Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10907/2019
PA/10913/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 March 2020	**On 15 April 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANDRIY [L]
JULIA [L]
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mrs Koulla Degirmenci instructed by Yemets Solicitors.

ERROR OF LAW FINDING AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Herbert OBE ('the Judge') promulgated on 7 January 2020 in which the Judge allowed the above First respondent, (AL) appeal on asylum and human rights grounds and the appeal of the second respondent (JL) as a dependent pursuant to article 8 ECHR.

Background

2. AL is a Ukrainian national born on 26 September 1979. JL is his daughter who was born on 12 August 2000.

3. The Judges findings, set out from [53], can be summarised in the following terms:

a. The respondent has made no attempt to verify the summonses which have been in its possession since 2016, despite such information being easily obtainable from the authorities in the Ukraine [53].
b. The expert report authenticates the documents on the balance of probabilities [55].
c. An issue with the signature and other issues raised by the expert did not undermine the authenticity of the documents [55 -57].
d. The account relied upon is credible with documents supplied more likely than not to be genuine meaning AL will face arrest on return to Ukraine and punishment for his failure to comply with previous summonses [58].
e. Detention conditions in Ukraine will breach AL's Article 3 rights as accepted by the respondent in the refusal letter [59].
f. The Judge relied upon the opinion of Professor Galiotti, which was not disputed by the Presenting Officer that circumstances have changed in Ukraine and prosecutors are much more likely to open cases and courts find in their favour [60].
g. In relation to the JL, there is a presumption that under 276ADE her article 8 rights become entrenched in the UK. JL's removal will be undesirable as there are no countervailing factors. Pursuant to section 117B JL speaks English and is likely to be of benefit the UK economy. Her removal will not be in accordance with her article 8 rights [62].
h. The appeal of AL is allowed on asylum grounds as he will face persecution for a Convention reason namely his aversion to military service and that prosecution will amount to persecution and subject him to treatment in breach of article 8 ECHR [63].
i. JL's appeal is allowed as she forms a family unit with her mother and leaving her on her own even as a 19-year-old woman would be a clear breach of article 8 and that of her father [64].

4. The Secretary of State appealed asserting the Judge failed to follow existing country guidance, relied solely upon the expert report, and that the summons cannot be genuine and the evidence credible, as it is said the first summons was issued for conscription in 2002 yet conscription was not introduced in Ukraine until 2014.

5. It is also asserted the Judge erred in referring to JL's mother as being in the UK when her last known residence was in the Czech Republic.

6. Permission to appeal was granted by another judge of the First-tier Tribunal on 27 January 2020 on the grounds as pleaded which are said to be arguable.

7. In a Rule 24 response received on the 9 March 2020 AL and JL oppose the application asserting:

a. The ground asserting regarding receipt of a summons for conscription in 2002 is erroneous as the appellant's claim has never been that he received military call-up papers in 2002. The reference to 2002 is a

typographical error, a claim supported at [4] of the decision That sets out the full dates of the court summonses 15 October 2015, 18 March 2015, 14 March 2016 and 3 October 2016 which is consistent with the appellant's documentary evidence.

b. At [21] of the determination where it is claimed this error arises is not part of the Judge's findings.
c. The grounds are wrong when claiming there was no military conscription in 2002 as this was reintroduced in May 2014 after being stopped in October 2013 according to the CPIN.
d. It is asserted the Judge did not find that solely because the summons were genuine the AL faced immediate detention on return to Ukraine. The Judge found both the military call-up notice and court determination that the appellant had been convicted and sentenced in his absence, genuine.
e. The grounds rely on the country guidance case of PK which has been overturned by the Court of Appeal. The decision is in line with the current country guidance of VB which found that although criminal convictions were rare those who had been subjected to criminal proceedings were at risk on return to Ukraine. Prospects of a trial are asserted as being irrelevant as if that was the case the appellant would spend a period in pre-trial detention centre which would place him at risk of ill-treatment.
f. It was found that a convicted draft evader, returning to Ukraine, would come to the attention of the authorities at the airport and will be taken into detention.
g. The Judge was entitled to find where AL had run away from military service there was a real risk of a period in detention beyond the initial period of weeks and months taken to determine the issue a trial and that it was unlikely that given AL had absconded that he will be granted.
h. The Judge considered country guidance.
i. It is not correct the Judge took an almost uncritical approach to the expert report which had not been challenged before the First-Tier Tribunal. It is argued the Judge considered the expert report and the same was not challenged by the Presenting Officer.
j. The Secretary of State had been in possession of the appellants documents since 2016 yet made no attempt to verify them which the Judge was entitled to take into account.
k. The grounds materially misread the Judge's findings at [64] relating to JL.

Error of law

8. The current country guidance relating to Ukraine is VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC) in which it was held that:

> (i) 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;

(ii) there is a real risk of anyone being returned to Ukraine as a convicted criminal sentenced to a term of imprisonment in that country being detained on arrival, although anyone convicted in absentia would probably be entitled thereafter to a retrial in accordance with Article 412 of the Criminal Procedure Code of Ukraine; (iii) there is a real risk that the conditions of detention and imprisonment in Ukraine would subject a person returned to be detained or imprisoned to a breach of Article 3 ECHR.

9. The more recent decision of the Upper Tribunal in PK (draft evader; punishment; minimum severity) Ukraine [2018] UKUT 241 was overturned by the Court of Appeal in PK (Ukraine) v SSHD [2019] EWCA Civ 1756 and the case remitted. The Upper Tribunal is to rehear PK on 27 and 28 April 2020, subject to the current disruption to listing arrangements, and so is not a decision available to the Judge in the decision under challenge.

10. It was accepted by Mrs Degirmenci that the Judge had erred in law in allowing the appeal of AL on Refugee, Humanitarian Protection and Article 2 ECHR grounds, on the facts as found, as there is no legal basis for such findings. The country guidance case is authority for the proposition that prison/detention conditions for those detained as draft evaders are so poor that if the appellant was to be detained it would amount to a breach of his rights pursuant to Article 3 ECHR.

11. The decision of the Judge to allow the appeal of AL on anything other than Article 3 ECHR is therefore set aside. The Tribunal shall consider the merits of the challenge to ascertain whether any error has been made in the assessment of the Articles 3 element and, if so, whether it is material to the decision to allow the appeal.

12. The reference to the 2002 summons has been shown to be a typographical error when the decision and available evidence is read as a whole. No arguable legal error is made out on this ground.

13. The Secretary of State asserts the Judge relied entirely on the view set out in the expert report of Professor Galeotti dated 4 December 2019. The Judge clearly places weight upon report [60] but it was not disputed by the Presenting Officer before the Judge. Concerns were raised regarding the objectivity of Professor Galeotti by Mr Walker who claimed the weight given to his report had to be considered in this context.

14. The Judge was arguably wrong to conclude at [53]

> "53. Firstly, the Home Office has since the summonses in 2016 has made no effort to verify those documents which on the information before me be quite easily be obtained from the Ukrainian government, from Jthe ustice [sic] system and the Ukrainian Army. I take judicial note that there are a number of Ukrainian asylum seekers in the United Kingdom and therefore whilst there was no explanation put forward by this respondent, the embassy in the Ukraine could not be so overwhelmed or overburdened with work. There is simply no explanation for this failure."

15. Where a claimant seeks to rely on a document then, in the normal course, the burden lies on the claimant to show that it is a document that can be relied on. The Judge fails to give adequate reasons for why on the facts of this case the burden should be effectively reversed. There appears no engagement with the substantial number of cases such as Tanveer Ahmed* [2002] UKIAT 00439 which found "there is no obligation on the Home Office to make detailed enquiries about documents produced by individual claimants. Doubtless there are cost and logistical difficulties in the light of the number of documents submitted by many asylum claimants. In the absence of a particular reason on the facts of an individual case a decision by the Home Office not to make inquiries, produce in-country evidence relating to a particular document or scientific evidence should not give rise to any presumption in favour of an individual claimant or against the Home Office".

16. In MJ (Singh v Belgium : Tanveer Ahmed unaffected) Afghanistan [2013] UKUT 253 (IAC) the Tribunal held that the conclusions of the European Court of Human Rights in Singh v Belgium (Application No. 33210/2011) neither justify nor require any departure from the guidance set out in Tanveer Ahmed [2002] Imm AR 318 (starred). The Tribunal in Tanveer Ahmed envisaged the existence of particular cases where it may be appropriate for enquiries to be made. On its facts Singh can properly be regarded as such a particular case. The documentation in that case was clearly of a nature where verification would be easy, and the documentation came from an unimpeachable source.

17. There is no explanation in the decision under challenge how it is said verification could be easily undertaken on the facts.

18. In MA (Bangladesh) and AM (Bangladesh) [2016] EWCA Civ 175, the Court of Appeal said the statement in PJ (Sri Lanka) that 'the circumstances of particular cases might exceptionally necessitate an element of investigation' did not lay down a legal requirement that a case must be 'exceptional' before such a duty arose. Rather the situation, in which such a duty would arise, would occur only exceptionally.

19. The Court of Session in LB, Petition for Judicial Review [2019] CSOH 45 has held that there was no obligation on the Home Office to take steps to verify the claimant's alleged refugee status in Italy (which was in issue). It was explained (see [20]) that the case was one in which it would not have been at all easy or straightforward for the Home Office to have checked the authenticity of the Italian documents relied upon.

20. The respondent asserts the Judge's finding the summons and court documents are genuine is contrary to the country guidance case law yet VB found that although it was not reasonably likely a draft evader would face criminal or administrative proceedings if such a person did face prosecution a prison sentence may result.

21. The Upper Tribunal in the conclusions at [104 – 107] of VB write:

> "104. It is accepted by all as probable that on return to Ukraine the two appellant's would be entitled to a retrial in the light of Professor Bowring's evidence. Given that they would both

undoubtedly request this as a preliminary to challenging their prison sentences we find it probable that they would be held during the process of decision-making by the authorities on this issue in a pre-trial detention facility, or SIZO. We accepted the evidence of Professor Bowring that this would likely take a matter of weeks or perhaps months: it is not an entirely clear-cut legal issue and not one which arises routinely and the context is one of a recent large turnover of judges and the chief prosecutor being new and inexperienced in this field. We do not see that the appellant's could possibly apply for bail until the issue of entitlement to a re trial has been determined as they would until this point simply be convicted offenders was sentences of imprisonment.

105. Whilst it seems highly likely the issue of a trial would be eventually determined in their favour even at this point whether the appellant were to be granted bail cannot be a foregone conclusion. There is a presumption in favour of bail under the current criminal procedural code, however the appellant's have shown themselves persistent avoiders of military service and the Ukrainian justice system, and it might be is that the authorities have chosen to make examples of them in the context of their previous harsh sentences. We find a real risk that the period of detention in the SIZO would, in this context, extend beyond the initial period of weeks or months taken to determine the issue of the retrial in their favour.

106. We do not find that there is evidence to support the idea that ultimately, on a retrial, the appellant's would be sentenced to serve a period of imprisonment. At the current time this is clearly a very rare occurrence. We find it is more likely that they would receive an administrative penalty in the form of a fine or if a criminal penalty were pursued that this would ultimately result in a suspended sentence of imprisonment or be converted to probation. From the material before the Tribunal at the current time this is clearly the way proceedings for failure to do military service are generally dealt with in the few cases which have reached this stage.

107. The question then arises as to whether the probable period of several months in a SIZO on return to Ukraine, that we find that the appellants are likely to experience prior to this retrial, would amount to a real risk of a breach in their Article 3 ECHR rights. We find that this would be the case following the country guidance set out above, most probably due to the high likelihood that they will be held in a SIZO in overcrowded and materially poor detention conditions."

22. Whilst the country guidance case supports the Secretary of States contention that ordinarily punishment for draft evasion would not include a period of imprisonment the case does not rule out that imprisonment may be considered an appropriate sentence particularly in a case where the draft evader has absconded and is unable to present their case to the court.

23. AL's position is that he has been subjected to criminal proceedings and has been tried in absence on 27 November 2016 and sentenced to 2 months imprisonment. The issue before the Judge was therefore whether the documents presented by AL in support of his claim are genuine. The Judge records, in summary, the evidence of the expert in relation to such documents between [31 – 35] in the following terms:

> "31. The expert states that he has seen all the various documents and stated that the document presented appeared genuine on the balance of probabilities. He said the layout of the documents is in the style, language, font and format as he has seen previously. He said that there was appeared to be an absence of receipts especially in the early years of conflict.
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> 32. He said that there was a possibility that the signature for the receipt was collected in another way and it was not sufficient to treat the entire papers as a fake but he brought it to the court's attention.
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> 33. He said that the appellant would have been called up as a reservist given his age but that could occur in a lawful manner.
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> 34. He also states that the absence of a signature by the appellant did not undermine the existence of the document. There was a problem since in the 2014 draft since refusing to sign was possible and therefore alternative signatories from family members were collected or by an affidavit. The expert queries the Home Office source as being from an NGO who had briefed the Canadian Refugee to Prof disputes the fact that a single anonymous source who may have a considerable expertise in Ukraine commenting in 2015 would not be sufficient to undermine the authenticity of such a document.
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> 35. The court summons he dealt with at paragraph 27 – 30 and stated that the correct address format and style of the document was provided and as was with the current determination. He commented on the case of VB and another (draft document-present condition) Ukraine in CG 2002 UKUT 00079 and stated that, "Ukrainian military prosecutors are much likely to open cases on court that are likely on their favour at the time. He also stated that, it is a matter of record that draft dodgers had been imprisoned. He also commented that those offenders who attended court, admit they are guilty or otherwise demonstrate contrition are far less likely to face custodial sentences". He continues, "of course, those who do no not such as Mr [L] are more likely to receive such treatment. The expert gives a number of examples of draft dodgers having been imprisoned. He also commented on the fact that they were far less likely having evaded conscription to be granted bail in the interim."

24. The opinion of an expert that just because a document may be in the correct format does not necessarily mean it is a genuine. But the Professor clearly gives his opinion upon her issues identified in the Reasons for Refusal letter to impact upon the validity of the document

and still concludes, on the balance of probabilities, that the documents provided by AL are genuine.

25. Although the Secretary of States disagrees with this conclusion the Court of Appeal have made it clear that the Upper Tribunal must not interfere in a decision of the First-tier Tribunal unless a genuine error of law is identified in their decision. The Judge's findings are reasoned and the weight to be given to the evidence was a matter for the Judge. Whilst the Secretary of State may consider this to be unduly generous decision the problem for Mr Walker at this stage is that the Home Office Presenting Officer before the Judge did not challenge the experts report at that hearing. It appears the content of the report and validity of the expert were taken as read. If the Secretary of State has concerns regarding the quality of the reports produced or reliability/objectivity of the same by this expert, such matters need to be set out to enable a judge to hear competing argument and adjudicate upon the same. That did not occur in this appeal.

26. Neither the country guidance case nor the expert state that a draft evader will never receive a prison sentence. Whilst it may be unlikely that an individual may be convicted in absentia the evidence before the Judge did not establish that this was impossible or did not happen.

27. The Ground asserting the Judge allowed the appeal pursuant to article 8 as it was found AL would face persecution due to his aversion to military service is made out in light of the finding the Judge allowing the appeal on Convention grounds was arguably unlawful. However as the finding in relation to article 3 appears to be finding within the range of those available to the Judge on the evidence it is not made out that any error is material.

28. The forthcoming country guidance case, when published, may give more up-to-date clarification regarding the situation concerning draft evaders from Ukraine. If that establishes on the basis of the latest material that there will be no breach of Article 3 in respect of a person similar to that of AL the Secretary of State may be able to take further action. That is a matter for the future. At this stage I find no arguable legal error material to the decision to allow the appeal made out in relation to the Article 3 ECHR grounds only.

29. Although the Grounds challenge the Article 8 findings in relation to JL, it was accepted by Mr Walker that if AL's decision stood he would have no basis for challenging the findings relating JL.

30. In conclusion, I find that the Judge's decision to allow AL's appeal pursuant to Article 3 ECHR only has not been shown to be affected by arguable material legal error. That aspect of the decision and the decision to allow JL's appeal pursuant to Article 8 ECHR shall stand.

Decision

31. There is no material error of law in the Judge's decision. The determination shall stand as per [30] above.

Anonymity.

32. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 23 March 2019