



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

Appeal Number: HU/21504/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 30 January 2020**

**Decision & Reasons Promulgated
On 5 February 2020**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

**Y B
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:

Mr. J. Martin, of counsel, instructed by Samars Solicitors

For the Respondent:

Mr. L. Tarlow, Home Office Presenting Officer

DECISION AND REASONS

ANONYMITY ORDER

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order which reads “Unless the Upper Tribunal or a court directs otherwise, no reports of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant. 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. I make this order so as to avoid a likelihood of serious harm arising to the Appellant from the content of his claim.”

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Ukraine. He initially arrived in the United Kingdom in June 2002 with leave to remain until 27 October 2002 under the Workers’ Registration Scheme. He has not had any leave to remain since that date. He applied for leave to remain in the United Kingdom on 21 December 2012, on private and family life grounds, but his application was refused in October 2013. The Appellant made a further application for leave to remain on 26 May 2016 in which he relied on the fact that he had been convicted and sentenced to three years imprisonment for refusing to attend for military service in Ukraine. On 28 June 2018 his application was refused and certified as being clearly unfounded. The Appellant challenged this decision by way of a pre-action protocol letter, dated 17 July 2018.
2. The Appellant’s application was reconsidered but refused on 9 October 2018. He appealed against this decision and First-tier Tribunal Judge Norris dismissed his appeal in a decision promulgated on 20 August 2019. First-tier Tribunal Judge O’Brien refused him permission to appeal to the Upper Tribunal on 22 November 2019 but Upper Tribunal Judge Gill granted him permission to appeal on 16 December 2019.

ERROR OF LAW HEARING

3. At the start of the hearing counsel for the Appellant indicated that, given the potential interest of the Ukrainian authorities in this appeal, it would be appropriate to make an anonymity order. I was in agreement with this submission and the Home Office Presenting Officer did not object to the making of such an order. Counsel for the Appellant also accepted that Article 3 of the European Convention on Human Rights could be characterised as a “new matter” and was not in issue in this hearing. As I informed the parties, if I found that there had been an error of law in the First-tier Tribunal Judge’s decision, it would be open to the Appellant to write to the Respondent to seek her consent to this new matter being relied upon at any resumed hearing. Both counsel for the Appellant and the Home Office Presenting Officer then

made oral submissions and I have referred to these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

4. When the Appellant's application was reconsidered and a further decision was reached on 9 October 2018, the Respondent restricted her consideration to Article 8 grounds. First-tier Tribunal Judge Norris then restricted her consideration of the Appellant's appeal to considering whether removing the Appellant to Ukraine would amount to a breach of Article 8 of the ECHR.
5. In the grounds of appeal, it was submitted that, given the content of the Pre-action Protocol letter, it was implicit in the refusal that Article 3 of the ECHR was in issue. However, as noted by Upper Tribunal Gill when she granted permission to appeal on 16 December 2019, because the Respondent had not reached any decision on Article 3, reliance on this Article amounted to a "new matter" and the Respondent's consent was needed before it could be pursued and had not been obtained.
6. Instead, permission to appeal was given on the basis that it was arguable that, in his assessment of:
 - (i) whether there were very significant obstacles to the appellant's reintegration into the community in Ukraine for the purposes of paragraph 276ADE(1)(vi) of the Immigration Rules; and
 - (ii) whether his removal would breach his Article 8 rights claim outside the Immigration Rules,the judge may have erred in law by failing to consider the likelihood of the appellant being detained on arrival"
7. The Appellant relied on a document said to have been issued on 10 May 2016 by the Zboriv District Court of Ternopil Region, which stated that he had been convicted of avoiding

military service and sentenced to three years in prison. He also relied on Summons, requiring him to report to the District Military Commissariat on 19 February 2016, 30 March 2016 and 20 April 2016 and a Summons to attend Zboriv District Court on 10 May 2016. The Respondent did not seek to argue that these were not valid documents. Instead, she had submitted in her decision letter that the Appellant could return to Ukraine to try and explain why he had not reported for military service and to appeal his conviction.

8. First-tier Tribunal Judge Norris did refer to the Appellant’s “potential detention” in Ukraine if returned there in paragraph 7.6 of her decision. But she merely noted that anyone convicted *in absentia* “would probably be entitled to a retrial” on return. This finding was in keeping with the country guidance provided in *VB and others (draft evaders and prison conditions) Ukraine CG* [2017] UKUT 00079 (IAC), where the Upper Tribunal found that:

“anyone convicted in absentia would probably be entitled thereafter to a retrial in accordance with Article 412 of the Criminal Procedure Code of Ukraine”.

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9. But, in paragraph 7.7 of her decision, First-tier Tribunal Judge Norris went on to speculate that, despite his conviction, the Appellant was more likely to be given an opportunity to meet the draft rather than be sent to prison for three years; [as] the latter would be self-defeating. In paragraph 7.16 the Judge did note that the Appellant may face imprisonment on return to Ukraine but again relied on her assertion that he had not made any proper enquiries as to whether he may now undertake military service instead of serving his prison sentence.
10. When doing so, she failed to take into account paragraph 27 of the expert report by Rano Turaeva-Hoehne, dated 25 April 2019, suggested that Ukraine clearly needed more conscripts at that time, as it stated that:

“[The] local Ukrainian news agency covering city news explained pressing issues of conscription of the concerned citizens how the three categories of conscripts are mobilised and stated that in the category of urgent mass conscription (in the scheduled waves of conscription spring and autumn annually) all citizens both male and female between the 27-60 are called..”

11. At paragraph 28 of the report, the expert also stated that:

“The punishment for deserting or refusing to serve in the army is punishable by law. Local news reported imprisoned deserters and those who refused to serve which were sentenced from two to five years (under Art. 336 Criminal Code of Ukraine).

12. The Home Officer Presenting Officer was not able to direct me to any evidence which suggested that those previously sentenced for draft evasion would simply be permitted to enlist instead of serving their criminal sentence.

13. First-tier Tribunal Judge Norris also speculated that the Appellant may be able to rely on the fact that in 2000 he had been assaulted and suffered a broken jaw and a deep stab wound as a reason why he had not answered his draft. There was no evidence to suggest that an historic injury such as this could lead to a conviction and sentence being overturned.

14. In any event, suggesting that a conviction and sentence may be overturned in the future did not reduce the risk of the Appellant being ill-treated at the point of his return. This was because in *VB and others* the Upper Tribunal also held that:

“2. 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...[and that]

3. There is a real risk that the conditions of detention and imprisonment in Ukraine would subject a person returned to be detained or imprisoned to a breach of Article 3 of the ECHR”.

15. Whilst Article 3 was not in issue at the appeal, conditions of detention which met the threshold for inhuman and degrading treatment were clearly a factor which had to be taken into account when considering whether there were very significant obstacles to the Appellant re-integrating into society in Ukraine. These conditions were also a relevant factor to be taken into account when considering whether on return his right to respect for bodily integrity, as protected by Article 8 of the European Convention on Human Rights, would be breached.

16. For all of these reasons, I find that there were errors of law in First-tier Tribunal Judge Norris’ decision.

DECISION

- (1) The Appellant's appeal is allowed.
- (2) First-tier Tribunal Judge Norris' decision is set aside in its entirety.
- (3) The appeal is remitted to the First-tier Tribunal to be heard *de novo* by a First-tier Tribunal Judge other than First-tier Tribunal Judges Norris or O'Brien.

Signed

Date 30 January 2020

Nadine Finch

Upper Tribunal Judge Finch