



IAC-AH-CO-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/10467/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 28 October 2015**

**Decision & Reasons Promulgated
On 6 January 2016**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**VIKTOR NESTEROVSKYI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr M Diwnycz, a Senior Home Office Presenting Officer
For the Respondent: Mr M Middleton, Kirklees Law Centre

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and to the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, Victor Nesterovskyi, was born on 28 August 1973 and is a male citizen of Ukraine. He claimed asylum in the United Kingdom on arrival in August 2014. His claim for asylum was rejected and a decision was made to remove him from the United Kingdom. The appellant appealed against that decision to the First-tier Tribunal (Judge Thornton) which, in a decision and reasons promulgated on 6 March 2015, allowed

the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. Granting permission, Deputy Upper Tribunal Judge Archer, found that it was “probably open to the judge on the available evidence to find that there was a reasonable likelihood or real risk of the appellant be called up [to the military] if returned to Ukraine.” Deputy Judge Archer noted that the First-tier Tribunal (Judge Thornton) found that the appellant was thereafter at real risk of imprisonment but observed that the judge had not made any finding as to whether or not the appellant would undertake military service or choose to go to prison. He considered that admission to be an arguable material error of law. Deputy Judge Archer considered that, if the appellant was prepared to undertake further military service, then it was arguable that there would be no risk of imprisonment and, in consequence, no breach of Article 3 ECHR.
3. Judge Thornton has produced an extremely detailed and thorough decision. I find that Deputy Judge Archer, in granting permission, has failed to understand the crux of the appellant’s argument as regards military service/risk on return. Quite rightly, the judge has concerned herself with the likelihood of future risk to the appellant upon return to the Ukraine. She did find that part of his account was lacking in credibility [27]. However, crucially, the judge found that it was credible “that the appellant left Ukraine on 7 August 2014, two weeks after the third wave mobilisation bill was signed on 23 July 2014, in order to evade mobilisation after he became liable for mobilisation when the upper age limit was extended.” That is a finding which is properly reasoned by reference to the relevant evidence. Further, at [25], the judge rejected the Presenting Officer’s submission that the appellant would not be held responsible for avoiding military service because call up papers had not been served on him in person. The judge has made a very clear finding that the appellant will have been summoned for military service and also that he has not answered to that summons. In consequence, the appellant will not escape punishment under Article 336 of the Ukrainian Criminal Code because which records that, “if a man does not live at the place of his permanent residence, we will not look for him. Nevertheless he shall answer in law.” That “answer in law” would expose the appellant, in the judge’s reasoned analysis, to the real risk of imprisonment for two – five years in conditions which would breach Article 3 ECHR (see *PS (prison conditions: military service) Ukraine CG* [2006] UKAIT 00016, upon which the appellant relied at the hearing before the First-tier Tribunal). There will be no question of the appellant choosing to undertake military service in order to avoid being imprisoned; he already faces imprisonment for the historic misdemeanour of having already evaded military service.
4. Judge Thornton made the additional finding at [30] that “the appellant would be at real risk of persecution as a result of his imputed political opinion as he would be viewed as a pro-Russian separatist because he had evaded mobilisation.” In effect, the judge found that the appellant faced a double risk, namely imprisonment under the Criminal Code for having

evaded mobilisation and, additionally, persecution by reason of imputed political opinion because his evasion of military service would lead those in authority and having the power to persecute him to believe that he was a pro-Russian separatist. The judge has supported both of those conclusions by a very detailed and carefully reasoned analysis of the evidence. The question of choice and/or the appellant's reasons for evading military service which form the basis of the Secretary of State's grounds of appeal are of no relevance in the light of the judge's findings. The judge has found that risk to the appellant has crystallised whilst he has been in the United Kingdom and that there is nothing he can do to alter that risk should he now return to Ukraine. In the circumstances, the Secretary of State's appeal is dismissed.

Notice of Decision

This appeal is dismissed.

No anonymity direction is made.

Signed

Date 20 December 2015

Upper Tribunal Judge Clive Lane