



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

Appeal Number: PA/02110/2020 (P)

THE IMMIGRATION ACTS

**Decided at Field House
On 13 January 2022**

**Decision & Reasons Promulgated
On 18 January 2022**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OP

(ANONYMITY DIRECTION MADE)

Respondent

DECISION AND REASONS

Introduction

1. In this decision the appellant is referred to as the “Secretary of State” and the respondent as the “claimant”.
2. This is an appeal by the Secretary of State against the decision of Judge of the First-tier Tribunal Farmer (‘the Judge’) sent to the parties on 4 June 2021. The Judge allowed the claimant’s appeal against a decision to refuse him leave to remain on human rights (article 3) grounds.
3. By a decision dated 5 July 2021 Judge of the First-tier Tribunal Andrew granted the Secretary of State permission to appeal on all grounds.
4. The claimant is represented by Yemets Solicitors.
5. The respondent is represented by Mr. S Whitwell, Senior Presenting Officer.

6. The error of law hearing was scheduled to be listed before me on 14 January 2022. On 13 January 2022 Mr. Whitwell contacted the Tribunal and confirmed the Secretary of State's wish to withdraw her appeal. On the same days Yemets Solicitors confirmed their agreement with the Secretary of State's position. An agreed consent order was subsequently filed with the Tribunal.

Facts

7. The claimant is a national of Ukraine and is aged 30. He arrived in the United Kingdom clandestinely, with his wife, on 13 May 2019. He claimed asylum on 21 May 2019.
8. The core of his claim was that he undertook compulsory military service for 12 months from the summer of 2014 and was subsequently placed in the reserves. He was personally served call-up papers in 2018 but decided to ignore them. He did not wish to rejoin the military, primarily due to the escalation of the conflict in the east of the country and not wishing to kill or be killed. In 2019, he received his second call-up notice and was informed as to the consequences of evading military service. He failed to report as required and subsequently he was summons to attend court. He moved to his wife's village and so was not present when a member of the military attended his family home and asked where he was as he had failed to attend a court hearing. A few days later his parents received a court judgment confirming that he had been sentenced to three years' imprisonment. The claimant then left the country.
9. His application for international protection was refused by the Secretary of State on 21 February 2020.
10. His appeal hearing was held before the Judge at Hatton Cross on 25 May 2021. The Judge accepted:
 - The claimant was credible as to his personal history, at [28]
 - A court summons and sentencing documents relied upon by the claimant were genuine, at [29]
 - His details will be checked by the authorities against a computer system upon return and he will be found to have a conviction, no outstanding appeal and an outstanding prison sentence. He will come to the immediate attention of the Ukrainian authorities, at [31]
 - Considerations of pre-trial bail will not arise as he is a convicted person. Being an absconder it is highly unlikely that bail would be granted, at [32]
 - It is therefore highly likely that he would be taken into detention and highly likely that he would be held in a pre-trial detention facility where he is likely to spend weeks or even months, at [32]-[33]

- It was accepted in *VB and Another (draft evader and prison conditions) Ukraine CG* [2017] UKUT 79 (IAC) that prison conditions in Ukraine are such that a detained or imprisoned person would have their article 3 rights breached, at [35].

11. The Judge concluded, at [36]:

‘36. On this basis, given my findings of fact that the appellant has been convicted and sentenced to 3 years’ imprisonment and it is highly likely that he would be detained on his return to Ukraine and not granted bail, the appellant’s appeal is allowed on Article 3 grounds.’

Secretary of State’s challenge

12. The Secretary of State advanced two grounds of appeal, which are summarised below:

- (i) The Judge erred by failing to have any regard to the country guidance decision of *PK and OS (basic rules of human conduct) Ukraine CG* [2020] UKUT 314 (IAC).
- (ii) Unlawful weight was accorded to expert evidence.

Decision

13. The parties have filed a consent order establishing agreement in respect of the Secretary of State’s wish to withdraw her appeal. I am required to consider whether to consent to the proposed withdrawal: rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (‘the 2008 Rules’).
14. I consider it appropriate to take this opportunity to address in certain concerns in a written decision arising from consideration of the Secretary of State’s grounds of appeal. In doing so, I observe that I have not had the benefit of oral observations from the Secretary of State.
15. I note that the two grounds are linked. The first ground requires the establishment of a material error in respect of the second, because on its own and in light of the finding that the various court documents are genuine, the first challenge is unsustainable.
16. In respect of the criticism that there was a failure to consider relevant country guidance, on its face this is a valid concern. However, as the Tribunal has recently re-affirmed in *AAR (OLF - MB confirmed) Ethiopia CG* [2022] UKUT 00001 (IAC), at [18], a failure to identify and apply a relevant country guidance decision without good reason might amount to an error of law in that a relevant consideration had been ignored, and legally inadequate reasons had been given for the decision. Failure does not always establish a material error of law.
17. In *VB and Another* the guidance provided in recital 2 of the headnote details that 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 was not expressly departed from. The Tribunal in *PK and OS* did not expressly depart from this guidance.

18. A concern that arises from the drafting of ground 2 is that it is not clearly explained that the Secretary of State's position in her decision letter and at the hearing was not that the documents were unreliable, but they relate to another person. The decision letter details, at [42]:

'It is noted that in support of your asylum claim you have submitted to the Home Office translated copies of court summons and court verdicts. It is noted that your name is [OP] and your date of birth is [22 April]. This is also stated in your internal Ukrainian passport you submitted in support of your claim. However, on the court summons you have provided, it states the name of [OVP]. On the court verdict you have provided, it states that name of [OVP] and date of birth of [20 April]. It is evident from the information which you have provided to support your claim that the date of birth of the individual on the court verdict document is different to your own. As such, no weight will be placed on this document as well as the court summons in support of your asylum claim.'

19. At a case management hearing held on 28 January 2021 the Secretary of State confirmed her position that the Ukrainian proceedings concerned another person. This position was confirmed at the hearing before the Judge, at [13].
20. The Judge addressed the first concern raised in the decision letter and accepted at [21] that certain documents referenced the claimant's patronymic, resulting in reference to OVP. This finding is entirely reasonable on the facts, and I conclude that the Secretary of State's refusal on this ground stems from a lack of understanding as to the cultural use of patronymics in Ukraine, both officially and in common speech.
21. The Secretary of State's primary challenge is therefore rooted in ground 2 and is directed towards the second concern, namely the disparity in dates. It is asserted that too great a weight was placed by the Judge on the evidence of Professor Galeotti when concluding that the error as to the date of birth was simply a typographical error. Various complaints are made in ground 2 as to steps the expert should have undertaken including:

'... No background to the alleged trial of this appellant in absentia was provided, other than a putative date of [date provided], and the putative details of the court, from the document's own contents. No examination of actual court records by the expert was undertaken, despite him referring to the court website at footnotes 24 and 27 of his report. Had the expert exercised due diligence, he would have checked the existence or the lack of it, of the court verdict on the court website, before proclaiming it to be genuine. It is submitted that not to do so was to mislead the Tribunal as to the weight to be attached to the document. ...'

22. A specific complaint is made that the expert, and therefore the claimant who relied upon the expert's report, misled the First-tier Tribunal. This is a very serious allegation. I am satisfied that this is not the true position. It was not the Secretary of State's case before the Judge that the documents were not genuine, rather it was stated that they related to another person. This is the case the claimant asked the expert to address and is the one the claimant himself addressed at the hearing. I am satisfied that the author of the grounds advanced a case that was not the one placed before the Judge and was expressly identified as not being the Secretary of State's position both at the case management hearing and the hearing before the Judge. The approach adopted by the author of the grounds is not a proper one. My concern is that it is the Secretary of State who has misled in this matter by failing to clearly identify the true position in her grounds of appeal. She benefitted by securing permission to appeal on the basis that it was arguable that the Judge placed too great an emphasis and weight upon the expert report. I consider it appropriate that I express my real concerns as to the approach adopted by the author of the grounds, but it is appropriate that I note that I have not received observations from the Secretary of State on this matter.
23. I further observe that the author of the grounds has not signed section D of the appeal form, as required, and has not identified themselves. This is of concern considering the approach adopted as to ground 2.
24. I take this opportunity to observe that the Secretary of State's reliance upon the purported citable legal principle in the decision of *OK (PTA; alternative findings) Ukraine* [2020] UKUT 44 (IAC) is entirely misconceived. The decision is reported in respect of procedure. It is not authority in respect of the particular facts as previously found in that matter by the First-tier Tribunal. There is no cogent ground for asserting that if the Judge had considered the decision in *OK* "he would have approached the appellant's evidence differently."
25. Upon considering the grounds of appeal as advanced, and having read the Judge's decision, I am satisfied that no material error of law is identifiable.
26. The approach adopted by the Secretary of State to withdraw her appeal is appropriate in the circumstances.
27. Upon the Secretary of State having given appropriate written notice the Tribunal consents to the withdrawing of her appeal: rule 17(1)(a) and (2) of the 2008 Rules

Notice of Decision

28. The consequence of the Tribunal consenting to withdrawal is that, as there is no challenge remaining to the decision of the First-tier Tribunal, the appeal before the Upper Tribunal is dismissed and the decision of the First-tier Tribunal dated 4 June stands.

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

Dated: 13 January 2022

TO THE RESPONDENT
FEE AWARD

No fee was paid and so there can be no fee award.

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

Dated: 13 January 2022