



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

Appeal Number: DA/02487/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 29 September 2017**

**Decision & Reasons Promulgated
On 3 October 2017**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

VOLODYMYR PYSKLYVETS

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A. Radford of counsel instructed by Lupins Solicitors

For the Respondent: Mr. W. Bramble, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant, who was born on 16 November 1964, is a national of Ukraine. It is the Appellant's case that he first entered the United Kingdom on 20 May 2006 and claimed asylum on 23 January 2009, after he was encountered by a UK Border Agency arrest team.

On 30 January 2009, he was convicted of being knowingly possessing a false Lithuanian passport and another person's driving licence and sentenced to 12 months' imprisonment.

2. On 20 February 2009, the Appellant applied for a facilitated return to Ukraine, withdrew his application for asylum on 13 March 2009 and was removed to Ukraine on 24 April 2009. An exclusion order was made on 5 May 2009 but the Appellant re-entered the United Kingdom in April 2010.
3. The Appellant was arrested on 6 March 2011 and on 8 March 2011 he was convicted of failing to provide a specimen, driving without a licence and possession of a false instrument. He was sentenced to five months' imprisonment and on 5 April 2011 he was served with illegal entry papers. He completed his criminal sentence and was transferred to Immigration Detention. He was served with a decision to deport on 27 May 2011 and he appealed on 6 June 2011. His appeal was heard on 26 August 2011 and his appeal was dismissed on 6 September 2011. His appeal rights became exhausted on 20 October 2011 and on 17 December 2011 he was served with a deportation order.
4. The Appellant made further representations on 15 December 2011 and 16 October 2012. It is his case that he was previously a business man in Ukraine and had been subjected to extortion, threats and physical attacks from an organised criminal group and that this placed him within a particular social group for the purposes of the Refugee Convention. His application to revoke his deportation order on an asylum grounds was refused and the Respondent decided that the further representations did not amount to a fresh claim on 26 February 2013. He appealed and his appeal was dismissed with First-tier Tribunal Judge Lucas in a decision promulgated on 15 December 2014. First-tier Tribunal Judge Shimmin granted the Appellant permission to appeal on 16 March 2015. On 3 February 2016 Upper Tribunal Judge Gleeson found an error of law in First-tier Tribunal Judge Lucas' decision and remitted the appeal to the First-tier Tribunal on 4 March 2016.
5. The remitted appeal was heard by First-tier Tribunal Judge Callow on 13 March 2017 and he dismissed the appeal in a decision promulgated on 11 April 2017. The Appellant appealed and First-tier Tribunal Judge Andrew granted him permission to appeal on 31 July 2017.

ERROR OF LAW HEARING

6. Both counsel for the Appellant and the Home Office Presenting Officer made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

DECISION

7. The first ground of appeal asserted that First-tier Tribunal Judge Callow did not give adequate reasons for his conclusions in relation to the expert evidence relied upon by the Appellant.
8. As counsel for the Appellant noted, the panel in its determination, promulgated on 6 September 2011, accepted that the Appellant had been a businessman in Ukraine and in paragraph 54 they found that he may have been beaten by those to whom he “owed” money. In paragraph 58, they also accepted that he had been beaten by unknown people in 2009. This was accepted by First-tier Tribunal Judge Callow and it was in relation to this factual matrix that the Appellant’s legal representatives had sought expert evidence. Both experts found that it was plausible that this would put the Appellant at risk in Ukraine and that he would not be able to obtain a sufficiency of protection from the Ukrainian authorities or benefit from internal relocation. In addition, they found that his previous political activity would not give rise of itself to persecution but was likely to make it more difficult for him to access protection from the Ukrainian authorities.
9. Dr. Slade also explained that it was likely that the criminal gang would have an on-going interest in keeping the Appellant in a renewed relationship of dependence as this would give rise to an on-going source of income.
10. In paragraph 31 of his decision, First-tier Tribunal Judge Callow simply stated that “the expert reports from Drs Galeotti and Slade do not show that the appellant would be at risk on the basis claimed. In making their assessments the experts, have, with respect to them, quite improperly assumed the role of deciding the credibility of the appellant’s claim”.
11. This is the only direct findings First-tribunal Judge Callow made about the Dr. Galeotti’s report. I have taken into account the fact that Dr. Galeotti reminded himself of the duty he

owed to the court as an expert and I note that he was explicitly instructed to comment on the plausibility of the Appellant's account. I also note that Dr. Galeotti is a well-known and respected expert and that, at paragraph 13 of his report, dated 4 December 2011, he stated that "it is, of course, not for me to make any judgment about credibility".

12. The First-tier Tribunal Judge also stated in paragraph 27 of his decision that Dr. Slade had ignored adverse credibility findings previously made about the Appellant's account. But in paragraph 3 of his report, Dr. Slade outlined the questions which he had been asked to provide an opinion on. Questions ii) and iii) were predicated on the instruction "assuming that it is accepted that our client is still of interest to organised criminals as he describes in his statement". They then go on to ask him whether in these circumstances the Appellant would be able to obtain protection from the Ukrainian authorities and if, in his opinion, there is a properly functioning witness protection scheme. He was also asked whether it would be possible for the Appellant to relocate to another area of Ukraine to avoid the attentions of the criminals, if he was at risk.
13. Dr. Slade then gave an impartial and fully referenced assessment of the level of organised crime in Ukraine, which included an analysis of the shortcomings of the Respondent's own Country Information and Guidance on Ukraine. At paragraphs 15, he noted that he could not provide any detailed comment on the levels of organised crime in the Appellant's specific town and home regions but stated that reports indicated that organized criminal groups operated throughout Ukraine with more or less intensity.
14. In paragraph 17, he goes no further than finding that the account given by the Appellant was highly plausible and common for businessmen in Ukraine at the time when he was in business there. It is the function of experts to identify whether country conditions in general fit the account given by an appellant. When doing so they do not usurp the ultimate role of the Judge to decide whether an appellant's account is credible in the context of expert and objective evidence and his own statements. It was also within their legitimate professional role to engage with previous findings that the Appellant would be able to access state protection.
15. The second ground of appeal asserted that the First-tier Tribunal Judge had failed to make clear findings about which parts of the Appellant's account were rejected and which were accepted. It was submitted that there was evidence which was commented on by the experts

and which was also in the papers before First-tier Tribunal Judge Callow that he failed to take into account or refer to.

16. I have taken into account that First-tier Tribunal Judge failed to give any weight to the fact that in his expert report, dated 4 December 2011, Professor Galeotti found that the Public/Civil Control ID Card, a notice of appointment, a certificate from the Officer of the Public Prosecutor and the reference from the Ministry of Internal Affairs all appeared to be genuine documents. This was evidence which was relevant to any future fear of persecution and the First-tier Tribunal Judge should have said whether he was giving it any weight. The Home Office Presenting Officer agreed with this conclusion in his oral submissions and noted that in paragraph 30 of his decision First-tier Tribunal Judge Callow had mistakenly found that no new evidence had been submitted in relation to the Appellant's political profile.
17. As counsel for the Appellant also noted, in an appeal with the considerable history of this one, it was also necessary for the First-tier Tribunal to make clear findings as to what aspects, if any, he accepted of the Appellant's account. He did not carry out such an exercise.
18. The third ground of appeal related to the manner in which the First-tier Tribunal Judge treated the section of the Appellant's witness statement, dated 9 March 2017, which referred to events concerning his wife. At the beginning of this statement, the Appellant explained that his previous solicitors had not fully updated his statements, dated 18 March 2014 and 29 June 2016, before submitting them. In his most recent statement, the Appellant asserted that his wife continued to receive telephone call asking where he was once every one or two months. But in paragraph 29 of his decision First-tier Tribunal Judge Callow found that "the belated evidence of the appellant's wife in a statement, dated 1 September 2016, (after IJ Parker recused herself at the hearing of 12 July 2016) describing demands made of her as to the appellant's whereabouts amid reminders that he remained in debt to them...is an afterthought to bolster the appellant's claim. Had this evidence been credible it would have been made available when the appellant formally claimed asylum in October 2012 and would have been produced by the way of a statement at the hearing before IJ Parker. The production of a statement at the hearing of this appeal is an attempt to shore up a gaping hole in the credibility of the appellant's claim".

19. However, the record of proceedings made by First-tier Tribunal Judge Parker indicated that she recused herself because counsel and the Appellant's previous solicitors had taken responsibility for not including this evidence in his updated statements. A more detailed record submitted by the Respondent makes it even clearer as it states that "my understanding is that a tactical decision was made by reps that appellant could 'get home' on sufficient positive credibility findings in 2011 decision and expert evidence presented in 2014. Seems to me a tactical error since there have always been credibility issues and the appellant was likely to be cross-examined". She then added that it was "not in the interests of either party for me to determine the appeal". Therefore, First-tier Tribunal Judge Callow's approach was not in keeping with the reasons for adjourning the previous appeal hearing, which amounts to a procedural error.
20. I also note that there is a reference by First-tier Tribunal Judge Lucas in paragraph 53 his decision, promulgated on 15 December 2014, to criminals starting to contact the Appellant's wife again in 2013 and this allegation being contained in a statement made by the Appellant, dated 18 March 2014. In paragraph 60 of the decision First-tier Tribunal Judge Lucas notes that the statement also said that the organised criminals were continuing to contact his wife.
21. Furthermore, the Appellant's re-drafted statement, dated 9 March 2013, refers to contact with his wife by those he feared starting again in early 2013 and, therefore, the Appellant could not have disclosed this in 2012. This confusion over dates indicates a lack of anxious scrutiny on the part of the First-tier Tribunal Judge.
22. As a consequence, I find that First-tier Tribunal Judge Callow did make material errors of law in his decision and reasons.

DECISION

- (1) The Appellant's appeal is allowed.
- (2) The appeal is remitted to a First-tier Tribunal Judge other than First-tier Tribunal Judge Callow.

Nadine Finch

Signed

Date 29 September 2017

Upper Tribunal Judge Finch