



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11410/2017

THE IMMIGRATION ACTS

Heard at Field House
On 10 May 2018

Decision & Reasons Promulgated
On 17 May 2018

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department Appellant

And

OB Respondent
(ANONYMITY ORDER MADE)

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 original 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.

Representation:

For the Appellant: Mr N Bramble, Senior Presenting Officer.

For the Respondent: Ms J Norman, of Counsel, instructed by Sterling & Law Associates LLP.

DECISION AND REASONS

Introduction and background facts:

1. The Secretary of State has been granted permission to appeal against a decision of Judge of the First-tier Tribunal Graham, promulgated on 29 January 2018 following a hearing on 6 December 2017, by which she allowed the appeal of OB (hereafter the "claimant"), a national of Ukraine born on 6 November 1979, on asylum grounds and

human rights grounds (articles 2 and 3 of the ECHR) against a decision of the Secretary of State of 26 October 2017 refusing to grant asylum (the "Refusal Decision").

2. The judge's reasons for allowing the appeal are neatly encapsulated at para 36 of her decision which reads:

"36. Notwithstanding my credibility findings I am satisfied that the appellant recently completed his national military service [*sic*] is effectively a reservist. Being below 60 he is within the bandwidth of men who are liable to be subject to the mobilisation programme in force in Ukraine. Given the objective evidence before me as highlighted I am satisfied that the treatment of those conscripted into the Ukrainian forces falls below recognised international standards and therefore the appellant is a refugee entitled to international protection."

3. The grounds contend that the judge materially erred in law as follows:
 - (i) Having found that the claimant had produced false call-up papers and, given that he has already completed his national service, the judge failed to explain why he would be called up in the future.
 - (ii) She failed to consider the leading case on national service, i.e. Seper & Bulbul v SSHD [2001] EWCA Civ 681.
 - (iii) She failed to consider the Secretary of State's position, as stated in the Refusal Decision, that the conflict in Ukraine was not internationally condemned.
 - (iv) She failed to consider the Secretary of State's position, as stated at para 53 of the Refusal Decision, that those who refused to serve receive probationary sentences and are not sentenced to imprisonment.
4. In granting permission, Judge of the First-tier Tribunal Brunnen said that the judge's finding that the claimant was liable to be called up again appeared to be based solely on a submission rather than any identified evidence and that the evidence that the judge had cited in support of the finding that conscripts are ill-treated did not arguably relate to that issue.

The judge's decision

5. The basis of the claimant's asylum claim may be summarised as follows: He said he became a member of a political party, called the Party of the Region, from 2002. He said that he had previously served in the Ukrainian army from 1997 until 1998 or from 1998 to 1999 (para 10 of the judge's decision). However, if he were to return to Ukraine, he would be mobilised again. He said he had received five military call-up notices dated between June 2015 and October 2016. He submitted in evidence three such notices. Since he had received call-up notices, he would be regarded as a draft evader. He would be detained on arrival.
6. The judge rejected the claimant's evidence that he had been a member of a political party (para 25). She rejected his evidence that he had received further call-up notices, finding that his evidence that he had been called up a second time to undertake military service in Ukraine was materially inconsistent and that the call-up notices that he had produced were unreliable (paras 28-31).
7. The judge then said as follows, at paras 32-35:

- "32. As a result of my findings, it follows that I do not accept his account that he is being enquired about by the military authorities in Ukraine and consequently, I do not accept that he would be viewed as a draft evader if he returned to Ukraine. This means that I have discounted the possibility of pre-trial detention upon return to Ukraine.
33. I heard submissions on behalf of the Appellant that notwithstanding any adverse credibility findings the appellant would be at risk upon return to Ukraine because having previously completed his compulsory military service he remains eligible for further mobilisation. I have considered the Amnesty Report entitled "Breaking Bodies" dated May 2015. I have borne in mind that the conclusions of the report are now two and a half years old. However, I am also referred to two Human Rights Watch Report dated 21st July 2016 which (at 48 and 93) refers to torture and breaches of human rights and disappearances on both sides in the Russia/Ukraine conflict. The second HRW report headed "You Don't Exist" finds (at 101) found as follows; *"...conflict between the separatists — and non-state armed force — and Ukrainian forces is primarily a non-international armed conflict, which falls within the remit of Common Article 3 of the Geneva Convention and Protocol II relating to non-international armed conflicts, to which Ukraine is also a party.... Patent held by any party connection with the armed conflict in eastern Ukraine are protected under international human rights and international humanitarian law. In both of these bodies of law, the ban on torture and other ill-treatment is one of the most fundamental prohibitions. Both Common Article 3 of the Geneva Convention and Protocol II require that any study party to the conflict must be protected against violence to life persons, in particular, murder and mutilation and torture. The provisions also bar outrages upon personal dignity, in particular, humiliating and degrading treatment.... Torture also crime under international humanitarian law in all conflicts.... In forced disappearances are serious crimes under international law and are prohibited at all times and are both international human rights law and international humanitarian law.... The ECHR and the ICCPR allow state parties to derogate from certain articles — in other words to limit certain rights during emergency situations including armed conflict. In May 2015, Ukraine derogate it from a number of articles in both conventions, including, as relevant to this report, articles relating to the right to liberty security and fair trial in relation to terrorism suspects. But the treaties also require any restrictions to be necessary, proportionate and non-discriminatory. Secretary general of the Council of Europe issued a statement that derogation does not mean that Ukraine is no longer bound by the ECHR and that the European Court of human rights will assess in each case whether derogation is justified...."*
34. Amnesty International and Human Rights Watch investigated cases in which members of the Ukrainian authority and paramilitary is health civilians in prolonged captivity. Captivity involved periods during which they were forcibly disappeared or subjected to prolonged incommunicado detention. Many of those interviewed said they were tortured before being transferred to other facilities and after being transferred they were beaten subjected to electric shock and threatened with rape and execution.
35. I have also referred to the report on Human Rights situation in Ukraine by the Office of the United Nations High Commissioner for Human Rights, dated August 2017. The report (5-12) finds that Ukraine Military is guilty of human rights abuses which were not effectively dealt with; there is a lack of accountability with a prevailing sense and state of impunity, a persistent practice of torture, a denied access to detainees, documented cases of summary executions, and enforced disappearances."

Submissions

8. In summary, Mr Bramble submitted that the judge did not explain why she had departed from Sepet & Bulbul which was relied upon in the Refusal Decision. The background material referred to by the judge at paras 33-35 of her decision does not show that the conflict was internationally condemned. The judge did not explain why the evidence she described at paras 33-35 justified departing from Sepet & Bulbul. He submitted that the activity that must be internationally condemned is activity in the frontline. There was no reason to think that, if the claimant were to be called up again, he would have to go to the front-line.

9. Mr Bramble submitted that the judge did not explain why the claimant would be called up given that she had rejected the call-up notices. She did not explain why, even if he was called up again, he would have to serve, given that para 53 of the Refusal Decision states that, although the penalty for draft evasion is one to three years' imprisonment, those who fail to serve after receiving a call-up notice in practice receive probationary sentences and are not sentenced to imprisonment. Para 53 of the Refusal Decision states that draft evaders who are found guilty receive fines, community serve or suspended sentences. He submitted that the judge failed to address para 53 of the Refusal Decision.
10. I shall incorporate Ms Norman's submissions into my reasoning.

Assessment

11. The mere fact that the judge had rejected the claimant's evidence that he had received call-up notices did not absolve her from considering the background material to decide whether he was nevertheless liable to be mobilised as a reservist.
12. The first question is whether the judge was entitled to find that the claimant was eligible to be called up again notwithstanding that he had previously completed his military service.
13. In this regard, Ms Norman referred to the fact that, at para 21 of its decision, the Upper Tribunal in VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC) drew a distinction between the term "*conscription*" and "*mobilisation*". The term "*conscription*" refers to compulsory military service in Ukraine for all male citizens aged 18 to 25 years of a period of 12 months in the army or air force or 18 months in the navy, whereas "*mobilisation*" refers to the forced re-recruitment of these who have already completed their compulsory military service at a later stage in their lives.
14. The same distinction between conscription and mobilisation was also referred to at paras 5.1 and 5.2 of the Secretary of State's "*Country Policy and Information Note*" on Ukraine entitled: "*Military service*", version 4.0 dated April 2017 (hereafter the "CPIN"), which was submitted to the judge at the hearing.
15. Para 5.4.2 of the CPIN states that the age limit for staying in reserve was increased from 50 to 60 for privates and sergeants, from 55 to 60 for junior and senior officers and to 6 for high rank officers. Given that the claimant was aged 38 years at the date of the hearing before the judge, he fell within the age group liable to be mobilised as a reservist.
16. I agree with Ms Norman that, given the material that was before the judge, she was fully entitled to find that the claimant was liable to be mobilised as a reservist notwithstanding her rejecting of his evidence that he had received call -up notices.
17. Next, the applicable country guidance was VB. At head-note (1), the Tribunal said that it was not then reasonably likely that a draft evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings for that act and that it would be a matter for any judge deciding an appeal to consider, in the light of developing evidence, whether there were aggravating matters which might lead to imposition of an immediate custodial sentence, rather than a suspended sentence or the matter proceeding as an administrative offence and a fine being sought by a prosecutor.

18. However, the judge did not decide the appeal on the basis that the claimant would receive punishment in the form of an immediate custodial sentence. The judge's reasoning at paras 33-35 of her decision has to be considered in the context of paras 10-24 of Ms Norman's skeleton argument that was before the judge, where Ms Norman argued that military service in Ukraine involves acts, which the claimant may be associated with and which are contrary to the basic rules of human conduct as defined by international law.
19. This particular issue was not covered by the country guidance in VB, as para 7 of the decision in VB indicates.
20. In relation to the definition of conflicts that are internationally condemned, Ms Norman quoted at para 12 of her skeleton argument paras 29-34 of the judgment of the Court of Appeal in Krotov v SSHD [2004] EWCA Civ 69. Although paras 29-34 of Krotov are all relevant, it is only necessary for me to quote para 29 which reads:
- "29. ... In *Sepet and Bulbul*, Laws LJ simply adopted the wording of paragraph 171 (absent the reference to condemnation by the international community), namely military action involving acts "contrary to basic rules of human conduct". Lord Bingham on the other hand referred to "atrocities or gross human rights abuses". However, I do not doubt that both had in mind in this context conduct universally condemned by the international community, in the sense of crimes recognised by international law or at least gross and widespread violations of human rights. The Tribunal in *B v SSHD* propounded a test based upon paragraph 171 and an expansion of the words of Laws LJ as follows:
- "Where the military service to which he is called involves acts, with which he may be associated, which are contrary to basic rules of human conduct as defined by international law."
21. The test propounded by the Tribunal in B v SSHD [2003] UKIAT 20 and which is quoted at para 29 of the judgment of Potter LJ in Krotov is also expressed at para 2.3.3(a) of the CPIN. Para 2.3.3 of the CPIN reads:
- "... a requirement to undergo compulsory military service – or punishment for failing to complete this duty – does not, in itself, constitute persecution. It will only do so where:
- (a) military service would involve acts, with which the person may be associated, which are contrary to the basic rules of human conduct;
 - (b) the conditions of military service would be so harsh as to amount to persecution; or
 - (c) the punishment for draft evasion or desertion is disproportionately harsh or severe."
22. Since VB did not decide whether the conflict in Ukraine was internationally condemned and given the test for whether a conflict is internationally as set out in B v SSHD was set out in Krotov and also at para 2.3.3 of the CPIN, it was a matter for the judge to decide, on the evidence before her, whether the claimant would, as a reservist, be involved in or be associated with acts which are contrary to the basic rules of human conduct.
23. In this respect, Ms Norman had set out at paras 14-24 of her skeleton argument the background material that was relied upon on the claimant's behalf in support of the submission that, in the words of para 2.3.3 of the CPIN, military service in Ukraine "*would military service involve acts, with which the [claimant] may be associated, which are contrary to the basic rules of human conduct*".

24. This background material included the evidence that the judge referred to at paras 33-35 of her decision, i.e. the Amnesty International Report entitled: "*Breaking Bodies*" dated May 2015, two Human Rights Watch reports one of which was dated 21 July 2016 and the second entitled: "*You Don't Exist*" and the report of the United Nations' High Commissioner for Refugees dated August 2017.
25. Having considered this evidence, the judge concluded at para 36 that she was satisfied that "*the treatment of those conscripted onto the Ukrainian forces falls below recognised international standards*". Although this is not, in terms, a finding that the conflict in Ukraine is one that is internationally condemned because it satisfies the meaning given to that term in B v SSHD, it is nonetheless clear, when paras 33-35 of the judge's decision are read in conjunction with paras 10-24 of Ms Norman's skeleton argument, that the judge was in fact considering the question whether the conflict in Ukraine was internationally condemned. It is also clear that she concluded, implicitly, that the conflict in Ukraine was one in which the claimant, as a reservist performing military service, may be associated with acts which were contrary to the basic rules of human conduct. Although she did not express this conclusion in terms, it is implicit that this was her conclusion, from the material before her, extracts from which she quoted at paras 33-35 of her decision, when read together with the skeleton argument that was before her.
26. As I said, there is no country guidance on this particular issue and it was therefore a matter for the judge to decide on the material before her.
27. For the reasons given above, even if the judge's reasoning was lacking, there was ample material before her to justify the conclusion she implicitly reached, that military service in Ukraine would involve the claimant being involved in or being associated with acts that were contrary to the basic rules of human conduct. Accordingly, she did not materially err in law in reaching this conclusion. There being no country guidance on this point, it has not been shown that she materially erred in law in reaching this conclusion.
28. Finally, Mr Bramble submitted that the judge failed to consider the Secretary of State's position that, if the claimant did not report for military service as a reservist, he would not be sentenced to imprisonment but would be likely to receive a fine, community service or a suspended sentence. However, this is irrelevant, given the conclusion I have reached in the preceding paragraph, and given, further that para 2.3.3 of the Secretary of State's CPIN suggests, in view of the fact that punishment is mentioned separately at para 2.3.3(c), that it was sufficient if para 2.3.3(a) is satisfied irrespective of punishment. The Secretary of State's grounds do not contend that the judge was wrong to follow para 2.3.3. of the CPIN.
29. In conclusion, I should say that, having heard the submissions of the parties and considered the skeleton argument that Ms Norman relied upon at the hearing before judge, it is clear to me that the Secretary of State's appeal to the Upper Tribunal relies upon arguments that were the subject of the appeal before the judge and that, in pursuing this appeal, the Secretary of State is attempting to re-ague issues that were before the judge and that have already been decided by her.

Decision

The decision of Judge of the First-tier Tribunal Graham did not involve the making of an error on a point of law such that it falls to be set aside.

A handwritten signature in blue ink, appearing to read 'DKG'.

Signed
Upper Tribunal Judge Gill

Date: 14 May 2018