Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03590/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 07 December 2021	**On 20 January 2022**

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

MK
(ANONYMITY DIRECTION CONTINUED)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Slatter of Counsel instructed by Sterling Lawyers Ltd, solicitors
For the Respondent: Mr J McGirr of the Specialist Appeals Team

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 the Appellant or any member of the Appellant's 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.

DECISION AND REASONS

The Appellant

1. The Appellant is a national of Ukraine born in 1975. He is married with two children, an adult son and a minor daughter. On 16 June 2016, the Appellant arrived in the UK as a visitor. On 20 November 2018, two days after he had been arrested as an overstayer, he claimed asylum on account of his fear of return to Ukraine because in early 2015 he had received mobilisation papers in consequence of the Russian interference in the Donbas region in north-east Ukraine and feared being sent to the front line or being imprisoned for failing to respond to the mobilisation papers (see asylum interview replies 30 and 31). In April 2015 after a medical examination, he had been found fit to serve.

2. He had been conscripted for National Service between 1993 and 1995 and attained the rank of an ammunition supply platoon sergeant and cook of the third grade.

The Original Decision of the SSHD

3. On 11 March 2019 the Respondent (the SSHD) refused the claim. She did not accept the Appellant had given a truthful account of events in Ukraine and after considering at length the decisions in VB and Another (draft evaders and prison conditions) CG [2017] UKUT 79 (IAC) and PK (Draft evader; punishment; minimum severity) CG [2018] UKUT 241 (IAC) concluded that the UNHCR Handbook provided that a person is not a refugee if the only reason for desertion or draft evasion is dislike of military service or fear of combat and that any punishment the Appellant might receive would be neither disproportionate nor excessive.

4. The Appellant's claim in respect of his private life in the United Kingdom based on Article 8 of the European Convention was also refused. He did not meet any of the time critical requirements of paragraph 276ADE(1) of the Immigration Rules and there were no very significant obstacles to his re-integration on return to Ukraine. Further, the SSHD considered there were no exceptional circumstances warranting consideration of the claim outside the Immigration Rules.

The Proceedings in the First-tier Tribunal

5. On 11 April 2019 the Appellant through his solicitors lodged notice of appeal. The grounds are the Appellant had received mobilisation papers; as a draft evader he would be imprisoned in conditions which would amount to inhuman and degrading treatment and that anyone convicted and sentenced to a term of imprisonment in the Ukraine would be detained on arrival. The final ground was that on mobilisation there would be a real risk of him being associated with acts contrary to the basic rules of human conduct. At the hearing before us this was explained as referring to the conduct and behaviour of the various opposing parties in the "Anti-Terrorist Operation" (the ATO) in the Donbas region, including the Ukrainian armed forces.

6. By a decision promulgated on 21 June 2021 First-tier Tribunal Judge Hussain dismissed the appeal on all grounds. On 21 July 2021 the First-tier Tribunal granted permission to appeal.

7. The grounds for appeal are that the Judge arguably erred in law by:

   (1) not considering the evidence of the continuous mobilisation of reservists and recent changes in Ukrainian legislation

   (2) by not taking adequate account of the findings at paragraph 238 of PK and OS (Basic rules of human conduct) Ukraine CG [2020] UKUT 00314 (IAC) and that reservists do not choose where they serve

   (3) not considering the application of the jurisprudence in Shepherd v Germany (App.C-172/13) ECLI:EU:C:2015:117 and that the Appellant fell in the category of people "that (it) is reasonably likely that, by the performance of their tasks, they would provide indispensable support to the preparation or execution of such acts". These are acts contrary to the basic rules of human conduct, that is breaches of international humanitarian law being committed in the ATO.

   The grounds further mentioned that the Court of Appeal has given permission to OS, the second named appellant in PK and OS Ukraine CG [2020] UKUT 00314 (IAC) to appeal on the grounds that it is arguable "the Upper Tribunal had misunderstood and/or misapplied Shepherd".

8. Permission to appeal was granted on the basis it was arguable that Judge had erred in consideration of the Country Guidance decisions VB and PK [2020] and that the Judge's findings at paragraphs 47-48 of his decision are unclear and may be inconsistent with current Country Guidance of the Upper Tribunal in PK [2020] and the background evidence.

Proceedings in the Upper Tribunal

9. Mr Slatter opened by requesting that this appeal be stayed pending the outcome of the appeal of OS, being the second appellant in PK [2020] to the Court of Appeal following the grant of permission already mentioned at paragraph 7.

10. He submitted the Appellant's case is the same as that of OS and that they were about the same age. We remarked OS was a pilot and the Appellant was a sergeant in the artillery involved in the supply of ammunition and was a cook (see replies 93-95 of the asylum interview). Mr Slatter responded that both the Appellant and OS had been sent mobilisation papers and the prospect of military service had to be considered in the light of the findings at paragraph 4.10 of the Home Office Country Policy and Information Note on Ukraine: Military service (the CPIN) at p.289 of the Appellant's bundle (AB).We have

noted that this page relates to service in the Crimea and paragraph 7.1 of the CPIN at pp.295-296 addresses the conditions of service in the ATO. Mr Slatter submitted that in this connection PK [2020] had not looked at whether military service outside the ATO could amount to indispensable support for activities in the ATO. Mr Slatter submitted that even if deployed outside the ATO or in western Ukraine the Appellant would be supplying indispensable support to those engaged in the ATO. Further, the Judge had found the Appellant had received his mobilisation papers. Even if he had a low profile, his appeal should be stayed until the outcome of the appeal of OS to the Court of Appeal had been decided.

11. Mr Slatter relied on the judgment in SG (Iraq) v SSHD [2012] EWCA Civ. 940. The Court of Appeal found that an appeal should be stayed if the reasons given for permission to appeal cast substantial doubt on the reliability of the Tribunal's reasons.

12. At paragraphs 67-71 of SG (Iraq) Burnton LJ concluded:

> In my judgment a Country Guidance determination of the Upper Tribunal (Immigration and Asylum Chamber) remains authoritative unless and until it is set aside on appeal or replaced by a subsequent Country Guidance determination.
>
> The filing of an application for permission to appeal a Country Guidance determination of the Upper Tribunal (Immigration and Asylum Chamber) cannot, of itself, justify the Court granting an injunction staying the removal of anyone whose removal is justified by that determination. However, if the judge considers that the evidence relied upon by the claimant may satisfy the test to which I refer below, it may be appropriate to grant a stay pending the decision of the Court of Appeal on the application for permission to appeal. In such a case, it may well be appropriate for the judge to suggest that the Court of Appeal expedite its consideration of the application for permission to appeal.
>
> Whether the grant by the Court of Appeal of permission to appeal a Country Guidance determination justifies a stay in the cases of those seeking to challenge removal directions where the decision to remove them relies or is justified by that determination must depend on the facts and the evidence relied upon by the claimant. The facts will include the content of the determination and the reasons given for the grant of permission to appeal.
>
> If the evidence relied upon was considered by the Tribunal, it is unlikely that a stay will be appropriate unless the reasons given for the grant of permission to appeal cast substantial doubt on the reliability of the findings of the Tribunal.
>
> In relation to evidence other than that considered by the Tribunal, and in particular evidence of subsequent events, I would endorse the test formulated by Irwin J. The Court should not stay removal pending the decision of the Court of Appeal unless the claimant has

> adduced a clear and coherent body of evidence that the findings of the Tribunal were in error.

and at paragraphs 74(4) and (5) Gross LJ found:

> Finality and an operative system of immigration control are important policy objectives; the submission would be destructive of both. Its reductio ad absurdum can readily be illustrated: if the mere fact of a pending appeal against a CG determination resulted in a stay of its operation – even against those who had already exhausted the statutory appeals process – there need never be finality; as soon as one appellant lost, another individual in the same broad category would apply for permission to appeal and so on.
>
> Rejection of the submission does not mean that individuals are deprived of protection against the potentially irreversible and grave consequences of removal. It could hardly be said that the system currently moves with unseemly haste to remove a failed appellant. To the contrary, it is a striking feature of the law in this area that even after an individual has exhausted the appeals process, he has the opportunity to launch a "fresh claim" pursuant to para. 353 of the Immigration Rules and the protection against removal afforded by para. 353A, reinforced by the possibility of Judicial Review. These provisions serve to balance the interests of finality with those of the individual seeking to resist removal; no more is required in the interests of individual fairness and any more would seriously undermine finality.

13. Mr Slatter submitted that grant of permission to appeal in PK [2020] cast substantial doubt on the Judge's decision.

14. Referring to paragraph 67 of PK [2020], Mr Slatter submitted the Upper Tribunal had applied the wrong legal test. The correct test was whether there was a sufficient risk as described at paragraph 38 of Shepherd v Germany. We set out paragraphs 36-39:-

> 36 Secondly, it can be seen from the very wording of Article 9(2)(e) of Directive 2004/83 that it is the military service itself that would involve war crimes. That provision does not refer solely to the situation in which the applicant would be led to commit such crimes personally.
>
> 37 It follows that the EU legislature intended the general context in which that service is performed to be taken into account objectively. Accordingly, situations in which the applicant would participate only indirectly in the commission of such crimes, because, inter alia, he is not a member of the combat troops but rather, for example, serves in a unit providing logistical or technical support, are not, as a matter of principle, excluded. Consequently, the fact that the person concerned, because of the merely indirect nature of that participation, could not be prosecuted under criminal law, in particular before the International Criminal Court, cannot preclude protection arising from Article 9(2)(e) of Directive 2004/83.

> 38 However, although the enjoyment of international protection is not limited to those who could be led to commit acts which constitute war crimes personally, such as combat troops, that protection can be extended only to those other persons whose tasks could, sufficiently directly and reasonably plausibly, lead them to participate in such acts.
>
> 39 Thirdly, Article 9(2)(e) of Directive 2004/83 is intended to protect the applicant who opposes military service because he does not wish to run the risk of committing, in the future, acts of the nature of those referred to in Article 12(2) of that directive……

15. Mr Slatter submitted the use of the expression "reasonably likely" at paragraphs 61, 93 and 100 of PK 2020 indicated the Upper Tribunal had applied the civil standard of proof instead of the lower standard.

16. He referred to paragraph 4.10.1 of the CPIN relying on the report from the Office Français de protection des réfugiés et apatrides (OFPRA), 'Fact Finding Mission Report -Ukraine,' May 2017. This comments on the stages of mobilisation. The first tranche comprises reserve officers and sergeants who have served and have military specialities and the second tranche is sergeants of all military specialities. The Appellant fell within the second if not the first tranche.

17. The Upper Tribunal in PK [2020] had not considered in the context of the standard of proof identified at paragraph 38 of Shepherd v Germany whether indispensable support for the acts against International Humanitarian Law in the ATO could be deduced from the activities in which the Appellant would be required to carry out on his mobilisation. The CPIN noted the mobilisation of specialists and the risk that they would be associated with acts contrary to the basic rules of human conduct in the ATO. Mr Slatter did not refer us to any specific passage in the CPIN or the OFPRA report to support his submission on the risk of association by reason of mobilisation with acts contrary to the basic rules of human conduct in the ATO.

18. Mr McGirr relied on the Rule 24 response and submitted that the appropriate standard of proof had been applied in PK [2020].

19. Mr Slatter had no further submissions to make and in answer to our questions submitted that if OS succeeded in the Court of Appeal than the Appellant should succeed.

Conclusions and reasons

20. We refer to the request for a stay of these proceedings pending the judgment of the Court of Appeal in the appeal of PK [2020]. The Court of Appeal's grant of permission identifies as the principal issues whether the Upper Tribunal had erred in its treatment of Shepherd v Germany and if the Upper Tribunal had so erred, then whether there is a sufficient risk, not likelihood, of OS who is now the sole appellant before the Court of Appeal, of serving in a role which would provide indispensable support for acts of the military constituting breaches of

basic rules of human conduct. The issue of mental anguish referred to in the Court of Appeal's grant of permission was not raised before the Judge or ourselves. The second ground of appeal whether there was "a sufficient risk of OS providing a sufficient support role for the combatants in the ATO" which is enough to establish refugee status was refused because it involves no question of law and no point of principle or importance and most importantly for the subject appeal it is fact specific.

21. We mention at this stage that the application for a stay of proceedings was considered by Upper Tribunal Judge Owens who in her Note and Directions of 12 October 2021 concluded it was not in the interests of justice to stay the appeal because the proceedings in PK [2020] may go on for some time and the permission granted on 6 September 2021 was on a narrow issue only. Further, there was the issue of potential delay.

22. We find paragraph 67 of SG (Iraq) mandates us to refuse a stay of proceedings. The subsequent paragraphs deal with a situation where there is an appeal against removal directions. In this appeal no removal directions have been issued. We have taken account of the recently increased military presence in the Donbas region widely reported in the media. This may add to the general instability in the region but we do not consider it has any real impact at present on the assessment of the risk on return claimed by the Appellant.

23. Burnton LJ at paragraph 71 stated that in relation to evidence other than that considered by the Tribunal, and in particular evidence of subsequent events, the Court should not stay removal pending the decision of the Court of Appeal unless the claimant has adduced a clear and coherent body of evidence that the findings of the Tribunal were in error. As we have already noted, there are no removal directions in this appeal and the lack of relevant evidence enforces the argument against a stay of proceedings.

24. We have considered Part 5 of the judgment in AB (Sudan) v SSHD [2013] EWCA Civ. 921. At paragraph 25 Jackson LJ giving the lead judgment noted that decisions to grant or refuse stays of proceedings are case management decisions and "will rarely be challenged and even more rarely be reversed on appeal". The reasoning in paragraphs 28-32 is reflected in the part of the judgment of Gross LJ in SG (Iraq) already mentioned.

25. For the reasons given in the five preceding paragraphs and taking into account that a requested stay has already been considered in the Upper Tribunal, we dismiss the application for a stay of these proceedings.

26. We have noted the grounds of appeal to the Upper Tribunal do not rely on any claim based on ill-treatment of draft evaders by the Ukrainian authorities.

27. At paragraph 44 of his decision the Judge found “there was no sufficient evidence that if the Appellant was to respond to the call-up or else forcibly conscripted, he would be sent to the conflict zone”. This was not expressly challenged before us and Mr Slatter relied on the proposition that the Appellant would be at risk because he has specialised knowledge skills and wherever deployed his service would amount to the provision of indispensable support for acts of the military constituting breaches of basic rules of human conduct, said to be being committed in the ATO.

28. The OFPRA report at page 30 notes that those who were mobilised generally did not go directly or quickly to the ATO. There was no evidence before the Judge or ourselves to suggest the Appellant had specialist skills which indicated he would be deployed in the ATO. Paragraph 7.1 of the CPIN notes page 24 of the OFPRA Report 2017 stated that in June 2016, the Military advisor of the European Union Delegation in Ukraine asserted that conscripts (not recruits) mainly serve in supporting roles in backward positions and that sending conscripts to combat zones is against the law. Many conscripts are actually drafted into the Navy and the Air Force, but only few into the Army and the National Guard (the latter is mostly guarding public buildings). Representatives of the Ministry of Defence of Ukraine specified that, in anti-terrorist operation (ATO) zones, conscripts could however still work in arsenals. Indeed, the law provides that in the ATO zone, conscripts would not be involved in military tasks.

29. Regardless of any possible argument about which standard of proof might be applicable, the Judge noted the absence of any evidence before him to show the Appellant would be deployed in the ATO. We find the submission that the Appellant if deployed anywhere else in the Ukraine would be a person whose tasks could, sufficiently directly and reasonably plausibly, lead him to participate in acts constituting breaches of basic rules of human conduct to have not been supported by adequate evidence of causal nexus and indeed, to be so remote as to be fanciful. Our conclusion is that the Judge has not been shown to have materially erred in law and his decision shall stand.

Anonymity

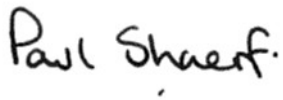
30. An anonymity direction was made by the First-tier Tribunal. No submissions were made with reference to it and we consider it appropriate to continue the anonymity direction.

SUMMARY OF DECISION

The decision of the First-tier Tribunal does not contain an error of law and shall stand.

Anonymity direction continued.

Signed/Official Crest Date 04. i. 2022

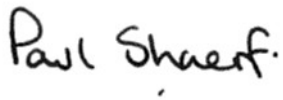


Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

As we have dismissed the appeal we make no fee award.

Signed/Official Crest Date 04. 1. 2021



Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

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.