

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: PA/03752/2018**

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **On 30 July 2018** | **On 17 September 2018** |

**Before**

**UPPER TRIBUNAL JUDGE FINCH**

**Between**

**M L**

**Appellant**

**-and-**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Ms K. Degirmenci, of counsel instructed by Yemets Solicitors

For the Respondents: Mr. S. Kotas, Home Office Presenting Officer

**DECISION AND REASONS**

**BACKGROUND TO THE APPEAL**

1. The Appellant is a national of Ukraine. He was arrested and detained as a suspected illegal entrant on 3 January 2018 and removal directions were set for 10 January 2018. On that same day he said that his life was in danger if he was removed to Ukraine and a screening interview was conducted on 17 January 2018. His substantive asylum interview took place on 2 February 2018.

2. His application for asylum was refused on I March 018 and First-tier Tribunal Judge Telford dismissed his appeal in a decision, promulgated on 11 May 2018. Upper Tribunal Kopieczek granted him permission to appeal on 8 June 2018.

**ERROR OF LAW HEARING**

3. On 26 July 2018 the Appellant’s solicitor wrote to the Upper Tribunal enclosing a copy of an expert report by Professor Galeotti and also informed that Tribunal that the original of the Ukrainian court document was in their possession and had now been sent to the expert. They also sought permission to rely on copies of the Appellant’s military card. I did not place any weight on these documents when reaching a decision as to whether First-tier Tribunal Judge Telford should have granted the Appellant an adjournment but I formally admitted them into evidence for the purposes of any future hearing. Counsel for the Appellant and the Home Office Presenting Office also made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

**ERROR OF LAW DECISION**

4. Upper Tribunal Judge Kopieczek primarily granted permission to appeal on the basis that, when refusing the Appellant’s application for an adjournment, the First-tier Tribunal Judge unfairly pre-judged the outcome of the Appellant’s substantive appeal.

5. The First-tier Tribunal Judge had the power to adjourn the hearing which arose from Rule 4(3)(h). of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (“the 2014 Rules”). When considering whether to exercise this power, the First-tier Tribunal Judge had to apply the overriding objectives contained in Rule 2 of the 2014 Rules.

6. Rule 2(1) states that “the overriding objective of these Rules is to enable the Tribunal to deal with the cases fairly and justly”. Rule 2(2) then gives examples of what it meant by “fairly and justly”. It is my view that many of these factors applied in this case. For example, the potential of a breach of Article 3 of the ECHR which may occur, if the Appellant is removed to Ukraine, gives rise to the need to give anxious scrutiny to all available evidence and indicates that any appeal will be of significant importance given the possible consequences to the Appellant if he is removed in error. When considering the proportionality of granting any adjournment, it was also relevant that the hearing had been set down for 24 April 2018 and the Appellant was stating that the expert report could be provided in the time frame of 15 – 22 May 2018; a delay of less than one month. The costs arising from the adjournment would also largely fall on the Appellant himself, as he did not have the benefit of legal aid and would have to pay for representation on two separate dates.

7. First-tier Tribunal Judge Telford did not approach the application for an adjournment through the prism of the Procedure Rules. He did accept, in paragraph 11 of his decision, that the Appellant had applied for an adjournment of the hearing in order to obtain an expert report on the court document sent to him by his sister and said to show that he was being prosecuted for draft evasion. But he did not take into account its potential value to both the Appellant and the Tribunal.

8. Instead, the First-tier Tribunal concentrated on the fact that the Appellant had not mentioned the document during his screening interview or his substantive asylum interview. He also noted that in his sister’s statement, dated 22 April 2018, she said that she had known about the document since early January 2018. I have noted that the screening interview was conducted on 17 January 2018 and that the Appellant’s substantive asylum interview took place on 2 February 2018. I have also taken into account the fact that what the Appellant’s sister actually said in her witness statement, dated 22 April 2018 was that:

“In January 2018 I went to the family home in order to tidy the house following the Christmas celebrations when I found a court summons. It had been summonsed the Appellant to appear at Court on 23 January 2018. I was in a big shock. The next working day I went to see a solicitor Mr. Kolomiets to whom I paid a big sum of money who assured me that he could defend the Appellant. However, the end result was he was sentenced to two years imprisonment. I did not tell the Appellant about this straight away as at this stage he was already in immigration detention centre. He has really been struggling and I did not want to worry him anymore as I was still trying to find another solicitor to resolve this”.

9. The First-tier Tribunal Judge also asserted that he had discovered in the appeal hearing that there was no guarantee that the original of the court document would ever arrive in the United Kingdom. This does not correlate with the record of proceedings, where the Appellant confirmed that the original had been posted ten days before and that it could arrive in two or three weeks time.

10. First-tier Tribunal Judge Telford also failed to take into account the fact that there was a Reply Notice, dated 4 April 2018, on file in which the Appellant’s solicitors had informed the Tribunal that he wished to provide an expert report by Professor Galeotti. They also enclosed the correspondence already undertaken with this expert about timescales and price. This was not the case where a vague wish to instruct an expert had been raised on the day of the hearing. It was also clear that the Appellant was willing to incur the financial burden of paying for such evidence.

11. It also appears to me that refusing the Appellant time to produce an expert report potentially had an adverse impact on his ability to participate fully in the proceedings. This was particularly the case when, in particular, at paragraph 33 of his decision, the First-tier Tribunal Judge found that “Article 3 is not made out as I find that he has not established the veracity of the documents he produced late in the day”. He also relied on the fact that the Appellant had not provided the original of the court document in paragraphs 16 and 51.

12. The First-tier Tribunal Judge compounded his error in paragraph 15 of his decision where he found that “without an original document the expert cannot be expected to give any useful evidence”. An expert can clearly give some evidence about a copy of a document in relation to its wording and format and the extent to which it conforms with objective evidence relating to such documents.

13. There were also a number of material errors of fact in the decision. For example, there was no evidence that he was legally represented when he first arrived in the United Kingdom or that he had personal knowledge of immigration through his job in Ukraine. He had no representatives when he was encountered by the East London Arrest Team and told them that he had previously been a labourer. In his witness statement he said that he used to repair bicycles in Ukraine. It was also not the case that his sister was visited every two weeks after the prosecution. It was her case that she did not live at the family home and only found the court paper when she went there to clean the house. It had also never been the Appellant’s case that he had used a false Polish ID card. At most, he told a member of the East London Arrest team that he had obtained a false ID from Poland which correlates with his account of going to Poland and obtaining a Romanian ID Card. In addition, it was not the case that the Appellant had conceded that his asylum claim was contrived. Instead, he had conceded that in the light of case law, he had to concede that his subjective fear of ill-treatment in Ukraine could only attract the protection of Article 3 of the European Convention on Human Rights and not the Refugee Convention.

14. It is also not clear from paragraph 45 of his decision that the First-tier Tribunal understood the nature of the Appellant’s claim and the ratio of *VB &Another (draft evaders and prison conditions) Ukraine CG* [2017] UKUT 00079 (IAC). It was his case and the finding of the Upper Tribunal that “there was 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”. It also found that “there is a real risk that the conditions of detention and imprisonment in Ukraine would subject a person returned to be detained or imprisoned to a breach of Article 3 ECHR”. It was not the case that he faced prosecution as opposed to persecution.

15. As a consequence, I find that there were errors of law in First-tier Tribunal Judge Telford’s decision.

**DECISION**

(1) The Appellant’s appeal is allowed.

(2) First-tier Tribunal Judge Telford’s decision is set aside.

(3) The appeal is remitted to the First-tier Tribunal to be heard *de novo* at Taylor House before a First-tier Tribunal Judge other than First-tier Tribunal Judge Telford.

Nadine Finch

Signed Date 30 July 2018

Upper Tribunal Judge Finch