Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10045/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*
On 5 February 2021

Decision & Reasons Promulgated
On 25 February 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

A D
(ANONYMITY DIRECTION CONFIRMED)

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Representation:
For the Appellant: Ms. K Degirmenci, Counsel, instructed by Yemets Solicitors.
For the Respondent: Mr. I Jarvis, Senior Presenting Officer

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Nightingale ('the Judge') sent to the parties on 31 January 2020 by which the appellant's appeal against the decision to refuse him leave to remain on international protection grounds was dismissed.

2. Judge of the First-tier Tribunal O'Brien granted permission to appeal on all grounds by means of a decision dated 5 March 2020.

Remote hearing

3. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Anonymity

4. The Judge issued an anonymity direction, and no request was made by either party for such direction to be set aside. I confirm the direction at the conclusion of this decision. I do so as it is presently in the interests of justice that the appellant is not publicly recognised as someone seeking international protection: paragraph 13 of 'Upper Tribunal Immigration and Asylum Chamber Guidance Note 2013 No 1: Anonymity Orders'.

Background

5. The appellant is a national of Ukraine and aged 33. Whilst in Ukraine he married and had a child. He asserts that he undertook military service for one year in 2006. Consequent to his military service, he had regular, secure employment. Several months after the outbreak of war in the Donbass, which commenced in February 2014, the appellant received a call-up notice, which he signed for. He was required to go to the military commission on identified date. He did not comply. He received a second notice. He did not sign for this document nor for others subsequently sent to him. In his own words he carried on with his life. His wife also received call-up papers.

6. The respondent details that on 31 July 2017 the appellant applied for a visit visa at the British Embassy in Warsaw, stating that he wished to visit this country as a tourist. The application was refused on 14 August 2017.

7. The appellant states that he entered the United Kingdom clandestinely in a lorry in the autumn of 2017, accompanied by his wife. He decided that he wanted to remain in this country until the war in Donbass concluded, being concerned that if he returned to Ukraine he would have to participate in fighting. He asserts that he was supported in this country by family members who sent him money every month.

8. The appellant was arrested at the scene of an accident in January 2019 and was found to be in possession of false documents. He was subsequently sentenced to 8 months

in prison for driving under the influence of alcohol, document offences and driving without insurance. He claimed asylum whilst serving his custodial sentence.

9. The respondent refused the application for international protection by a decision dated 11 October 2019, observing that the appellant had given inconsistent dates as to when he had undertaken military service and was vague as to the details of his recent call-up. It was noted that he had remained in Ukraine until the autumn of 2017 and had not experienced any difficulties during such time.

Hearing before the First-tier Tribunal

10. The appeal came before the Judge sitting at Hatton Cross on 23 January 2020.

11. The Judge made positive findings in favour of the appellant, including at [38]:

- He had undertaken military service in 2006
- The military ID card presented was genuine
- As a person who had previously performed military service, he was eligible to be called back into the ranks.

12. As to the call-up summons dated 1 February 2015, relied upon by the appellant, the Judge concluded, at [39}:

> '39. … He states that this is the only document which he signed for. Professor Galeotti is able to comment on the contents of that document which he states, to his best professional opinion, appears genuine. He considers the layout, language, font and format as well as the citation of the correct law and correct addresses for the military commissariat. Professor Galeotti, however, can do no more than say that the contents appear to be correct. I have proceeded on the basis that there is a reasonable degree of likelihood that this document calling the appellant up to service in February 2015 is genuine.'

13. However, the Judge made several adverse credibility findings. With regards to a court summons the Judge was critical as to the circumstances in which it was presented, at [40]:

> '40. I have considerable concerns that the court summons was not provided to Professor Galeotti for his opinion. Professor Galeotti's report is dated 16 January 2020. The witness statement from [the appellant's mother-in-law] was provided to the Tribunal under covering letter of 19 December 2019 and is dated 18 December 2019. This document was not provided to Professor Galeotti. I note that this document was translated on 11 December 2019 by a certified interpreter. The summons to court requires the appellant to attend on 7 August 2019. I can find no reason as to why there should have been any delay in obtaining this document, providing it to the respondent and, indeed, instructing Professor Galeotti to provide an opinion on this document. The appellant was in daily contact with his mother-in-law until he was sentenced to prison in the United Kingdom on 11 February 2019. His custodial sentence would have finished around June

> or July 2019. He must have been back in daily contact with his mother-in-law again from this time. There is no reason to suspect that his wife was not in daily contact with his mother-in-law during this time and, most certainly, in August 2019 when it is claimed the school proceedings took place.'

14. The Judge concluded, at [40]:

> '40. I find is of considerable concern that court proceedings are raised only as a very late stage in these proceedings when, in fact, the appellant must have been well aware of the claimed prosecution in August or September 2019 by way of his regular communication with his mother-in-law. That evidence of legal proceedings comes forward only after this refusal where one of the key factors indicating a lack of risk to this appellant is a lack of prosecution is, I find, highly indicative of recent invention to bolster what is, I find, a weak claim.'

15. The Judge observed several discrepancies and inconsistencies in the appellant's account which led to her having considerable concerns as to the appellant's credibility on key issues of his account. Such concerns include:

- In his asylum interview of May 2019, the appellant states a fear of being called up to fight without mentioning an attendant fear of criminal prosecution or imprisonment.
- There is inconsistency and discrepancy as to where the family resided in Ukraine. Ms. Degirmenci accepted at the hearing that the two stated cities are some 400 km apart.
- Inconsistency in the statement of the appellant's mother-in-law as to where she resided.

16. At [46], the Judge details, *inter alia*:

> '46. … His claim as it stands presently has been considerably embellished to that made in the course of his asylum interview. His claimed prosecution has been evidenced only recently despite what I find have been numerous opportunities to bring this to the respondent's attention before the refusal on 11 October 2019. There has been no credible explanation as to why this has not taken place or, indeed, for why there has been no reference to these court proceedings in August 2019 until 16 December 2019 just before the adjourned hearing on 29 December 2019. With regard to the expert instructed, there is no credible explanation given as to why he was not provided with this court summons in order to consider it. I also find that the background evidence indicates that the period during which this appellant and his wife remained in Ukraine was one where those who were avoiding conscription were being actively sought and pursued. This appellant has latterly claimed that he moved to Kyiv, yet he was working for a business in that city and returning to his family home. If there had been any genuine interest in him during this time, he would have been easily traced by the authorities and detained.'

17. The Judge did not accept the court summons to be a genuine document. She further found that the appellant had embellished his personal history and concluded that there was no real risk that he was sought for military service after the first call-up paper in February 2015, of being presently liable to be called up for military service, of prosecution in respect of a failure to abide by his call-up or of detained or imprisoned on return to Ukraine as a result of any criminal sentence imposed. She dismissed his appeal.

Grounds of Appeal

18. The grounds of appeal were drafted by Ms. Degirimenci, who did not represent the appellant at the hearing before the Judge. They run to seven pages and identify four grounds of complaint:

    (1) A failure to consider risk on return in light of positive findings of credibility and evidence from an expert.

    (2) A failure to take into consideration relevant evidence and the taking into consideration of irrelevant evidence when making adverse probability findings.

    (3) The making of a perverse finding in relation to the appellant's ability to exempt himself from military service.

    (4) A failure to take into consideration relevant evidence in relation to section 8 findings.

19. In granting permission to appeal Judge O'Brien concisely identified the complaints and reasoned:

> 'The Judge appears to criticise the appellant for failing to mention in May 2019 a fear of criminal proceedings when it was said that there had been no indication until August 2019 that he would be prosecuted. Even if the Judge was entitled to reject the appellant's claim to have been summonsed to court, there is an arguable failure to consider whether the accepted call-up notice of 2015 would lead to the appellant being identified and consequently prosecuted on return in any event, given the expert evidence without regard.'

Decision on Error of Law

20. For reasons detailed below, Ms. Degirmenci addressed me on grounds 2 to 4 at the hearing, with brief reference to ground 1 at the conclusion of her submissions.

Ground 1 - Failure to consider risk on return in light of positive findings of credibility and evidence from an expert.

21. Ms. Degirmenci candidly accepted that ground 1, concerned with the risk of the appellant being arrested on return to Ukraine, had now to be considered in light of the recent country guidance decision of *PK and OS (basic rules of human conduct) Ukraine CG* [2020] UKUT 00314 (IAC), where it was confirmed that it is not reasonably likely that conscripts and mobilised reservists who have avoided military

service would be identified as such at the border. I observe [281] of the country guidance decision:

> '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*.'

22. The complaint advanced by ground 1, which was identified by Judge O'Brien as a reason for granting permission to appeal, has been addressed by the country guidance decision and no longer enjoys merit.

Ground 2 - Failure to take into consideration relevant evidence and the taking into consideration of relevant evidence when making adverse probability findings.

23. Several separate complaints are made within this ground of appeal. I observe that when considering the existence or otherwise of a material error of law, care must be taken to consider the reasons underpinning a decision in the round rather than necessarily focusing upon a forensic examination of words or sentences in an isolated manner. An error of law is to be material.

24. Complaint is made as the judge's reasoning at [42] of her decision:

> '42. There are also a number of discrepancies within the appellant's account. I have read the appellant's Asylum Interview Record in full and with care. The appellant's only stated fear is of being called to go to war. He raises no fear of criminal prosecution or, indeed, of imprisonment. He makes no reference in his interview to having moved to Kyiv. He also stated before me that he was not stopped at checkpoints. However, at question 46 of his interview he states that sometimes they stopped at checkpoints but he would 'carry on living'. He stated that he lived in Ternopil and made no reference to living in Kyiv. He was specifically asked how he managed to avoid going into the army and he states that he does not know and that they came when he was not home or at work or travelling. There is no mention of any relocation to Kyiv. I find this causes me considerable difficulties in accepting the appellant's claim. It is highly indicative of further recent embellishment from the time of the appellant's interview.

25. The appellant observes that his interview took place in May 2019 and he only received his summons in August 2019. He states, therefore, that he could not have mentioned a fear of prosecution before he had received the summons. I accept that the Judge did not accurately consider the presented chronology. However, I am required to consider the materiality of such error.

26. The Judge provides several reasons for not accepting the genuineness of the purported criminal proceedings. As Ms. Degirmenci appropriately accepted before me a primary reason for the Judge's disbelief as to the genuineness of the summons was that there was no credible excavation provided as to why it was not presented to the expert to consider. This finding, at [46], has not been challenged, and I am satisfied that it was a proper decision to be made by the Judge in the circumstances.

27. I observe that the Judge provided further reasons for not accepting the credibility of the court summons, consequent to a consideration undertaken in accordance with the guidance provided in *Tanveer Ahmed*: [2002] UKIAT 439, [2002] Imm. A.R. 318. The Judge reasoned, at [47]:

> '47. I have considered the court summons in the round in accordance with *Tanveer Ahmed* but I have no expert opinion to assist me regarding its authenticity. There are numerous unexplained discrepancies in this appellant's account and, also, unexplained discrepancies with the background situation evidence. The appellant states that he did not think to instruct a lawyer in Ukraine regarding these legal proceedings in August 2019. As I indicated to Ms. Revill, I have some difficulties accepting his evidence that this was not a possibility in light of other Ukrainian appeals in which I have received evidence from Ukrainian lawyers who have attended proceedings which have taken place in absentia. However, I accept that the issue is what the appellant believed was possible rather than what actually may be possible. Nonetheless, he did not instruct any legal representation to attend court. I find the claim that there have been legal proceedings and that the appellant has been sentenced highly questionable and, taken in the round with the other concerns I have, I find that it has not been established on the lower standard applicable that this appellant has been prosecuted or, indeed, convicted or sentenced to any term of imprisonment as a result of failing to respond to a mobilisation request.'

28. The appellant complains the Judge failed to consider his evidence that he had been informed by his mother-in-law that he could not be prosecuted if he did not attend the hearing in Ukraine. He states that he did not instruct lawyers because he believed that nothing would come of the matter. I am satisfied that the Judge had in mind the appellant's evidence on this issue, as detailed at [29] of her decision. Further, it is clear that the Judge has taken into account concerns identifiable within the evidence presented, when considered it in the round, which she identifies at [48] as being riddled with inconsistency and implausibility. Consequently, the sole challenge to [47] enjoys no merits and, so, there is no meritorious challenge to any of the relevant adverse findings the Judge made in respect of the court summons. That can only mean that the Judge's error of fact identified at para. 25 above cannot properly be considered a material error of law.

29. A further challenge to the Judge's reasoning at [42] is based upon a forensic examination of the appellant's evidence, as detailed at §10 of the grounds of appeal:

> '10. Further at paragraph 42, the Judge also finds his evidence discrepant regarding whether he had been stopped at checkpoints, stating 'He also stated before me that he was not stopped at checkpoints. However, at question 46 of his interview he states that sometimes they stopped at checkpoints but he would 'carry on living''. However, on a careful reading of question 46, the appellant did not say that he was ever stopped at a checkpoint. The answer is recorded as 'I lived in fear but carry on living. I was always worried. Sometimes they stopped at checkpoints but carry on living.' His reference to the checkpoints related to his fear and not to him having been stopped.'

30. Upon considering question 46 of the interview and the corresponding answer, I am satisfied that on a reasonable and natural reading the appellant accepted that sometimes he was stopped at checkpoints. In such circumstances the judge cannot be criticised for believing the appellant's answer before her to be inconsistent with his answer given in interview. There is no merit in this complaint

31. Complaint is made as to the Judge's finding concerning the failure of the authorities to prosecute the appellant's wife, addressed at [44] of the decision:

> '44. The appellant does not appear to have made any attempt to depart Ukraine between 2015 and autumn 2017. From the expert report, it appears that this was during the height of the conscription drive, but also during the time of the beginning of the prosecutions of those who were avoiding conscription. The statement of the appellant's mother-in-law, at paragraphs 11 to 12, described the incident where the village council member named Ivan approached her as the catalyst for the departure of the appellant and her daughter from Ukraine. She says that Ivan told her that as the appellant had not responded to any of the call-up papers that the matter had been referred for him to be prosecuted. Since both the appellant and his wife are said to be avoiding conscription, it is unclear why the appellant would be prosecuted and not his wife …'

32. This paragraph must be read with [41] of the decision, which Ms. Degirmenci accepts has not been challenged. Noting the evidence of the appellant's wife that she had received a call-up papers and had remained in the family home throughout the relevant time until leaving the country with her husband in autumn 2017, the Judge found, at [41]:

> '41. … I note the expert report regarding the efforts of the authorities to pursue those dodging the call-up during this period. I also note that it is claimed that the appellant's wife received call-up papers to go to the army. She remained in the family home throughout her time in Ukraine, leaving only with the appellant in autumn 2017. There is nothing new for me to indicate that she was pursued for military service or, indeed, that she had any difficulties. She would have been easy for the authorities to locate and, I

> find, her continued presence in the family home indicates that the authorities had little interest in pursuing the call-up papers.'

33. In the circumstances, the challenge advanced as to [44] falls away because the Judge has given adequate and lawful reasons as to why she concluded that the authorities had little interest in prosecuting the appellant's wife, and this was a lawful reason to not accept that the authorities had an interest in prosecuting the appellant.

34. I find that the complaint identified at §15 of the grounds of appeal concerned with the Judge's finding at [46] of the decision, detailed above, is simply a disagreement as to findings of fact made and identifies no meritorious challenge as to the existence of a material error of law.

35. As for the complaint identified at §16 of the grounds, Ms Degirmenci took me to the appellant's visa application of July 2017 which identified the appellant as having stated that he resided in Kyiv. She accepted that he detailed his wife as living in Ternopil oblast. The difficulty for the appellant in advancing this ground of challenge is the significant inconsistency and discrepancy in the evidence presented as to where the appellant resided and worked. I am satisfied that the Judge could reasonably make an adverse finding at [42] in circumstances where in his interview the appellant confirmed that his last address in Ukraine was in Ternopil oblast and that his parents resided at the same address. He further confirmed that he lived in Ternopil at Q51 of his interview. There is no merit in this challenge.

36. Consequently, this ground of appeal is dismissed.

Ground 3 - The making of a perverse finding in relation to the appellant's ability to exempt himself from military service.

37. The appellant asserts at §18 of his grounds of appeal:

> '18. At paragraph 48, the Judge concludes that she does not believe the appellant received any repeated requests to attend military service, 'or indeed, that the appellant has not, in fact, been able to exempt himself from any requirement to serve'. This is a perverse finding not based on any evidence before the Judge.

38. It is appropriate to consider [48] of the decision in its entirety:

> '48. I find that the appellant has established only that it is reasonably likely that he has undertaken military service previously in Ukraine and that he received one call-up notice in February 2015. I do not find on the lower standard applicable that this call-up request was repeated or, indeed, that the appellant has not, in fact, been able to exempt himself from any requirement to serve. I find his account riddled with inconsistencies and a number of aspects of his claim are so implausible that I reject his account on the lower standard applicable. I do not find any real risk that he was sought for military service after the first call-up paper in February 2015 or that he is

> presently liable to be called up for military service or that he has been prosecuted or that would be detained or imprisoned on return as a result of any criminal sentence imposed. I find that he is not at risk on return for the reasons claimed and that he does not make a claim to asylum, humanitarian protection or in article 3 grounds.'

39. The section of the paragraph complained of unfortunately adopts the use of a double negative: 'I do not find on the lower standard applicable ... that the appellant has not, in fact, been able to exempt himself from any requirement to serve'. Giving the benefit to the appellant, it can read as a finding that the appellant has secured exemption from military service, which was not an issue addressed at the hearing. However, nowhere else in the decision is there reliance upon this finding and as is clear from [48], when read as a whole, there are numerous reasons as to why the Judge did not accept that the appellant possessed a well-founded fear of persecution in respect of (1) being sought for military service after the first call-up paper in February 2015, (2) being presently liable to be called up for military service, (3) having been prosecuted, and (4) being detained or imprisoned on return as a result of any criminal sentence imposed. Such findings were expressly based upon the rejection of the appellant's account consequent to it being riddled with inconsistency and implausibility, not upon a finding that he had secured exemption from military service. In such circumstances there is no merit to this ground of appeal.

Ground 4 - A failure to take into consideration relevant evidence in relation to section 8 findings.

40. Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 lists various behaviours which must be taken into account as potentially damaging an appellant's credibility, including a delay in making an asylum claim.

41. By means of this ground of appeal the appellant challenges findings as to delay made by the Judge at [45] of her decision:

> '45. In addition to the foregoing, I find that there has been no explanation for the delay in claiming asylum. The appellant claims that he had come to United Kingdom for safety yet made no attempt to claim asylum until he was arrested by the police in January 2019; around eighteen months after his claimed arrival. Although such delay may not be determinative of overall credibility, I find it raises further considerable doubts as to the genuine nature of the appellant's claim to require protection.'

42. It is said that the Judge failed take into consideration, or make a finding upon, the appellant's explanation as to why he delayed in making his claim for international protection. The appellant states that following his arrival in this country he sought legal advice and was informed that he could be detained then returned to Ukraine. Fearful of this, he decided to lay low until the conflict in Ukraine came to an end.

43. I accept the appellant's contention that the Judge erred in stating that no explanation had been provided as to the delay in claiming asylum. His explanation is provided in his statement of 17 December 2019 when addressing questions 52 and 53 of his

interview. However, when taking this evidence at its highest the lawyer simply informed the appellant that there was a 'chance' of detention and removal. It was the appellant's decision not to claim asylum and, in the meantime, he continued to reside in this country with false documents. I observe that the Judge did not place excessive weight upon such delay when assessing credibility, rather placing it in the mix with the appellant's inconsistent and implausible evidence. In the circumstances, whilst there was an error of law in not considering the explanation provided as to why there was a delay in seeking international protection, such error cannot properly be considered to be material when considering the overall evidential findings.

44. For these reasons, this appeal must fail.

Notice of Decision

45. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

46. The decision of the First-tier Tribunal is upheld. The appeal is dismissed.

47. The anonymity order is confirmed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

48. 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 appellant and members of his family. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed: *D O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 8 February 2021

TO THE RESPONDENT
FEE AWARD

No fee was paid and so no consideration is given to a fee award.

Signed: *D. O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 8 February 2021