Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07213/2019 (P)**

THE IMMIGRATION ACTS

Decided Under Rule 34	**Decision & Reasons Promulgated**
On 8th November 2020	**On 10th November 2020**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

VS
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. Pursuant to directions sent on 28 July 2020 indicating a provisional view that in light of the need to take precautions against the spread of Covid-19 and the overriding objective, it would be appropriate in this case to determine the issue of whether the First-tier Tribunal's decision involved the making of an error of law and if so whether the decision should be set aside without a hearing; the parties did not raise any objections (subject to one point about which the Appellant noted that oral submissions may be helpful if not agreed) and both parties have made written submissions on the issues raised in the appeal.

2. In circumstances where no objections were made in principle to the main error of law issues being determined without a hearing; where the Rule 15(2A) application can be justly determined on the papers and where the parties have made written submissions; it is in the interests of justice to

proceed to determine the error of law issues on the papers in light of the written submission available and the full appeal file.

3. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Scott promulgated on 13 March 2020, in which the Appellant's appeal against the decision to refuse his protection and human rights claim dated 22 July 2019 was dismissed.

4. The Appellant is a national of Ukraine, born on 28 December 1981, who claims to have arrived in the United Kingdom clandestinely in July 2008. He was encountered by the authorities during an enforcement visit on 17 April 2019, following which he claimed asylum on 23 April 2019. The Appellant claimed to be at risk on return to Ukraine on the basis that he had been convicted and sentenced in absentia to imprisonment for a period of three years for draft evasion and also that he was at risk on return from the Mafia, the original reason for him fleeing Ukraine.

5. The Respondent refused the application the basis that although it was accepted that the Appellant had previously served in the Ukrainian military as claimed, the remainder of his claim was not credible. In particular it was not accepted that there was any further mobilisation after 2014, that the Appellant was too old for a call-up to the military; that call-up papers could not have been legitimately served on the Appellant's family members and as the findings in the country guidance case of VB & Another (draft evaders and prison conditions: Ukraine) (CG) [2017] UKUT 79 (IAC) were that very few draft evaders have been subject to any criminal proceedings, let alone convicted of any offence or sent to prison. The Respondent was not satisfied that there was any evidence supporting the Appellant's claimed conviction and sentence. For these reasons, the Appellant was not accepted to be at real risk of persecution on return to Ukraine. Further, he did not meet the requirements for a grant of leave to remain on the basis of private or family life set out in the Immigration Rules and there were no exceptional circumstances to warrant a grant of leave to remain on any other basis.

6. Judge Scott dismissed the appeal in a decision promulgated on 13 March 2020 on all grounds. In summary, there was no dispute that the Appellant had previously served in the Ukrainian army and it was found to be plausible that the Appellant, as a military reservist, was liable to be called up as part of a mobilisation, with the rejection of the reasons given by the Respondent for not accepting the same. However, the First-tier Tribunal found that this alone was not sufficient for the Appellant to be at risk on return to Ukraine, he would only be at risk of detention if in addition he had been prosecuted, convicted and sentenced to 3 years' imprisonment for draft evasion such that he would be detained on return to Ukraine; which if accepted, pursuant to country guidance, would be a breach of Article 3 of the European Convention on Human Rights.

7. The First-tier Tribunal, whilst accepting much of the expert evidence of Professor Galeotti, did not attach weight to his views on the genuineness

of the documentation relied upon, in particular because he had not been provided with the originals and he did not have any qualifications or expertise in the forensic examination of documents. The evidence was found to amount to little more than saying that the documents looked authentic, which was not considered to take the matter very much further.

8. The First-tier Tribunal found that even if the call-up papers were reliable, the court documents relating to conviction and sentence, together with the lawyer's letter were not reliable and it was not accepted that the Appellant had established that he had been sentenced to a term of imprisonment in Ukraine, such that he would not be at risk on return there. The reasons for that conclusion are contained primarily in paragraph 57 of the decision, which in summary were that (i) the country guidance in VB was that it was not reasonably likely that a draft evader avoiding mobilisation in Ukraine would face criminal proceedings, or that an immediate custodial sentence would be imposed in the absence of aggravating factors. The expert evidence was broadly consistent with this, although there were reports of prosecutions taking place and custodial sentences being imposed, particularly in cases of reservists failing to attend court; (ii) the Appellant had not relied on draft evasion as a problem for him at his screening interview; (iii) there was an inconsistency in the record of the asylum interview as to the length of sentence of imprisonment imposed; (iv) there was no explanation of any difficulty or delay in obtaining the court documents relating to sentence and conviction, which were submitted some time after the asylum interview; (v) the date of the court hearing was a national holiday in Ukraine and there was no evidence that the court would, or did, sit on a national holiday, with the inference that it did not; (vi) the letter from the Ukrainian lawyer was clearly unreliable for the same reasons as found by the Upper Tribunal in OK and additionally the translation was inaccurate undermining the accuracy and reliability of both documents such that no weight was attached to the letter; and (vii) the document relating to conviction and sentence was submitted at the same time as the lawyers letter, both in with same subject matter and the obvious unreliability of the lawyers letter also tended to undermine the reliability of the court document.

The appeal

9. The Appellant appeals on seven grounds, that the First-tier Tribunal materially erred in law as follows:

   (i) In erroneously relying on factual findings made in the case of OK (PTA: Alternative findings) Ukraine [2020[UKUT 44, in which adverse findings were made in relation to a letter from the same Ukrainian lawyer, considered in the circumstances of that case and without setting any precedent that such letters, even from the same source, could never be reliable. Further, the First-tier Tribunal relied on this case which was not reported until after the hearing in the present appeal and the parties were not therefore given the opportunity to make any submissions on it.

(ii) In failing to take into consideration relevant evidence in relation to the export report of Professor Galeotti, in particular in relation to the authenticity of documents examined in circumstances where the Respondent held the originals (albeit initially denied) which were not therefore available for examination. The First-tier Tribunal erred in attaching little weight to this part of the expert evidence because the author did not have forensic qualifications and without taking into account the author's reply on this specific matter or explanation as to why scanned, rather than original documents, made no difference to his assessment of them.

(iii) In failing to take into consideration that evidence of the reliability of the Appellant's documents was not limited to the expert report, but included evidence from the Appellant's father as to how documents were obtained and the original envelopes in which they were sent to the United Kingdom.

(iv) In failing to take into consideration evidence relevant to the assessment of the Appellant's credibility in circumstances where much of the Appellant's claim was considered to be plausible and consistent with background country information and the expert evidence relied upon; and in placing reliance on the Appellant's screening interview in circumstances where he explained that he was interviewed not in his first language and not all questions were understood.

(v) In taking into consideration irrelevant evidence, including that produced by the Respondent on the day of the hearing about national holidays in Ukraine, which was admitted in the appeal without clear explanation as to the reliance to be placed on it. The Appellant was not given an opportunity to produce any evidence in response and failed to take into account the possible explanations given in submissions for the date on the court documents corresponding with a national holiday. The Appellant seeks permission to rely on further evidence not before the First-tier Tribunal showing that under Ukrainian law, a Judge has discretion to sit on a national holiday.

(vi) In making irrational findings that both the original document and a translation of it were unreliable because of the addition of an email address in the letterhead which did not appear on the original and therefore undermined the accuracy and reliability of the document. The Appellant seeks permission to rely on further evidence not before the First-tier Tribunal, namely a letter from the translator explaining the error.

(vii) In irrationally conflating the assessment of the genuineness of the court documents with the lawyer's letter, finding the reliability of one to be undermined by the obvious unreliability of the other. The documents were not obtained together and the assessment of each should have been independent.

10. Further to the directions stated 28 July 2020, written submissions in support of the appeal made on behalf of the Appellant, with continued reliance on the grounds set out above and submissions made on them which were materially the same as the original grounds. Those submissions include more detailed application under rule 15 to rely on additional documents, going wider than those referred to in the original grounds of appeal and including (i) a document about the ability of Ukrainian courts to sit on bank holidays; (ii) email correspondence between Professor Galeotti and the Appellant's representatives; (iii) military service records book; (iv) court document confirming conviction and sentence dated 1 May 2019, together with translations; and (v) letter from Ukrainian lawyer, with translation. It is stated that all of these documents had at some stage been in the possession of the Respondent, however no further submissions were made as to why it was appropriate to admit them at this stage.

11. The Respondent made written submissions in response to the grounds of appeal on 25 August 2020 in the form of a rule 24 response opposing the appeal. In relation to the first ground of appeal, the respondent submits that the First-tier Tribunal properly summarised and adequately assessed all of the relevant evidence, including the expert evidence and his lack of qualifications to forensically examine the documents and the apparent improper translation of the lawyer's letter, without simply relying on the decision of OK to discount or cast doubt that letter.

12. In relation to the second ground of appeal, it is not in dispute that the expert did not see the original documents and no adjournment was sought to enable those documents to be placed before the expert for assessment. The Respondent submits that in isolation, this ground does not undermine the evidence or the weight attached to it by the First-tier Tribunal, upon which conclusions were drawn which were available to the Tribunal on the evidence. Further, irrespective of the particular qualifications of the expert, the remained clear issues on the translation of documents.

13. In relation to the third ground of appeal, the First-tier Tribunal's decision makes express reference to the written statement from the Appellant's father (in paragraphs 12c, 21, 22, 23 and 24), to which little weight could be attached because the evidence could not be tested orally and in isolation could not have been material to the claim. In any event, the First-tier Tribunal is not required to refer to each and every piece of evidence before it and in this case dealt with the key focus of the Appellant's claim relying on the expert report and three core documents. When read as a whole, it is submitted that the decision reached, with factual findings on those court documents, was one which was open to the First-tier Tribunal.

14. In relation to the fourth ground of appeal, the First-tier Tribunal gave clear and adequate reasons, having balanced all of the factors, for documents not being reliable and it is perfectly plausible for some of the evidence to be accepted in given weight, with other parts rejected with

reasons. It is submitted that the grounds of challenge offer only an alternative interpretation of the evidence rather than identifying an error of law in the approach in conclusions reached by the First-tier Tribunal.

15. In relation to the fifth ground of appeal, the Respondent does not accept that reliance on additional documents on the day of the hearing "ambushed" the Appellant or his Counsel; nor was the admittance of such evidence unfair, particularly ais no objection was made to it and no application for an adjournment was made, at the outset or when the relevance of the documents became clear. The Respondent submits that the relevance of the information was self-evident and was in any event addressed during final submissions on behalf of the Appellant. In the circumstances there was no error of law by the First-tier Tribunal.

16. In relation to the sixth ground of appeal, the Respondent submits that the First-tier Tribunal was entitled to find the translation of the document to be unreliable given the anomaly on the face of the documents and in any event the reasons given for not finding this to be genuine were wider than simply a translation error.

17. Finally, the Respondent submits that the final ground of appeal does not in any way undermine the whole findings and reasons given by the First-tier Tribunal and is not material to the outcome of the appeal.

18. There was no specific response from the Respondent to the Appellant's application contained within the grounds of appeal to adduce and rely on further documents of an error of law in the First-tier Tribunal's decision.

19. Further submissions were made on behalf of the Appellant on 19 August 2020, in which reliance was continued on the original grounds of application and the earlier written submissions of 6 August 2020. A number of specific points were made in reply to the Respondents written submissions. These included that the Appellant had specifically relied on the written evidence from his father and not just on the expert report and core documents, the statement being important evidence upon which the First-tier Tribunal simply made no findings. The weight to be attached to such evidence was for the First-tier Tribunal and it is not appropriate after the event for the Respondent to state that in any event it would have been of limited evidential value in the absence of oral evidence. In relation to the original documents, it is submitted on behalf of the Appellant that it is unrealistic to have applied for an adjournment to place the original documents before the expert in circumstances where the Respondent denied possession of the same until partway through the appeal hearing.

Findings and reasons

20. As a preliminary matter, I determine the application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to admit further documents in support of the grounds of appeal and relevant to the issue of whether there was an error of law by the First-tier Tribunal. The test to be

applied to the application is set out in Ladd v Marshall [1953] 1 WLR 1489 as follows.

21. The three limbs of the test for new evidence to be admitted are, in summary, first, that the fresh evidence could not have been obtained with reasonable diligence for use at the trial; secondly, that if given, it probably would have had an important influence on the result; and, thirdly, that it is apparently credible although not necessarily incontrovertible.

22. I deal with each of the documents listed in paragraph 10 above which the Appellant seeks to rely on, taking the first two linked documents together. First, the Appellant seeks to rely on a document which states that it is about the ability of the Ukranian courts to sit on bank holidays. The document is Ruling No.40 from the Council of Judges of Ukraine dated 2 July 2018, with reliance placed on paragraph 2. That paragraph states that it has been decided that:

> *"2. Organisation of work (scheduled hours) of investigating judges and court staff during off-duty hours (weekends and holidays) belongs to the issues of internal operation of the court and the work of individual judges and court staff. Therefore it belongs to the competence of the panels of judges."*

23. The next document is referred to as e-mail correspondence with Professor Galeotti, which refers to a document attached (presumably the first document) and seeks an opinion as to whether a particular paragraph includes trials. The view is that it is ambiguous but could be argued to relate to trials, such that there is no reason on this basis why the Appellant's trial *couldn't* have taken place on a holiday (emphasis in the original).

24. These two documents could in theory have been available before the First-tier Tribunal, although in practice the date of the trial and the national holiday in Ukraine had not been raised prior to the hearing such that there would have been no reason to obtain either at that stage.

25. However, there is a difficulty in satisfying the second and third tests in Ladd v Marshall as although both documents are apparently credible (albeit not incontrovertible), the e-mail does not identify what the document is that was attached to the request and it can only be inferred to be the first document. There is no explanation of this document or the application of the decision contained therein. More importantly, the part of the document relied upon is said by Professor Galeotti to be ambiguous, in his opinion. At best, the document together with the e-mail suggest that there might not be a basis upon which it could be said that a criminal trial definitely could not take place on a national holiday; but does not refer to any arrangements or decision by the specific court, nor any evidence of the specific case having been heard on a bank holiday. In these circumstances, it cannot be said that it would probably have had an important influence on the outcome; the evidence can not undermine the finding in paragraph 57(e) of the decision that there *"is no evidence that*

the Court would, or did, sit on a national holiday and the obvious inference is that it did not" which was only one of many reasons why it was not accepted that the Appellant had been convicted and sentenced as claimed. These documents are not therefore admitted as they do not, individually or together, meet all three limbs of the test in Ladd v Marshall.

26. The third and fourth items were not attached to the written submissions and in any event were already before the First-tier Tribunal such that it is not understood why they were referred to at all as part of a Rule 15(2A) application.

27. The final document is a letter from the translator explaining that the letterhead in the original translation had been copied and pasted from a different piece of translation work with the e-mail address not deleted in error; together with a copy of the Ukrainian lawyer's letter and an updated translation. The letter and updated translation did not exist at the time of the First-tier Tribunal hearing, but it is evidence which could (and should) have been available at the appeal with due diligence from the legal representative. The error on the face of the original translation had been identified by the Respondent in correspondence on 16 December 2019, over 6 weeks before the hearing and further to which the Appellant was on notice that this was an issue. There is no explanation as to why this additional evidence was not sought prior to the hearing before the First-tier Tribunal. In these circumstances, the first test is not met and these documents are not admitted.

28. For these reasons, the Rule 15(2A) application is refused in respect of all documents referred to and sought to be relied upon by the Appellant either in the grounds of permission to appeal and/or in the written submissions subsequently filed.

29. The first ground of appeal concerns the First-tier Tribunal's reliance on the decision in OK reported after the hearing of the present appeal and without the parties being given any opportunity to make submissions on it. The First-tier Tribunal refers to the circumstances and findings in the case of OK in paragraphs 44 to 47 of the decision, including quotation from paragraphs 18 to 20 of the decision of the Upper Tribunal in which no error was found in that case in the First-tier Tribunal's approach to evidence. This included limited weight being given to Professor Galeotti's opinion as to the genuineness of call-up papers and court documents and the letter from the same Ukrainian lawyer as in the present appeal on which it was found that no reasonable judge could have placed any weight on such a problematic document which was considered to be wholly unreliable. In paragraph 57(f) of the First-tier Tribunal's decision, the materially identical letter from the same Ukrainian lawyer was found to be unreliable for the same reasons given by the Upper Tribunal in OK and in addition because of the unreliable translation of the document.

30. The Tribunal did not treat the decision in OK as binding or as establishing any precedent on the facts about the weight to be attached to the

evidence from Professor Galeotti as to the genuineness of documents (there being no reference at all to this case in relation to this matter), or from the same Ukrainian lawyer; but merely adopted the reasoning given therein for why the lawyer's letter was given no weight. There is nothing to suggest that the First-tier Tribunal considered this to be binding, nor that it applied it such. I find no error of law in the cross reference to the findings and reasoning in OK in circumstances where there was materially identical evidence before both Tribunals and about which the same conclusions would inevitably be drawn. This is particularly so in relation to the Ukrainian lawyer's letter, which had the additional difficulty of a translation which on its face contained an obvious error and upon which no reasonable Judge could have placed any weight.

31. Whilst there is some force in principal in the Appellant's appeal on the grounds of procedural fairness that neither party was permitted to make any representations on the case of OK which was reported only after the appeal hearing; in reality this could have had no material impact on the outcome of the appeal. Even without reference to the reasoning in OK, the First-tier Tribunal could rationally only have reached the same conclusions in relation to the weight to be attached to the Ukrainian lawyer's letter and translation on the evidence before it and for the reasons given. For these reasons, there is no error of law on the first ground of appeal.

32. The second ground of appeal is that the First-tier Tribunal failed to take into account the fact that the Respondent held the originals of documents which Professor Galeotti examined scanned copies of (such that the originals were unavailable for inspection) and erred in attaching little weight to the evidence in the absence of forensic qualifications and the expert's explanation of his assessment of the documents, including as to the nature of the scans.

33. The First-tier Tribunal set out in detail the evidence of Professor Galeotti and his qualifications from paragraphs 35 to 39 of the decision (which included his reasons for finding that each document was, in his best professional assessment, apparently genuine). This was followed by detailed reference to the Respondent's concerns and submissions raised in her 'Position Paper' dated 16 December 2019 in paragraph 40 of the decision and Professor Galeotti's response in paragraph 41. It is clear from this that the First-tier Tribunal was aware of and had fully taken into account all of this evidence, including the specific response to concerns about Professor Galeotti's qualifications and that he had not seen the original documents. There is simply nothing to suggest that these matters, having been expressly set out, were not taken into consideration in the decision.

34. Further, it is of note that the Appellant did not at any stage apply for an adjournment of the appeal so that the original documents could be placed before Professor Galeotti for examination and that is unaffected by any dispute with the Respondent as to their location given the Appellant knew that they had been handed to the Respondent's representative at a

previous hearing and that this was a matter which could have been resolved in the process of consideration of any application for an adjournment or the practicalities of one, particularly following the Respondent's Position Paper dated 16 December 2019.

35. It is perfectly permissible for the First-tier Tribunal to have accepted much of Professor Galeotti's report, particularly those parts on which he has specific expertise, experience and qualifications; but not to attach any significant weight to his assessment of the genuineness of documents relied upon by the Appellant for the reasons given. Those were in essence contained in paragraphs 53 and 54 of the decision, that he had only seen copies of the documents and he had no qualifications or expertise in the forensic examination of documents. The view that the documents looked authentic did not advance the matter very far given that if someone was to produce false documents, they may well be expected to make them look as authentic as possible.

36. These were conclusions that the First-tier Tribunal was entitled to reach on the weight to be attached to the evidence on the basis of what was before it, particularly in circumstances where there had been no application for an adjournment or attempt to obtain the originals to put before the expert and where Professor Galeotti accepted that there were differences in court documentation from different locations as well as over time, such that comparison had not been made with documents from the same court but only similar documents and little or no explanation as to how it was known that the documents used for comparison were genuine either. For these reasons there is no error of law on the second ground of appeal.

37. The third ground of appeal concerns the further evidence about the court documents from the Appellant's father upon which no express findings are made by the First-tier Tribunal. The Respondent refers to a number of parts of the decision which set out the Appellant's claim, including by reference to the evidence of or obtained by his father; albeit there is no express reference to the written statement at all and no specific findings on it.

38. However, contrary to the grounds of appeal, the Appellant's father's written statement does not contain any evidence as to how the court documents were obtained or why there was a delay in obtaining and/or sending the same. The statement refers to attending court (with no detail as to what happened other than the outcome that the Appellant was convicted and sentenced), to being told by a single solicitor that he could not assist with an appeal (again with no detail as to the particular solicitor, reasons, nor any attempt to obtain a second opinion) and then to the Appellant asking for a copy of the court decision which was sent by the Appellant's mother. There was no separate statement from the Appellant's mother about this.

39. The First-tier Tribunal, in paragraph 57(d) of the decision, noted that there was a delay in the court document showing conviction and sentence being submitted and rejected the claim that there was a difficulty in obtaining the same given that there was no explanation of this or any evidence as to why there should be any such difficulty. That finding was clearly open to the First-tier Tribunal, there was no such explanation or evidence and it was not necessary to refer to the Appellant's father's written statement specifically in this regard. Documents failing to contain relevant evidence do not need to be listed.

40. It is not necessary for the First-tier Tribunal to expressly refer to each and every piece of evidence in the appeal and despite the Appellant's reliance on his father's written statement, it is self-evident that this was not one of the key pieces of evidence relied upon and nor could it have materially advanced his claim given the lack of detail contained within it (which did not include anything information as to how the court documents were obtained or anything which went to the issue of whether they were genuine) and that the evidence could not be tested in court. In these circumstances, there is nothing to suggest that the First-tier Tribunal failed to take into account this evidence which could not in any event have had any material bearing on the findings made in relation to the court documents or otherwise.

41. The fourth ground of appeal focuses on the First-tier Tribunal's assessment of the Appellant's credibility. The Appellant relies on a number of findings in favour of his credibility, including the rejection of most of the Respondent's reasons for refusal and that the further call-up for service was plausible and consistent with the background country evidence available. The reasons for rejecting the final part of the claim, that the Appellant had been convicted and sentenced for draft evasion are contained in paragraph 57 of the decision, but the Appellant submits that it is unclear what weight is attached to the first four of these matters and appeals on the basis that neither individually or cumulatively, these could not be determinative of adverse credibility and/or, in doing so, had not properly considered all relevant evidence.

42. In relation to paragraph 57(a), the Appellant submits that it is unclear whether the First-tier Tribunal accepted the evidence of Professor Galeotti about prosecution and sentence of reservists; which supports the Appellant's claim. It is however not asserted that there was any specific submissions for departure from the country guidance case of VB nor any sufficient or cogent evidence to do so, the basis of this evidence from Professor Galeotti or otherwise.

43. In paragraph 57(b) there is reliance on the Appellant's screening interview, that he had not raised within it the main reason for his claim to be at risk of persecution on return to Ukraine; and generally as to the assessment of the Appellant's credibility. The First-tier Tribunal in paragraph 57(b) states that it has taken account of the fact that the Appellant did not raise draft evasion as a problem during his screening

interview, despite three sets of call-up papers having been served as well as the summons to attend court; and the Appellant's evidence that he was interviewed with a Russian, not Ukrainian interpreter, albeit at the time the Appellant confirmed that he had understood all of the questions.

44. There is no indication from the decision as to what weight is attached to this factor, amongst a number of other reasons given for rejecting the claim. Whilst it is generally the case that little weight is to be attached to a screening interview given the relatively brief nature of the questions asked, or to any inconsistencies between that and the later claim; it is still likely to be relevant, even if not of significant weight, that the main part of the claim advanced at appeal had not been referred to at that stage. This is particularly so when the Appellant was legally represented at that point. When reading the decision as a whole, I find that some weight has been attached to this factor as adverse to the Appellant's claim, but nothing to indicate any undue weight was given to this point.

45. The First-tier Tribunal relies on an inconsistency in the substantive asylum interview as to the length of sentence in paragraph 57(c); which is referred to in two separate places as two years, compared to the court document which shows a sentence of three years. The Appellant stated that this was simply a mistake by one of those involved in the interview, without any identification or who made the mistake on more than one occasion.

46. The Appellant also refers to the finding at paragraph 57(d) of the decision about the delay in obtaining the court documents and evidence about it; which I have already dealt with above. In short, there was no evidence before the First-tier Tribunal of any substance as to how the document was obtained or why there was a delay or any difficulty in obtaining it.

47. The First-tier Tribunal states that when considering whether the Appellant was convicted and sentenced as claimed, he must show that the documents which bear directly upon those matters are reliable, namely the court documentation and the lawyer's letter. In making that assessment, the First-tier Tribunal states that account is taking of the seven factors set out in paragraph 57 of the decision; with the conclusion in paragraph 58 that having regard to all of the evidence, the Appellant has failed to show that the court documentation and lawyer's letter was reliable, even to the lower standard of proof.

48. The First-tier Tribunal in part sets out the evidence for and against the genuineness of documents, including the Appellant's explanation of certain matters and in part, sets out firmer conclusions or at least the weight to be attached to certain evidence (in particular in relation to the lawyer's letter). It is clear from reading the decision that the First-tier Tribunal has balanced all of the evidence in the round, as it is required to do, when deciding that the Appellant has not established that the court documentation was genuine. It is clear that this was not based on any one individual piece of evidence, but a rounded assessment of all of the factors

in paragraph 57 assessed together and is specifically on the basis of this final part of the Appellant's claim, whether or not the earlier call-up papers were reliable (with a finding that these were at least plausible).

49. It is of course possible for the First-tier Tribunal to find that parts of the Appellant's claim are credible, or at least plausible (no actual positive credibility findings were made as to the call-up papers), but make adverse findings specifically on documentation which needed to be found to be genuine for the Appellant to establish that he was at risk on return to Ukraine. The factors set out were, cumulatively, sufficient for finding that the Appellant had not established that the documents relating to his conviction and sentence were genuine. That conclusion was open to the First-tier Tribunal to reach having considered the evidence in the round. For these reasons there is no error of law on the fourth ground of appeal.

50. The fifth ground of appeal concerns the Respondent's evidence of a national holiday on the date the Appellant claims that he was convicted and sentenced in Ukraine and the First-tier Tribunal's finding in paragraph 57(e) of the decision that there was no evidence that the Court would, or did, sit on a national holiday and the inference was that it did not. As above, the further documents suggesting that the Court was not prohibited from sitting on a national holiday were not admitted as at their highest, they did not undermine the finding that there was a lack of evidence that the Court would, or did, sit on the date claimed.

51. The focus of the written submissions on this ground were on the basis of procedural fairness, that no notice of this being an issue was raised before the hearing and the relevance of the additional document from the Respondent was not apparent at the outset of the hearing. It is also said that it would be an insurmountable financial burden on the Appellant to commission specific evidence on the practice and procedure of the specific court in his home area; albeit if the submission is not accepted by the Respondent, the Applicant would need to consider obtaining such evidence. In those circumstances it is suggested that a paper hearing may not be suitable.

52. However, whether or not this matter is determined with or without a hearing, it is a matter for the Appellant, on whom the burden lies to establish his claim, as to whether any further evidence is relied upon and any such evidence would be required to be available to the Upper Tribunal, accompanied by an appropriate Rule 15(2A) application at the time that the issues of error of law are to be determined. It is clear that no such further evidence is available and therefore can not be taken into account, whether this decision is made on the papers or following an oral hearing.

53. The Respondent has not expressly accepted the evidence nor the submission and there is force in the submissions made on her behalf about the absence of any application for an adjournment to deal with this

evidence and that the Appellant's Counsel in any event having made submissions on it to the First-tier Tribunal.

54. For whatever reason, it remains the case that there is evidence, as was before the First-tier Tribunal, that the court date was a national holiday and that there is no evidence that the relevant court would, or did, sit on that date and as such the First-tier Tribunal were entitled to draw the inference that it did, particularly in circumstances where no application for an adjournment to advance evidence against this was made (even if late in the proceedings when the relevance became clear) and where submissions were made against the inference drawn. If this were the only reason that the court documents were found not to be reliable, then there may be more force in the Appellant's appeal on this point as a matter of procedural fairness, but it was not and again the circumstances that there was no application for adjournment and submissions were made on the evidence is relevant, as is the fact that there is still no evidence against the inference that the court did not sit on a national holiday. In all of the circumstances, I do not find any procedural unfairness on the basis of the fifth ground of appeal nor any error of law in the finding in paragraph 57(e) of the decision.

55. The sixth and seventh grounds of appeal concern the rationality of the findings in paragraph 57(f) and (g) of the decision as to the translation errors in the letter from the Ukrainian lawyer. I do not find that it is irrational for the First-tier Tribunal to find that an obvious error on the face of a translation calls into question the accuracy and reliability of the letter as a whole – it is entirely rational to find that it did, particularly in the absence of any other means of checking the translation of a document in Ukrainian and in the absence of any explanation for the error despite it being identified prior to the hearing. As above, the later letter from the translator explaining the error has not been admitted as it could and should have been available to the First-tier Tribunal.

56. I do find that the First-tier Tribunal's finding in paragraph 57(g) that the unreliability of the lawyer's letter also undermines the reliability of the court document to be without foundation. The fact that the two documents were submitted at the same time does not rationally mean that they were intrinsically linked or obtained at the same time or necessarily from the same source (in fact there is no information at all about how the court document was obtained); nor that the reliability of one was relevant to the reliability of the other. It is possible that one document could not be reliable but the other is; albeit the First-tier Tribunal has given other independent reasons as to why, in the round, that was not accepted.

57. The final question is however whether the error in paragraph 57(g) in isolation, or even together with procedural fairness point in the fifth ground of appeal about the national holiday in paragraph 57(e) of the decision could have been material to the outcome of the appeal; in circumstances where no other error of law has been found. I do not find

that it could have been given the breadth of reasons given for the First-tier Tribunal's adverse findings, considered together in the round. The genuineness of the court document was clearly undermined by the background country evidence, the lack of any explanation as to how it was obtained and the lack of any positive supporting evidence of its genuineness, in circumstances where it was not originally relied upon, where inconsistent information was given about the length of sentence and where the document was dated on a national holiday with nothing to suggest the court would, or did sit on that day. For the reasons already given, it was open to the First-tier Tribunal to attach no weight to the lawyer's letter and there was nothing of substance in the Appellant's father's written statement to support the genuineness of the document either. For all these reasons, there were no material errors of law in the decision of the First-tier Tribunal, who dismissed the appeal on the basis of findings which were open to it on the evidence, having taken all relevant matters into account. The appeal is therefore dismissed and the decision of the First-tier Tribunal stands.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

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 G Jackson Date 9th November 2020

Upper Tribunal Judge Jackson