



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/11691/2017

THE IMMIGRATION ACTS

**Heard at Birmingham CJC
On 12 April 2022**

**Decision & Reasons Promulgated
On 22 April 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

II

(Anonymity direction made)

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Rutherford instructed by Braitch Solicitors.

For the Respondent: Mr Bates, a Senior Home Office Presenting Officer.

DECISION AND REASONS

- 1.** The appellant, a citizen of Ukraine, born on the 14 June 1988, appeals a decision by the Secretary of State for the Home Department to refuse her application for asylum or any other form of international protection. The date of the impugned decision is the 23 October 2017 although the merits of the appellant's appeal have to be considered as at the date of the appeal hearing.
- 2.** This appeal has a long procedural history. In a decision promulgated on 1 November 2018 First-tier Tribunal Judge Bristow dismissed the

appeal. On 2 May 2019 Deputy Upper Tribunal Judge McClure found an error of law in that decision and remitted the appeal to be heard afresh. The appeal was reheard by First-tier Tribunal Judge Chohan who in a decision promulgated on 15 July 2019 also dismissed the appeal on both protection and human rights grounds.

- 3.** Permission to appeal that decision was granted by Upper Tribunal Judge O’Callaghan on 9 November 2019 and in a decision promulgated on 17 January 2020 Upper Tribunal Judge Pickup found material error of law, set the decision of the First-tier Tribunal aside, and listed the appeal for a Resumed hearing before him sitting at Manchester. That hearing occurred on 15 October 2021 although the day before the hearing the respondent’s representatives applied for an adjournment to authenticate documents which were purported to emanate from the Ukrainian courts and said to be relevant to the appellant’s claim that she will be at risk on return because she had previously been instructed as a lawyer to act on behalf of the Communist Party which has been banned in Ukraine since 2015. The appellant also claimed to face a real risk as a result of her family relationship with her uncle; a person said to be wanted by the Ukrainian authorities and a member or leader of the LPR. That hearing was adjourned with directions.
- 4.** In order to enable the matter to be reheard within a reasonable period of time a Judicial Transfer Order was made by the Principal Resident Judge leading to today’s hearing before me.
- 5.** First-tier Tribunal Judge Chohan accepted that the appellant had been practising as a lawyer in Ukraine but was not satisfied that the alleged family relationship had been established. Judge O’Callaghan did find arguable ground 3(c) of the renewed permission application which asserted that the evidence provided was sufficient to demonstrate that AVT, a person wanted by the Ukrainian authorities, shown in the extract from the named website is the same man shown in wedding photographs and that the website included a date of birth and address which are identical to the passport produced by the appellant which she also alleges belongs to the same man, her uncle.
- 6.** It is also the case that the appellant and her husband have been granted leave to remain in the United Kingdom pursuant to article 8 ECHR. One of their children, D, entered the United Kingdom on 17 July 2014 and has therefore acquired the necessary seven years residence to satisfy the definition of a ‘qualifying child’ which would have made it necessary to consider the reasonableness of removing the child to Ukraine with the child’s mother and father, pursuant to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 and paragraph EX.1 of Appendix FM the Immigration Rules. Had leave not been granted prior to the hearing the appellant would have succeeded on this ground, but as such leave has been granted that is not a live issue in relation to which I need anything further.

Discussion

7. It became clear from discussions at the outset of the appeal that despite the summary of his position by Mr Bates, realistically reflecting the situation that prevails in Ukraine today, of an entitlement to Humanitarian Protection, the appellant wished to pursue her claim under the Refugee Convention as she wanted it to be found that she was telling the truth in relation to her circumstances. Although, as it was accepted for the reasons set out below that the appellant was entitled to succeed under article 15(C) of the Qualification Directive in relation to her home area in the east of Ukraine, and that it was not reasonable to expect her to internally relocate to any other part of Ukraine, especially in light of the practical difficulties that she would encounter in the hypothetical situation in which she and her family, including two children, were returned and had to internally relocate, the appellant is entitled to a decision on whether she is a refugee and therefore entitled to be recognised as such in law.
8. As noted above, it has been accepted the appellant was a lawyer in Ukraine. She has provided documents in support of her specific claim to have undertaken work of behalf of the Communist Party in Ukraine. In her witness statement dated 20 April 2018 the appellant writes:
23. I did a lot of work for the Communist Party including the following:
24. I was a thriving and very professional student who took my job very seriously. I ensured that my name was on documents that I had worked on in order to enhance my position, such as the Agreement. I was therefore very proud of what I was doing.
25. In Ukraine whilst the legal representative keeps documents a lot of the documentation is given back to the client. Official documents were given back to the client. Court decisions and determinations were given back to the client. In this case I know that the Communist Party client had a lot of documentation that I assisted him with.
26. Most of the work I did was as a result of the chief member instructing me. I did not directly liaise with anyone else, I would communicate with him and if anyone in the Communist Party needed work or help they would talk through the chief.
27. As mentioned I took my job very seriously. My family were all proud of me as I was a barrister. My husband and I lead what I would describe as a very comfortable wealthy life partly because of my profession. I covered a lot of areas of law apart from crime. My knowledge was very broad and I enjoyed working with numerous people.
9. The appellant names the person she describes as the chief within the Communist Party as Kilinkarov Spiridon who after the Communist Party was banned in 2015, it is known quit the party. It is therefore plausible that the appellant would have dealt directly with this individual when receiving instructions to act in proceedings. It must be remembered that in many Eastern European countries at that time the State, provided for the needs of the individual which was a different societal structure to that which existed in the 'West'.

- 10.** The Communist Party in Ukraine, the KPU, was first banned at the peak of perestroika on 30 August 1991 as a consequence of the failed coup by a section of the Soviet ruling elite. In 1993, the Presidium of the Supreme Council of Ukraine reneged on its 1991 decision, ruling that Ukrainian citizens who support communist ideas can create their own parties. A few months later, a new “renewed” Communist Party was established via a congress held in Donetsk. Old cadres attempted to get the KPU completely rehabilitated – the party had previously been a member of the Communist Party of the Soviet Union (KPSS), but was, at least formally, considered an independent party. In December 2001, ten years after the first ban, Ukraine’s Constitutional Court ruled that the renewed Communist party of Ukraine bore no relation to the KPSS, opening the gate for full rehabilitation.
- 11.** In May 2014, Ukraine’s acting president Oleksandr Turchynov requested that the Ministry of Justice examine banning the KPU on the basis of alleged complicity in separatism in eastern Ukraine and calls for overthrowing the new authorities in Kyiv. Less than a month later, Valentyn Nalivaichenko, director of the Security Service of Ukraine, stated that the documents necessary for banning the KPU and removing parliamentary immunity from its deputies, had been handed to the Ministry of Justice. In July, the Ministry of Justice reported that it had filed a court case to ban the KPU.
- 12.** In July 2015, the Kyiv city regional administration court opened a new case (826/15408/15) on the basis of the Ministry of Justice’s suit against the KPU. The suit took the Ministry of Justice’s July 2015 decree, and the legal conclusions of its expert commission, as the basis for its actions.
- 13.** In December 2015, the Kyiv city administrative court banned the KPU from operating.
- 14.** However, that is not the end of the account for in May 2017 46 Ukrainian MPs called on the Constitutional Court to recognise the “decommunisation law” as unconstitutional. In September 2017, the Kyiv regional appellate administrative court paused the appeal against the ban until the Constitutional Court decided on the constitutionality of the “decommunisation law”. Meaning the first instance court decision is yet to come into force.
- 15.** The appellant’s advocacy certificate is dated 2012 in the documents provided which are initially in her maiden name. In her witness statement the appellant confirms that the Agreement dated 5 January 2011 made between herself and the Communist Party, a copy of which in the bundle, is one of many and that later documents would have had her current surname following her marriage. The appellant alleges a real risk as a result of emails received threatening her. She expresses a fear from the SBU, the Security Service of Ukraine (Sluzhba Bespeky Ukrayiny,) a law enforcement agency responsible for protecting the state security of Ukraine, and the AZOV Battalion in Ukraine.
- 16.** The appellant claims the risk arises from the Azov Battalion because in 2014, around the time the appellant claims to have received an email

from this organisation, they tried to take over what the appellant describes as “the capital town and that before being part of the government they were extremely brutal and had been known for their bad ways”. The appellant refers to receiving emails from those she believed to be from these organisations threatening her although the emails did not reference their name and one was from an unverified sender referred to by the appellant at [36] of her witness statement as St-Group@Ya.ru sent on 16 August 2016.

- 17.** It is clear the appellant does not actually know who sent these emails and because there was a reference to the SBU she states she immediately thought it was the Azov Battalion. The appellant in her asylum interview accepted she was unable to identify exactly how the Azov Battalion would find out about her work with the Communist Party but claims that she has more information as to how the knowledge was disclosed as a result of a Communist Party members house being raided. The appellant also claims that as a result of her family’s political affiliation with the Communist Party her work is open and in the public and could have become known to 3rd parties.
- 18.** The appellant’s claim that she would face a real threat as being classed as a person who undertook anti-government acts and who will be seen as a threat to the government of Ukraine is not made out. I accept that there is evidence of lawyers being killed in Ukraine. For example in the appellant’s bundle at page 633 is a news article, confirmed in a similar article at page 635, which refers to two Ukrainian lawyers having been under sustained pressure from the Ukrainian authorities in connection with a high profile and deeply politicised case they were working on; resulting in one of them missing on 6 March 2016. The news article refers to the two named individuals being defence lawyers in the high profile and publicised case since 2015 who had repeatedly spoken publicly of harassment and intimidation that they have been subjected to by the Ukrainian authorities which they believe was an attempt to obstruct them from effectively defending their clients. The news article at page 633 describes the body of one of the lawyers being found in central Ukraine bearing gunshot wounds.
- 19.** The evidence supports the appellant’s contention that those with an adverse profile to the authorities in Ukraine, at that time, might face a real risk if the work they undertake creates the necessary adverse profile. The difficulty for the appellant in this appeal as it is not made out that the work that she was undertaking on behalf of the named member of the Communist Party in the east of the country, at the relevant time, created such a risk. It is not made out for example that the Ukrainian Communist Party of Luhansk Region was at the time the appellant was involved with it an illegal organisation or one that was deemed to be contrary to the interests of the Ukrainian state. A number of documents are dated prior to the outlawing of the Communist Party in Ukraine in 2015.
- 20.** Even if, as the appellant claims, she was advised in an email received on 4 December 2017 from Spiridon Kilinkarov that his property was

raided and documents seized in 2014, some of which may have her name on them, this does not establish that she was other than an advocate undertaking work on behalf of the Communist Party or its members. It is not established the required level of adverse profile will be imputed to the appellant such as to place her at real risk as per the other legal representatives referred to in the news articles relied upon in the appeal bundle.

- 21.** The banning of the Communist Party in 2015 is also a decision subject to challenge to the European Court of Human Rights as being contrary to the rights of the individual enjoy freedom of expression in relation to their political views. Mr Bates referred to the desire of the Ukrainian authorities to join the EU which, although a matter referred to in more recent news articles following the Russian invasion of Ukraine, is an issue that will have to be worked through specially in relation to the right of free speech and political association.
- 22.** Whilst emails have been received and disclosed indicating individuals warned the appellant take care for herself and her family as employers have been threatened, and there may be some who genuinely face such a situation, it has not been made out that on the basis of her employment that the appellant is one such person.
- 23.** I deal at this stage with the evidence obtained by the Secretary of State following the recent adjournment by Judge Pickup. A number of enquiries were made by another Senior Home Office Presenting Officer of the public database in Ukraine which accurately records cases that are pending within the courts in Ukraine. The outcome of the enquiries has led the Secretary of State to further challenge the appellant's claims on the basis that her name was not revealed in any of the searches made. The appellant in her rebuttal statement indicates the reason her name was not disclosed is that the parameters by which the searches were made were inaccurate/wrong by reference to the date and also the criteria for parties to proceedings; as the dates could bore no relationship to when the appellant practised as an advocate, and she was never party to the proceedings as she was a legal representative. The appellant claims in the rebuttal statement that had the correct parameters been searched her capacity as a representative would have been revealed. Mr Bates confirmed that as a result of problems accessing the database within Ukraine it had not been possible to undertake further enquiries using the information provided by the appellant, so at this stage I find that little weight can be placed upon the results of these enquiries in light of the points raised in the rebuttal statement.
- 24.** The appellant does not claim that any risk she faces arises solely as a result of her work as an advocate claiming that she is also at risk as a result of a family connection to an uncle. The appellant relied on a number of documents in support of the claimed relationship. Some of that included photographic evidence requiring a comparison between and individual appearing in the photographs and that of the appellant's father.

- 25.** In relation to this evidence Judge Chohan wrote (subsequently anonymized):
8. The appellant's father's name is OVT and her uncle's name is AVT. It can be seen that they both have the same middle and surnames. However, that, per se, does not mean they are related. The appellant relies on military cards relating to both her father and uncle, which was sent to her by her grandmother from the Ukraine. It is the appellant's claim that both her father and uncle attended the same military college. Her father's military cards states that it was issued by the Political Department of Gorkov Higher Military School of Logistics. The uncle's military card states it was issued by Nizhny Novgorod Higher Military School of Logistics. It is clear that the cards were not issued by the same military schools. Certainly, there is no evidence before me to establish that they are the same establishments. In the absence of other evidence, I am not satisfied that the appellant's father and claimed uncle brothers.
 9. The fact that I do not find the appellant's father and claimed uncle to be related as claimed by the appellant, should end matters here. However, for completeness, I consider the other evidence submitted by the appellant. There are photographs of the appellant's wedding day at which it is claimed that her uncle attended. Mr Swaby submitted that the wedding photos did not mean that the appellant and the claimed uncle were related and that people have friends who attended weddings. However, during the hearing the appellant maintained that the man in the photographs at the wedding was her uncle. The appellant has submitted a passport and a military card of her claimed uncle but they are old and dated. At page 131 of the appellant's bundle, there is a photograph of a man who looks like the man at the appellant's wedding but that does not mean it is her uncle.
- 26.** There is no evidence provided, despite this being an issue of concern throughout, from a facial recognition expert confirming the identity although, as noted, even if there are similarities in terms of their facial identity that does not necessarily prove the relationship is as claimed.
- 27.** The point raised by Judge Chohan regarding the difference in names appearing in the military cards might be explained by the fact that Nizhny Novgorod was formerly known as Gorky between 1932 and 1990. The appellant states that her uncle is six years younger than her father and the appellant's explanation relating to the change of name set out at [50] of her witness statement of 2018 is therefore plausible.
- 28.** Permission to appeal to challenge the finding of Judge Chohan was granted, as noted above, by reference to paragraph 3(c) of the renewed application for permission to appeal in which it is written:
- c. The Appellant provided evidence to the First Tier Tribunal from the website Centre for Research of Signs of Crimes Against National Security of Ukraine, Peace, Humanity and the International Law. The evidence is that AVT is wanted by the Ukrainian authorities and includes a photograph of AVT. The genuineness of this website and indeed the photograph have not been questioned by the Judge. Indeed, at paragraph 9 he accepts that the man in that photograph looks like the man at the

Appellant's wedding. The extract from the website also includes the date of birth and address for AVT. These details are the same as those contained in the passport produced by the Appellant which she states is her uncle's. It is the Appellant's case that the copy of her uncle's passport sent to her by her grandmother and that the details contained in this document and the website support case that she is related to AVT. It is submitted that when considering her claim that her uncle is in fact AVT, the evidence contained in these two documents along with the photographs which, as the judge accepts there is a clear resemblance, demonstrates the Appellant is related is claimed to AVT. This evidence has simply not been considered by the Judge.

- 29.** At [46] of the appellant's witness statement of 20 April 2018 the appellant writes:
46. When I received my decision I was upset, I then contacted my grandmother and I explained to her that I needed more evidence regarding my uncle. Due to security I am unable to speak directly to my uncle about this although I still communicate with my uncle however, they are greeting messages only. I do not want to put my uncle in any danger therefore I spoke to my grandmother. My grandmother told me that she had spoken to my uncle to obtain further evidence that he was only prepared to give a copy of his passport and a copy of his military card. This again is important and very personal evidence that I would not have had if I was not closely related to my uncle.
- 30.** The appellant also refers to documents in her appeal bundle including her marriage certificate which confirms her father's name which is the same surname as her uncle and a copy of her father's birth certificate.
- 31.** The appellant's claim not to speak about her case directly with her uncle as she did not want him to be in a situation where if he is being monitored by the Ukrainian authorities he was to be found to be working with her is plausible. It means a course that if AVT is being monitored there is nothing to connect him with the appellant's case.
- 32.** Applying the lower standard of proof applicable to appeals of this nature I find that the weight of evidence supports the appellant's claim that she is related to AVT who is the younger brother of her father and therefore her paternal uncle, although that is not the end of the matter.
- 33.** The appellant's claim is that she faces a real risk on return as a result of family association with her uncle, but I do not find such claim made out. Whilst this is not inconceivable that a person connected to an individual wanted by the state authorities in Ukraine may be questioned about their relationship the appellant's own evidence is that she has been very careful to ensure there was nothing incriminating passing between her and her uncle. Mr Bates asked the appellant where her grandmother or her own mother currently lives which is in the east of Ukraine. There is insufficient evidence to establish a claim that other family members have been targeted or subjected to persecution as a result of the familial association. Whilst the appellant may have a subjective fear that she faces a real risk on return because uncle is wanted by the authorities such claim has not been objectively made out on the available evidence.

- 34.** It is not made out that either individual family association or a combination of the family association and her previous professional association with the Communist Party create an environment of a credible real risk for the appellant in a hypothetical situation in which she is returned to Ukraine.
- 35.** The appellant's evidence is that she does not support the Communist Party, does not support Russia, does not support the invasion of Ukraine, and does not support the overthrow of the President or the current elected ruling party within Ukraine. There is nothing within the appellant's personal political profile that would give rise to a real risk.
- 36.** Paragraph 334 of the Immigration Rules states that:
- “An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:
- (i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;
 - (ii) they are a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
 - (iii) there are no reasonable grounds for regarding them as a danger to the security of the United Kingdom;
 - (iv) having been convicted by a final judgment of a particularly serious crime, they do not constitute a danger to the community of the United Kingdom; and
 - (v) refusing their application would result in them being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Geneva Convention, to a country in which their life or freedom would be threatened on account of their race, religion, nationality, political opinion or membership of a particular social group”.
- 37.** The Convention reason in this appeal is imputed political opinion, there being no evidence of actual adverse political opinion giving rise to real risk. Whilst it is accepted that the appellant is in the United Kingdom, she is not a danger to the security of United Kingdom and has made a valid claim for asylum, the evidence does not establish the existence of an imputed adverse political opinion sufficient to establish a real risk of persecution in the event of a hypothetical return to Ukraine sufficient to establish the appellant is entitled to be recognised as a refugee.
- 38.** Paragraph 339 C of the Immigration Rules states:
- Grant of humanitarian protection
- 339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

- (i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;
- (ii) they do not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
- (iii) substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country; and
- (iv) they are not excluded from a grant of humanitarian protection.

339CA. For the purposes of paragraph 339C, serious harm consists of:

- (i) the death penalty or execution;
- (ii) unlawful killing;
- (iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or
- (iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

39. The appellant is not excluded from a grant of humanitarian protection. Again the appellant is in the United Kingdom, and I have found as a matter of fact that she does not qualify as a refugee for the reasons set out above. It is accepted that in light of the situation prevailing in Ukraine substantial grounds have been shown for believing that if the appellant is returned to Ukraine especially to the east of the country from where she originates, she will face a real risk of suffering serious harm as a result of the invasion of Ukraine by Russia as evidenced in the news media and contemporaneous country reports - 339CA(iv) refers. As also accepted before me that it would be unreasonable to expect the appellant to return to Ukraine only to have to work out how best to travel across the country to a place of safety which, as a female with minor children, would appear to require her to leave Ukraine and seek safety along with the millions of other similar refugees in an adjoining European country.

40. In summary, I find that although the appellant's claim to have been an advocate working for the Communist Party and to be related to her uncle is credible, she has not established any risk of ill treatment arising from such associations sufficient to establish persecution for a Convention Reason and, therefore, has not established an entitlement to be recognised as a refugee. I do, however, find that on the basis of the facts as found and the situation prevailing in Ukraine, at the date of hearing, that the appellant has established an entitlement to a grant of Humanitarian Protection. On that basis I allowed the appeal.

Decision

41. I allow the appeal.

Anonymity.

42. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 13 April 2022