Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07180/2017**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 29 January 2018	**On 5 February 2018**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

IURIL DVORYANYN
AKA YURIY DVORYANYN
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of Ukraine born on 1 March 1979, challenges the determination of First-tier Tribunal Judge M A Khan promulgated on 7 September 2017 dismissing his appeal against the respondent's decision of 14 July 2017 to refuse to grant him asylum and humanitarian protection under paragraph 336 of the Immigration Rules.

2. The appellant's immigration history is poor. He entered the UK using a visit entry clearance in 2001 and overstayed. When encountered by

immigration officials in 2008, he produced a fraudulently obtained Latvian identity document. He was arrested and the premises were searched. Two further Latvian documents and a false Lithuanian identity card were found. All bore the appellant's photograph and an alias. The appellant was arrested and charged and on 4 July 2008 he received a six-month custodial sentence. He was subsequently served with removal directions but then claimed asylum. His appeal was dismissed and an attempt at judicial review was rejected. On 17 December 2008 he was removed.

3. On 19 October 2009 the appellant turned up in France and attempted to enter the UK using a fraudulently obtained Polish identity card. A fingerprint check revealed his true identity. It is unclear from the papers whether or not he was refused entry.

4. On 24 May 2017 the appellant was encountered by the police with regard to a criminal matter. He gave yet another false identity but his true identity was revealed when he was finger printed. He then claimed asylum on the basis that he would be forced to undergo military service in Ukraine. Initially this was on the basis that he was afraid to do so but subsequently representations were made on the basis that he had religious reasons for not wishing to be conscripted. He also relied on private and family life said to be established here.

5. Judge Khan dismissed the appeal.

6. Permission to appeal was initially refused by First-tier Tribunal Judge Scott Baker on 25 September 2017 but granted on renewal by Upper Tribunal Judge Eshun on 7 November 2017 on the basis that the judge arguably erred in refusing to adjourn the appeal when the representatives claimed to have only been notified of the hearing four days earlier and had not had adequate time to prepare.

7. The respondent, in her Rule 24 response, opposed the application for permission.

8. On 24 January 2018 the appellant's representatives wrote to the Upper Tribunal seeking an adjournment. They maintained that the appellant was in custody on a criminal matter and they had been unable to take instructions.

9. The application was refused by Upper Tribunal Judge O'Connor on 25 January 2018. He took the view that as no production order had been sought, that it had not been anticipated that the appellant would have attended the hearing and that the representatives had not indicated that they had been unable to take instructions previously with respect

to the error of law issue, the matter could proceed on the basis of submissions from his representatives.

10. The matter then came before me.

The Hearing

11. There was no appearance by the appellant's representatives at the hearing on 29 January 2018 and it was not until after completion of the hearing that a fax was received from the appellant's representatives removing themselves from the court record.

12. I heard submissions from Mr Kotas who adduced the appellant's PNC record showing that he had been convicted, following guilty pleas, of two offences of supplying Class A drugs and had received two 40-month prison sentences to be served concurrently.

13. Mr Kotas submitted that with respect to Judge Khan's determination, no errors of law had been shown. There was no merit in the complaint that he had erred in refusing to adjourn as the notice of hearing had been sent to both the appellant and the representatives and no steps had been taken to instruct an expert. He submitted that the real issue appeared to be one of funding as the appellant's representative withdrew from the hearing for that reason. He submitted that although the judge was criticized for his approach to Devaseelan, he had been entitled to rely on previous decisions and determinations. The appellant was found to have used false documents and to have given evasive evidence. The success of his appeal hinged on the documents allegedly from the military but the appellant had a history of relying on false documents. The judge was entitled to find that his evidence could not be relied on. Even taken at its highest, the appellant's claim had not reached the stage where it could be said that prison conditions in Ukraine breached article 3 as no criminal proceedings had commenced. If the claim was to be believed then all that had happened was that the appellant had received draft papers. There was a lack of reliable evidence to establish he was a conscientious objector. I was referred to the head notes of VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC).

14. At the conclusion of the hearing I reserved my determination. I now give my reasons.

Conclusions

15. There are two issues in this case. The first is whether the First-tier Tribunal judge erred when refusing to adjourn the hearing before him and the second is whether he erred in assessment of the appellant's substantive claim. Before I move on to those matters, I shall refer briefly to the matter of the recent adjournment request. Notice of hearing for today's proceedings was served on both the appellant and his representatives on 13 December 2017. Those representatives had prepared the challenge to the First-tier Tribunal's determination and as there had been no amendments to the grounds, those would have been the grounds they were due to argue before me. No further instructions would have been necessary in order to do so. I also note that there has been no renewed application for an adjournment either by fax or by a personal appearance. I was satisfied that the notice was properly served, that no objections had been raised to the refusal of the adjournment the week before the hearing and that the matter of determining whether or not there was an error of law in the determination of the First-tier Tribunal could properly and fairly be dealt with in the appellant's absence. I, therefore, proceeded with the hearing in the appellant's absence.

16. For the reasons set out below, I find that the First-tier Tribunal Judge did not err either with respect to the adjournment request or to the merits.

17. The appeal against the respondent's decision was lodged on 28 July 2017 and on 31 July the representatives (Sterling and Law Associates) and the appellant were notified of the scheduled hearing for 22 August 2017. On the afternoon of 21 August 2017, the Tribunal received a letter from the representatives (who have remained on record throughout, until 29 January 2018) maintaining that the notice of hearing did not reach them and that they had only just been notified of the hearing by the appellant. they sought an adjournment in order to prepare for "complex issues" and to arrange an expert report which would be "crucial" to the case and which would take at least three weeks to obtain.

18. The following morning a solicitor attended the hearing to make an oral request for an adjournment. She maintained that the notice of hearing had been sent to the wrong representatives, that they were not aware of the hearing until 18 August, they needed more time to prepare and to obtain an expert report and that the appellant was looking to instruct different representatives. The judge refused the adjournment application. He noted that the Notice had been sent to the correct solicitors at the correct address and to the appellant and that they had had almost a month to prepare. He considered there had been ample opportunity to instruct an expert and that the appellant had had every opportunity to instruct different representatives. He gave the representative time to consult with the

appellant, to take instructions and to prepare a hand written witness statement but she withdrew from the hearing citing funding issues.

19. The grounds complain that the judge acted unfairly and gave no consideration to whether the appeal could have been fairly determined without an adjournment particularly as there was no witness statement or bundle.

20. Given that the representative was afforded every opportunity to consult with the appellant and to prepare a witness statement, there is no merit in the complaint that no statement had been prepared. I note from the file that contrary to what the representative argued, and not pursued in the grounds, the notice of hearing was indeed properly served at the representatives at the same address that is recently provided by them. It was also served on the appellant. as the solicitors had prepared the initial grounds of appeal and lodged the appeal, they would have been aware of the basis of the claim and should have known if further evidence was required. No details are offered as to what an expert might add to the case particularly given the recent determination of the Upper Tribunal on military service in Ukraine and there is no explanation as to why no steps had already been taken to approach an expert. Nor is the contention that the solicitors needed more time to prepare consistent with the claim that the appellant wanted to instruct different representatives.

21. The judge properly considered the matter and was entitled to proceed. His approach does not disclose an error of law which would require the determination to be set aside.

22. The second issue concerns the substantive claim. The judge is criticized for his approach to Devaseelan, it being argued that previous adverse findings on credibility should not be used to apply to fresh documents. At paragraph 39 the judge had regard to the appellant's previous history of dishonesty in the production of and reliance on fraudulently obtained documents. Given that background, and the appellant's convictions for fraud, he was entitled to view the appellant's fresh evidence with caution. There is no error in his approach in that respect. The judge noted that the appellant had admitted to producing false documents at his previous hearing (at 29). He had also relied on many false identity documents. He was unable to explain how he had obtained the fresh evidence. When he assessed the evidence as a whole (at 40), he did not find that the appellant had been credible or consistent.

23. It is legitimate for countries to require their citizens to perform compulsory military service and punishment for failing to complete this duty cannot automatically be regarded as persecution. The

appellant claims to be a conscientious objector; i.e. someone who can show that the performance of military service would require his participation in military action contrary to his genuine religious or moral convictions. However, he has been inconsistent in that even up to the point of his hearing before the First-tier Tribunal where he maintained he did not want to die (at 22), did not want to fight (at 32) and was afraid (at 24). The judge was entitled to find that he was an unreliable witness.

24. I was referred to VB. Head note 1 states: *"At the current time it is not reasonably likely that a draft-evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings for that act, although if a draft-evader did face prosecution proceedings the Criminal Code of Ukraine does provide, in Articles 335, 336 and 409, for a prison sentence for such an offence. It would be a matter for any Tribunal to 2 consider, in the light of developing evidence, whether there were aggravating matters which might lead to imposition of an immediate custodial sentence, rather than a suspended sentence or the matter proceeding as an administrative offence and a fine being sought by a prosecutor".* Given that the appellant's claim was not accepted, he has not, as Mr Kotas pointed out, reached the stage where he faces criminal or administrative proceedings for evading military service.

25. No submissions have been put forward on article 8 grounds and no evidence of any family or private life was put to the judge.

26. Having considered all the evidence, I find that the First-tier Tribunal did not make errors of law which require the decision to be set aside.

Decision

27. The appeal is dismissed on asylum, humanitarian protection and human rights grounds.

Anonymity

28. I see no reason to continue the anonymity order made by the First-tier Tribunal.

Signed

Upper Tribunal Judge

Date: 2 February 2018