IAC-FH-CK-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08867/2019

THE IMMIGRATION ACTS

Decision Pursuant to Rule 34 Rules
On 01 June 2020

Decision & Reasons Promulgated
On 05 June 2020

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

YV
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings._

The Appellant is a citizen of Ukraine. The First-tier Tribunal made a direction to anonymise the Appellant in accordance with its practice in protection claims (see Guidance note 2013 No 1: Anonymity Orders). This is no reason for me to interfere with this. The order continues. Alternatively I make an order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Appellant's date of birth is 20 March 1965. He made an application for asylum. This was refused by the Secretary of State on 4 September 2019. The Appellant appealed against the decision. His appeal was dismissed by First-tier Tribunal Judge Lingam. He made an application to appeal against the decision of the First-tier Tribunal. Resident Judge Sutherland Williams sent a notice pursuant to Rule 35 of the 2014 Procedure Rules on 22 November 2019. In his decision he proposed to set aside the decision of Judge Lingam on the basis that she misapplied Chiver (10758) (ground one of nine). Judge Sutherland Williams proposed to exercise his power to review the decision pursuant to Rule 35 of the Tribunal Procedure (First-tier Tribunal) (IAC) Rules 2014. Notice was accordingly given to the Respondent. The Respondent raised objections to this in written submissions of 4 December 2019. On consideration of the Respondent's objections he granted permission on all grounds. The matter was listed for an error of law hearing on 13 February 2020. On that occasion it was adjourned because neither party was ready to proceed.

Rule 34

The matter was relisted on 1 April 2020. In the light of the COVID-19 pandemic the hearing was adjourned. On 27 April 2020 COVID-19 directions were issued to the parties, seeking submissions in relation to any error of law and inviting objections to the matter being determined on the papers without a hearing. Neither party has communicated objections to the proposal for the matter to be determined on the papers.

I have had full regard to the Pilot Practice Direction: Contingency Arrangements in the First-Tier Tribunal and Upper Tribunal and the Presidential Guidance Note No 1 2020 and I conclude that this appeal should be determined without a hearing. The appeal can be fairly and justly determined without the need for a hearing. I have considered the grounds of appeal and written submissions prepared by the Appellant and the Rule 24 response and written submissions submitted on behalf of the Respondent.

Written submissions have been received from both parties relating to the error of law issue. Both parties have made an application pursuant to Rule 15(2a) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Appellant's immigration history

The Appellant arrived in the UK in 2000 as a visitor. His visa expired on 26 January 2001. On 28 May 2015 he was served papers by the Secretary of State as an overstayer. On 17 July 2019 he was arrested for immigration offences. On 21 July 2019 he made a claim on asylum grounds.

The Appellant's claim

The Appellant's claim in summary is that he is a draft evader and is at risk of imprisonment. He was a sergeant in the Soviet Army from 1984 to 1986 and the authorities are keen to benefit from his expertise. He was called up in 2014. Criminal proceedings for evasion were brought against him. In 2016 he received a letter at his home in Ukraine informing him that if he were found he would be imprisoned for draft evasion.

The Decision of the First-tier Tribunal

Judge Lingam heard evidence from the Appellant. She directed herself on the law including her approach to assessing credibility (at paragraphs 23 to 29 of the decision). The judge at paragraphs 30 to 36 considered matters that do not go to the core of the Appellant's account and in those matters found that the Appellant was not credible. In respect of the core of the Appellant's account, namely his claim to be a draft evader who had been prosecuted in his absence, the judge engages with this at paragraphs 38 to 61. She considered documents submitted by the Appellant to support his claim. These comprise three court summonses and a judgement. The documents had been translated. The judge describes the documents at paragraphs 41 and 42.

At paragraph 43 the judge considers the Appellant's evidence that the authorities are keen to recruit him for his past specialised military service and knowledge gained about defence equipment. The judge did not find it credible that the authorities would be seeking to recruit the Appellant for military operation on outdated training skills.

The judge considered that the Appellant's mother had not been visited by the police regarding his whereabouts. She said at paragraph 44 that there are "sufficient reasons for me to place little or less weight on this aspect of the Appellant's evidence to reject his incredulous claim of being served with two notices prior to being prosecuted by the Regional Court for draft evasion in Feb 2016".

The judge found that the Appellant's evidence was inconsistent about those he fears on return to Ukraine. She found that the Appellant's claim was further complicated by him claiming that he had a religious objection to military service. She considered as damaging to his credibility the fact that the Appellant had delayed making a claim for asylum. She found that the Appellant had failed to establish that he was of interest as a draft evader or that he was served a summons to face prosecution or that there had been any findings made against him. She went on to make findings in the alternative. She found that if he were a draft evader, he would not be subject to imprisonment applying VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079.

The Grounds of Appeal and submissions

The grounds of appeal comprise 10 pages. There are 9 grounds in total which are insufficiently particularised. They overlap and they are repetitive. They lack sufficient clarity. It is difficult to distinguish 9 separate grounds. The author is reminded of VHR (unmeritorious grounds) Jamaica [2014] UKUT 00367 and Nixon (permission to appeal: grounds) [2014] UKUT 00368.

The written submissions of three pages rely on the grounds of appeal and repeat them. Ground 1 asserts that the judge decided that the Appellant was of poor credibility before considering the core of his account. She failed to properly assess credibility because she failed to consider that even if there were parts of the Appellant's claim that she did not accept the core of his claim could still be intact. It is submitted that the judge erred in relying on the discrepancies when they were peripheral to the Appellant's account. The Appellant relies on Chiver (10758), a case decided on 10 March 1994. The written submissions repeat the grounds claiming that the judge considered peripheral matters that did not go to the core of the Appellant's claim. The Secretary of State says that the judge engaged with Chiver and my attention is drawn to paragraph 29 of the judge's decision.

Ground 2 asserts that the judge considered "irrelevant evidence" which does not go to the core of the Appellant's account. Specific findings are identified at paragraphs 6 -12 of the grounds of appeal as being irrelevant to the assessment of credibility. Ground 5 challenges the same findings on the basis that they were not open to the judge. It is argued by the Secretary of State in respect of ground 2 that the judge was entitled to consider the overall evidence given by the Appellant.

Ground 3 asserts that the judge's decision to place little weight on the documentary evidence was inadequately reasoned. The only reasons given is an erroneous finding regarding the Ukrainian judge's initials, that any skills that the Appellant gained would be outdated and that the Appellant's mother had not been visited by the authorities. The judge was not entitled to conclude that skills obtained during military training in the 1980's would be outdated. The Appellant would qualify for mobilisation irrespective of any skills that he may have. It was never part of the Appellant's evidence that his mother had not been approached by the authorities. The written submissions assert that the judge's findings are perverse relating to the documentary evidence. Ground 4 also raises issues concerning the documentary evidence. It is asserted again that the judge made a material error when she noted the discrepancy in the Ukrainian judge's name.

The Appellant makes an application under Rule 15 (2A) to establish that there was a translation error and there was no discrepancy in the name of the judge as recorded on the documents. The Respondent submits that the First-tier Tribunal cannot be wrong in identifying a discrepancy in the Appellant's evidence.

Ground 6 asserts that the judge did not properly consider the "objective" evidence and country guidance. She erred in concluding that if the Appellant is required to enlist then his mother would be able to engage legal representation. The Appellant would be at risk because there is an outstanding warrant and he is a previous absconder. Thus, the United Kingdom will breach its obligations under Article 3 in returning the Appellant. There are several issues raised in ground 6 regarding the application of VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079. The complaint is repeated at ground 9 which says that the judge's findings at paragraphs 61-63 are confused. It was not necessary for the Appellant to establish a convention reason to be at risk under article 3. The Respondent submits that the judge properly applied the law based on her findings.

Ground 7 asserts that the judge has placed "over-reliance" on s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

Ground 8 asserts that the judge applied a too high a standard of proof. Reference is made to paragraph 50 of the decision and the judge's finding that the Appellant has failed to show that he had previously received training on defence equipment. This is because reservists do not have to demonstrate any particular skills to be called up. He has provided 2 military call up papers which the judge did not engage with. It is asserted that it is "wholly inappropriate to expect an asylum seeker to provide documentary evidence to substantiate all aspects of his claim". The Respondent submits that the judge did apply the correct standard of proof and paragraphs 8 and 29 are referred to.

Conclusions

In respect of ground 1, the judge directed herself at paragraph 29 as follows:-

> "29. Therefore, it is imperative that the Appellant's account is examined as a whole - Chiver (10758) and that, even if some parts of the Appellant's account is not accurate, the rest can remain credible … as stated by the Tribunal in Kasolo (13190) and which I accept that if the account appeared confusing or if it lacked details, the benefit of doubt must be construed in favour of the Appellant".

In the case of Chiver (Asylum; Discrimination; Employment; Persecution) (Romania) [1994] UKIAT 10758, the following was said:-

> "It is only when an adjudicator after stating that evidence is believed or disbelieved reaches a conclusion which has no foundation in the belief or disbelief that a determination cannot stand because of inherent inconsistencies. In this case this is patently not so for the adjudicator's findings on credibility adverse to Mr. Chiver go as the adjudicator said to the details of the story. It is perfectly possible for an adjudicator to believe that a witness is not telling the truth about some matters, has exaggerated the story to make his case better, or is simply uncertain about matters, but still to be persuaded that the centre piece of the story stands. This is particularly so where the critical criterion for an

> adjudicator is the reasonable likelihood of persecution occurring were a person to return to a particular country."

There is no challenge to the judge's self-direction at paragraph 29. It accurately reflects what the Tribunal has said about assessing credibility. The complaint in this case is that the judge considered matters peripheral to the Appellant's account (and irrelevant – ground 2) and concluded from these that he was not telling the truth. The matters which are categorised as irrelevant in the grounds include matters in the screening interview, the Appellant failing to remember the dates of his grandfather and father's death and the Appellant's motives for coming to the United Kingdom. Whilst I accept that these matters are properly characterised as peripheral to the core of the Appellant's account, they were unarguably matters about which the judge was entitled to make adverse findings. They were not irrelevant. The judge decided to engage with the peripheral matters before the core of the Appellant's account (including documentary evidence). That is not an error of law. She had to start somewhere. Importantly she did not reject the core of the Appellant's account based on these findings. There are identifiable reasons why the Appellant's core account was not found to be credible. The judge rejected his evidence that the authorities were keen to recruit him for his past military expertise. She was entitled to draw a reasonable inference from the evidence that any skills the Appellant learnt during military service in the mid-1980s would be out of date. While I appreciate that to be conscripted there is no requirement for the Appellant to prove that he has skills of interest to the military, this was how the Appellant's case was presented at the hearing (and reflects what he said in his AIR in answer to q42). The challenge to the judge giving this as a reason for rejecting credibility is wholly unarguable. It was a finding open to the judge on the evidence before her (ground 5).

The judge found that the delay in making a claim damages the Appellant's credibility. This is challenged in ground 7. The Appellant delayed in making a claim. He said he was called up in 2014 and the court summonses are dated 2015 and the judgement 2016. He made a claim in 2019. The judge at paragraph 48 considered his explanation and rejected it. It is unarguable that this was her starting point. There is no support for the assertion that the judge misapplied JT (Cameroon) v SSHD [2008] EWCA Civ 878.

The judge also found that the Appellant's mother having not been visited by the authorities regarding the Appellant's whereabouts suggested that he was not of interest. Grounds 2 and 5 challenge this finding on the basis that the finding was not supported by the evidence and irrelevant. This is a perverse suggestion. It is reasonably expected that had the Appellant's evidence been that his mother had been visited by the authorities who were looking for him, he would have mentioned this in his evidence. In the light of the absence of such evidence, it was entirely open to the judge to infer that they had not. It was unarguably the case that being a wanted man was material to his account. The Appellant bears the burden of proof.

Ground 2 comprises a list of disagreements with the findings of the judge. The point made by the judge at paragraph 45 is that the Appellant's account lacked

clarity. The judge at paragraph 48 said "as a note of interest, if he had in 2015 sought legal opinion on the call-up papers; it unclear (sic) why those documents had to be resent by his mother". In the grounds the Appellant claims that the Appellant's evidence was not that his mother had sent him the papers in 2015, his evidence was that she told him about them. This finding is one that has no material bearing on the outcome of the appeal. In any event, the judge was entitled to infer from the evidence that the papers had been sent to him in 2015 when he sought legal advice on them.

In respect of ground 3 and 4, the decision must be read as a whole to understand why the judge found the documents to be unreliable. The documents comprise summonses and a judgement of the court. They were submitted to establish that the Appellant was called up and is a draft evader and subject to criminal proceedings. At paragraph 42 the judge recorded an anomaly in the initials of the judge on the translation of the judgement of the court judgement which she described as the fourth document and those recorded on a summons (described as the third document). This was not the reason given for finding the documents to be unreliable. The grounds focus on what the judge said at paragraph 41. However, there were several reasons given for rejecting the core of the Appellant's account (see above) and for rejecting the reliability of the documents. The observation about the judge's initials was not the reason why she found the documents to be unreliable. The grounds of appeal misunderstand the application of Ahmed (Documents unreliable and forged) Pakistan * [2002] UKIAT 00439.

The Appellant's written submissions pursue an application under Rule 15(2a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to admit a retranslation of the document showing that there was an error in the translation of the document before the First-tier Tribunal arising from the fact that in the Ukrainian alphabet a B is a V. It is incumbent on the Appellant's solicitors to take reasonable care when preparing the Appellant's case and to be aware of any inconsistencies or discrepancies in the evidence. In any event, for the reasons I have given the matter was not material to the outcome. Whilst there is no good reason why the Appellant's legal team did not spot the discrepancy before the hearing before the First-tier Tribunal, if the evidence were admitted for the purposes of my decision it would make no difference. Had that evidence been before the First-tier Tribunal it would have made no difference to the outcome.

The Secretary of State makes an application under Rule 15(2a) to produce evidence in relation to the court judgement relied on by the Appellant to establish that there are outstanding criminal proceedings and he is wanted. The Respondent says that the evidence was obtained by entering the judge's name into the search engine which returned results establishing that Judge B L Dziubych sat at the Ternopil Inter District Court of the Ternopil Region on the day in question on 12 February 2016 and there are screenshots of the hearings that took place at that court on that particular day. The Respondent's case is that all the unique number references in the second column from the left all comprise of the following format: 607/nnnn/nn-suffix. The unique number on the judgment adduced by the Appellant does not follow this format and must

bring its reliability into question. The Respondent asserts that a general search of all Ukrainian courts on all dates was conducted and the Respondent has produced evidence of this and asserts that no evidence has been found which would support the reliability of the Appellant's documentary evidence. There are four hearings presided over by Judge B L Dziubych and none of them contain any details matching the Appellant or his purported judgment. This in the Respondent's submission casts serious doubt on the reliability of the Appellant's evidence.

There is no good reason given by the Respondent for this evidence not being before the First-tier Tribunal. I have not taken it into account when considering whether the First-tier Tribunal made an error of law.

In respect of grounds 6 and 9, the judge was entitled to reject the Appellant's account that he was wanted and had been subject to criminal proceedings. She went on to consider his claim in the alternative on the basis that he has been called up for military training. In this respect she properly applied the country guidance case of VB and Another (draft evaders and prison conditions: Ukraine) CG [2017] UKUT 79. The judge lawfully rejected the evidence of criminal proceedings. She said that if he was a draft evader, he would not be at risk on return. This is entirely consistent with VB.

The issues raised in ground 6 concern the application of VB and specifically paragraph 43 of the decision in which the judge says "even if I were to give the documents any weight (which I do not) the judgement clearly states that the criminal case against the Appellant has been stopped until he is found. That being so the authorities are not actively looking for him". I accept that had the judge found the documentary evidence reliable, her findings are problematic. However, this is of no materiality because the judge, as she made clear throughout, rejected the Appellant's account and found the documentary evidence to be unreliable. Ground 9 raises Article 3 as distinct from the Appellant's asylum claim. However, this is misconceived because the judge was entitled to conclude that even if he is a draft evader the Appellant would not be at risk on return.

Ground 8 asserts that the judge applied a higher standard of proof than that required in asylum cases. This is wholly without substance. The judge properly directed herself as regards the standard and burden of proof at paragraph 8 and there is no support for the assertion that she failed to properly apply the law.

The parties can be left in no doubt why the judge dismissed the Appellant's appeal. The judge was also entitled to consider the adverse findings in respect of the matters that were peripheral to the Appellant's account. However, she considered the evidence in the round. She was mindful of Chiver (Asylum; Discrimination; Employment; Persecution) (Romania) [1994] UKIAT 10758 and how credibility should be assessed, having properly directed herself. She made findings on material matters that are grounded in the law and adequately reasoned.

For all the reasons given I conclude that the grounds do not properly identify an error of law capable of making a difference to the outcome in this case, therefore there is no reason for me to interfere with the decision. The decision of the First-tier Tribunal to dismiss the Appellant's asylum claim stands.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Joanna McWilliam Date 1 June 2020
Upper Tribunal Judge McWilliam