Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07798/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 December 2019	**On 10 January 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

[O P]
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs K Degirmenci, Counsel instructed by Yemets Solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to appeal by First-tier Tribunal Judge Landes on 7 November 2019 against the determination of First-tier Tribunal Judge Hodgkinson, promulgated on 24 September 2019 following a hearing at Harmondsworth on 12 September 2019.

2. The appellant is a Ukrainian national born on 10 December 1983. He entered the UK in February 2004 to undertake seasonal farm work and then overstayed. He claims to have been scammed by a man he believed would make an application for an extension as a student on his behalf. His asylum claim was made on 5 July 2019 after his arrest on 29 June 2019 and after he was served with enforcement papers. He claims to be at risk on return to Ukraine for having evaded military service for which he was sentenced in absentia to three years' imprisonment.

3. His appeal was dismissed by the First-tier Tribunal Judge who found that he was not a credible witness, that his documents were unreliable and that he would simply be returned to Ukraine as a failed asylum seeker who had not done his military service and not someone who had been convicted and sentenced to a prison term.

4. There has been no Rule 24 response from the Secretary of State.

The Hearing

5. The appellant was in attendance at the hearing before me when I heard submissions from the parties.

6. Ms Degirmenci relied on the written grounds. She submitted that it was clear from the interview record (where the appellant had been interviewed in English) that there were significant issues in comprehension and that although the judge recognised this, he nevertheless placed reliance on discrepancies and omissions arising from it. It is maintained that this was perverse. The second ground is that the judge failed to note that contrary to his finding in the determination, the appellant had in fact mentioned the sentencing document in his witness statement. Not only was the judge mistaken when he stated that the appellant had not mentioned this, but he also failed to take account of the appellant's explanation for the late submission of documentary evidence. Ms Degirmenci also submitted that the judge had wrongly relied on a "discrepancy" over how the military summons and the court papers had been received in Ukraine. The appellant's evidence had always been that the military summons had been served by hand and the court documents sent by post and that the questions put to the appellant at the hearing did not clarify which of the two he was being asked about. It was submitted

that the judge also misread the CPIN which stated that call up papers were commonly left with family members who were required to sign for them. The judge misinterpreted this as meaning that the recipient had to be the subject of the mobilisation call up. The judge also misunderstood the background evidence when he found that the appellant would not be required to serve as he was over 27 years old. The evidence, however, made it clear that only ordinary conscription ended at 27; mobilisation continued through to 65. Ms Degermenci also submitted that the appellant had not been asked to clarify the confusion relied on by the judge as to whether he had given his passport to the man who he thought would apply for an extension of leave for him or whether he had it at home. It was submitted that had the appellant been given the opportunity to explain he would have made it clear that he had both an external and an internal passport (as is the case in Ukraine) and that this was the cause of the "discrepancy". Finally, it was submitted that the judge should have considered the judgment of the New Zealand Tribunal in AB (Ukraine) [2015] that was placed before him. Even though it predated UK country guidance, it made relevant findings on matters not covered by the Upper Tribunal in VB. For all these reasons, I was asked to set aside the determination of the First-tier Tribunal.

7. In response, Mr Tarlow submitted that the determination was sustainable. He submitted that the interviewing officer had asked the appellant if he was happy with the interview being conducted in English; what else could he have done. He maintained that the judge was, therefore, entitled to rely on the interview record. The judge had taken account of country guidance and had reached a sustainable conclusion. The challenge should be dismissed.

8. Ms Degirmenci replied. She pointed out that the problem was that the appellant was not aware that there had been problems in his being understood at the interview until the transcript was read back to him in his own language. The interview record was unreliable. The matter should be re-heard.

9. At the conclusion of the hearing, I indicated that I would be setting aside the determination of the First-tier Tribunal. I now give my reasons for so doing.

Discussion and Conclusions

10. In reaching my decision, I considered all the evidence and the submissions made.

11. There are plainly serious issues arising from the screening and asylum interview records and indeed the judge acknowledged this. He observes at paragraph 44 of the determination that *"a number of the answers given by the appellant in his asylum interview are difficult to understand. Indeed, at one point during the interview, the interviewer himself expressed some concern regarding his level of comprehension of English"*. At paragraph 45 he remarks that the content of the AIR *"does appear to reflect a certain lack of understanding..."* Notwithstanding these concerns and the obvious problems with the appellant's understanding of the questions asked and the incomprehensible replies given (such as at Qs.28-35, 39, 42 and 49), the judge placed weight on alleged discrepancies and issues arising from the interview records and used them as reasons to dismiss the appeal. He justified this on the basis that the appellant had confirmed he was happy to proceed in English. This did not, however, take account of the fact that the appellant could not be relied upon as being able to judge whether there were issues at the interview as he was not best placed to understand whether his replies were properly understood by the interviewer. Indeed, as the grounds and submissions point out, the appellant would not have realised the difficulties until the record of the interview was read back to him in his own language. I therefore agree with Ms Degirmenci that the judge erred in placing reliance on discrepancies and omissions arising from the interview record when there were clear flaws in comprehension both by the appellant and the interviewing officer. On this basis alone, the determination is unsustainable. There are, however, further errors that undermine the sustainability of the determination.

12. The judge was wrong to find that the appellant did not refer to any documents confirming his term of imprisonment when his witness statement does make reference to these (at paragraph 43). The judge appears to have overlooked this. The judge also criticised the late production of the documents from the military and the court but took no account of the appellant's explanation that he had been in detention and found it difficult to obtain evidence in a timely fashion and also that his mother had been afraid to send the papers to the UK. In the end, his sister scanned and sent them to him by email.

13. The appellant maintains that when asked about the receipt of documents in Ukraine during cross-examination, he was referring only to the sentencing document. His evidence always was that the mobilisation papers had been hand delivered and

signed for. The judge, however, understood the appellant to be referring to both documents and hence wrongly found there was a discrepancy over how the summons had been received.

14. The judge also found that the appellant could not have been sentenced in his absence for an offence he did not commit as he rejected the claim that the appellant had been served with mobilisation papers. This was based on his erroneous assumption that only the subject of a call up could sign for its receipt whereas the CPIN and the expert report both confirm that is not the case and that call up papers can be left with and signed for by a family member.

15. The judge was also wrong about the age at which the appellant could no longer be mobilised. The cut off age of 27 years relied on by the judge refers to ordinary conscription whereas mobilisation can continue through to the age of 65.

16. The judge also noted a discrepancy in whether the appellant had given his passport to the man whom he believed was going to make an application for leave for him or whether he had it at home. Had this discrepancy been put to the appellant, he would have been able to explain that he was talking of his external and his internal passports.

17. Finally, reliance was placed on a decision from the New Zealand Tribunal which the judge declined to take into account. As it was a part of the evidence, he should have considered it even though it predated country guidance. It would have been open to him to find that it did not advance the case but as it formed part of the evidence, it had to be considered.

18. For all these reasons, I conclude that the First-tier Tribunal Judge erred in law in dismissing the appellant's asylum appeal. I set aside the determination in its entirety other than as a record of the oral evidence given. The matter shall be remitted back to the Tribunal for another judge to hear the evidence and to make a fresh decision.

Decision

19. The decision of the First-tier Tribunal is set aside and a fresh decision shall be made by another judge of that Tribunal.

Anonymity

20. I continue the anonymity order made by the First-tier Tribunal.

Signed

Upper Tribunal Judge

Date: 20 December 2019