Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07783/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
20 September 2018	**On 09 July 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

T S
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: 11 May 2018 – Mr S Walker, Senior Home Office Presenting Officer
27 September 2018 – Mr S Whitwell, Senior Home Office Presenting Officer

For the Respondent: 11 May 2018 – Ms J Norman, Counsel instructed by Sterling Law Associates
27 September 2018 – Ms J Norman, Counsel instructed by Sterling Law Associates

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Respondent (also "the claimant"). Breach of this order can be punished as a contempt of court. I make this order because this is a protection case arising from the claimant avoiding military service. Publishing the claimant's identity could easily enhance or even create a risk to his safety in the event of his return.

2. I have already given my reasons for finding that the First-tier Tribunal erred in law. My reasons were sent on 22 May 2018 and I append them to this decision for the purposes of any possible appeal. Although this Decision and Reasons is intended to be intelligible without reference to the Reasons for Finding an Error of Law it might be convenient to read those reasons as an introduction to this decision.

3. As I explained more fully in the Reasons for Finding an Error of Law the respondent, hereinafter "the claimant", is a citizen of the Ukraine who was born in January 1980 and who challenges the decision of the Secretary of State to refuse him leave to remain on human rights grounds.

4. It has been established that the claimant is not a refugee. The only issue to be resolved is whether the claimant faces a real risk his being imprisoned in international unacceptable conditions.

5. As I said, or rather *intended* to say, at paragraph 7 of my Reasons for Finding Error of Law:

> "I can understand the judge's finding that [the claimant] would not do the military service if required. It is not made particularly clear, either in the Decision and Reasons or in the evidence, but the reasons are [that the] claimant expressed a marked reluctance to perform military service and an abhorrence of the conditions that a soldier was required to endure and of the things that soldiers are required to do. The judge, who had the advantage of hearing the claimant give evidence was, I find, entitled to conclude that he is somebody who would not perform military service if he was required to serve."

6. Unlike the First-tier Tribunal I have the benefit of a specific and detailed expert report. The report was provided by Dr Galeotti and is dated 25 March 2018. Dr Galeotti begins the report with the usual and necessary expert declaration including references to Part 35 of the Civil Procedure Rules 1998 and the Ikarian Reefer guidelines.

7. Dr Galeotti introduced himself as a senior research fellow at the Institute of International Relations in Prague and the head of its Centre for European Security. His career and academic qualifications are the kind that would be expected of a person with such an appointment and include the degree Doctor of Philosophy awarded by the London School of Economics and Political Science where he focused mainly on transnational crime, policing and security in post-Soviet countries including Ukraine. Clearly he is very well qualified to give the opinion that he does and, subject to argument, that opinion is entitled to a great deal of respect.

8. Importantly, he was shown copies of the summonses relied upon by the claimant to support his contention that he had been required to present himself for military service.

9. Dr Galeotti explained that it did not concern him that he had not seen the originals because the documents were clearly high quality copies and the paper used by the Ukraine authorities was variable in quality and appearance so it would not have been an advantage to him in determining if the documents were genuine to have seen the originals. The quality of the paper would not have informed his decision. From the perspective of someone used to considering documents produced by the authorities in the United Kingdom this seems strange but this, I find, is a matter where, in the absence of contrary evidence, Dr Galeotti's expertise had to be respected and is a complete answer to the concerns in the Refusal Letter about Dr Galeotti not seeing the original documents on which he opined.

10. He was quite satisfied that he had been shown copies of court documents issued by the appropriate authorities in Ukraine. He based that finding on comparing the layout, font, content and style with other documents that he understood to be original and his conclusion was unreserved and unequivocal. Dr Galeotti noticed things about the numbers identifying the claimant which, consistent with his case, show him to be a former serviceman who is eligible for mobilisation (see paragraph 18 of the report).

11. Dr Galeotti described the documents as "standard documents dispatched to summon reservists and young men of conscription age to the regular draft and also during a mobilisation". This may well be right but rather glosses over findings that I consider important. Although they do not show the "year of call up" or the "expiration of service" they do show the claimant to have the "military speciality" of "vehicle driver" and that he was "sent to reserve service" on 15 April 1988. He is said to have sworn a "military oath" on 26 April 2000 but he was "unfit for in time of peace, able-bodies for limited service in time of war".

12. In a supplementary report sent by email on 19 September 2018 Dr Galeotti said that people whose medical condition did not prevent service altogether would be sworn in and enrolled on the reserve register to be ready in the event of future mobilisation. He said "this is quite rare (most potential draftees were and are either fully fit or clearly incapable of serving) but by no means unique".

13. In short the claimant is not someone who has ignored conscription but someone who has previously had dealings with the military authorities but who has now ignored mobilisation.

14. Dr Galeotti was then asked to assess the chance of the claimant being identified in the event of his return to Ukraine. He said that the "the likelihood is considerable" that the claimant's case has been brought before a court and he had been tried in absentia. There was no documentary evidence to support this claim. The conclusion was explained with reference to Article 22 of the Ukrainian Constitution which enshrines the duty to defend the country in certain conditions and Dr Galeotti's specialist knowledge that since 2014 reservists of the rank of private and sergeant continue to be part of the reserve and subject to mobilisation until they were 60 years old.

15. It was, he said, "normal practice" to prosecute in absentia those who had mischievously avoided either conscription into military service or mobilisation after conscription. Such conduct was regarded as inexcusable and the

conviction was recorded. As a consequence, he presumed the claimant to have been considered a "draft dodger" and to have been convicted under Article 335 or 336 of the Criminal Code. Article 336 was the more serious offence of failing to heed a mobilisation. It carried a tariff of up to five years' imprisonment whereas the lesser offence carried up to three years.

16. Dr Galeotti thought it "unlikely" that a draft dodger could re-enter Ukraine without being detained or at least identified on arrival. He said all arrival ports were developed to "modern standards" and had computerised systems which scanned passports and checked against the national identity base. He supported this view with a reference to a decision of the Australian Government Refugee Tribunal and indeed of this Tribunal in **VB and Anor (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC)**.

17. He said the usual procedure would be to identify such a person and to hold him and then transfer him to prison. I note at paragraph 22 there is reference to a *Ms* S. This is clearly a typographical error.

18. However, Dr Galeotti also explained that even if the claimant was able to get into the Ukraine without being detected his problems would not be over. He referred to "numerous cases" of people arrested in the course of random document checks conducted by police at nightclubs or similar places where the public gather. He said that the claimant had a right to live anywhere within the Ukraine but there was still a national registration system with a database that is used to identify people wanted by the authorities. This can be accessed by any police officer. Any encounter with authorities could lead to his being detected as someone subject to a custodial sentence. He could not avoid registration. It was not only a legal requirement that a person be registered but there were checks to ensure that the law was obeyed. Bribery was a possible solution but it was not reliable because there would be too many occasions when the claimant might have to prove his identity.

19. Dr Galeotti accepted that there was evidence that people are not denied access to services that are needed because they were not registered in the area where they resided but that was rather a different point. The law provided that people were entitled to services. The implication is that in an emergency the law would assume that a person was registered. That does not alter the fact that there is an obligation to register and a failure to register would deprive a claimant of access to medical care and he would be unable to renew his passport or his driving licence.

20. There was also a national labour book registration database which would be a further means of the authorities finding the claimant. Its scope was extended in 2017 specifically for the purpose of identifying and prosecuting draft dodgers and mobilisation dodgers.

21. Dr Galeotti then addressed his mind to the prospects of custodial sentencing. He recognised that there had been widespread practice of avoiding national service. It was said that about 380,000 young men reached subscription age in the Ukraine every year but of that number around 76,000 actually served. A majority did not meet the medical standards of service when given their physical and mental examination or the minimum education requirements.

Others were exempted on various grounds including a genuine conscientious objection on religious grounds and being the sole supporter of a widowed mother.

22. He then quoted from a report by War Resisters International saying that there were something like 50,000 draft dodgers every year and that over an eight year period 48,624 were prosecuted. It is a raw analysis but this tends to suggest there is something like a 1-in-8 chance of being prosecuted.

23. However, people who are prosecuted, in Dr Galeotti's judgment, were punished and faced "full punishment" under the law. A UNHCR report relied on by the Home Office in January 2015 said that draft dodgers had to pay fines but he said this was a report based on just sixteen cases in the autumn of 2014. This represented about .03% of the year's draft dodgers and he did not regard it as a sufficiently big sample to be representative especially as it was contradicted by other accounts and government pronouncements. He reminded himself that the Ukraine Criminal Code provides for imprisonment of two years upwards to five years for those evading the draft or evading mobilisation and it was a matter of record that draft dodgers had been imprisoned.

24. It was his view that changing circumstances meant the situation was different from 2015 and that the obligation to mobilise was taken more seriously by the government, in fact "much more seriously" than had been the case. As a consequence of this, it is harder to avoid responsibilities by bribing officials who were less willing to be bribed and therefore those who are able to take bribes demand a higher fee. In the immediate aftermath of the Euromaidan Revolution and the Russian intervention people were more willing to serve. That seems to be no longer the case but the expectation that they do serve is still high. The government takes the view that the undeclared war on Russia continues and it takes an "increasingly dim view" of draft dodging. In January 2015 a "blogger" was charged with treason for issuing calls to boycott a military mobilisation.

25. According to the Home Office Country Policy and Information Note on Ukraine: Military service of November 2016 the offender was sentenced to three and a half years' imprisonment. It is said that in August 2015 there were some 400 draft dodgers already in prison.

26. He was not aware of any specific research on the point but anecdotally it appeared that people convicted in their absence tended to be more seriously punished than those who had faced the courts. Further in his opinion the claimant's failure to pay fines or carry out community service "may well" have resulted in sentences that had been imposed have been converted to a custodial term. He cited the appropriate provision of the Criminal Code that provided for that eventuality.

27. There was also evidence that draft dodgers were regarded with ill will by prison officials and other inmates and were at the "bottom of the pecking order".

28. He then turned his mind to whether the claimant would be required to engage in acts contrary to international law.

29. In short, Dr Galeotti regarded this as something that was possible but unlikely. It was possible because there was clear evidence of the Ukraine security forces

being involved in internationally unlawful conduct, particularly abuse of human rights including torture, but although these things undoubtedly happened they were described as "relatively uncommon". There was nothing to suggest that the claimant would be more likely than anyone else to be required to do such activities. Nevertheless, he took issue with the view of this Tribunal in **PS (prison conditions; military service) Ukraine CG [2006] UKAIT 00016** which found there was "no question" of a person in military service being required to perform such acts. He said that decision failed to acknowledge the present war in the Donbas. The international situation was different, the government was different, and it was wrong to assume that the values of 60 years ago were relevant now.

30. Disobedience to orders would attract prolonged periods of imprisonment particularly three to seven years if the disobedience was in battle. In February 2015 punishments were made more harsh in a climate of "mass violations of military discipline". Problems were with desertion and alcoholism and simple disobedience.

31. The abuses tended to be carried out by the National Guard rather than the regular military but the regular military were not immune from criticism and the government had not shown any ability to prevent further abuses.

32. Ms Norman summarised her case with a skeleton argument dated 19 September 2018.

33. This explains that the claimant is a Ukrainian national who arrived in the United Kingdom in 2004. He has not undertaken formal military service but he has a military card and is a reservist. She said that it is his case he is liable for mobilisation until the age of 60.

34. When the claimant was in the United Kingdom in 2004 conflict broke out in the Ukraine and the claimant was sent a number of call-up notices from the Ukraine on different dates between 2014 and 2017. He made an asylum claim which he put forward on a "sur place" basis. He said that he would have to choose between performing his military service and thereby being required to engage in conduct contrary to international standards or experiencing internationally unacceptable punishment.

35. Ms Norman said there were three things for the Tribunal to consider. First, has the claimant been called up? Second, is there a risk of pre-trial detention on return? Third, even if not prosecuted is there a real risk of being required to take part in any internationally condemned acts?

36. She submitted that the background evidence shows that a reservist can be mobilised up until the age of 65. She submitted that the claimant's military call-up papers are genuine and in support of that she relied on the expert opinion of Dr Galeotti. She drew attention to Dr Galeotti's explanation in the supplementary report that being unfit for military service would not result in being excused from military service but, in the case of minor medical problems, of being sworn in and enrolled and required to register to be ready for future mobilisation. This is the category in which the claimant says he comes and the expert evidence to this is "rare" but "by no means unique". This evidence, I find, answers the concerns about the chronology raised in

paragraph 42 of the Refusal Letter. It is believable that the claimant was due to be mobilised in 2014 and 2015 as a former soldier even though his service was nominal. I do not accept that his claim to have contacted the Ukrainian authorities in London in December 2016 to obtain an emergency travel document discredits his claim to have been called up in 2017 when he was known to be in the United Kingdom. I have no reason to assume that the Ukrainian authorities have the necessary efficiency or, even if they did, that his presence in the United Kingdom would stop his being "called up" even if he was unlikely to attend. The apparent failure to mention the 2017 "call up" when he was interviewed on 21 July 2017 is detrimental to is case but has to be considered with the evidence that the documents are genuine. His case does not depend on renewed interest in 2017.

37. She relied on Dr Galeotti's view that he would be almost certain to face detention in the event of return. This is because he would be detected when he passed through any kind of passport control.

38. She then relied on the decision of this Tribunal in **VB and Others** that any form of detention would be contrary to his rights under Article 3 of the European Convention on Human Rights.

39. The skeleton argument is more expansive in support of the contention that if called to do military service there would be a requirement to take part in internationally condemned behaviour.

40. She relied on the decision of the Court of Appeal in **Krotov v SSHD [2004] EWCA Civ 69** to identify the kind of conduct that would be unacceptable and then drew attention to background evidence which, she said, said that is the kind of conduct with the Ukraine forces are engaged. She then referred to other material suggesting that the Ukraine authorities were complicit. Dealing with Dr Galeotti's evidence she that it was "possible, albeit unlikely" that the claimant would have to take part in such activities Ms Norman submitted (at paragraph 27 of the skeleton argument) that if there was a possibility of the claimant being expected to take part in them it was inherently more likely that he would be associated with them. I have to say I do not understand that argument and do not find it attractive.

41. Mr Whitwell's submissions, appropriately, concentrated on the Refusal Letter. In particular, I was referred to paragraph 56 and 57. This shows that there were "currently hundreds of cases" open in the courts for draft evasion. The majority of people were released on probation. The only detected prison sentence was "postponed" and did not come into force. This chimes completely with the decision of the Tribunal in **VB and Anor (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00179 (IAC)** which found "at the current time it is not reasonably likely that a draft evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings for that act, although if a draft evader did face prosecution …" he could expect a sentence less than a prison sentence.

42. He then referred to the country policy in its notes from April 2017 but I did not find those arguments helpful. I agree with Ms Norman that, as explained in **VB**, it is unclear what the source quoted at 5.3.1 of the Country Policy and Information Note Ukraine: Military service April 2017 actually meant when it

referred to notices being "hand-delivered and require the signature of a recipient". We are all familiar with the use of recorded delivery in the United Kingdom where letters can and frequently are "signed for" by a person other than the intended final recipient. Further, it would make little sense of Dr Galeotti's evidence about people being convicted in absence if they had to have actual rather than deemed knowledge of a hearing in the criminal courts. Following **VB** I do not accept that there was any inconsistency between that snippet of evidence, properly understood, and the evidence in this case.

43. Mr Whtiwell relied on the Refusal Letter

44. The claimant did not give evidence before me. There was little point. His case is clearly understood and he was not going to retract from it. What matters is the quality of the evidence about what will happen on return and that is expert evidence rather than the claimant's opinion however sincerely held. I am satisfied that the documents seen by Dr Galeotti are genuine and this includes the document showing the claimant has been summoned to court. Dr Galeotti has given proper reasons for finding them persuasive and there have been no reasons given for doubting them. They are part of a plausible story and are right on their own terms.

45. It follows that I deal with this case on the basis that this claimant is someone not only who, like many other, has been required to do military service but has not done it and whose case has been brought before a court. I find Dr Galeotti's reasoning that a person in such circumstances would be noticed in the event of return to be wholly irresistible.

46. It is one of the many distinctive features of this jurisdiction that "fact-finding" is more to do with predicting what might happen in the event of a contingency than actually deciding what did happen. The simple truth is I do not know what will happen if this man is returned. I do not know that I have been told the truth by the claimant. I am satisfied it is reasonably likely that the core of his story, namely that he does not want to do military service, that he is being required to do military service and that his refusal to be mobilised has led to his prosecution is right.

47. I am also satisfied that it is a reasonably likely consequence of that firstly that he would face a prison sentence but even if he did not that he would face detention in unlawful conditions while the matter was being resolved. This is explained fully by Professor Galeotti and is sufficient reason to allow his appeal on Article 3 grounds, which, having reminded myself that it is sufficient if the claimant proves his case to the "real risk" standard, is what I do.

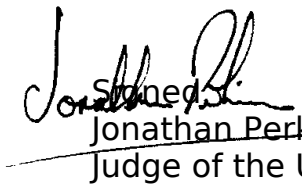
48. This is not in any way to go behind the decision in **VB**. That remains good guidance but subject to the obvious limitations that it is based on the evidence before it and the international situation had deteriorated since then, it may be that the position is worse but this is not what I have decided. I have decided that this particular claimant has shown that he is somebody who is at risk for particular reasons in his case. In short it was decided in **VB** that draft and mobilisation evaders are not usually at risk of prosecution. This claimant has persuaded me that is at risk.

49. I do not see any point in engaging at great length with the additional submissions about the claimant having to do internationally unacceptable acts. For what it is worth I accept at face value Dr Galeotti's observations that the claimant could be subject to that sort of requirement because those things go on but it is unlikely and I would not have allowed the appeal for that reason.

50. Nevertheless, I allow it for the reason that I have.

Decision

51. The First-tier Tribunal erred in law. I set aside its decision and I substitute a decision allowing the claimant's appeal on Article 3 grounds.



Signed:
Jonathan Perkins
Judge of the Upper Tribunal

Dated 5 July 2019

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(Immigration and Asylum Chamber) Appeal Number: PA 07783 2017

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Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Ms J Norman, Counsel instructed by Sterling Law Associates, Solicitors

REASONS FOR FINDING ERROR OF LAW

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal dismissing on asylum grounds but allowing on Article 3 grounds the appeal of the respondent (hereinafter "the claimant") against the decision of the Secretary of State refusing him international protection.

2. Certain things are clear. The appeal was unequivocally dismissed on asylum grounds and there is no cross-appeal. It is also an accepted fact, and I have checked with Mr Walker for the Secretary of State that this was not an error, that if the claimant does go prison then he risks facing conditions so severe

that they would contravene his rights under Article 3 of the European Convention on Human Rights.

3. The appeal on asylum grounds was dismissed because the First-tier Tribunal did not believe the claimant's evidence of his involvement in anti-Government political activity.

4. Neither did the First-tier Tribunal accept the claimant's evidence that he had been "called-up" into the armed services and did not accept, therefore, that there was any risk of the claimant being identified on return as a person who had been evading the draft. It is plain from the evidence that a lot of people who receive call-up papers do not respond responsibly and many are prosecuted, although custodial sentences seem to be very rare.

5. The reasons for allowing the appeal emerge in paragraphs 54 and 55 of the Decision and Reasons. The judge was satisfied that the claimant would refuse to perform military service and would risk Article 3 severe ill-treatment as a consequence. This is not the same as a finding that he would be in trouble for avoiding the draft. It goes further than that. It is a finding that he would not do his military service and refusal would create the risk of imprisonment.

6. The challenge in the Secretary of State's grounds is that it is unclear how the judge moved from disbelieving much of the claim to finding that the claimant is somebody who would be expected to do military service, and if he was expected to do military service the findings that he is somebody who would refuse to carry out that service if required.

7. I can understand the judge's finding that he would not do the military service if required. It is not made particularly clear, either in the Decision and Reasons or in the evidence, but the reasons are. The claimant expressed a marked reluctance to perform military service, and an abhorrence of the conditions that a soldier was required to endure and of the things that soldiers are required to do. The judge, who had the advantage of hearing the claimant give evidence was, I find, entitled to conclude that he is somebody who would not perform military service if he was required to serve.

8. What I cannot work out is how the judge concluded that the claimant is somebody who would face a real risk of being required to do military service. The judge found that the claimant has not being called-up and that he is not somebody in a category of people who were particularly likely to be called up. Rather he is past the age when persons are most likely to be of interest and I simply do not understand what supports that finding.

9. I hesitate because it is unattractive to tell somebody that an appeal that they thought had been successful is not, and I can only do it if there is a clear error of law.

10. Nevertheless, I have to say, having reflected on the case and having had considerable assistance from Miss Norman and Mr Walker, that I am satisfied that this finding that the Applicant faces a real risk of being made to do military service is perverse, at least to the extent that it is wholly unexplained.

11. I therefore set aside the decision of the First-tier Tribunal insofar as it relates to the Article 3 claim.

12. Having heard submissions from the parties I am satisfied that this decision has to be remade. I remind the parties that, as the pleadings now stand, there is only room to argue the Article 3 point. I have indicated that finding that *if* the claimant is obliged to perform military service he will refuse and will be at risk of unlawfully severe treatment is lawful. The only issue to be resolved is whether the claimant is at real risk of having to do that service.

13. I know that there is a new expert report which has been served with the permission of the Upper Tribunal, but that does not of itself open up issues beyond those that I have indicated above.

Notice of Decision

14. The First-tier Tribunal erred in law. I set aside its decision to allow the appeal with reference to article 3 of the European Convention on Human Rights. The case will remain in the Upper Tribunal before me for re-determination on the point. The appellant may want to give additional evidence to explain why he would have to do military service. In addition, the expert may be invited to provide an additional supplementary report.

Signed

Jonathan Perkins, Upper Tribunal Judge Dated: 16 May 2018