



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal number: UI-2022-000655  
(PA/51397/2021)  
IA/03219/2021

**THE IMMIGRATION ACTS**

Heard at: Field House  
On 12 November 2021

Decision & Reasons Promulgated  
On 27 July 2022

Before

Upper Tribunal Judge Gill

Between

**S D**  
**(ANONYMITY ORDER NOT MADE)**

Appellant

And

The Secretary of State for the Home Department

Respondent

**Anonymity**

**I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.**

The parties at liberty to apply to discharge this order, with reasons.

I make this order because this is a protection claim.

**Representation:**

For the appellant: Ms S Panagiotopoulou, of Counsel, instructed by Yemets Solicitors.

For the respondent: Ms A Ahmed, Senior Presenting Officer.

### **Decision and Directions**

1. The appellant, a national of Ukraine born on 11 March 1994, appeals against a decision of Judge of the First-tier Tribunal Dineen (hereafter the “judge”) who, in his decision following a hearing on 12 November 2021, dismissed his appeal on asylum, humanitarian protection and human rights grounds against a decision of the respondent of 15 March 2021 to refuse his protection claim for reasons given in a decision letter of 15 March 2021 on which date he was also served with a deportation order.
2. The deportation order was made following the appellant’s conviction on 21 April 2020 of an offence of being in possession of a false document for which he was sentenced to imprisonment for one year.
3. At the hearing before me, Ms Ahmed submitted copies of the following documents which were before the judge:
  - (i) the respondent’s Country Policy and Information Note (the “CPIN”) entitled: “*Ukraine: Military service*” dated December 2020 (version 7);
  - (ii) a copy of the decision in VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC); and
  - (iii) a copy of the decision in PK and OS (basic rules of human conduct) Ukraine CG [2020] UKUT 00314 (IAC).
4. The basis of the appellant’s asylum claim, in summary, was that he had been prosecuted in Ukraine for evading military service and had been sentenced in his absence to 2 years’ imprisonment. He did not wish to serve in the Ukrainian army for the following reasons: He is a Ukrainian Catholic and his religion forbids his participation in war. He has health problems which the judge referred to at para 13 as “*a damaged finger on his left hand, and unparticularised kidney dysfunction*”.
5. At the hearing before me, Ms S Panagiotopoulou drew my attention to the following paragraphs of the refusal letter in which the respondent accepted as follows:
  - (i) that the appellant had received three call-up papers (para 34) which were accepted to be genuine (para 36);
  - (ii) that he had failed to comply with the call-up papers because he was in the United Kingdom (para 37 of the refusal letter);
  - (iii) that he had continuously evaded the draft (para 38 of the refusal letter); and
  - (iv) that he had come to the “*adverse attention*” of the Ukrainian authorities (para 42) but the respondent did not accept that he had been prosecuted and sentenced in his absence.
6. Ms Ahmed did not take issue with the above, although I have since noted that para 86 of the refusal letter states: “... *it is not accepted that you have been called up for military service*”. In any event, given the clear terms in which the facts set out at (i)-(iv) above are stated in the relevant paragraphs of the refusal letter, it must follow that the statement from para 86 of the refusal letter that I have just quoted was made in error.

7. Paras 82-83 of the refusal letter noted that the country guidance in VB and another (Draft evaders and Prison Conditions) Ukraine CG [2017] UKUT 00079 (IAC) held that there was a real risk that the conditions of detention and imprisonment in Ukraine would subject a person returned to be detained or imprisoned in breach of Article 3 ECHR.
8. In support of his claim that he had been prosecuted in his absence and sentenced, the appellant submitted a witness statement from his mother that stated that she had received a visit from court officials looking for the appellant to give him a court summons for a hearing on 11 March 2020; and that she consulted a solicitor informally and was told that the appellant had no excuse for failing to carry out military service as required. She said that she had attended the court hearing, at which the appellant was sentenced to 2 years imprisonment; and that, at the conclusion of the hearing, she sought from the court clerk a copy of the decision but she was told that it was not possible for that to be given to anybody except the appellant himself.
9. There was also a witness statement from the appellant's wife in which she said, inter alia, that, in March 2020, the appellant's mother told her that the appellant had been prosecuted in his absence and sentenced to 2 years' imprisonment and that the police "*were now looking for him*" (paras 29 and 30).
10. The judge rejected the appellant's claim that he had been prosecuted and convicted (para 45). Whilst he accepted that the appellant was a Ukrainian Catholic, he did not accept that the appellant had established that he had a conscientious objection to military service on the ground of his religion (para 43). He did not accept that the appellant had a conscientious objection to war independently of his formal religion (para 47). His reasons are given at paras 36-47 which read:
  36. A key question in the appeal is therefore whether the appellant has, as he claims been convicted in his absence. As to that, there is no documentary evidence. There is no evidence from any expert, or by reference to any legal publication, as to whether a document recording conviction would be available to his mother, or to a lawyer on his behalf if one were appointed.
  37. Although his mother states that a lawyer was informally consulted, there is no evidence that any professional representative was instructed to approach the court in order to obtain documentary evidence of the alleged conviction.
  38. There is no evidence of any attempt by the appellant himself to approach the court in writing for documentary evidence of the conviction.
  39. While his mother states in paragraph [42] of her written evidence that "... after the hearing the police started to look for the appellant on a regular basis and still do so...", no particulars are given as to visits by the authorities to herself or anybody else for this purpose. There is no evidence of the issue of any warrant for the appellant's apprehension following the alleged conviction.
  40. I take into account, as set out in VB and referred to in paragraph [43] of the of the refusal letter, that very few draft evaders have been subject to any criminal proceedings let alone convicted of any criminal offence or sent to prison. This is reinforced in the case of PK & OS in which the judges found draft evaders were not likely to encounter criminal or administrative sanctions on return.

41. I also find that, should the appellant be required to perform military service, he is, because of his health conditions, not at risk of frontline combat duty. In any event the conditions of military service do not give rise to a real risk of treatment contrary to Article 3 ECHR, as noted in the country guidance decision PS [2006] UKAIT 00016.
42. As to the appellant's religion, I note the baptism certificate at page 24 of the appeal bundle and dated 21 September 1994. This baptism is stated to have been performed in Ukraine. However, at page 25 is another certificate purporting to show that the appellant was baptised on 21st of March 1994, at the Ukrainian Catholic cathedral in London W1. I attach no weight to the second certificate. However, bearing in mind the first certificate which is consistent with the appellant's case, and taking into account of the significant numbers of Ukrainian Catholics born in that country, I accept on the lower standard that the appellant is in fact a Ukrainian Catholic.
43. However, there is no evidence that this faith requires a member to have a conscientious objection to military service.
44. In making my findings I take into account, as damaging to the appellant's credibility generally, that he has produced a document which was not a valid passport as if it were, pursuant to Subs 3(b) of s 8 Asylum and Immigration (treatment of Claimants etc Act 2004
45. Taking account of all the above matters, I am not satisfied, even on the lower standard of proof, that the appellant has been convicted as he claims in Ukraine.
46. There is thus, as I find, no risk of the appellant being imprisoned in breach of his human rights upon return to Ukraine.
47. *[sic]* do not accept that the appellant has a conscientious objection to war independently of his formal religion. He stated in his evidence in cross examination that he did not accept aggression and war, or the situation currently in Ukraine. He said that Jesus never advised force. The appellant did not present more detailed reasons for conscientious objection. I find that his reluctance to serve relates to the specific current situation in Ukraine, and also his unwillingness for personal reasons to enter the army. I do not find it to be the result of genuine and universal conscientious objection to war."

11. There are four grounds which, in summary, are as follows

- (i) Ground 1: The judge failed to consider the evidence of the appellant's wife.
- (ii) Ground 2: The judge failed to give adequate reasons for rejecting the evidence of the appellant's mother.
- (iii) Ground 3: The judge did not give any reasons for his finding (at para 41) that the appellant will not be at risk of frontline combat duty because of his health condition.
- (iv) Ground 4: The judge failed to consider whether, given the appellant's "*particular disability which as stated in evidence would have rendered him unable to fire a gun and perform basic duties of a soldier as well as defend himself*", the conditions of military service in the appellant's case would give rise to a real risk of the appellant being subjected to treatment in breach of Article 3.

12. I heard oral submissions from Ms S Panagiotopoulou and Ms Ahmed for which I am grateful and which I have considered very carefully.

## Assessment

13. I will take grounds 1 and 2 together, for reasons which will become obvious.
14. Ms Ahmed submitted that the evidence of the appellant's wife was hearsay, in that, she merely repeated what the appellant's mother had told her. Given that the judge had considered the mother's evidence, Ms Ahmed submitted that the judge did not materially err in law by failing to consider the wife's evidence.
15. In my judgment, the evidence of the appellant's evidence was relevant in two ways. Firstly, as to the content of her evidence, i.e. as to what the appellant's mother had told her, it amounted to the wife relaying or repeating the evidence of the mother and therefore did not add to the mother's evidence.
16. However, it was also relevant in another, and potentially important, way, that is, it was evidence independent of the evidence of the appellant's mother, that she (the wife) was told in March 2020 by the appellant's mother that the appellant had been sentenced. In other words, she gave evidence of the occurrence of an event in March 2020, the event being that the appellant's mother told her that the appellant had been sentenced, that was capable of corroborating the evidence of the appellant's mother in her witness statement.
17. Para 3 of the grounds states that the wife's evidence was unchallenged, in that, she was not cross-examined at the hearing. If the judge had accepted that the wife had been told in March 2020 by the claimant's mother that the appellant had been sentenced, that was capable of providing material support to the evidence of the appellant's mother that he had been convicted and sentenced in his absence.
18. However, the judge did not mention the evidence of the appellant's wife at all.
19. For the reasons given above, ground 1 is established.
20. I do not accept that the judge otherwise erred in law in his consideration of the evidence of the appellant's mother. However, by failing to consider the evidence of the appellant's wife in assessing the evidence of the appellant's mother, the judge did fail to give adequate reasons for rejecting the evidence of the appellant's mother. Ground 2 is therefore also established.
21. For all of the reasons given above, I am satisfied that the judge did materially err in law in reaching his finding that there was no real risk that the appellant had been convicted and sentenced in his absence.
22. Ground 3 relates to the first sentence of para 41 of the judge's decision. I am satisfied that the judge did not give any reasons for his finding at para 41 that, if the appellant is required to perform military service, he is not at real risk of frontline combat duty because of his health conditions. At the hearing, Ms Ahmed took me to relevant passages in the CPIN. Although this CPIN was before the judge, the fact is that the passages to which Ms Ahmed drew my attention were not dealt with by the judge in his decision. It is therefore simply not known why he found that the appellant is not at real risk of frontline combat duty because of his health conditions.
23. Ground 4 relates to the second sentence of para 41 of the judge's decision. I am satisfied that the judge failed to consider the appellant's disability and whether it was

such that the conditions of military service in his case give rise to a real risk of a breach of his rights under Article 3.

24. All four grounds are therefore established. I am satisfied that the errors explained at paras 15-21 above in relation to grounds 1 and 2, which concern the credibility of the appellant's claim that he had been prosecuted and sentenced, are material to the outcome. Grounds 3 and 4 are also material to the outcome.
25. For all of the above reasons, I set aside the decision of Judge Dineen in its entirety.
26. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:
  - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
  - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."
27. In my judgment, given that it is necessary for all the issues in this case to be decided afresh on the merits, this case falls within para 7.2 (a). In addition, the situation in Ukraine has changed since the hearing on 12 November 2021 before the judge in view of Russia's invasion of Ukraine on 24 February 2022. The appellant should have the opportunity of having his case being considered against the current situation by the First-tier Tribunal in the first instance so that, if the decision is adverse to him, he has an opportunity to make an application for permission to appeal to the Upper Tribunal without the second appeals criteria being applicable.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside in its entirety. This case is remitted to the First-tier Tribunal for a fresh hearing on all issues on the merits by a judge other than Judge of the First-tier Tribunal Dineen.

Signed: Upper Tribunal Judge Gill

Date: 5 June 2022

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### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is “sent’ is that appearing on the covering letter or covering email