

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: PA/03854/2017**

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **On 5 June 2018** | **On 12 June 2018** |
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**Before**

**UPPER TRIBUNAL JUDGE WARR**

**Between**

**mr n k**

(ANONYMITY DIRECTION made)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms J Fisher of Counsel instructed by Sterling & Law Associates LLP

For the Respondent: Mr I Jarvis, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Ukraine born in December 1989. In 2015 he was refused a multi-entry visa. On 1 October 2016 he arrived in the UK with a Polish identity card. However on examination Ukrainian documents were discovered and he was refused leave to enter the UK. He applied for asylum on 3 October 2016. The application was refused on 5 April 2017. The appellant’s appeal came before a First-tier Judge on 19 May 2017 where the judge heard oral evidence from the appellant. The appellant’s then Counsel (Ms Norman) summarised the appellant’s case as recorded by the judge in paragraph 7 of his decision as follows:

“(i) The appellant is eligible for conscription; he is a draft evader;

(ii) military service would include acts which are contrary to international standards; therefore he is a refugee;

(iii) pre-trial detention amounts to breach of Article 3 of the Human Rights Convention.”

2. The judge considered a military draft notice the original of which was produced at the hearing before him.

3. The judge’s treatment of this document is of some importance. The judge noted from the English translation produced by the respondent that the appellant was to arrive at the Zalisshckyky Regional Military Commissariat at 0800 hours on 27 October 2016 for a medical examination. The judge observed that the document was undated – the date it was created or served is not recorded. The judge’s analysis continues as follows:

“10. The document is a ‘pro-forma’ document, measuring 4 inches in length and 2 inches is breath. The bottom part is torn off. The appellant’s oral evidence is that it is torn off on being served; the torn off part is kept by the ‘authorities’ and the top part is left with the person served. I note that there is a manuscript alteration to the time the appellant was asked to report. This is clear in the ‘original’ but is not apparent in the copies. It appears the time the appellant was asked to report is ‘6.00’. But it appears to have been altered, in manuscript, to ‘*9*’, not *‘8*’ as in the English translation. I pointed this out to Ms Norman. She asked the appellant to explain.

11. He said he did not amend it but he was to attend the Military Commissariat at ‘*8*’. In my view, if this document is an official document issued by the official military authorities than there ought to consistency on essential issues such as the time the appellant was to have attended the Military Commissariat for a medical examination. It is possible that the authorities amended the time printed, on the document, from ‘*6*’ to ‘*9*’ and the translator made the error who wrote an ‘*8*’ instead of a ‘9’. However, if this was a genuine document, served on the appellant’s father, it is quite reasonable to think that those allegedly ‘serving’ the document would have impressed upon the father that the time the appellant is to report is ‘*9*’. It is further reasonable to assume that the father, who is said to have sent the document to the appellant, would have impressed upon the appellant the time he is to report is ‘*9*’.

12. The time of reporting, that is ‘*9*’, should have been in the forefront of the appellant’s mind, if this is a genuine document. The fact that the appellant adopts the error made the translator, and states that the time for him to report is ‘*8’*, undermines his credibility. The reason it undermines his credibility is that if the document is a genuine document, it deserves carefully studying. Consequences of failing to comply with the NOTICE are serious. He claims to know the consequences of failure to comply. Accordingly, I find his failure to note accurately the time he was suppose to have reported, as stipulated in the document, leads me to find the document is not genuine. The appellant knew it is not genuine and that is why he paid little regard to the details recorded in it.

13. The appellant produced the document at the AIR. In the AIR the appellant was asked if the document stated the date when he was to report for the medical examination (q54). He said it did. He was then asked “*what was the date and the time*” (q55). The appellant said he “*cant remember*”. This point was pursued ant the appellant said *I think it was November*”. This does not accord with the document itself or with the translation. Both record the *’27.10.2016*’. The English translation states “*You have to arrive to Zailishchyy……on 27.10.2016*”. I do not find it credible, for reasons stated above, the appellant, if the NOTICE is a genuine document and consequences of failure to comply are serious, would not have meticulously studied the document and clearly known the date he should report. I do not find ‘*November’* featuring anywhere in the document. It is not a credible argument that the appellant could have confused ‘date of service’ with ‘date on which he was meant to report’. It is not credible for the appellant to claim he was served with a document, in November (q39 AIR), but for him to have reported the previous month. I am happy to accept that Ukrainian system may be different but cannot accept even in Ukraine the authorities would serve on a potential draftee and the date on which he ought to have reported.

14. In the AIR the appellant was asked “*when were the call up notices sent to you?*” (q39). The appellant said *“(T)he last one came, I cant remember is November*” (Q39). The words “*last one*” implies more than one. He was asked how many Notices were sent (40). The appellant appears to suggest one arrived in the Spring and another in the autumn but the one sent in November is of a different character (q40). However, upon the question being repeated, he said just one Notice was sent (q41). I do find it credible the Ukrainian authorities would have sent preambles to the final call up Notice. In my view, the appellant was making things as the interview progressed and when pressed for clarity he is exposed.

15. On this point Mr Norman submits that nothing turns of whether the appellant could or could not remember exactly when the Notice arrived. On the contrary, a lot turns on it. It is an important document. It has consequences. Therefore, it is not credible that the appellant cannot remember when it was received.

16. In his latest witness statement the appellant has stated *“(O)n the 27th of October I received a call-up paper ….”* This directly contradicts what he had stated in the AIR. In the AIR he said his father received the call up papers, in November 2016 and he (the appellant) was in the UK (see: q50-60). There is no confusion as to what the appellant said in the AIR. In the AIR the appellant has not left room for doubt that the papers were served on his father in November and not on the 27th of October, as he now claims.

17. The appellant had a screening interview on the 12th of October 2016. The appellant was asked to state why he was seeking asylum in the UK. He said Ukraine was at war and he does not wished to called-up. He did not want to fight in any wars (see: “Resp 1” B). He did not mention receiving any call-up papers. This is consistent with the claim that the call-up was not received until November 2016.

18. The appellant’s solicitors made written submissions to the respondent. This is dated 10th of March 2017 (see: “Resp 1” E). The issue of ‘*consciousness Objection’ (sic)* is raised. This letter sets out the background information about the conflict in Ukraine and the current jurisprudence. The contents of the letter are substantially repeated in the appellant’s latest witness statement. The letter asserts that the appellant is ‘*subject to military call-up’; he has received summons ….*” but does not record when the ‘*summons’* were received by the appellant and if indeed the word ‘*summons’* actually refers to the MILITARY DRAFT NOTICE. If it does there is no explanation why the document was not sent to the respondent with that letter.”

4. In paragraph 19 the judge considered the Country Information Report provided by the respondent and noted that call-up papers required citizens to present necessary documents but the notice relied upon by the appellant did not state what documents he was required to present. Secondly the country information stipulated that the penalty for failure to report would be stated in the notice but this did not feature on the appellant’s document. The notice in this case was said to have been served on the appellant’s father rather than in person. This point was not determinative one way or the other in the judge’s view. Finally the judge noted that the appellant had said in his asylum interview that there had been follow-up measures undertaken by the Ukrainian authorities after his failure to report but this did not sit well with the country information although it was submitted by Ms Norman that the requirement of a warning to be embodied in the notice was “equivocal”.

5. The judge then considered the issue of conscientious objection and concluded his determination as follows:

“22. In my view, in none of the account has the appellant actually stated he objects to war on moral or religious grounds. He asserts horrors of war, as perceived by him-whether by personal experience or second hand. In my view, that is not the same thing as objecting to bear arms on moral or religious grounds. I venture no soldier male or female, goes to war without knowing the horrors of war. Not in the 21st century. However, fearing consequences of war to a soldier and not wishing not to enlist is one thing and objecting to war *simpliciter* is another thing. The latter is a ‘*conscious objector’* but not the former. In the light of the various accounts the appellant has provided I find he falls in the former and not the latter.

23. UNHCR published the following in September 2015: *‘Ukraine’s legal framework on regular conscription provides for conscientious objection and alternative service on religious grounds for members of religious organizations registered in Ukraine, subject to possible limitations in times of civil or military emergency. However, there is no clear provision on alternative service arrangements for individuals drafted through emergency mobilization, creating risks of enlistment contrary to a person’s religious beliefs. The religious beliefs of conscientious objectors summoned in the course of the waves of emergency mobilization in the context of the current conflict are reportedly often ignored by conscription offices.”* Even if the appellant’s solicitors assertion that the appellant is a ‘conscious objector’ there are alternatives which the appellant could explore.

24. In my view, whatever the appellant’s solicitors may assert that the appellant is a conscious objector’, the core element of the appellant’s case is that he is a draft evader and as such he will be punished in Ukraine and that the punishment amounts to breach of his rights under Article 3 of the Human Rights Convention. In support of his claim that he is a draft evader the appellant relies on the NOTICE. I do not find the appellant’s evidence, on this core element of his claim, stands up to scrutiny on the lower standard. I find the contents of the document are unreliable:

(i) the time when he was suppose to have reported;

(ii) the manuscript alteration of the time; the original printed time reads *‘6’*; the manuscript alteration reads *‘9’* but the appellant insists he is to report at *‘8’*;

(iii) the appellant has given inconsistent dates as to service of the NOTICE;

(iv) the appellant is inconsistent as to the number of such document being served on him;

(v) there being no follow-up by the authorities for his alleged failure to report.

In my view, the evidence looked in the round to the lower standard leads me to find the appellant is not a truthful witness.

25. Ms Norman has provided the Tribunal with a number of First-tier DECISIONs. In a number of them she herself represented the appellants in question. Those DECISIONs are not binding on me. Secondly, I note the appellants in those appeals were found to be credible witnesses. I do not find the appellant in the instant appeal to be a credible witness. I am unable to attach any weight to the NOTICE he relies, as evidence of him being called-up.”

6. The judge accordingly dismissed the appeal on asylum, humanitarian protection and human rights grounds. There was an application for permission to appeal. Permission to appeal was refused by the First-tier Tribunal on 27 September 2017. The application was renewed but on 23 October 2017 the Upper Tribunal refused permission also. The matter was taken further on judicial review. Mr Justice Walker granted permission on 30 January 2018 and the decision to refuse permission was quashed on 6 March 2018 by Master Gidden. The Vice-President granted permission on 17 April 2018, referring to Section 12 of the Tribunals, Courts and Enforcement Act 2007.

7. Counsel noted that Mr Jarvis had indicated he was relying on a recent unreported Upper Tribunal case heard before two Upper Tribunal Judges and promulgated on 2 May 2018 (PA/09094/2017). I reminded Counsel that reliance had been placed before the First-tier Tribunal on unreported First-tier decisions. She indicated she was not focusing on those decisions. She was more concerned by the credibility findings made by the First-tier Judge.

8. In relation to the military draft notice she had not seen the original. The judge had relied on assumptions and even if he were right about the document that was not the end of his task since the appellant would be eligible for military service at his age. It was understandable that the appellant had not been clear about the date since he had been in custody as he had repeatedly said he did not know when the document arrived. The claimed inconsistencies to be found at pages C9 and C10 of the respondent’s record of the appellant’s interview had been elevated by the judge into critical issues. The treatment of these matters undermined the rest of the judge’s findings in the determination. The judge’s approach to credibility was unsustainable. Reference was made to a number of notices served on the appellant in paragraph 14 – it was clear that the appellant had said that notices had been sent in Ukraine but only one in the UK. The judge had focused on peripheral issues and there was no objectivity in the determination. The judge had simply relied on his own views and assumptions. Reference was made to the unreported Tribunal decision in **RY v Secretary of State** promulgated on 10 August 2017 (Appeal No. PA/04663/2016). The appellant was eligible for military service and was liable to be mobilised.

9. Mr Jarvis handed in the case of **PK**. He submitted that the complaints made about the credibility findings in the determination amounted to no more than a disagreement with the factual analysis. The judge was not barred from considering plausibility and the background evidence. He referred to **Y v Secretary of State [2006] EWCA Civ 1223**. The military draft notice was an important document and the judge had been entitled to conclude as he had done. It was open to him to note that the terms were not consistent with the background evidence and the appellant had not referred to receiving any call-up papers at his interview in October 2016. It was clear from the country guidance in **VB** that it was not reasonably likely that a draft evader avoiding conscription or mobilisation would face criminal or administrative proceedings and there was no internal protection need at all. The judge had properly analysed the evidence between paragraphs 9 and 20 of the determination. It was to be noted that the original document had not been seen by either representative before me. The judge had been entitled to take the view that he had done about the notice. The case of **VB** was very clear and at paragraph 67 it appeared that only a couple of persons had actually been sent to prison for conscription or mobilisation with evidence of suspended sentences, probation or fines in only tens of other cases. Reference had been made to the historical background in paragraph 69 of **VB**. The Tribunal had concluded in paragraph 72 that there was at present no real risk of an individual receiving a prison sentence for draft evasion. The appellant would not be compelled to fight – see paragraph 59 of **PK**. The judge had been entitled to find as he did bearing in mind the current country guidance and **PK** confirmed the position in **VB**.

10. Counsel responded making it clear that she challenged all the judge’s findings of fact. For example the screening interview on 12 October would have been prior to the date recorded on the document. She reiterated her argument that the findings had been based on assumptions. In paragraph 71 of **VB** reference had been made to a new harder line judiciary and prosecutor. The recent case of **PK** was unreported. **VB** had not considered the issue of international humanitarian law.

11. At the conclusion of the submissions I reserved my decision. I have carefully considered all the material before me. I remind myself that I can only interfere with the decision of the First-tier Judge if it was flawed in law. As the Vice-President stated my approach is governed by Section 12 of the Tribunals, Courts and Enforcement Act 2007.

12. The judge directed himself in appropriate terms on the burden and standard of proof and in my view very carefully analysed the document that forms the centrepiece of the appellant’s claim and I have set out the relevant passages from the determination above. Counsel submits that these findings were based on personal views and flawed assumptions. It is quite clear that the judge gave a full, proper and indeed painstaking analysis of this document. It may be that another judge would have placed different emphasis on different points. But I certainly do not accept that the analysis was based on flawed or personal assumptions or that viewed as a whole the findings were unfair or unreliable. I bear in mind the guidance in **Y v Secretary of State** to which Mr Jarvis made reference. As was said in the case of **Awala [2005] CSOH 73** at paragraph 24 which is referred to in paragraph 26 of the case of **Y** “the Tribunal of fact is entitled to make reasonable findings based on implausibilities, common sense and rationality and may reject evidence if it is not consistent with the probabilities affecting the case as a whole”. In my view the judge’s decision was satisfactorily reasoned. Ms Fisher did not place reliance on the unreported First-tier decisions that had been put before the judge. The judge noted that the decisions were not binding on him and moreover the appellants had not been found to be credible witnesses. Before me reliance was placed on the decision of **PK** which was recently promulgated. The Tribunal found that the two appellants in **VB** had been prosecuted and convicted of draft evasion and sentenced to five years and two years’ imprisonment respectively while **PK** had by contrast no convictions and there was no evidence of any prosecution.

13. In paragraph 58 of **PK** the Tribunal, having carefully analysed **VB** concluded that the appellant did not have a well-founded fear of being persecuted because he did not face a real risk of being subject to a penalty for his draft evasion and that the judge’s failure to consider the point based on international humanitarian law was “therefore not material as there simply was insufficient evidence that the appellant faced a real risk of being punishable”.

14. Although I note the unreported decision of **RY** I find that the recent decision of **PK** was determined by two Upper Tribunal Judges and gives a clear and authoritative appraisal of the current position. The Tribunal confirms the position in **VB** and I am not satisfied that the First-tier Judge erred in dismissing the appeal on asylum, humanitarian protection and Article 3 grounds. In the light of VB and PK I am not satisfied that failure to deal with the issue of international humanitarian law and the questions of eligibility and mobilisation give rise to a material error of law in the circumstance of this case.

15. The determination was not materially flawed in law and accordingly this appeal is dismissed. The decision of the First-tier Judge is to stand.

**Anonymity Order**

I find it is appropriate to make an anonymity order.

**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 their 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.

**TO THE RESPONDENT**

**FEE AWARD**

The First-tier Judge made no fee award and I make none.

Signed Date: 11 June 2018

G Warr, Judge of the Upper Tribunal