Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00914/2019 (V)**

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 13 April 2021	**On 23 April 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AS
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Ms S Panagiotopoulou, instructed by Yemets Solicitors

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was skype for business. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing

2. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing AS's appeal against the Secretary of State's decision to refuse his asylum and human rights claim.

3. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and AS as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

4. The appellant is a citizen of Ukraine, born on 13 November 1983. He claims to have entered the UK in September 2017 hidden in a lorry. He was encountered on 2 December 2017 during an enforcement visit and was served with illegal entry papers. Removal directions were set for his removal to Ukraine on 12 December 2017, but removal was deferred when he claimed asylum on 8 December 2017.

5. The appellant claimed to be at risk on return to Ukraine as a draft evader. Whilst he had managed to defer his military service at the age of 18 and 19 years, he did not respond to a call-up notice when he was 24 years old, nor to further call-up notices in 2015, 2016 and 2017. He was told by his brother that a court summons had been issued against him for a date in June 2017. His brother had the court papers and he had not seen them. He did not respond to the summons as he feared being imprisoned for avoiding military service. He was aware that the trial went ahead in his absence but he did not know what the sentence was. He heard from his neighbour that the police came looking for him at his registered address shortly after the trial.

6. The appellant's claim was refused on 19 April 2019. The respondent noted that the court summons was dated 13 July 2016, which was before the draft notices he claimed to have received. There was no confirmation from the appellant's brother to show that he had sent the documents to him. The respondent considered that the appellant's ability and willingness to remain in Ukraine despite the issue of the call-up notices, at a time when there was a military conflict, was inconsistent with his claim that the authorities were looking for him. The respondent did not accept that the appellant had been tried and sentenced in his absence and in any event noted that he did not meet the criteria for being summonsed to military service. The respondent considered that the appellant would not be a suitable candidate to engage in acts contrary to international law. Further, even if he continued to express his refusal to undertake military service, he would not receive punishment amounting to persecution. His fear of being wanted by the authorities was based upon speculation. The respondent did not accept that the appellant had demonstrated a genuine subjective fear of military draft on return to Ukraine and rejected his claim to be a draft evader. It was considered that the appellant was at no risk on return to Ukraine and that his removal would not breach his human rights.

7. The appellant appealed against that decision and his appeal was heard by First-tier Tribunal Judge Russell on 23 October 2019. The case before the judge was that the appellant feared imprisonment in Ukraine in consequence of a sentence for his failure to undertake military service and that he had been sentenced in July 2017 to a period of three years imprisonment. He claimed that the prison conditions would engage Article 3 and, further, that the actions

of the Ukraine military in eastern Ukraine amounted to violations of international humanitarian law and that punishment for evasion was accordingly persecutory. The judge accepted that the appellant's claim was true and he accepted as reliable the documents relied upon by the appellant, referring to some discrepancies but noting that the correct date for the court summons, as re-translated, was 13 July 2017 and not 2016, so addressing the respondent's concerns. He therefore accepted that the appellant had been summoned to perform military service, that he evaded the summons and that he was sentenced in absentia to imprisonment for three years for his failure to answer the draft. The judge found that the appellant fell into the categories of those at risk, as set out in VB & Anor (draft evaders and prison conditions : Ukraine) (CG) [2017] UKUT 79 as someone who would be at risk of being detained on arrival and being subjected to Article 3 violation because of the conditions of detention and imprisonment in Ukraine. He found that the appellant would be subjected to persecution arising out of his political opinion or perceived political opinion because of his refusal to participate in the kind of military action in Ukraine. The judge accordingly allowed the appeal on asylum and human rights grounds.

8. The Secretary of State sought permission to appeal Judge Russell's decision on two grounds: firstly that the judge erred in his approach to the documentary evidence by mischaracterising the respondent's stance on the documents, ignoring discrepancies in the documents and by effectively reversing the burden of proof; and secondly that the judge failed to address the appellant's brother's witness statement.

9. Permission was refused in the First-tier Tribunal but was subsequently granted on a renewed application in the Upper Tribunal.

10. AS's representatives filed a Rule 24 response to the grant of permission, in which it was asserted that the Secretary of State's grounds erroneously characterised the proceedings before the FTT and were in parts disingenuous. Reference was made to the extremely brief submissions from the Home Office Presenting Officer (HOPO) at the hearing before the FTT and to the fact that, despite the judge on two occasions stating that he had documentary evidence to corroborate the appellant's claim, the HOPO did not state at any stage that there was any serious challenge to that documentation and made no submissions of the sort outlined in the grounds. Reference was also made to the fact that it was accepted at the hearing that the original documents, including the envelopes in which they were sent from Ukraine to AS's solicitors, were in the possession of the Home Office, although they were not produced at the hearing as the HOPO did not have the Home Office file with her. Accordingly, it was disingenuous for the Secretary of State, in her grounds, to criticise the judge for finding the documents genuine when he only had photocopies before him. Any criticism on the basis that the documents were incomplete was also disingenuous when it was the Secretary of State's appeal bundle which had mismatched the documents to the translations and omitted parts of documents. The assertion in the grounds, that there was no evidence

of the provenance of the documents, was also untrue as the appellant had provided such provenance.

11. The appeal was then listed for a remote hearing conducted through Skype for Business and came before me.

Hearing and submissions

12. Both parties made submissions before me.

13. Ms Everett submitted that the challenge boiled down to the judge's misunderstanding of the Secretary of State's position, as the Secretary of State did not accept the documents and the judge did not appreciate that that was the case. Ms Everett accepted that the original documents had been in the possession of the Home Office and she submitted that the author of the grounds was probably unaware of that when preparing the grounds, and did not intend to mislead. She did not have the Home Office file herself and so was unable to say exactly what submissions were made, but the HOPO's minutes of the hearing showed that the challenge to the appellant's claim was maintained and that it was not accepted that the documents were what they were claimed to be.

14. Ms Panagiotopoulou referred me to the witness statement from the Counsel who had appeared on behalf of the appellant at the FTT which made it clear that the HOPO's submissions had been very brief and she submitted that the Secretary of State's grounds were misconceived and were in parts disingenuous. There were a number of points raised in the grounds about the documents but none of those were raised by the HOPO at the hearing. The grounds were therefore an attempt to re-argue the case for the Secretary of State. The only specific challenge made by the Secretary of State to the documents in the refusal decision was in regard to the time frame of the court summons in relation to the draft notices, but that had been resolved when the error in the translation had been clarified. The judge was fully aware of the issues in the case and considered the documents in the round together with the evidence as a whole in accordance with the principles in Tanveer Ahmed.

15. In response, Ms Everett submitted that the judge ought to have given more reasons why the documents were accepted at face value.

Discussion and conclusions

16. The assertion made in the appellant's rule 24 response, that the HOPO's submissions before the FTT were very brief, is indeed reflected in the record of proceedings in the court file, which records the submissions in the same terms as set out at [8] of the judge's decision and supports the appellant's claim that no particularised challenge was made by the HOPO to the documents. I accept that it is not the case that the Secretary of State made any actual concession

about the reliability of the documents, given that the refusal decision made it clear at [58] that the appellant's claim to be a draft evader was rejected, but it is the case that the refusal decision did not refer to any particular discrepancies in the documents other than that the summons appeared to have been issued before the draft notices. That matter was resolved before the judge, however, and he accepted that it was simply a mistranslation, having had that confirmed by the interpreter and having been provided with the untranslated version clearly showing the date as 13 July 2017 rather than 13 July 2016. The judge therefore accepted that the chronology was consistent with the appellant's account and it was on that basis that the judge, at [16], accordingly considered that the respondent's concerns about the documentation at [35] of the refusal decision had been adequately addressed and that there was otherwise "*no serious challenge to the authenticity of the documents*".

17. The grounds assert that the resolution of the time-line was not in itself sufficient reason for the judge to accept that the documents were genuine and reliable. However, that was not the sole reason why the judge accepted the documents as reliable. He considered the documents in the light of the evidence as a whole, in accordance with the principles in Tanveer Ahmed, noting at [15] that, notwithstanding the appellant's delay in seeking protection, his claim was internally consistent and was consistent with the background country evidence. I have to agree with the rule 24 response that, in such circumstances, and in the absence of any specific submissions made by the HOPO as to why or how the documents were deficient or otherwise unreliable, the judge was entitled to accept them as reliable.

18. In so far as the grounds refer to discrepancies in the documents, those were not raised before the judge and only appear belatedly in the grounds. As for the assertion that the judge erred by accepting documents which had been provided in photocopy format, I agree with the appellant that such a challenge is misconceived, when it was the case that the original documents were in the possession of the Home Office, having previously been provided to them by the appellant's solicitors, but they were not made available at the hearing and no adjournment request was made by the respondent to enable them to be produced. As for the assertion in the grounds that the provenance of the documents was unknown, again that was a matter for which an explanation had been provided and the original envelopes had been supplied to the Home Office. In addition, as the rule 24 response states at [17], any implication in the grounds that the appellant's documents were incomplete was also misconceived, given that it was the respondent's appeal bundle which had mismatched the documents and translations and omitted parts of the documents, whereas the appellant had supplied a complete set of documents to the Home Office and had ensured that the judge had sight of the complete documents.

19. Accordingly, it seems to me that the Secretary of State's grounds are simply a belated attempt to present arguments which ought to have been made before the judge but which were not made. On the

basis of the evidence before him and the case put to him by the respondent at the hearing, the judge was perfectly entitled to accord the weight that he did to the documentary evidence and to accept it as reliable. The fact that the judge did not specifically make findings on the appellant's brother's statement is not a material matter and the appellant's rule 24 response adequately responds to that ground at [22] to [25]. The grounds do not otherwise challenge the judge's decision in regard to his assessment of risk on return and indeed his assessment was properly made in the light of the relevant background country information and caselaw. The judge was entitled to reach the conclusion that he did.

20. For all of these reasons I find no errors of law in the judge's decision requiring it to be set aside and I uphold the decision.

DECISION

21. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to allow the appeal stands and the Secretary of State's appeal is dismissed.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 14 April 2021