Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02112/2020**

THE IMMIGRATION ACTS

Heard at: Field House
On 20th October 2021

Decision Promulgated
On 16 November 2021

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

The Secretary of State for the Home Department

Appellant

And

VM
(anonymity direction made)

Respondent

For the Appellant: **Ms Cunha, Senior Home Office Presenting Officer**
For the Respondent: **Ms Panagiotopoulou, Counsel instructed Yemet Solicitors**

'DECISION AND REASONS

1. The Respondent is a national of Ukraine born in 1968. On the 30th March 2021 the First-tier Tribunal (Judge Lenier) allowed his appeal on protection grounds, finding there to be a real risk of detention upon return to Ukraine, and that such detention would give rise to a real risk of inhuman and degrading treatment in violation of the United Kingdom's obligations under Article 3. The Secretary of State now has permission to appeal against that decisio

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The Decision of the First-tier Tribunal

2. The Respondent claimed to face a real risk of detention in Ukraine because he is a draft evader. He states that although he has already served three years in the navy (1986-1989), the conflict in Crimea has resulted in veterans being recalled. He states that call-up papers were sent to his family home in May 2018. Further papers were received in October 2018, and by April 2019 a summons had been issued ordering the Respondent to attend court and face trial for draft evasion. The Respondent states that he was sentenced *in absentia* to two years in prison. The lady who currently lives in the family home has informed him that the police have attended the property on a number of occasions to look for him.

3. The First-tier Tribunal accepted this evidence. It found the Respondent to be a generally credible witness. The Tribunal also placed significant weight on an expert report provided by a Professor Galeotti, dated 22nd March 2020. Professor Galeotti is an Honorary Professor at the UCL School of Slavonic and East European Studies with extensive experience in researching and writing about Ukraine: he was accepted as an expert witness by the Upper Tribunal in VB & Anr (Draft evaders and prison conditions) Ukraine CG [2017] UKUT 79 (IAC). Professor Galeotii opined that the documents produced by the Respondent, in copy form, appeared to be genuine; he further stated that to his knowledge mobilisation of reservist troops was ongoing, despite its official end in 2016.

4. Having accepted the account advanced by the Respondent, the Tribunal went on to conduct a risk assessment. It noted that Professor Galeotti had considered the issue of sentences passed *in absentia* in some detail in his report. He had had regard to the decision in VB [2017] but believed that matters had moved on in Ukraine since then, with prosecutions and call-ups increasing. Professor Galeotti's report agreed with the conclusions in VB [2017] that most draft dodgers are not imprisoned, but to his knowledge prosecutions were nevertheless proceeding, and custodial sentences being handed down. He reported that some 400 men were already in prison. The Respondent, believed Professor Galeotti, was at particular risk since as a reservist with existing military skills, he would be of greater value than a simple draft dodger. Having had regard to that evidence, the Tribunal directed itself to the country guidance in VB [2017]:

> *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.*

5. Applying that guidance, in light of Professor Galeotti's report, the Tribunal concluded that there were aggravating features in the Respondent's case, namely his having ignored two sets off call-up papers, and a court summons. He was further a reservist who already possessed military skills and as such could expect to be treated more harshly. There was a real risk that he would be imprisoned upon return to Ukraine. That being its finding, the Tribunal allowed the appeal with reference to the conclusion in VB [2017]:

> *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.*

The Grounds of Appeal

6. The Secretary of State's central complaint is that the First-tier Tribunal applied the wrong country guidance. She submits that the entire decision below is vitiated by Judge Lenier's failure to have regard to the *current* country guidance on Ukraine, namely PK and OS (basic rules of human conduct) Ukraine CG [2020] UKUT 314 (IAC). That decision was handed down on the 30th November 2020, and that the Tribunal should have had regard to it, regardless of whether it was brought to its attention by the parties. It follows that having failed to apply this new guidance the Tribunal failed to identify any cogent reasons to depart from it.

7. The second ground was not easy to decipher from the written grounds. Under the heading 'giving weight to immaterial matters' the Secretary of State criticises the First-tier Tribunal for the weight it attached to the report of Professor Galeotti. It is submitted that his report was written before the Upper Tribunal heard PK and OS, and that various details about the trial *in absentia* were not available. It is asserted Respondent (then appellant) should have produced more evidence from Ukraine, for instance by instructing a lawyer there. Before me Ms Cunha very realistically abandoned that ground, accepting that upon a full reading of the report of Prof. Galeotti it could not be said that it was incompatible with the findings in PK and OS. Nor could it realistically be argued that he was not an expert, nor accordingly that his report was an "immaterial matter" which should have been ignored by the Tribunal.

8. Towards the end of the second written ground there appears to be a third, but it may be a return to the first: that the Tribunal erred in assuming that the Respondent would come to the attention of the authorities upon return to Ukraine, or that he would be subject to call-up, since that it is contrary to the findings in PK and OS.

Discussion and Findings

9. The Secretary of State is of course correct to say that Tribunals are obliged to apply the *current* country guidance. PK and OS [2020] was handed down in November 2020, and the hearing before Judge Lenier was in March 2021. It is

therefore extremely regrettable if neither party brought it to the Judge's attention. The failure to apply it was *prima facie* an error.

10. Was it, however, an error such that the decision should be set aside?

11. The parties identified before me that two elements of the Tribunal's reasoning are particularly pertinent to my enquiry. The first is the Tribunal's application of the finding in VB [2017] that although there is not in *general* a real risk of imprisonment for evading the draft, in certain cases, where there are aggravating circumstances, such a risk will be made out. Before me Ms Panagiotopolou responded to this ground by pointing out that the operative guidance is in fact maintained in PK and OS [2020], at section 3 of the headnote:

> *b. It remains the case that, 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. The guidance given by VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC) remains in force.*

12. Ms Panagiotopolou is quite right. On this point, there is no material difference between the two decisions. Whilst it was an error not to apply the extant country guidance, it cannot be said to be material, since the ratio of the decision would have been the same even if the more recent guidance was applied. The Tribunal expressly acknowledged that there was not in general a real risk, but directed itself that such a risk could be made out in certain circumstances. Nothing in PK and OS changes that.

13. The second limb of this ground (referred to above as 'ground three') concerns the reasoning at paragraph 96 of the First-tier Tribunal decision:

> "I am satisfied, in light of the above, that country background evidence also supported a real risk of the appellant being detained at the airport on return, or, if he managed to avoid this, being subsequently detained. He was, in my view, a convicted offender and would be treated as such on return".

14. It is fair to say that this ground was not pursued with much vigour by Ms Cunha, who recognised that it faced the same difficulty as the first: whilst there was a failure to refer to the new country guidance, that failure is not material. At paragraph §88 of VB [2007] the Tribunal says this:

> 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.

15. It was this risk of initial, possibly pre-re-trial detention, that led to the appeal being allowed with reference to Article 3 ECHR. The written grounds assert that this "runs contrary to the evidence and findings in PK and OS [2020], in particular as set out at paragraph 3 of the headnote":

> *d. It is not reasonably likely that conscripts and mobilised reservists who have avoided military service would be identified as such at the border. Where a person has been convicted and sentenced in absentia, the guidance given in VB concerning their likely treatment at the border remains applicable.*

16. The Respondent was not of course simply a mobilised reservist. He was, on the findings of the Tribunal, a person who has already been convicted *in absentia*. The guidance in VB therefore remained applicable, namely that there was a real risk of apprehension at the border. I reject the contention in the written grounds that this conclusion somehow "runs contrary to the evidence and findings in PK and OS". At §281 that decision reads as follows:

> 281. We do not find that there is any evidence to suggest that Ukraine now has a sophisticated computerised system that operates at the border to detect suspected draft evaders upon their arrival. As Professor Bowring noted in his first report, he has no evidence concerning this issue. To the extent he thought that it is likely there would be such a system, we consider his evidence to be speculative. Again, there was nothing in any of the remaining background materials or media reports which supports Professor Bowring's estimate of the likely border infrastructure. In fairness to Professor Bowring, he clearly stated in his report that he was making an informed guess; but it was, nevertheless, speculation. We do not consider the findings in VB concerning the prospect of criminals convicted in absentia being identified at the border to be inconsistent with this conclusion. **There is a clear distinction between an individual who has failed to report for military service who has not been prosecuted, still less convicted, on the one hand, and a person who has been convicted and sentenced in absentia on the other, which was the context in VB**.

Anonymity Order

17. The Appellant is entitled to protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "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 his family. This direction

applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

18. The determination of the First-tier Tribunal contains no material error of law and it is upheld.

19. The Secretary of State's appeal is dismissed.

20. There is an order for anonymity.

Upper Tribunal Judge Bruce
21st October 2021