Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09914/2017**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 20 May 2021 **On 03 June 2021**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

SM (UKRAINE)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N. Nnamani, Counsel
For the Respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 against a decision of the Secretary of State dated 27 September 2017 to refuse the appellant's asylum and humanitarian protection claim made on 23 March 2017. I refer to the respondent's decision as being contained in the "reasons for refusal letter", or 'RFRL'.

2. The appellant is a citizen of Ukraine born in 1982. He claims to have ignored two summonses for compulsory military service in Ukraine, issued in February and March 2016, and to have been prosecuted and sentenced on 25 November 2016 in his absence to four years' imprisonment for draft

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evasion. He claims that he will be identified as a convicted criminal at the border upon his return and subsequently will be imprisoned in conditions that would breach Article 3 of the European Convention on Human Rights ("the ECHR"). Although the appellant originally claimed asylum on the basis that he would face being persecuted for failing to perform military service in Ukraine, he no longer maintains that limb of his claim, as confirmed by Ms Nnamani at the outset of the hearing before me.

Procedural and factual background

3. This is the appellant's third substantive appeal against the Secretary of State's refusal decision. The appellant's appeal was originally dismissed by First-tier Tribunal Judge Greasley in a decision and reasons promulgated on 8 August 2018. That decision was set aside by a different constitution of this tribunal on 8 November 2018 and remitted to the First-tier Tribunal. The matter was reheard by First-tier Tribunal Judge Oliver on 25 October 2019, who dismissed the appeal in a decision promulgated on 25 November 2019. The appellant again appealed to the Upper Tribunal. In a decision and reasons promulgated on 5 March 2020, I found the decision of Judge Oliver to have involved the making of an error of law and set it aside with no findings of fact preserved. My error of law decision may be found in the **Annex** to this judgment.

4. I directed that the matter be reheard in this tribunal, and it was in those circumstances that it resumed before me, on a face-to-face basis at Field House, on 20 May 2021, following a delay caused by the pandemic.

5. The appellant arrived in the United Kingdom on a visitor's visa in September 2006. He overstayed and subsequently came to the attention of the Secretary of State, who placed him on reporting conditions which persisted for a considerable period. On 30 November 2016, advised by the same solicitors through which he was later to make this asylum claim, the appellant applied to the Secretary of State for leave to remain on grounds of his human rights. That application was refused and certified as "clearly unfounded" on 13 February 2017. On 23 March 2017, the appellant claimed asylum. A screening interview took place on 29 March 2017, and a substantive interview was conducted on 16 August 2017. The claim was refused on 27 September 2017 and it is that refusal decision the appellant now appeals against in these proceedings.

6. The appellant claims that a postman delivered two military call-up notices to his mother's home in Ukraine on 25 February 2016 and 31 March 2016, requiring him to attend appointments in order to be enlisted for compulsory military service. The appellant was in this country at the time, without a passport (which he claims to have lost at an early point during his residence here), and was unable to return to Ukraine to perform his service. In any event, he did not want to; he knew of people who had returned from the frontline in the conflict with the Russia-backed groups with mental illnesses from the trauma they had experienced. He was afraid for his life in his likely role as a sapper.

7. As a result of failing to report to the military commissariat, the appellant was prosecuted and tried in absentia, he claims. He was sentenced to four years' imprisonment and has not been able to appeal due to being in this country following advice his mother received from a local solicitor that he had no case. The basis of the appellant's Article 3 claim is that he will be imprisoned upon his return to Ukraine and detained in conditions which would not comply with the requirements of Article 3 of the ECHR. He no longer maintains that he would be entitled to refugee status on account of being required to perform compulsory military service.

8. The respondent's case, as set out in the RFRL, and as developed by Mr Lindsay before me, is that the documents relied upon by the appellant to demonstrate that he has been called for military service and tried in his absence are not reliable. Even if they were genuine, fraudulently-obtained genuine documents are prevalent in Ukraine. The background materials and relevant country guidance suggest that, absent some special factor, prosecution for draft evasion is highly unlikely, still less is a sentence of four years' imprisonment reasonably likely to have been imposed. I am invited to reject the appellant's case that he received call-up notices in his absence and find that he was not tried in absentia.

Legal framework

9. Article 3 of the European Convention on Human Rights provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

10. In VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC), this tribunal held, at paragraph 3 of the Headnote:

> "There is a real risk that the conditions of detention and imprisonment in Ukraine would subject a person returned to be detained or imprisoned to a breach of Article 3 ECHR."

11. The appellant bears the burden of proof to establish his case to the lower standard. He must demonstrate that he faces a real risk of substantial harm.

Documentary evidence

12. In the course of the two substantive hearings before the First-tier Tribunal, these proceedings have generated a number of materials, many of which overlap. The appellant relied on the bundle prepared for the First-tier Tribunal, a supplementary bundle, plus three expert reports from Professor Mark Galeotti. At the hearing, the appellant provided original copies of the summonses he claims to have received in Ukraine, an original version of the Ukrainian court judgment, plus the envelope they were said to have been provided in by his mother from Ukraine.

The hearing

13. The appellant participated in the hearing in Ukrainian through an interpreter. At the outset, I clarified that the appellant and interpreter could understand one another.

14. The appellant gave evidence and adopted his statement dated 26 October 2017, prepared for the first appeal before the First-tier Tribunal. That statement is in identical terms to the one he signed for the second First-tier Tribunal appeal. He was cross-examined. I do not propose to set out the entirety of the appellant's evidence in this decision; I will do so to the extent necessary to reach and give reasons for my discussion.

Discussion

15. I reached the following findings having considered the entirety of the evidence in the round, to the lower standard.

16. By way of a preliminary matter, as Ms Nnamani realistically accepted, the appellant's claim does not engage the 1951 Geneva Convention. Ms Nnamani explained that, in light of the findings of PK and OS (basic rules of human conduct) Ukraine CG [2020] UKUT 314 (IAC), the appellant no longer considers his asylum claim to engage the 1951 Convention and does not pursue it. This appeal is therefore dismissed on asylum grounds. I turn to Article 3.

17. The appellant's Article 3 case turns primarily on whether I accept the two central planks of the his case: first, whether he received call-up papers, and secondly, whether I accept that he has been sentenced to a term of four years' imprisonment in his absence. If it is reasonably likely that the appellant has been sentenced to four years' imprisonment, pursuant to VB it is reasonably likely that he would be subject to the non-Article 3 compliant detention conditions in Ukraine, although he may be entitled to a retrial.

18. It is necessary to consider the background materials and country guidance relevant to military service in Ukraine. In PK and OS, it was held that it remained the case that it was not reasonably likely that a draft evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings; the panel endorsed the guidance previously given in VB to that effect in 2017 (headnote, [3.b]). At [277] of PK and OS, the tribunal found that the 'vast majority' of draft evaders are not prosecuted, and at [283] that draft evaders are not reasonably likely to be identified as such at the border. In PK and OS it was also held that, absent some special factor, it was highly likely that a person who had been convicted of unlawfully avoiding military service would be sentenced to a period of imprisonment.

19. VB also held that an immediate custodial sentence would be unlikely, barring some aggravating feature: see paragraph 1 of the headnote; as did PK at [3.c].

20. The respondent's *Country Policy and Information Note – Ukraine: documentation*, version 1.0, May 2020 ('the CPIN'), outlines the prevalence of forged documents, and genuine but fraudulently obtained documents: see paragraph 6.1.1 and following. The use of fraudulently-obtained genuine documents is prolific, and there is a cottage industry specialising in the production of false documents.

21. Turning to the specific evidence in the case, it is trite law that the weight to be ascribed to individual pieces of evidence, including documentary evidence, is a matter to be considered in the context of the overall evidence in the case, including the background materials and country guidance. See QC (verification of documents; Mibanga duty) China [2021] UKUT 33 (IAC), which states in the first paragraph of the Headnote:

> "The decision of the Immigration Appeal Tribunal in Tanveer Ahmed [2002] UKIAT 00439 remains good law as regards the correct approach to documents adduced in immigration appeals. The overarching question for the judicial fact-finder will be whether the document in question can be regarded as reliable..."

22. The appellant relies upon three reports from Prof. Galeotti, dated 26 October 2017, 10 October 2019 and 17 December 2019 to underline the reliability of the summonses and the court documents. Prof. Galeotti is an expert in post-Soviet security, policing and crime matters in the region. He is a Senior Fellow at the Royal United Services Institute and holds a number of other prestigious positions. He has travelled extensively to the region and has high level contacts in Ukraine. I accept that he is an expert in those matters and that his opinions carry weight, although two reservations are necessary. First, all three reports pre-date PK and OS. Secondly, Prof. Galeotti is not a document verification specialist. While I accept that a regional expert would be better placed than many to comment on official documents issued by the government of Ukraine, with the greatest of respect to Prof. Galeotti, document verification does not lie within his primary expertise.

23. Prof. Galeotti concludes that the summonses appear to be genuine, and typical of those issued to reservists and conscripts, based on 25 such documents he has viewed in total. Their layout is typical, and factual details (such as the location of the commissariat) is accurate. Normally they would be back-printed (which the appellant's are not), but that is not concerning, as around a third of the examples of call-up papers viewed by Prof. Galeotti were not back-printed, he writes. Normally one would expect a longer gap between the first and second summonses, in contrast to the summonses issued only weeks apart in this case, but given the ongoing conflict at the time, that is not concerning, considers Prof. Galeotti. The ink quality is poor, but that is true of many summonses, and the official stamps appear to be genuine.

24. The judgment of the court appears to be genuine, considers Prof. Galeotti. The judge was publicly listed on a Ukrainian judicial website at the time Prof. Galeotti first analysed the judgment, even if, in light of the respondent's concerns raised at the hearings before the First-tier Tribunal and addressed in his third report, the judge appears no longer to hold judicial office in Ukraine. The judgment's layout was typical of Ukrainian judgments; it adopted one of three main stylistic approaches. The provisions of Ukrainian law referred to were accurate, as was the location of the court, and the reference to the appellant's period of mobilisation.

25. Although Prof. Galeotti recognised that he does not have specific document verification expertise, his overall regional experience gave him confidence that the documents were genuine. Concerns raised by the Secretary of State before Judge Oliver, which Prof. Galeotti responded to in his third report concerning the functionality of the weblinks cited in the first two reports, were without foundation and puzzling: they all worked, he wrote.

26. In my judgment, it is not clear how Prof. Galeotti was able to benchmark or otherwise calibrate the 25 call-up papers he has viewed throughout his career against a genuine document. He had retained copies of only 12 such documents. His reports do not engage with the possibility that the documents he has viewed in other contexts could themselves have been forged; certainly one would expect a regional expert report addressing the reliability of official documents to engage with the prevalence of false documents in the country concerned, in light of the varied background materials to that effect collated by the respondent in the CPIN, or otherwise distinguish those background materials. I also have some concerns about Prof. Galeotti's opinion concerning the fact that, although most call-up papers were "back-printed" (that is, featuring official text on the reverse), a third of those he viewed were not. When assessing such significant differences between call-up papers, the national incidence of document forgeries was a matter that should have been the subject of some consideration but was not. It is not clear whether the call-up papers without back printing were genuine, or further examples of the prevalent practice of forgery in Ukraine.

27. When examining the judgment of the Ukrainian court, although in his second report at paragraph 21 Prof. Galeotti notes the findings of <u>VB</u> concerning the low likelihood of prosecutions for draft evasion, he distinguishes those findings on the basis they related to the 2014/15 draft. By the time the appellant was called up, in early 2016, the conflict in the east of the country had changed matters, he opined. Enforcement was more likely by then. The difficulty with relying on that analysis in these proceedings is that <u>PK and OS</u> has subsequently clarified that the enforcement emphasis remains on non-custodial disposals. Imprisonment is 'highly unlikely', as set out above. Matters had not changed to the extent suggested by Prof. Galeotti. The most recent country guidance throws the professor's analysis into sharp relief. There is no updated, post-<u>PK and OS</u> report from Prof. Galeott.

28. Even putting the above concerns about Prof. Galeotti's analysis of the summonses to one side, Prof. Galeotti does not address the well-documented prevalence of fraudulently-obtained genuine documents. This is an observation which applies equally to the Galeotti reports' analysis of both the summonses and the judgment. The reports do not address whether, if the documents are genuine, they are nevertheless reliable. In light of the prevalence of genuine but fraudulent documents in Ukraine, there is considerable force to Mr Lindsay's submissions that the key issue is, if the documents are 'genuine', are they *reliable*? Whether a document is genuine is not necessarily determinative of its reliability. To assess reliability, the entirety of the evidence must be considered, in the round.

29. I turn, therefore, to the evidence of the appellant. I accept that his evidence before me was largely consistent with the accounts he provided in his screening and substantive asylum interviews.

30. Under cross-examination the appellant was able to provide only scant details relating to the receipt of the summonses at his mother's house and the court proceedings. He claims to have done nothing in response to the summonses being received, and nothing in response to the judgment sentencing him to four years' imprisonment. He said under cross-examination that his mother sought the advice of a solicitor in Ukraine to address the court's *decision*, whereas his witness statements were silent as to that fact. His mother provided a witness statement for the second appeal before the First-tier Tribunal, dated 11 September 2019, in which she stated that, in response to the court *summons*, she sought the advice of a solicitor:

> "However they told me bluntly that they could not help as the appellant had broken the law and would almost certainly be prosecuted in his absence and that there would also be no chance to lodge an appeal. I was devastated as I thought if I paid for his services he would be able to help."

Putting to one side the fact that the appellant's mother's account differs from his in relation to whether the solicitor's assistance was sought before or after the judgment, it is striking that there are no details in the appellant's own statement relating to seeking the help of a solicitor. He confirmed under cross-examination that he has not sought to address the imposition of the sentence in any way, despite its length, and despite the magnitude of the mistreatment that, on his own case, he will be subject to. When pressed under cross-examination as to why he had taken no steps, the appellant was unable to provide an answer. I found his evidence in this respect to be unsatisfactory. At times he simply shrugged his shoulders. On any view, the imposition of a sentence of four years' imprisonment is a matter of some significance. The appellant's inability to explain *any* reaction to it, or steps taken in response, gives rise to some credibility concerns.

31. The appellant's mother's statement's summary of the legal advice purportedly received by the Ukrainian lawyer also conflicts with the background materials and country guidance. The advice that the appellant "would almost certainly" be prosected is at odds with the conclusions of two country guidance cases, VB and PK & OS, that very few people are prosected for draft evasion in Ukraine. VB held that those convicted in absentia would probably be able to appeal, a finding which appears to be at odds with the advice purportedly received from the Ukrainian solicitor that the appellant had no case at all.

32. There is another feature of the appellant's claimed conviction which is inconsistent with the background materials: the length of the appellant's sentence. Mr Lindsay asked the appellant if he was aware of any special feature about his circumstances or prosecution which would give rise to a sentence of four years' imprisonment, given the background materials and country guidance suggests that the emphasis of Ukrainian prosecutors and the courts is on fines and other non-custodial disposals for draft evasion. The appellant was not able to highlight any such features, and in submissions, Ms Nnamani did not draw my attention to any considerations inherent to the appellant's circumstances in Ukraine that would have merited a higher sentence. He left Ukraine in 2006, when he would have been 25 years old. He had been a student and had undertaken some military training as part of his course, but it was not his case (as Ms Nnamani confirmed) that he was a reservist. He had worked for a year before coming to the UK on a visitor's visa. It is difficult to see a special factor that features in the appellant's case which displaces the high likelihood of non-custodial sentences being imposed, or any features that would place his case at the four year point on a sentencing scale of a theoretical five year maximum; the appellant did not attempt to demonstrate that there were any.

33. Drawing this analysis together, while I accept that Prof. Galeotti is an established expert in regional security matters, he has not had the benefit I have had of hearing the appellant's evidence tested under cross-examination. Prof. Galeotti did not address the potential for fraudulently-obtained genuine documents to be held by the appellant. The reports pre-date the latest country guidance in PK and OS, and are inconsistent with it in some respects as set out above, particularly in relation to the likelihood of the appellant being prosecuted. Prof. Galeotti is not a document verification expert, and while his opinion in principle attracts weight, some features of his analysis of the documents featured weaknesses.

34. Turning to the appellant's evidence, it was light on detail and lacked credibility. His oral evidence featured significant events that were not in his statements, such as his mother's claimed attempt to secure legal advice. His mother's evidence of the solicitor's advice contrasts with the country guidance and background materials concerning the likelihood of prison sentences being imposed and the availability of a right of appeal. The appellant highlighted no special feature of his case which could have merited such a significant sentence being imposed, as set out above.

35. In her closing submissions, Ms Nnamani highlighted how the respondent had not obtained her own report to authenticate the documents. I do not consider this to be a case where the respondent's duty to verify documents and protection claims is engaged. As outlined in QC at paragraph 1 of the headnote, the obligation upon the respondent to take steps to verify document arises only exceptionally (in the sense of rarely):

> "An obligation on the respondent to take steps to verify the authenticity of the document relied on by an appellant will arise only exceptionally (in the sense of rarely). This will be where the document is central to the claim; can easily be authenticated; and where (as in Singh v Belgium (Application No. 33210/11)), authentication is unlikely to leave any 'live' issue as to the reliability of its contents. It is for the tribunal to decide, in all the circumstances of the case, whether the obligation arises. If the respondent does not fulfil the obligation, the respondent cannot challenge the authenticity of the document in the proceedings; but that does not necessarily mean the respondent cannot question the reliability of what the document says. In all cases, it remains the task of the judicial fact-finder to assess the document's relevance to the claim in the light of, and by reference to, the rest of the evidence."

36. Two of the essential criteria for the respondent's duty to be engaged are not met in the present matter. First, the document cannot easily be authenticated; Ms Nnamani did not attempt to contend that it could be. Secondly, and more significantly, authentication of the documents would not extinguish any remaining "live" issues as to the reliability of their contents. As outlined above, there is a prevalent practice in Ukraine of the use of fraudulently obtained but genuine documents. Whereas Ms Nnamani attempted to categorise this distinction relied upon by Mr Lindsay as an "intellectual" distinction, with the implication that it was of no relevance, in my judgment it is a central point. Even if the documents relied upon by the appellant in these proceedings were genuine, the remaining concerns surrounding the appellant's overall credibility as a witness would be outstanding. Verification by the respondent would be unlikely to take the matter much further.

37. Finally, while not determinative, I recall that despite, on his case, having already received the call-up papers and having been convicted and sentenced to four years imprisonment in his absence, the appellant did not make an asylum claim at the time in 2016. Instead, he made a human rights claim, and did not claim asylum until the refusal and certification of that claim is clearly unfounded. Pursuant to section 8(5) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, that is a factor harming the appellant's credibility.

38. In conclusion, therefore, having analysed the evidence in the case to the round, to the lower standard, I make the following findings. I do not consider the call-up papers and the judgment of the Ukrainian court to be reliable. They are inconsistent with the background materials and the relevant country guidance. The appellant's statements lacked essential

detail that he introduced only under cross-examination, in particular the steps taken by his mother to challenge the prosecution against him. His oral evidence lacked depth and was evasive at times. He did not make the claim for asylum at the time he contends the events giving rise to the basis of the claim took place, instead pursuing a different type of application, which was certified as "clearly unfounded". I do not consider the appellant to be credible.

39. I find that the appellant has not demonstrated to the lower standard that he received call-up papers in February and March 2016, nor that he was prosecuted and sentenced to four years' imprisonment in absentia later that year. It follows that there is no real risk of the appellant being subject to detention or imprisonment in Ukraine for draft evasion or any other reason, which is dispositive of this Article 3 claim.

40. The appellant did not argue that he would face Article 3 mistreatment on any other grounds, nor did he advance an Article 8 based claim.

41. This appeal is dismissed on human rights grounds.

42. Notwithstanding the above findings, in order to ensure this judgment does not expose the appellant to a risk he does not currently face, I maintain the anonymity direction already in force.

Notice of Decision

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

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.

Signed *Stephen H Smith* Date 24 May 2021

Upper Tribunal Judge Stephen Smith

Annex – Error of Law Decision

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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09914/2017

THE IMMIGRATION ACTS

Heard at Field House

On 26 February 2020

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

SM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Nnamani, Counsel, instructed by Yemets Solicitors
For the Respondent: Mr N. Bramble, Senior Home Office Presenting Officer

ERROR OF LAW DECISION AND REASONS

1. The appellant, SM, is a citizen of Ukraine, born on 13 May 1982. He appeals against a decision of First-tier Tribunal Judge M.R. Oliver promulgated on 25 November 2019 dismissing his appeal against a decision of the respondent dated 27 September 2017 to refuse his claim for asylum and humanitarian protection. The basis of the appellant's claim is that he faces persecution and/or inhumane prison conditions for evading

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military service in Ukraine, having been issued with call-up papers in 2016[1].

Factual background

2. The appellant claims to have received two military call-up documents at his home address in Ukraine, in February and March 2016. He also claims that he was sentenced by a court in Ukraine on 25 November 2016 *in absentia* to four years' imprisonment for draft evasion, providing a judgment of the relevant local court as confirmation. Upon his return, he claims, he will be detained and subject to inhumane conditions, and compelled to work as a mine-clearer in a potentially lethal role.

3. This matter has a lengthy procedural background. The appellant arrived in this country on a visitor's visa in September 2006. He did not leave upon its expiration. He was encountered by the police in December 2008 and later placed on reporting conditions. He made a human rights application in November 2016. The application was refused and certified as clearly unfounded. On 23 March 2017, the appellant claimed asylum.

4. The appellant originally appealed to First-tier Tribunal Judge Greasley, who dismissed the appeal in a decision promulgated on 8 August 2018. Upper Tribunal Judge Storey set that decision aside on 8 November 2018 and gave directions for the service of a supplementary expert's report, an issue to which I shall return. The matter was then reheard, with no findings preserved, in the First-tier Tribunal, before Judge Oliver. It is that decision which the appellant appeals against in these proceedings.

Permission to appeal

5. Permission to appeal was granted by First-tier Tribunal Judge Landes on the basis that, first, the judge's approach to the expert evidence involved procedural unfairness, was irrational, and that his findings were inadequately reasoned (Ground 1). A second ground of appeal related to the judge's assessment of the appellant's risk on return, in the event that the documents were genuine. Ground 2 did not stand on its own, as it was only engaged if the documents were found to be genuine.

The decision of the First-tier Tribunal

6. The context for the grant of permission to appeal arises from the appellant's reliance on reports of a Professor Galeotti, an expert in the region and in Ukrainian military matters. The first report, dated 26 October 2017, was also submitted to Judge Greasley. It concluded that the conscription documents and the court judgment were genuine, although it did not say whether the author had viewed the respondent's refusal letter and other documents relating to the appellant's claim, leading to Judge Greasley applying minimal weight to it. Judge Storey, when setting aside Judge Greasley's findings for other reasons, directed that the appellant

[1] The original decision promulgated stated 2015, which was a typographical error. It was 2016.

provide a supplementary report, considering some of the concerns raised by Judge Greasley, and setting out whether he had seen the respondent's refusal letter and the record of the asylum interview. The appellant complied with that direction, insofar as obtaining a supplementary report, dated 10 October 2019, although the supplementary report did not say whether the professor had seen the documents before reaching his views, contrary to the directions of Dr Storey.

7. At the hearing before Judge Oliver, the respondent relied on written submissions which sought to critique the contents and conclusions of both Galeotti reports. The critique included screenshots of Ukrainian websites which the professor claimed to have relied upon but which, the submissions contended, demonstrated that the conclusions of the Galeotti report could not be sustained. Details of the judge who purportedly presided over the appellant's court hearing in Ukraine were not included in a published list of judges presiding over the court in question, and nor did a public list of judgments feature details of the appellant's case, contended the submissions.

8. Judge Oliver appeared to be persuaded by the Secretary of State's written submissions. At [39] he said:

> "The submissions made in the document served by the respondent and adopted at the hearing follow the methodology outlined in the expert report submitted on behalf of the appellant. I have attempted to follow the search route set out in the submissions purely to check the accuracy of the reported results and the results accorded with those of the anonymous author of the submissions, save for the results of searching under the web address as referred to in the expert footnote 9 and 12, which came up with similar but not identical pages."

9. The judge sought post-hearing confirmation from Prof. Galeotti that he had seen the respondent's refusal letter and the record of the asylum interview. Confirmation was provided in an email submitted to the judge after the hearing by the appellant's solicitors. At [40], the judge appeared to have concerns that Prof. Galeotti had not addressed the concerns raised by the respondent in her written submissions:

> "Following the hearing on 25 November 2019 [sic] counsel for the appellant submitted an email from the expert in which he confirmed that he had sight of the respondent's refusal letter and asylum interview. The expert must have had some communication with the appellant's legal team after the hearing but had not replied to the written submissions submitted on behalf of the respondent. For all of the reasons set out above I find that the documents are unreliable (Tanveer Ahmed v SSHD* [2002] UKAIT 00439)."

The judge must have meant to state 25 October 2019. The letter was sent by Yemets Solicitors, not the appellant's barrister, as recorded by the judge.

10. The judge found that the documents were not genuine, and that the appellant did not face a real risk of being persecuted upon his return. Even if they were genuine and the appellant had been sentenced to four years' imprisonment, he would be able to appeal upon his return.

Discussion

11. Ms Nnamani advanced a robust attack on the judge's analysis of the Galeotti reports. She contends that the judge placed "unduly significant weight" on the contents of the Secretary of State's written submissions; the document was unsigned and purported to engage in analysis of the Galeotti reports for which the author's expertise was not apparent. The judge was procedurally unfair by expecting Prof. Galeotti to respond the submissions of the Secretary of State, given he had not directed him to do so, and there had been no indication that post-hearing submissions were sought in relation to anything other than the specific matter upon which the judge requested assistance (namely, compliance with Dr Storey's directions), still less that they would be welcomed.

12. Mr Bramble submits that the judge did no more than engage a detailed analysis of the contents of the reports, as part of his overall assessment of the case. The judge was required to adopt this approach pursuant to R (on the application of Hoxha and Others) v Secretary of State for the Home Department (representatives: professional duties) [2019] UKUT 00124 (IAC), headnote (3), he submitted:

> "(3) Where a medical expert report is relied upon by a legal representative, the representative has a duty to check the report for accuracy, including ensuring the report accurately reflects the way in which the information in it came to be obtained."

Headnote (vi) to PP (female headed household; expert duties) Sri Lanka [2017] UKUT 117 (IAC) requires a similarly vigorous approach, Mr Bramble also submitted:

> "(vi) The methodology of every expert witness should always be patent on the face of the report. If not, it should be provided via a supplement, accompanied by a full and frank explanation of the omission. Experts and practitioners are reminded of the decisions of the Upper Tribunal in MOJ and Others [2014] UKUT 442 (IAC), at [23] - [38] and MS (Trafficking - Tribunal's powers - Article 4 ECHR) Pakistan [2016] UKUT 226 (IAC), at [68] - [69]."

13. Mr Bramble is, of course, correct to submit that the judge was entitled to scrutinise the Galeotti reports. No authority is required for that proposition (I do not consider the proposition to be established by either of the authorities relied upon by Mr Bramble, which cover different situations, neither of which concern the task of a judge upon consideration of reports submitted to a tribunal). Some of the written submissions of the Secretary of State set out considerations which were valid and rational. For

example, Prof. Galeotti did not have document verification expertise of his own. He did not have genuine, verified documents against which to benchmark or calibrate his assessment of the appellant's documents. His first report had been compiled without the benefit of seeing the original documents.

14. However, there is also considerable force in Ms Nnamani's submissions. Most of the Secretary of State's written submissions featured untranslated screenshots of Ukrainian websites, all of which were in Cyrillic script. It is not clear how the judge purported to be able to have understood these websites, still less that he was able to compare them to the analysis conducted by Prof. Galeotti with any degree of confidence. It may be that the judge understands written Ukrainian; if so, he did not say so, nor explain what the documents meant.

15. An appeal to the Upper Tribunal may only be on a point of law, not a point of fact. The question for my consideration, therefore, is whether the judge's analysis of the Secretary of State's written submissions was irrational, or otherwise involved the making of an error of law such that the decision must be set aside. Did the judge's analysis of the Galeotti reports lead to him reaching findings that no reasonable judge could have reached? See, for example, the approach of the Supreme Court in Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600 at [62]:

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

16. The judge had the advantage of hearing the evidence in the case, and of considering the entire evidential landscape in a way that an appellate tribunal does not. There was certainly much analysis in the judge's decision which was plainly open to him on the facts. For example, the judge was entitled to ascribe significance to the late claim for asylum [41]. Ms Nnamani has not expressly challenged his finding that the appellant decided very shortly after his arrival in 2006 that he was not going to leave, and that that decision had nothing to do with a well-founded fear of being persecuted [43]. The basis of the appellant's claim for asylum was not a Convention ground [42]. The judge also had legitimate concerns about the dates and times of the call-up documents [38], and the fact that the four year sentence purportedly imposed on the appellant featured no explanation for its significant length, as would normally be expected [44].

17. It is in this respect that the judge's comments at [40] are highly relevant. The judge appeared to ascribe significance to the fact that Prof. Galeotti had not "replied" to the Secretary of State's submissions, served on the day of the hearing, with no advance notice. This was despite the fact that he "must have had some communication with the appellant's legal team after the hearing". The judge had not invited Prof. Galeotti to respond to

the Secretary of State's submissions, or to provide a further supplementary report. He had not indicated that post-hearing evidence would even be welcome, yet alone necessary. All that the judge had asked to take place after the hearing was for the professor to confirm that he had seen the documents the Judge Storey directed he have sight of.

18. The appellant cannot be criticised for having failed to do something that a party would never normally be permitted to do, which he was not directed to do. While judges are not required to give running commentary on the evidence in the case, where a significant point is to be taken against a party which has not been canvassed by the parties, fairness requires the judge to enable the party in question to have the opportunity to respond to the point. The judge's approach to the "failure" of Prof. Galeotti to respond to the Secretary of State's report in these circumstances amounted to procedural unfairness. See AM (Fair hearing) Sudan [2015] UKUT 656 (IAC), headnote (v):

> "Fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing."

19. This error in isolation is sufficient to render the judge's findings unsafe. However, when this concern is placed alongside the concerns set out above arising from the judge's reliance on the untranslated documents in Ukrainian, the errors are compounded. While the judge made superficially sound findings elsewhere in his decision, those findings may have been tainted by his procedurally unfair and flawed approach to the Galeotti reports and the Secretary of State's written submissions.

20. The decision involved the making of an error of law and must be set aside, with no findings preserved.

21. In light of my findings, above, it is not necessary for me to consider the second ground of appeal, concerning whether the judge erred in his application of the Country Guidance.

22. In view of the fact this matter has already been heard by the First-tier Tribunal twice, I consider that it will not be appropriate to remit it for a third hearing. I direct that the matter be reheard in the Upper Tribunal.

23. I give the following directions:

    a. Within 14 days of being sent this decision, the appellant is to serve on the Upper Tribunal and the respondent a further report from Prof. Galeotti responding to the concerns set out in the written submissions of the Secretary of State advanced before Judge Oliver;

    b. Within 28 days of being sent this decision, the respondent may serve further written submissions.

c. If either party wishes to rely on websites or other documents in a foreign language, that party must produce a certified translation of all such documents.

24. I maintain the anonymity order previously made.

Notice of Decision

The decision of Judge Oliver involved the making of an error of law and is set aside with no findings preserved.

The matter will be reheard in the Upper Tribunal with a time estimate of three hours and a Ukrainian interpreter.

The parties are to comply with the directions in paragraph 23, 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 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.

Signed *Stephen H Smith* Date 27 February 2020

Upper Tribunal Judge Stephen Smith