IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001556
First-tier Tribunal No:
PA/12084/2019

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 16 June 2022

Decision & Reasons Promulgated
On the 01 February 2023

Before

UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

VH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Norman, instructed by Sterling & Law Associates LLP
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Ukraine. He appealed to the First-tier Tribunal against the Secretary of State's decision of 18 November 2019 refusing to grant asylum and humanitarian protection. The judge dismissed his appeal on all grounds. The appellant sought and was

granted permission to appeal the judge's decision on the basis that it was arguable that the judge had failed to take into account a recent change in Ukrainian law allowing mobilised reservists to be sent to all zones, postdating the country guidance decision in PK and OS [2020] UKUT 00314 (IAC) and also in failing to make any findings on whether the appellant could be called to an "indispensable support role". It was also concluded that it was arguable that the judge had erred in failing to consider adequately the background evidence concerning the call-up of reservists for military service postdating PK and OS and the extent of the appellant's expected contribution as a mobilised serviceman.

2. Ms Norman sought to rely on a late amendment to the grounds, which was opposed by Mr Clarke. We decided that we would hear submissions on the grounds in respect of which permission had been granted and then consider whether to allow and if so, consider, the supplementary grounds.

3. In her submissions Ms Norman argued that the judge had erred, as contended in the grounds, in failing to take into account evidence postdating the country guidance in PK and OS. This was on the particular point of the finding in the country guidance case that mobilised or conscripted soldiers were not being sent to the ATO zone, which was where acts contrary to international humanitarian law were taking place. However, as set out in the skeleton argument before the judge and expanded upon in oral submissions, it was said that a further law had been enacted on 1 April 2021, in view of escalating aggression between Russia and Ukraine, allowing mobilisation of reservists without notice and, according to reports in the bundle provided, "to all defence forces" without restriction. This evidence had not been disputed by the Secretary of State, who had simply argued that the appellant had not established a close enough nexus to meet the test.

4. It was argued that there was no indication in the judge's decision that he had taken into account this recent change in the law which was clearly material to the situation as set out in PK and OS.

5. It was also argued that the reference to what was said in PK and OS about the ways in which indispensable support to those in an ATO zone could be provided by a mobilised reservist, and the appellant in this case had expertise as a sniper and he had experience of laying mines also.

6. In his submissions Mr Clarke argued that the Presenting Officer at the hearing before the judge put the case that the facts did not show a sufficiently close nexus to meet the test. He referred to the decision of the Upper Tribunal in Hussein & Abdulrasool [2020] UKUT 00250 (IAC). It was clear from paragraph 9 of that decision that foreign law required to be proved by expert evidence directed precisely to the questions under consideration. The evidence provided was vague. There was reference to Bill No. 3553, under which it was proposed to create territorial recruitment and social support centres on the basis of military registration and enlistment offices, to introduce registration of reservists and military

service by conscription from among reservists in a special period. It noted that in the event of an aggravation of the situation at the front or during a violation of the borders of Ukraine the state would be able to attract reservists within 24 hours. There was no reference to whether a person with the appellant's profile would be taken to the ATO zone. Also, at page 14 of the bundle, which was an article headed "Ukraine leader signs law to call up reservists for military service", there was no reference to mobilisation. If this was said to amount to strong grounds and cogent reasons, given the substance of the evidence put forward, the judge would have not found it to meet the necessary test. If this were a policy its terms were not before the judge but there was a reference to a bill. So although the judge did not refer to it, it was difficult to see that the test was met.

7. As regards ground 2 reference was made to headnote 3 in PK and OS with regard to indirect support. This was a bare assertion based on the appellant's skillset and the judge's finding was not irrational.

8. By way of reply, Ms Norman argued that in respect of ground 1 it was accepted as uncontroversial in VB that a person with previous service might be mobilised and as regards further evidence this was supported by Professor Galeotti, who said it was explicitly clear in the cited part of the law. This contrasted with Hussein, which was a case concerning nationality and an absence of evidence. Mobilisation was a legal process in the Ukraine and it was a fast-paced and rapidly changing situation. It could be seen from page 14 of the supplementary bundle in the article that this was an amendment to certain legislative Acts of Ukraine and that reservists could be mobilised without announcement and it was reasonable to infer that this concerned all defence forces. It was argued Mr Clarke was inviting the Tribunal to consider what could have been argued in the First-tier. The judge could have agreed that it meant all defence forces but had not dealt with the submission made to him.

9. With regard to ground 2 and the absence of evidence to support the argument of the appellant with regard to speculation, again Professor Galeotti had addressed this at paragraph 17 and paragraph 18 of the 2019 report. It was clear from what he said that the appellant had relevant skills for this conflict. Again, the judge had not dealt with this but just said it was academic learning. It should be borne in mind that the appellant had been found to be credible and that he had practical skills and it was not just academic learning.

10. After consideration, we concluded that there was a material error of law in the judge's decision in respect of ground 1. We do not consider that it can properly be said that the nature of the evidence as to the change in the law was such that the judge would inevitably, had he addressed his mind to it, have come to the conclusion that it made no difference to what was said in the country guidance case. There were the pieces of background evidence that we were referred to from the bundle and as summarised in the skeleton argument before the judge. Whether or not on a rehearing

the matter will be found to meet the test of justifying departure from the country guidance case of providing strong and cogent evidence is a matter that will have to be left to the judge who hears this appeal afresh. We do not see force in the point made by Mr Clarke in relation to the decision in Hussein. The context there is entirely different, being concerned with issues of Tanzanian nationality law rather than where there was no evidence. Here, there clearly was some evidence of a change in the law and it was necessary for the judge to address it.

11. As we stated at the hearing, we see less force to ground 2, which is essentially conjectural and on balance we consider that the judge did not err in his conclusions in that regard. However, for the reasons stated, we consider that there is a material error of law in respect of ground 1 and as a consequence, the matter will require to be reheard. In light of the very significant changes in the situation in the Ukraine since the judge's decision it will be appropriate for the matter to be reheard in its entirety in the First-tier Tribunal, at Taylor House.

Notice of Decision

The appeal is allowed to the extent set out above.

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 his 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.

Signed Date 11 January 2023

Upper Tribunal Judge Allen