Upper Tribunal
(Immigration and Asylum Chamber)

OK (PTA; alternative findings) Ukraine [2020] UKUT 00044 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**

On 9 December 2019

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

OK

(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms S Panagiotopoulou, Counsel, instructed by Yemets Solicitors

For the Respondent: Mr S Kotas, Senior Presenting Officer

DECISION AND REASONS

Permission should not be granted on the grounds as pleaded if there is, quite apart from the grounds, a reason why the appeal would fail.

Introduction

1.
This is an appeal against the decision of Judge of the First-tier Tribunal Lingam ('the Judge'), sent to the parties on 3 September 2019, by which the appellant's appeal against the decision of the respondent to refuse to grant her international protection was dismissed.

Anonymity

2.
An anonymity order was issued by the Judge and no application was made by the parties that it be set aside. We confirm the order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of her family. This order applies to, amongst others, the appellant and the respondent. Any failure to comply with this order could give rise to contempt of court proceedings. We do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of her protection claim becoming known to the public.

Background

3.
The appellant is a national of Ukraine and presently aged 33. She asserts that she clandestinely entered the United Kingdom on 31 December 2015. She was encountered by immigration officers during an enforcement visit to a property in East London on 18 March 2019 and she claimed asylum four days later, asserting that she possesses a well-founded fear of persecution at the hands of the Ukrainian authorities because she is a military draft evader.

4.
She states that she studied at a college between the ages of 15 and 18, obtaining a nursing diploma in 2004. In her interview she describes the three-year course as covering practical tasks such as applying dressings, taking blood and giving injections. As a junior nurse she worked as a feldsher in her village, a role she details in her witness statement to be akin to a doctor's assistant. Ms Panagiotopoulou confirmed at the hearing that a feldsher is a health care professional who provides various medical services limited to emergency treatment and outpatient practice. In Ukraine, they provide primary health care at outpatient clinics in rural areas, where there are no other primary care providers. By way of her undated witness statement the appellant details that she was not permitted to undertake any task without a doctor being present, though she was 'able to go to people's houses if someone has blood pressure and then I can give them an injection'. She married at the age of 19 and had three children. Whilst on maternity leave after the birth of her first child she commenced an accounting diploma by means of distance learning as her nursing wages were poor. Her evidence is inconsistent as to whether she qualified as an accountant. She returned to work as a nurse in her village in September 2010 after her second period of maternity leave and undertook limited roles. Her marriage ended in 2014, whilst she was pregnant with her third child.

5.
She asserts that she received her first military call-up papers in May 2014 but as she was a single mother who was pregnant with her third child, she did not take any steps in respect of the call-up. She received further call-up papers in December 2014, 3 months after the birth of her third child. As a qualified nurse she was required to attend a local army office. On this occasion she contacted the army officer to explain her circumstances but was informed that her mother could look after the children.

6.
We observe that the respondent's CPIN 'Ukraine: Military Service' version 5.0, dated October 2018, confirms the present compulsory draft age for men as being between 20 and 27. Women with military-related specialties and who are fit for military service in terms of health, age and family status are 'included in the list of registered persons liable for military service'. The note details at §3.10.1 that women called up may include field doctors and nurses.

7.

The appellant states that she left Ukraine in April 2015, initially travelling to Poland by car and then to France via Belgium by plane, utilizing a Schengen visa. She then clandestinely entered this country on 31 December 2015 hidden in a lorry. She details by means of her witness statement that she claimed asylum ‘straight away’ consequent to her arrival but it was not ‘logged’ by the respondent until after she was encountered. This was clarified at the hearing to the appellant having seen a solicitor after her arrival, but not ‘formally’ attending the respondent’s offices.

8.
She details that after her arrival in this country her mother informed her that further call-up papers were sent to her at home, dated 7 October 2016, 7 November 2016 and 21 November 2016. Her mother received a summons requiring the appellant to attend court in December 2016 in relation to her failure to abide by her military call-up. According to a court document presented to the respondent, on 12 December 2016 the appellant was found to be subject to ‘Article 336 of the Law on Preparedness Activity and Mobilisation’ and having received mobilisation certificates she was found guilty of having evaded military service. She was sentenced to a term of two years’ imprisonment.

Hearing before FtT

9.
The appeal came before the Judge sitting at Yarl’s Wood on 8 August 2019. At the hearing, the appellant relied upon a letter from Viktor Nedokus, a lawyer in Ukraine, dated 29 July 2019. The translation of the letter details:

‘On the provision of written clarifications with regard to holding [O.K.] criminal liable, at the petition of the defendant’s mother [M.T]

I, Victor Ihorovych Nedokus, hereby certify in writing that on 15/11/2016, [M.V.], mother of [O.K.] applied with a request for the legal defence of her daughter in the court of the city of Buchach. In conformity with Article 336 of the Criminal Code of Ukraine, the accused broke the Law of Ukraine based on the ‘Law of Military Service and Liability for Military Service’, and in accordance with the above, had failed to appear before the court. I, as a lawyer, refused to act as her representative since [O.K.] broke the law of the country.

Also, on 23/12/2016, after the trial, [M.V.] addressed to me V. I. Nedokus for appealing. After finding that [O.K.] is not staying in the territory of Ukraine, I refused to defend her.’

10.
The appellant also relied upon a report from Professor Mark Galeotti, Senior Associate Fellow with the Royal United Services Institute, dated 30 June 2019. Professor Galeotti expresses his best professional assessment as being that the call-up papers, court determination and a reference from the appellant’s former employers are genuine, though he observes a caveat as to the court document which mentions ‘Article 336 of the Law on Preparedness Activity and Mobilisation’. He observes that there is no such article 336, though the text accurately describes the law. He suggests that this might be a typographical error.

11.
The Judge found several inconsistences in the appellant’s evidence, including as to her history of employment. Her answers as to what she learned on her nursing course were ‘so non-specific' that despite the wide range of study areas arising in a three year course she could only say that she had ‘lessons and then … went to a hospital … present at operations … had practice … main thing is how to

take blood from a vein’. As to her general medical knowledge, her answers at interview identified an inability to identify normal blood pressure readings, normal resting heartbeat or even competent knowledge as to the working of arteries. The Judge found, to the requisite standard, that the appellant is not a qualified medical nurse or practitioner and so does not fall into a category of female medical worker who is liable for military service. In such circumstances, she will not be subject to call-up and so possesses no well-founded fear of persecution upon her return to Ukraine.

12.
The Judge considered the issue of call-up and prosecution in the alternative, with the appellant being a qualified female medical worker. She was satisfied that the postponement of military call-up for a single mother, permitted under the Law of Ukraine on Military Duty and Military Service, Part 1, Article 17, detailed at §4.2.1 of the October 2018 CPIN, was applicable in the circumstances. The Judge concluded at [86] that the appellant has not been subject to prosecution in absentia and would not be prosecuted upon return:

‘The following is a consideration of the evidence taken at its highest. The evidence in VB and Others supports the view that it is highly unlikely that even as a draft evader, she would be prosecuted. In the unlikely case she was to be prosecuted, the probability would be that she would face a financial penalty. I consider that even if the country guidance considers the prison conditions in Ukraine breach article 3 ECHR, it is very unlikely that as a single parent of three young children that a custodial sentence would be imposed on her. Besides, there is no claim that she suffers from any health issues that would aggravate her circumstances either whilst awaiting a re-trial or prosecution.’

Decision on error of law

13.
In the country guidance decision of VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC) it was held that 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 proceedings the Criminal Code of Ukraine does provide, in Articles 335, 336 and 409, that a custodial sentence may be imposed for such an offence. It is a matter for any Tribunal to consider, in the light of developing evidence, whether there are aggravating matters which may 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 further found that there is a real risk of anyone being returned to Ukraine as a convicted criminal sentenced to a term of imprisonment in that country being detained on arrival, although anyone convicted in absentia would probably be entitled thereafter to a retrial in accordance with Article 412 of the Criminal Procedure Code of Ukraine.

14.
A Judge of the First-tier Tribunal granted permission on all seven grounds of appeal drafted by counsel who represented the appellant before the Judge. We take this opportunity to observe that the grounds were not drafted by Ms. Panagiotopoulou. The complaints are varied, ranging from a purported failure by the Judge to come to a clear finding as to whether the appellant worked as a feldsher in Ukraine to an asserted failure to lawfully take into consideration an expert report. The criticisms are primarily directed at the Judge’s adverse findings as to the appellant’s employment in Ukraine and her prosecution in absentia. We observe that there was no challenge to the Judge’s finding in the alternative at [86] that even if the appellant was subject to a prosecution for draft evasion, it is very unlikely that as a single parent of three young children she would be subjected to a

custodial sentence. Noting the problem that faced her as to the express failure to challenge the finding of fact at [86] Ms. Panagiotopoulou submitted that there was an 'implicit' challenge to this paragraph of the decision identifiable within ground 6, which states:

'At paragraph 80 and 82, the Judge has erred in law in her alternative argument that even if the appellant had been prosecuted, she would be entitled to a retrial and would thus not be at risk. The country guidance case of VB made it clear that a person prosecuted in their absence would be apprehended on return at the airport [103]; that even if entitled to a retrial, the individual would be held in a pre-trial detention centre (SIZO) pending the hearing [54]; that a person who has previously run away is not likely to get bail [104]; and that there is a real risk of ill-treatment during this time. Thus. The Judge is clearly wrong that even if the appellant is apprehended, she will not be at risk. '

15.
In considering Ms. Panagiotopoulou's submissions as to an implicit challenge to a different paragraph being identifiable within this ground, we commence on the basis that this Tribunal will expect a professional representative to set out grounds of appeal with an appropriate degree of particularity and legibility. When examining this ground, it is clear to us that [80] and [82] comprise at their core an observation as to the relevant Country Guidance decision and a subsequent comment as to it being unclear why the appellant's mother did not approach a second lawyer when seeking representation. The author of the grounds has erroneously sought to elevate the observation and comment into findings of fact. We are satisfied that this ground of appeal, which proceeds on the basis that having been sentenced to a custodial term the appellant would be detained on return, does not implicitly engage with the findings made at [86] that even when taking the evidence presented at its highest, the appellant's personal circumstances are such that she could not establish to the requisite standard that if she were a draft evader she would be prosecuted, and if in the unlikely case she were to be prosecuted, as the mother of three young children that she would not receive a sentence of imprisonment. Consequently, the appellant has not challenged the alternative finding at [86] establishing that she does not possess a well-founded fear of persecution on her return to Ukraine and therefore this appeal must fail.

16.
We observe that when considering applications for permission to appeal to this Tribunal, judges must give careful consideration to whether there is any, or any meritorious, challenge to an alternative basis for refusing or allowing an appeal as the absence of such challenge will normally be determinative as to the prospect of success.

17.
We address the remaining grounds relied upon briefly. Ground 1 is misconceived, seeking to elevate comments and observations into findings of fact. The Judge did not accept that the appellant was a qualified nurse or nursing practitioner. She makes a number of adverse credibility findings as to the appellant's employment at [54], [55], [57] and [58] of the decision. At [52] the Judge is clearly noting the evidence before her as to the appellant's nursing studies and commenting that the proffered explanation is 'not straightforward'. This is a comment and not a finding of fact. The Judge again considers the appellant's evidence at [53], this time as to her employment as a feldsher. Contrary to the assertion made within ground 1, the Judge is simply noting the evidence presented and is not making a favourable finding of fact. At [56] the Judge is considering evidence purportedly authored by the appellant's former hospital employer and accepts that if she were working in her claimed role her earnings would have been low. This is clearly not a finding that she was so employed, as evidenced by observations earlier in the paragraph as to 'if her account of employment were true …' and 'whilst on

maternity leave for four years (if true) ...' Contrary to the assertion at [5] of the grounds the Judge unequivocally found at [61] that the appellant is not a qualified nurse. Her finding at [60] is that the appellant's stated role was no more than being an assistant to a doctor engaged in non-medical duties. Having made such finding of fact, the appellant could not satisfy the field doctors and nurses category established in the list of registered persons liable for military service.

18.
The Judge was entitled to consider the evidence presented in the round, and the evidence of Professor Galeotti is limited to his consideration of scanned copies of the call-up papers, hospital reference and court document, the latter being subject to a significant caveat. However, the grounds are not accurate in asserting at [9] that the Judge placed 'no weight' on Professor Galeotti's evidence. She confirmed at [77] of her decision that she placed 'little' weight on it because of her finding at [76] that the appellant's evidence as to being informed by her mother in 2015, whilst she was in France, that authorities had visited the family home seeking her to attend court for draft evasion, but the final three call-up papers were dated 7 October 2016, 7 November 2016 and 21 November 2016. On her own evidence they were issued whilst the authorities were seeking to prosecute her. This led to the Judge concluding that the appellant was simply making her account up as she went along. When considering the evidence in the round, we conclude that the Judge was entitled to give limited weight to Professor Galeotti's opinion as to the genuineness of the documents in light of the vagueness and significant inconsistencies in her evidence as to her employment and prosecution.

19.
We are satisfied that the Judge's approach to the letter from Mr. Nedokus was lawful. We have found this document to be entirely unimpressive. On its face, a member of the Ukrainian National Bar Association refused to represent the appellant at her trial because 'she broke the law of the country', in circumstances where he was capable of advancing significant mitigation on her behalf such as her being a single mother of three young children. The position adopted by Mr. Nedokus as to his unwillingness to attend and present mitigation in the face of a potential custodial sentence for draft evasion appears not only contrary to his professional role but also in stark contrast to the situation identified by the Tribunal in VB , at [67], when considering the circumstances in Ukraine around the time of the appellant's purported trial, namely that the imposition of custodial sentences for draft evasion was rare:

'We lack a straight-forward set of official statistics on the issue but information obtained by the FCO, UNHCR and newspapers indicates only a couple of persons would appear to have actually been sent to prison for conscription or mobilisation evasion, with evidence of suspended sentences, probation or fines in only tens of other cases.'

20.
A further concern as to the reliability of the letter is that despite having informed the appellant's mother that he would not represent her daughter at her trial because she 'broke the law', her mother unsuccessfully returned and sought to instruct him in respect of an appeal. No reasonable judge could place any weight on this problematic document, which we consider to be wholly unreliable.

21.
Ground 4 suffers from the same difficulty as ground 1 as the author of the grounds seeks to elevate observations made by the Judge when considering the evidence before her into credibility findings. We observe that Ms. Panagiotopoulou did not pursue this ground before us beyond simply relying upon its content. The Judge was simply addressing the appellant's evidence in the round and sifting it

to identify what weight to give to various strands. Her comments on peripheral matters were no more than that.

22.
The evidence from the appellant's mother is limited in nature. At its highest it details that she received three military call-up papers on behalf of her daughter and a court summons. She details that she sought to instruct Mr. Nedokus. Whilst the Judge gives limited consideration to the mother's evidence, we are satisfied that it is incapable of establishing the appellant's case when considered in the round with the other evidence presented in this matter, including the appellant's evidence. The appellant's evidence suffers from numerous inconsistencies, her knowledge as to nursing is severely limited and she is unable to provide specific evidence as to her three-year nursing course. The court determination relied upon refers to a non-existent criminal law provision and the letter from Mr. Nedokus is entirely unreliable.

23.
Ms. Panagiotopoulou appropriately withdrew ground 7 at the hearing. The Judge observed the appellant's failure to seek international protection in Poland, Belgium or France as she travelled to the United Kingdom and further noted her failure to claim asylum in this country for several years. The Judge gave lawful reasons for not accepting the appellant's explanation for such delay in approaching the United Kingdom authorities for asylum and these detailed reasons are not challenged. As Ms. Panagiotopoulou accepted before us, section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was 'in play' in this matter.

24.
For these reasons, this appeal must fail.

Notice of decision

25.
The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

26.
The decision of the First-tier Tribunal is upheld. The appeal is dismissed.

27.
The anonymity order is confirmed.

Signed: D O'Callaghan

Upper Tribunal Judge O'Callaghan

Date: 20 January 2020

TO THE RESPONDENT

FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed: D O'Callaghan

Upper Tribunal Judge O'Callaghan

Date: 20 January 2020