Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05435/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 12 October 2017	**On 01 November 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

[V D]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms I Sabic, Counsel, instructed by Duncan Lewis Solicitors
For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Kainth (FtJ), promulgated on 14 July 2017, dismissing the Appellant's appeal against the Respondent's decision dated 25 May 2017 refusing his asylum claim.

Factual Background

2. The Appellant is a national of Ukraine, date of birth [ ] 1991. He claims to have entered the UK illegally on 10 August 2015. He was encountered during an enforcement visit on 16 March 2017. Following

the issuance of removal directions for his return to Ukraine the Appellant made an asylum claim.

3. The Appellant fled Ukraine in August 2015 following attacks aimed at extorting money from him. In September 2015 military call-up papers were left for the Appellant at his parent's home. He did not answer the call-up papers and fears being imprisoned as a draft evader as a consequence. He additionally fears that the conditions of military service in Ukraine would amount to a breach of article 3 ECHR, and that he would be forced to perform acts contrary to basic rules of conduct. The Appellant is Catholic and does not wish to fight a war which is against his religious beliefs.

4. The Respondent accepted that the Appellant was beaten by villagers for money. The Respondent additionally accepted that the Appellant received a call-up notice instructing him to serve in the military. The Respondent did not however consider the Appellant would be of significant interest to the Ukrainian authorities if returned, or that he would face a risk of article 3 ill-treatment because of his failure to undergo military service or as a result of the conditions of military service, or that he would be required to engage in military acts contrary to basic rules of conduct.

The decision of the First-tier Tribunal

5. The FtJ did not find the Appellant a wholly credible witness, rejecting his explanation for the delay in his asylum claim. The FtJ did not however go behind the facts accepted by the Respondent in her Reasons For Refusal Letter. The FtJ noted that, to the Appellant's knowledge, there were no current judicial proceedings against him due to his failure to sign the call-up papers (there was no evidence before the FtJ that the Appellant's family had signed the call-up papers on his behalf). The FtJ considered the Country Guidance case of *VB and Another (draft evaders and prison conditions) Ukraine CG* [2017] UKUT 00079 (IAC) (*VB*). The FtJ claimed Ms. Sabic had accepted that the appeal could not succeed based on *VB*, and that she sought to distinguish *VB* by relying on an expert report from Dr Turaeva-Hoehne dated 16 June 2017. At [45] the FtJ quoted from Ms. Sabic's skeleton argument:

> It is important to note that the UT did not consider it had sufficient country of origin information available to make any informed country guidance decision on the question of what conditions those mobilised into the Ukrainian army would face [see paragraph 7 of VB]. Nonetheless, it is for this Tribunal to assess the evidence available before it on this point and to make a determination.

6. At [47] the FtJ posed for himself the question of what implications there would be for the Appellant should he refuse to be conscripted. The FtJ noted that there were no court proceedings in Ukraine against

the Appellant and he had not signed any conscription papers. The FtJ noted that a failure to complete military service could constitute persecution where the military service involved acts which were contrary to the basic rules of human conduct, or the conditions of military service would be so harsh as to amount to persecution, or the punishment for draft evasion was disproportionately harsh or severe. The FtJ referred to the September 2016 Country Information and Guidance (CIG) report on military service in Ukraine and expressed his concern that Dr Turaeva-Hoehne made no reference at all to *VB* in her report or to the documents that were considered by the Upper Tribunal in reaching their decision.

7. At [49] the FtJ stated,

> I did not agree with the submission made on behalf of the Appellant that the expert report upon which reliance is made, provides accurate information with respect to purported violations of humanitarian concerns by the Ukrainian army and the general decline of standards in Ukraine.

8. At [50] the FtJ noted that draft evaders do not automatically receive a custodial sentence and that one of the options available to the Ukrainian authorities was the imposition of a financial penalty. The FtJ comprehensively rejected the factors advanced by Ms. Sabic as being aggravating features increasing the likelihood of a custodial sentence being imposed on the Appellant. While accepting that the Appellant could potentially be the subject of prosecution under the Penal Code and Administrative Code of Ukraine, the FtJ observed that this did not mean that the Appellant would face an automatic mandatory custodial sentence. With reference to *VB* the FtJ concluded that the Appellant would not face any degrading treatment or punishment if returned to Ukraine.

9. Having found that the Ukrainian authorities were capable of providing a sufficiency of protection to the Appellant in respect of the attacks from the criminal gang in the village, and that the Appellant could, alternatively, avail himself of the internal relocation alternative, the FtJ dismissed the appeal on all grounds.

The grounds of appeal and the error of law hearing

10. The grounds note, as a preliminary point, that Ms. Sabic did not concede that the Appellant could not succeed on the basis of *VB* and that she did not seek to distinguish *VB*. The grounds essentially contend that the FtJ provided no reasons for his assertion at [49], as detailed in paragraph 7 above. Not only was the FtJ's finding at [49] unreasoned, he failed to engage at all with the evidence detailed in the expert report, and his reference to 'purported violations of humanitarian concerns' and 'general decline of standards in Ukraine' did not accurately describe the criteria the First-tier Tribunal was

legally bound to consider when determining risk on return. This error was material as the evidence before the FtJ, including the report from Dr Turaeva-Hoehne, a Human Rights Watch report dated 21 July 2016, and an OHCHR report on the human rights situation in Ukraine dated 13 June 2017, could have led to a different result had it been considered. Permission was granted on all the grounds.

11. In her oral submissions Ms. Sabic referred me to the skeleton argument that had been before the First-tier Tribunal, including the reference to the Court of Appeal decision in *Krotov* [2004] 1 WLR 1825. Ms. Sabic did not take issue with the FtJ's assessment of the consequences for refusing to serve in the army, and accepted that there were no aggravating features likely to result in a custodial sentence following any future prosecution. Ms. Sabic pointed out that *VB* did not assess the conditions of military service and that, at footnote 58 of the expert report, reference was in fact made to *VB*. It was incumbent on the FtJ to have engaged with the evidence detailed in the expert report and the other NGO reports. In relation to the materiality of the FtJ's error, it was submitted that even if the Appellant was given a fine, he would still be a person who was liable to conscription, and that there was nothing to indicate that he was somebody who, having refused conscription, would simply be left in peace. When I asked Ms Sabic to draw my attention to the evidence before the FtJ that the Appellant would continue to face pressure to join the army, she suggested, in the alternative, that the matter should be adjourned to enable further exploration of the evidence on this very point.

12. Mr Bramble submitted that the FtJ had been entitled to his conclusions relating to the consequences of draft evasion and that, had the FtJ properly considered the evidence detailed in the expert report, this could not have made any material difference to his conclusion.

Discussion

13. In *VB*, a recently promulgated decision providing country guidance on Ukraine, the Upper Tribunal considered the likely punishments for draft evasion and whether prison conditions for draft evaders were contrary to article 3 (paragraph 6). The Tribunal did not consider whether the conditions to which a draftee would be exposed during military service would breach article 3, or whether a draftee was at risk of being forced to commit acts contrary to international humanitarian law (paragraph 7). The Tribunal found there was a real risk that anyone being returned as a convicted criminal sentenced to a term of imprisonment would be detained on arrival, and that conditions of detention and imprisonment risked breaching article 3.

14. The 1st headnote of *VB* reads:

> *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.*

15. It was not in dispute that the Appellant was not a convicted criminal, or that there was any evidence that judicial proceedings had been commenced against the Appellant for his failure to sign or answer to the call-up papers, and Ms. Sabic accepted that there were no aggravating features that might lead to the imposition of an immediate custodial sentence (a finding of fact made by the FtJ in any event, which was not challenged and which was clearly open to him on the evidence before him and for the reasons given).

16. In light of the findings in *VB*, and the Appellant's particular circumstances as determined by the FtJ, the Appellant was not at risk of being imprisonment as a draft evader if returned to Ukraine.

17. I accept Ms. Sabic's submission that the FtJ's conclusion at [49], where he claimed that the expert report did not provide accurate information in relation to purported violations of 'humanitarian concerns' by the Ukrainian army, is insufficiently reasoned. The only possible explanation advanced by the FtJ for not attaching any weight to this aspect of Dr Turaeva-Hoehne's report is the absence of any reference in the report to *VB*. I note that the expert did in fact make reference to *VB*, albeit in extremely brief terms. The FtJ's reasoning, to the extent that he has provided any, is wholly deficient. I additionally accept that the FtJ did not engage with the evidence detailed in the expert report relating to the conditions of military service.

18. I am not however satisfied that this lack of reasoning is a material legal error capable of undermining the FtJ's ultimate conclusions. In short, this is because there was no evidence before the FtJ, either in the background documentation or in the expert report, capable of entitling him to conclude that any continued refusal by the Appellant to undertake military service would lead to him being forcibly conscripted or otherwise compelled to undertake military service, or that any continued refusal would expose the Appellant to a real risk of imprisonment. In these circumstances, the conditions of military service, or any risk of being made to perform acts contrary to basic rules of human conduct, would not arise for consideration as the Appellant would not face a real risk of being recruited.

19. *VB* found that there was no real risk that a draft evader would be imprisoned for refusing to be conscripted. At paragraphs 30 to 32 the Tribunal set out the relevant sections of the Ukrainian Penal Code and Administrative Code relating to avoidance of conscription, and noted (at paragraph 31), the quantum of fines imposed, including an increased penalty if the violation is repeated within a year. This suggests that men who continue to refuse to be conscripted may be liable to pay larger fines. At paragraph 57 of *VB* the Tribunal stated, "The evidence in the public domain is that very few draft evaders have, to date, been subject to any criminal proceedings let alone convicted of any criminal offence or sent to prison." The Tribunal noted that it was possible that sentencing might be more severe for individuals who do everything possible to avoid call-up, but that it was also possible for prison sentences to be suspended, and if a term is suspended there was a power to give probation/supervision. If there was any evidence that individuals who repeatedly refused to be conscripted and who were prosecuted, were subsequently imprisoned for continued refusal to be conscripted, I would have reasonably expected such evidence to be available and to have been brought to the Tribunal's attention. Yet at paragraph 67 the Tribunal noted, after considering the background and expert evidence before it, that only a couple of persons appeared to have actually been sent to prison for conscription or mobilisation evasion, with evidence of suspended sentences, probation or fines in only tens of other cases. There was no cogent evidence before the Tribunal to suggest that an individual who repeatedly refused conscription would either be at increased risk of being imprisoned, or of being forcibly conscripted. On the basis of the information before the Tribunal, the overwhelming majority of over 100,000 draft evaders have faced no consequences at all for their actions.

20. I have considered the report from Dr Turaeva-Hoehne in detail. I have approached the report on the basis that Dr Turaeva-Hoehne is sufficiently qualified to provide a report to the Tribunal on the conditions of military service and the consequences for refusal to be conscripted, although I did not hear detailed submissions on this point and I note that few of her published books and articles relate specifically to Ukraine, that her Ukrainian is 'working', and that she relies on NGO reports, scholarly texts, press articles and a 'wide network of informants both living in Ukraine and in Europe' as sources of her report. At paragraphs 19 to 22 the expert deals with military conscription in Ukraine, and at paragraphs 23 to 28 the expert considers draft evasion. The expert refers to local news reports of deserters and those who refused to serve being sentenced from 2 to 5 years, although this is said to be pursuant to Article 336 which, according to *VB*, relates to avoidance of mobilisation and not avoidance of conscription (which falls under Article 335). At paragraph 24 the expert considers the position of deserters who are already in military service, but this is not relevant to the issue of draft evasion

and the Appellant is not in military service. At paragraph 25 the expert refers to a local news report, only available in Ukrainian, of several cases of imprisonment of a school teacher and others for draft evasion, which occurred in 2015. This however sits uncomfortably with the conclusions reached by the Tribunal in *VB*. The only explicit reference to forced recruitment (other than a vague reference to soldiers getting on a bus and driving off somewhere with the young men) appears at paragraph 28 where the expert cites a single source (Sputnik news, a Russian news agency, citing 'local informants') describing representatives of enlistment offices bursting into student dormitories to 'catch' those evading military service, and threatened to bring those who refused to the recruitment office in handcuffs. There is no other reference to someone being forcibly conscripted, and no further evidence as to what would happen to someone who repeatedly refused to be conscripted. There is no reference to forcible conscription in any of the NGO reports relied on by the Appellant, or in the CIG reports, or indeed in any report before the Tribunal in *VB*. Ms. Sabic acknowledged the dearth of evidence to support an assertion that individuals are being forcibly recruited, or that a person who remains liable to military service but who continues to refuse conscription is likely to face renewed attempts of conscription or greater punishment for such refusal. She invited me, as an alternative, to adjourn to enable the Tribunal to consider further evidence on this point, but it is for the Appellant to demonstrate, albeit to the lower standard of proof, that he will be at risk of either forcible recruitment or at real risk of imprisonment for continuing to refuse to undertake military service, and I can only identify a material error of law based on the evidence that was before the FtJ.

21. If there is no satisfactory evidence, and therefore no real risk, that the Appellant will be imprisoned for repeatedly failing or refusing to undertake military service, and no satisfactory evidence that he will be compelled to undertake military service, he will simply not find himself in a position where he is subjected to any adverse conditions that may accompany military service, or be forced to participate in acts contrary to basic rules of human conduct. Put simply, there was insufficient evidence before the FtJ sufficient to entitled him, on any rational view, to conclude that the Appellant would ultimately be forcibly conscripted or imprisoned if he persisted in refusing to undertake military service. In these circumstances, the FtJ's failure to engage with the evidence in the expert report describing the conditions of military service and the possibility that the Appellant may be required to engage in acts that may breach international humanitarian law can have no material impact on his ultimate conclusion that the Appellant does not face a real risk of persecution or article 3 ill-treatment if returned to Ukraine.

Notice of Decision

The appeal is dismissed

30 October 2017

Signed
Upper Tribunal Judge Blum

Date