The judge was entitled to be concerned about the evidence. The judge did not require corroborative evidence. The judge identified major inconsistencies in the Appellant's evidence and was entitled to attach weight to the SEF.

Conclusions

18. Grounds 1 and 2 can be dealt with as one. I conclude that there is no unfairness arising from the findings of the judge. The Appellant relied on a document in order to establish that he was wanted by the Ukrainian authorities. His solicitor obtained a printout from a website in order to support this claim. The judge was entitled to raise concerns about the reliability of this evidence. In respect of the Appellant's solicitor's witness statement, it was not incumbent on the judge to enter the arena and direct questions to this witness or to assist the represented Appellant in the preparation of his case. The Appellant's solicitor should have been aware of what information the Tribunal was likely to expect bearing in mind her profession and that reliability of the documentary evidence was an issue clearly raised by the Secretary of State. The Appellant was represented by competent Counsel. It was not unreasonable to expect the Appellant to have produced evidence relating to the provenance of the documents.

19. Ms Pylypchuk's hand written witness statement was skeletal. The Appellant bears the burden of proof. There was no adequate explanation why she had not provided better evidence. There is no evidence before me that had she given oral evidence she would have said anything that would have made a material difference to the outcome of this appeal. The grounds ignore the internal discrepancies between the extract and the Appellant's evidence as found by the judge. The assertion that the judge did not apply the correct standard of proof is wholly unsupported.

20. In respect of the documents referred to at paragraphs 54 through to 56, whilst Ms Fisher told me that the discrepancies were errors in translation, there was simply no evidence of this before the First-tier Tribunal. The documentary evidence was produced by the Appellant. It was his evidence. There were internal inconsistencies within these documents of which he and those representing him should have been aware. The reliability of documentary evidence had always been an issue in this case. It is not the case that the Appellant was ambushed. He had ample opportunity to prepare his case. He had the benefit of legal representation. The judge's findings are grounded in the evidence and adequately reasoned. There was no unfairness. Ms Fisher did not make oral submissions in respect of SSHD v Maheshwaren referred to in the grounds. However, having considered the case, I highlight the following paragraphs because they support my conclusions on the matter:

> "4. Undoubtedly a failure to put to a party to litigation a point which is decided against him can be grossly unfair and lead to injustice. He must have a proper opportunity to deal with the point. Adjudicators must bear this in mind. Where a point is expressly conceded by one party it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the tribunal indicates that it is minded to

take that course. Cases can occur when fairness will require the reopening of an appeal because some point of significance – perhaps arising out of a post hearing decision of the higher courts – requires it. However, such cases will be rare.

5. Where much depends on the credibility of a party and when that party makes several inconsistent statements which are before the decision maker, that party manifestly has a forensic problem. Some will choose to confront the inconsistencies straight on and make evidential or forensic submissions on them. Others will hope that 'least said, soonest mended' and consider that forensic concentration on the point will only make matters worse and that it would be better to try and switch the tribunal's attention to some other aspect of the case. Undoubtedly it is open to the tribunal expressly to put a particular inconsistency to a witness because it considers that the witness may not be alerted to the point or because it fears that it may have perceived something as inconsistent with an earlier answer which in truth is not inconsistent. Fairness may in some circumstances require this to be done but this will not be the usual case. Usually the tribunal, particularly if the party is represented, will remain silent and see how the case unfolds."

21. I now turn to ground 3. The judge was mindful of the limitations of a screening interview (see para 61); however, the problem with the answers given by the Appellant was not a lack of detail but glaring consistency. He had claimed in the screening interview to have been convicted in his absence, but this was not his claim as later advanced. I remind myself of what the UT said in YL;

> "19. When a person seeks asylum in the United Kingdom he is usually made the subject of a 'screening interview' (called, perhaps rather confusingly a "Statement of Evidence Form – SEF Screening–). The purpose of that is to establish the general nature of the claimant's case so that the Home Office official can decide how best to process it. It is concerned with the country of origin, means of travel, circumstances of arrival in the United Kingdom, preferred language and other matters that might help the Secretary of State understand the case. Asylum seekers are still expected to tell the truth and answers given in screening interviews can be compared fairly with answers given later. However, it has to be remembered that a screening interview is not done to establish in detail the reasons a person gives to support her claim for asylum. It would not normally be appropriate for the Secretary of State to ask supplementary questions or to entertain elaborate answers and an inaccurate summary by an interviewing officer at that stage would be excusable. Further the screening interview may well be conducted when the asylum seeker is tired after a long journey. These things have to be considered when any inconsistencies between the screening interview and the later case are evaluated."

22. The judge was wholly entitled in this case to rely on the Appellant's screening interview during which the Appellant failed to mention a

significant part of his account on which he later relied about which he failed to provide an adequate explanation.

23. The judge did not conflate the issues of evasion and risk from wrongful prosecution. There were serious credibility issues arising from the Appellant's claim on both grounds. The judge did not find that the Appellant was credible and rejected his account in its entirety (see para 69). It was open to the judge to reject the Appellant's evidence of mobilisation in the light of the discrepancies in his evidence. There is nothing unlawful about this finding. In any event, the judge did not find that there were criminal proceedings and as such even if the Appellant is a draft evader as claimed, applying VB he would not be at risk on return. In addition, I take account of PK (Draft evader; punishment; minimum severity) Ukraine [2018] UKUT 00241: person will only be entitled to refugee protection if there is a real risk that the prosecution or punishment they face for refusing to perform military service in a conflict that may associate them with acts that are contrary to basic rules of human conduct reaches a minimum threshold of severity. There was insufficient evidence of this before the FTT.

24. The grounds fail to properly reflect the decision of the judge. There were numerous credibility issues, many of which have not been challenged in the grounds. A proper reading of the decision makes it clear that the judge considered the evidence in the round and properly applied Tanveer Ahmed. The judge made findings that are grounded in the evidence and adequately reasoned. The grounds amount to a disagreement with them. There are no fairness issues arising.

25. The decision of the judge does not contain an error of law and the decision to dismiss the Appellant's appeal is maintained.

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.

Signed Joanna McWilliam Date 30 October 2018

Upper Tribunal Judge McWilliam