Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12660/2018**

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On the 16 June 2022	**On the 19 July 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

MR TK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J. Norman, Counsel instructed by Stirling Law Associates
For the Respondent: Mr D. Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

DIRECTION REGARDING ANONYMITY

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant.

Failure to comply with this order could amount to contempt of court.

INTRODUCTION

1. The Appellant is a national of Ukraine, born on 13 August 1986. He appeals against the decision of First-tier Tribunal Judge Mace (determined on 14 May 2019), (hereafter "the Judge") in which his claims under the Refugee Convention and the ECHR were dismissed.

THE JUDGMENT UNDER CHALLENGE

2. In the decision, the Judge summarised the Appellant's international protection claim which is based upon the fact that he asserts that whilst in the United Kingdom (having entered lawfully in 2013 and then overstayed his visa) he received call-up papers to the Ukrainian military as well as a police summons. He claims that he is a conscientious objector to carrying out military service on the basis that the Ukrainian army has committed war crimes.

3. Ultimately the Judge considered the Appellant's claim of having received call-up papers to the military to be lacking credibility. The Judge concluded (at [21]) that it was unlikely that further conscription notices would have been issued to the Appellant (in 2015, 2016, 2017 and 2018) as claimed when the Appellant had already passed the age for compulsory conscription (the age of 27.)

4. The Judge also preferred the evidence from an IRB Canada report which included a note stating that military service notices contain a warning regarding refusal or evasion of military service which was contrary to the oral evidence of the Appellant, and indeed the view of Prof Galeotti (see [12 & 22].)

5. The Judge also considered as incredible that the Appellant's mother would not have told him about her receiving his call-up papers until 2017 ([24 & 26].)

6. The Judge also concluded that section 8 of the 2004 Claimants Act was engaged by the Appellant's failure to claim asylum until 16 April 2018 bearing in mind that he had been overstaying in the United Kingdom since 5 December 2013, [27].

7. At [30] onwards the Judge considered the assessment of international protection issues on the alternative basis that the call-up notices were in fact genuine. The Judge concluded that there was not a real risk of the Appellant being taken into pre-trial detention and highlighted that there was no arrest warrant and the Appellant had not been convicted in his absence, [31].

8. The Judge also applied PK (Draft evader; punishment; minimum severity) [2018] UKUT 241 (IAC) ("PK [2018]") and noted the Upper Tribunal's reference to the presumption of bail in Ukraine and the use of automatic bail in the majority of cases. The Judge therefore found that there is a presumption in favour of bail for those awaiting trial and concluded there was no good reason why this did not also apply to the Appellant on the basis of his non-attendance in response to the summons, [33].

9. At [39], the Judge found that there were no aggravating features in the Appellant's case which would materially affect the risk of a custodial sentence and in doing so she made reference to the fact that the Appellant had not served previously in the army.

10. At [42], the Judge also concluded that PK [2018]) should not be departed from in light of the Appellant's reliance upon Sepet v Secretary of State for the Home Department [2003] UKHL 15.

11. Overall, the Judge concluded that the Appellant had not established, the burden being upon him at the lower standard, that there was a real risk that he would be prosecuted and in the alternative that even if he was, the likely penalty would not amount to persecution and/or a real risk of serious harm (see [44]).

THE PROCEDURAL HISTORY

12. The Appellant appealed against the decision of the Judge by way of Grounds of Appeal dated 4 June 2019; this application was refused by First-tier Tribunal Judge Chohan in a decision dated 21 June 2019.

13. The Appellant then pursued a further appeal directly to the Upper Tribunal on 3 July 2019; permission to appeal was refused by Upper Tribunal Judge Hanson on 10 July 2019.

14. The Appellant lodged a Judicial Review against the Upper Tribunal's refusal of permission which resulted in permission being granted by Mr Justice Cavanagh (on 5 November 2019). In doing so the Judge noted the recent decision of the Court of Appeal which had allowed the Appellant's appeal against the Upper Tribunal's decision in PK [2018]. This was followed by a formal notice of decision from the Upper Tribunal dated 3 January 2020.

THE ERROR OF LAW HEARING

15. The hearing was carried out in person at Field House on 16 June 2022. We heard oral submissions from both Ms Norman and Mr Clarke.

THE APPELLANT'S CHALLENGE

Ground 1

16. In respect of Ground 1, the Appellant complains that the Judge materially erred at [21] of her decision where she indicated that the Appellant did not appear to have sufficient experience to be mobilised. Ms Norman suggests that this issue was not raised in the Secretary of State's Refusal letter and "*does not seem from the contemporaneous note of hearing from Counsel who appeared at the First Tier that… [it] was put to him during the hearing*."

17. We observe that the note of hearing kept by Miss Charles (Counsel at the FtT hearing) and referred to by Ms Norman, has not been placed before us and we conclude the Appellant has simply not provided sufficient evidence to show that the Judge acted unfairly in drawing this conclusion.

Ground 2

18. The Appellant also contends that the Judge provided insufficient reasoning for preferring the information given by a senior program officer at NED to the IRB Canada reported 2015, (namely that military service notices contain a warning regarding refusal or evasion of military service whereas none of the call-up notices before the First-tier Tribunal included such a warning); compared to the view of Prof Galeotti, who indicated that while some call-up papers do include such warning this is not always the case as the forms are generated at a local level and their format can vary.

19. We think there is more strength in this point. At [17] of the judgment, the Judge notes that Prof Galeotti considers the call-up documents to be genuine and goes on to accept his expertise whilst indicating that she gave his evidence "*due weight*".

20. It was of course entirely correct for the Judge to assess that expert evidence in the context of all of the evidence before her, including the adversarial submissions made by both parties, but we conclude that the Judge did err in failing to provide any justification at all, at [22], for preferring the single reference in the IRB report to the view of Prof Galeotti.

21. That is not to be read as a finding that the Judge could not have preferred the IRB evidence but our conclusion is that the Judge simply did not explain why she preferred that evidence over the expert evidence which she had earlier accepted and given due weight, as per the requirements in South Bucks District Council v Porter [2004] UKHL 33.

22. This however is not enough to show a material error in the judgment such as to cause it to be set aside because the Judge went on to consider the issue of return to Ukraine on the alternative basis that the call-up notices were genuine (see [30] onwards).

Ground 3

23. This Ground falls away in light of our acceptance of the Appellant's argument in Ground 2.

Ground 4

24. The Appellant argues that the Judge's conclusions about the credibility of the Appellant's claimed status as a conscientious objector (at [41]), as well as the Judge's reliance on PK [2018] in respect of the finding that it was not relevant whether the Appellant would be required to engage in acts contrary to International Humanitarian Law, are unlawful.

25. In our view, whilst it is undoubtedly right to say that PK [2018] was not a Country Guidance case per se, and that some aspects of the reasoning were set aside by the Court of Appeal on challenge[1] for reassessment by the Upper Tribunal (albeit with the Court declining to decide the question "*whether a draft evader facing a non-custodial punishment for failing to serve in an army which regularly commits acts contrary to IHL is entitled to refugee status"* on the basis that earlier authorities including Sepet v Secretary of State for the Home Department [2003] UKHL 15 only touched upon the issue or were obiter, see [31]) nonetheless we have taken the view that the Appellant has not made out the argument that the Judge materially erred in her alternative findings.

26. Firstly, we remind ourselves of the Judge's conclusions, predicated on the basis that the military call-up papers were in fact genuine, from [30] onwards:

    a. The Appellant is not likely to be taken into pre-trial detention on the basis of his failure to comply with the police summons, [31]:

        i. The judge went on to assert that the police summons "*provided by the Appellant provides for valid reasons for non-compliance which appear available to the Appellant and in any event the consequences of non-compliance are limited to pecuniary penalty*."

    b. There is equally no arrest warrant and no evidence that any proceedings have been initiated; the Appellant has not been convicted in his absence and there are therefore no aggravating features capable of showing that pre-trial detention would be used at such preliminary stage.

    c. Equally, the Appellant had not left Ukraine in order to avoid the call-up, [32] (and we note that Ms Norman did not pursue any arguments about the Judge's conclusions in terms of the potential additional factor of the Appellant's ethnic Russian partner and so we say no more about that.)

[1] PK (Ukraine) v The Secretary of State for the Home Department [2019] EWCA Civ 1756

d. Additionally, the Appellant has an answer for his non-attendance to the bail summons (that being that he was residing in the United Kingdom) and there is a general presumption in favour of bail for those awaiting trial, [33].

e. The background material provided in the appeal was not sufficient to depart from the authoritative conclusions drawn by the Upper Tribunal in the Country Guidance case of VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 79 (IAC) ("VB"), meaning that whilst the Ukrainian penal code does provide, in principle, for a custodial sentence to be given for draft evasion that this was not applied in practice to the vast majority of the very sizeable number of people who had evaded the draft in Ukraine, [34].

27. We take into account the fact that, on reassessment, the Upper Tribunal in PK and OS (basic rules of human conduct) Ukraine CG [2020] UKUT 314 (IAC) ("PK and OS [2020]"), concluded at [104(a) & (i)], that:

> *"Where a person faces punishment for a refusal to perform military service that would or might involve acts contrary to the basic rules of human conduct, that is capable of amounting to "being persecuted" on grounds of political opinion for the purposes of the Refugee Convention."*
>
> *"Where a causal link exists between the likely military role of the conscript or mobilised reservist, the commission of or participation in acts contrary to the basic rules of human conduct, and the punishment to be imposed, punishment including a fine or a non-custodial sentence will be sufficient to amount to "being persecuted" for the purposes of the Refugee Convention, provided it is more than negligible."*

28. There is therefore some divergence on the legal principles to be applied (rather than the country evidence available to the Upper Tribunal in 2020 which cannot be used to formulate a material error of law against an earlier decision of the Tribunal – see MA (Iraq) & Anor v Secretary of State for the Home Department [2021] EWCA Civ 1467 at [98]) between the decision of the Upper Tribunal in PK [2018] and PK and OS [2020] but we do not think this can make any difference to the lawfulness of the conclusion drawn by this Judge in her decision taken in 2019.

29. This is because, in our view, the Judge's assessment of the likelihood of the Appellant receiving any punishment at all as a consequence of his failure to comply with the call-up notices and/or the police summons is entirely in conformity with the Upper Tribunal's analysis of the relevant law and country evidence in VB.

30. We note that Ms Norman has not argued for instance that the Judge materially erred for failing to conclude that the evidence available to

her in 2019 should have caused her to depart from the authoritative conclusions of the Upper Tribunal in VB.

31. For completeness, in VB, the Upper Tribunal concluded that it was not reasonably likely that a draft evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings for that act (see [72]).

32. The Upper Tribunal also provided that any future Tribunal looking at these issues should consider whether there were any aggravating matters which might lead to the 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; the Tribunal also concluded, at [85], that prison conditions would reasonably likely amount to a breach of Article 3 ECHR.

33. In this case, as we have set out above, the Judge did apply VB as she was required to do and did consider whether or not there were any aggravating features in this case which might cause the Appellant to face criminal or sufficiently serious administrative proceedings for the draft evasion in question.

34. We therefore think that Ms Norman's Ground 4 misses the essential point, that even if she was right to argue that any punishment at all for draft evasion would constitute persecution for the purposes of the Refugee Convention (which we note that PK and OS [2020] did not ultimately find – see [104(i)], where it was held that the punishment has to be *more than negligible*) she was obliged to firstly show why the Judge materially erred in her conclusion that the Appellant would not face any administrative or criminal punishment at all. We have concluded that she has failed to do so in this Ground.

Ground 5

35. The Appellant asserts that the Judge did not give lawful reasons for concluding that the Appellant would not face pre-trial detention if returned having failed to answer a police summons relating to a criminal investigation.

36. We consider that there is no merit in this argument. It is plain that, contrary to this assertion, the Judge did expressly provide reasons for concluding that the Appellant would not face pre-trial detention. We have already laid out above the Judge's engagement with the absence of aggravating factors and we conclude that the reasoning was entirely in accordance with the guidance given by the Upper Tribunal in VB.

CONCLUSION

37. We therefore conclude that the Appellant has not shown that there are any material errors in the decision of the First-tier Tribunal Judge

which require its setting aside by reference to section 12(2) of the Tribunals, Courts and Enforcement Act 2007.

38. The Appellant's appeal is therefore dismissed.

Signed  Date 4 July 2022

Deputy Judge of the Upper Tribunal Jarvis

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