



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10247/2018

THE IMMIGRATION ACTS

Heard at Field House
On 18 September 2019

Decision & Reasons Promulgated
On 26 September 2019

Before

Upper Tribunal Judge Sheridan

Between

OB
NB
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Radford, Counsel instructed by Duncan Lewis solicitors
For the Respondent: Ms Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Ukraine. The first appellant (hereafter “the appellant”) was born on 2 January 1974. He is married to the second appellant, who was born on 7 December 1977.
2. The appellant claims to be at risk on return to Ukraine because he has evaded military conscription. He claims that three notifications requiring him to report for military service were received by his wife in 2014.

3. The appellant's claim was rejected by the respondent. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge Traynor ("the judge"). In a decision promulgated on 19 June 2019, the judge dismissed the appeal. The appellant is now appealing against that decision.
4. The judge did not find the appellant credible. Amongst other things, the judge found damaging to the appellant's credibility that he had not explained in the papers, or provided medical evidence to confirm the position in respect of, a noticeable eye defect. At paragraph 38 the judge stated:

"What is not explained in the papers, and the appellant has provided no medical evidence to confirm this, is the fact that the appellant has a very noticeable eye defect which is immediate apparent [sic] to everyone. Neither representative dealt with this and it was left to me to enquire as to whether the appellant suffered from any health problems. It was only in the course of this clarification of his evidence that he explained that he had sight problems with his left eye following an injury in childhood but he claimed his vision was reduced by only 10%. When I enquired of him as to whether or not he was aware this may be sufficient to exempt him from military service, given his sight problems, he responded by stating that he did not think that was possible and that, in any event, he had been issued with a Ukrainian driving licence and was allowed to drive. Significantly, he told me that he had never asked the authorities for any exemption on the grounds of his sight problems."

Grounds of Appeal and Submissions

5. The grounds of appeal make a single argument, which is that the judge developed his own case theory regarding the appellant's eye condition. At paragraph 9 of the grounds it is stated that there was no mention of the appellant's eye condition in the respondent's reasons for refusal letter. The grounds cite case law where judges are cautioned to avoid developing their own theories of a case.
6. At the commencement of the hearing I drew Ms Radford's attention to paragraphs 65 and 66 of the respondent's reasons for refusal letter. Paragraph 65 starts by stating that the appellant has confirmed he has a sight condition and then proceeds to set out three different sources of information concerning exemptions from military service on medical grounds in Ukraine. At paragraph 66 the respondent stated:

'Therefore based on the information above, it is considered that the issue with your eyesight would deem you unsuitable for military service, especially in a combat role, and that any medical examination would render you unsuitable to handle military equipment owing to your condition.'

7. Ms Radford acknowledged that the eye issue was raised by the respondent (even though the contrary had been asserted in the grounds) but argued that the judge erred nonetheless because the judge's finding that the appellant would not be conscripted for medical reasons was based on speculation and not grounded in the evidence. She argued that the only evidence on this issue was that given by the appellant and the judge had misconstrued and/or ignored it.

Analysis

8. The argument in the grounds of appeal is misconceived as the judge did not develop his own case theory. As is clear from paragraphs 65 and 66 of the reasons for refusal letter, the argument that the appellant would be unsuitable for military service because of his eye condition was made by the respondent. This is a case in which the judge agreed with the position taken by the respondent. It is not a case where it can be said that the judge developed his own theory.
9. Ms Radford argued that the grounds can be read as challenging the judge making findings regarding the appellant's eye condition that are not supported by the evidence. I do not accept that the grounds cover this argument as they make only one submission which is that the judge developed his own case theory.
10. In any event, I am not persuaded that Ms Radford's argument has merit. The respondent was clear in the reasons for refusal letter that he took the view that the appellant's eye condition meant he would not be considered suitable for military service. The appellant cannot therefore argue he was taken by surprise by this matter being at issue. It was open to the appellant, upon whom the burden of proof lay, in light of the respondent's position, to submit evidence (such as a medical report) to substantiate his claim that he would be conscripted despite his eye condition. However, no such evidence was adduced and the appellant relied solely on his witness evidence. It was for the judge to decide whether to accept the witness evidence or not; and no error of law arises from the judge accepting the respondent's position and deciding that the appellant's witness evidence was not sufficient to discharge the burden of proof.
11. The appeal is therefore dismissed.

Notice of Decision

The appeal is dismissed. The decision of the First-tier Tribunal does not contain a material error of law and stands.

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

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 20 September 2019