



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001130
PA/03098/2020**

THE IMMIGRATION ACTS

**Heard at Field House
On the 7 July 2022**

**Decision & Reasons Promulgated
On the 15 September 2022**

Before

**UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE SAINI**

Between

**VR (UKRAINE)
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant and members of his family. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

For the Appellant: Ms. K Degirmenci, Counsel instructed by Yemets Solicitors
For the Respondent: Mr. S Whitwell, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals a decision of Judge of the First-tier Tribunal Pears ('the Judge') who by a decision sent to the parties on 19 July 2021 refused his appeal on humanitarian protection and human rights (articles 2, 3 and 8) grounds
2. Upper Tribunal Judge Blundell granted the appellant permission to appeal to this Tribunal by a decision dated 28 January 2022.

Anonymity

3. The Judge made an anonymity order. Neither party requested that the order be set aside. We confirm the order above.

Brief Facts

4. The appellant is a national of Ukraine and is presently aged 36. He undertook military service in Ukraine between 2005 and 2006, working as a cook, and was subsequently assigned to the military reserves.
5. He entered the United Kingdom in 2009 with entry clearance as an International Sportsperson, valid for six months. He subsequently overstayed.
6. The appellant states that his family received call-up papers sent to him whilst he was in the United Kingdom: twice in January 2014, twice in August 2014 and twice in January 2015. His father attended the military commissariat to explain that the appellant was not residing in Ukraine and consequently no further communication was received from the military in respect of his call-up to the armed forces. He details that the Ukrainian authorities commenced a criminal prosecution in 2020 in respect of his failure to comply with his call-up.
7. He was encountered by the United Kingdom authorities on 17 December 2018 and claimed asylum on the same day. The respondent refused the application for international protection by a decision dated 19 June 2020.
8. The appellant's wife and their child are present in the United Kingdom, the latter being in this country in 2017. Both are Ukrainian nationals.

First-tier Tribunal

9. The appeal came before the Judge sitting at Hatton Cross on 8 July 2021. The appellant attended the hearing and relied upon various documents including an expert report from Professor Mark Galeotti, dated 28 November 2020. Professor Galeotti considered various call-up papers and other documents relied upon by the appellant and opined that they appeared to him to be genuine.

10. The Judge dismissed the appellant's appeal, finding, *inter alia*, that the appellant was not credible as to his stated history of being called up to serve in the Ukrainian military in 2014 and 2015 or as to the Ukrainian authorities initiating a criminal prosecution in 2020.

Grounds of Appeal

11. The appellant relies upon lengthy grounds of appeal prepared by Ms. Degirmenci, who represented him before the First-tier Tribunal. We observe that the grounds of appeal run to thirty-six paragraphs over thirteen pages, considerably longer than the Judge's findings of fact which run to nineteen paragraphs over four pages of his decision.
12. The grounds of challenge against the Judge's decision are particularised by Ms. Degirmenci as follows:
 - (1) Failure to take into consideration relevant evidence in respect of the respondent's conduct of the appellant's asylum interview.
 - (2) Failure to take into consideration relevant evidence in relation to changes the appellant made to his answers in interview and in his witness statement.
 - (3) Failure to take into consideration relevant evidence in relation to the military call-up notices.
 - (4) Failure to take into consideration relevant evidence and consideration of irrelevant evidence in relation to the appellant's documents.
 - (5) Failure to ask questions.
 - (6) Irrelevant consideration in relation to the availability of the sentencing document.
 - (7) Failure to take into consideration the father's witness statement.
13. We consider it appropriate to set out ground 5 in its entirety:

'Ground 5 - failure to ask questions - permission to adduce further evidence

21. At paragraph 61, the Judge finds that the Appellant has failed to produce evidence that his documents arrived in the UK in 2019 and states that they were not seen by anyone until the day of the hearing. With respect to the latter point, this is clearly wrong as the Appellant's representatives at the time confirmed that they were sending certified copies of the originals and invited the Respondent to request the originals if required (see representations made by Sterling Law of 13 March 2020, Respondent's bundle, p70). It was therefore clear that the originals were in their possession.

22. In relation to the second of these points, it was clearly in evidence that the Appellant's documents were sent to him to the UK by his parents. The Appellant clarified that this was by post and he did have the envelope. At no stage at the hearing was the Appellant asked where that envelope was. If the failure to produce this envelope was material to the Judge's decision, he should have asked the Appellant about it. If the Appellant had been asked, he would have explained that it had always remained in the possession of his legal representatives and never returned to him.
23. In fact, the envelope had originally been in the possession of his previous representatives and was then forwarded to the Appellant's current representatives. Due to an apparent misfiling, the envelope had not been stored together with the Appellant's other documents, so that when he went to collect his original documents from his representatives in order to present them at appeal, he was not given the envelope. This was noticed soon after the appeal and an attempt was made to place this before the Judge before any decision was made- please see letter from Yemets Solicitors dated 13 July 2021, with attached certified copy of the said envelope. However, it appears this did not reach the Judge before his decision was made.
24. Permission is therefore sought to produce this letter from Yemets Solicitors dated 13 July 2021 with attached copy of the envelope in which the Appellant was sent his documents to the UK.
25. It is submitted that this evidence, through no fault of the Appellant, was not available to him to produce at his appeal. The failure to locate the envelope was due to human error and has been explained in the representative's letter of 13 July 2021 and the Appellant should not be prejudiced by its late discovery and production.'

14. In granting permission to appeal Judge Blundell observed at [2]:

- '2. It is the fifth ground of appeal which has persuaded me, on balance, to grant permission to appeal. It is said that there that the judge arguably erred in failing to take account of an envelope which was provided on 13 July 2021; after the hearing but before the issuance of the decision. I have not seen the letter from the appellant's solicitors. Nor have I seen proof of postage. It seems that the author of the grounds had enough evidence before her to assert that this document was sent. It is clear from [61] that the judge was troubled by the absence of that envelope. If what is asserted at ground 5 is made out, it is arguable that the judge proceeded, through no fault of his own, on a mistaken factual basis. The assertions in this ground will need to be attested by a statement made by the solicitor with conduct of the matter.'

Analysis

15. We commence our consideration by observing the contents of a letter sent by Yemets Solicitors to the First-tier Tribunal at Hatton Cross after the

conclusion of the hearing on 8 July 2021 but prior to the promulgation of the Judge's decision on 19 July 2021:

'We represent the above named client. We make an application for the following document to be placed before the Judge:

* A certified copy of the original envelope which contained the documents our client relies on in relation to his protection claim, sent from Ukraine by his father to the UK. Our client's evidence is that his father sent him his military documents and military summons to the UK. This is a true copy of the envelope in which the documentation was sent which was in our possession.

We erroneously understood that the envelope had not been forwarded to us by our client's previous solicitors. Please note to date we have never received a full copy of the file despite numerous requests. However, we only just discovered that the original envelope was held in our safe separately from the military documents and military summons received from the previous solicitors. We are not quite sure why this was filed separately and can only put it down to human error.

Shortly before the hearing we met with our client to prepare him for the hearing and we ensured that we handed him all his original evidence. Unfortunately, as the envelope was in kept in another part of the office, we omitted to give it to him to take to Court. We profusely apologise for any confusion caused and request that our client's appeal is not prejudiced due to this.

In light of the above we would request that the hearing is resumed on papers to allow for this evidence to be admitted.'

16. We note the contents of a track and trace report issued by the Royal Mail confirming that this letter was received by the First-tier Tribunal at Hatton Cross at 09.11 on Wednesday, 14 July 2021. This was some five days before the promulgation of the Judge's decision.
17. In respect of the hearing before us, Ms. Anna Bilinsky-Jemec, a solicitor at Yemets Solicitors with conduct of the appellant's case, filed a witness statement dated 6 July 2022 in which she confirmed, *inter alia*:
 - '2. I was first instructed on 14th October 2020. The Appellant had previously been represented by Sterling Law. When the Appellant instructed us, his application for asylum had been refused and he instructed us to prepare for his appeal hearing.
 3. On 14th October 2020 we wrote to Sterling and Law to request a copy of the file. On 28th October 2020 we received a partial file. This included original documentation relied on by the Appellant, including military call-up papers, a military call up notice and military service book and records.
 4. At the time of the appeal hearing we erroneously understood that an envelope received from our client's father in Ukraine containing his original evidence had not been forwarded to us by

our client's previous solicitors. We have never received a full copy of the file despite numerous requests.

5. Shortly before the hearing we met with our client to prepare him for the hearing and we ensured that we handed him all his original evidence.
 6. Following the hearing 8th July 2021 it came to my attention that the envelope was held in our safe separately from the military documents and military summons and notice received from the previous solicitors. We are not quite sure why this was filed separately and can only put it down to human error. Unfortunately, as the envelope was being kept in another part of the office, we omitted to give it to the Appellant to take to the hearing.
 7. On 13 July 2021 I forwarded a letter by recorded delivery (exhibit ABJ1). This letter was delivered to IAC York house on 14th July 2021. I attach the Royal Mail track and trace report (exhibit ABJ2). I requested that the letter be placed before the Immigration Judge who had heard the appeal on 8th July 2021.
 8. In my letter I explained that through no fault of the Appellant, he not been able to produce the original envelope sent from Ukraine as it was not available to him to produce at this appeal and the Appellant should not be prejudiced by its late discovery and production.
 9. With my letter I attached a certified copy of the original envelope (exhibit ABJ3) which contained the documents the Appellant relied on in relation to his protection claim, sent from Ukraine by his father to the UK. It is the Appellant's evidence that his father sent him his military documents and military summons to the UK. I produced a certified copy of the envelope in which the documentation was sent which was in our possession.
 10. I did not send the original because I did not want it to get mislaid as sometimes mail can get lost in the post.
 11. I confirm that I still have the original envelope.
 12. Unfortunately, the letter was not put before the Immigration Judge.
 13. I apologise for my error and the inconvenience that this has caused.'
18. We note that the required notice has not been complied with under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 seeking permission for the appellant to rely upon Ms. Bilinsky-Jemec's statement of truth and the exhibited documents. However, on the particular facts arising in this matter we consider it to be in the interests of justice that those documents are formally admitted.

19. It is unfortunate that this evidence was filed and served late in the afternoon on the day before the hearing but Mr. Whitwell, with his usual helpful frankness, confirmed that he had enjoyed sufficient time in which to consider the contents. Whilst he expressed with clarity the respondent's position that the Judge had ultimately come to the right conclusion, he candidly accepted that as the evidence had been received by the First-tier Tribunal at Hatton Cross at a time when the Judge was still seized of the matter, fairness required that the decision in this matter be set aside. Unsurprisingly, Ms. Degirmenci supported that contention. For the reasons detailed below, we agree.

20. We observe [61] of the Judge's decision:

'61. I have no criticism of the expert. The originals were clearly available and there is no explanation of why they were not supplied to him. The expert gives his reasons why he accepts that the documents are genuine but I make the following observations about his report. He is neither a document expert nor forensic scientist as he himself points out. He was not supplied with the screening interview, the asylum interview and any statement from the Appellant. He makes a comment about the paper on which the documents are usually produced but has not ever seen the original paper of these documents. By the time of his report the Appellant claims (1) that he had been prosecuted and sentenced and (2) his father was not able to obtain the documents that are related to that. However the expert was not told that (although he mentions it in theory at paragraph 78 (iv)) and he had given evidence in VB where evidence of convictions had been supplied – the mother there went and collected them. The original documents all have both handwriting and stamps which he was not able to examine in their original form. The form of all 4 call up papers are identical and so copying one from another might not have been difficult and one would, if one had the originals, have laid each on the top of one another. There is clear reference in the objective evidence to corruption in Ukraine but that issue does not seem to have been considered. **It seems to me that the obvious point to make is that it is said that the call up papers came into existence in 2014 and 2015 and that the Appellant was aware of them and that he claims that they arrived in the UK in 2019 but cannot produce evidence to support that and they were not seen by anyone until the day of the hearing.'**

[Emphasis added]

21. We consider the Judge to have taken great care to carefully assess the evidence placed before him. We also consider that no complaint can properly be made against the Judge himself as to his being entirely unaware of the post-hearing letter sent to the Tribunal on 13 July 2021 with an attendant copy of the envelope, certified as being a true copy of the original by Ms. Bilinsky-Jemec. However, he was clearly troubled by the failure of the appellant to provide the original envelope used to

forward relevant documents onto him. In the circumstances that arise, as accepted by Mr. Whitwell, the principle of fairness is to be applied. Ultimately, a possibly important piece of evidence belatedly relied upon by the appellant was not considered by the Judge at a time when he remained seized of the appeal. The evidence provided under cover of the letter of 13 July 2021 could – and we go no further – have resulted in the Judge reaching a different conclusion as to the genuineness of the documents before him. In the circumstances, whilst sympathetic to the position of the Judge, we are satisfied that the requirements of fairness can only but dictate that his decision as to the humanitarian protection and human rights (articles 2 and 3) appeal is set aside, with no findings of fact preserved, and the appellant be permitted to advance his appeal at a resumed hearing with all the evidence he wishes to rely upon.

22. The appellant did not seek to challenge before us the Judge’s rejection of his human rights (article 8) appeal, at [75]-[77].
23. In the circumstances, we are satisfied that the approach identified by Mr. Whitwell is appropriate. We agree that the proper course of action is for the decision of the First-tier Tribunal to be set aside in respect of the humanitarian protection and human rights (articles 2 and 3) appeals, with no findings of fact preserved, but the decision made in respect of the human rights (article 8) appeal is to stand. Consequently, [75]-[77] are properly to be preserved.

Resumed Hearing

24. The nature or extent of any judicial fact finding which is necessary in order for the decision in this appeal to be re-made is such that, having regard to the overriding objective in rule 2 of the 2008 Rules, it is appropriate to remit the case to the First-tier Tribunal: paragraph 7.2(b) of the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal.

Notice of Decision

25. The decision of the First-tier Tribunal dated 19 July 2021 is set aside in respect of the humanitarian protection and human rights (articles 2 and 3) appeals for material error of law, pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.
26. Findings of fact made by the First-tier Tribunal in paragraphs [58]-[74] are not preserved.
27. The decision of the First-tier Tribunal dated 19 July 2021 stands in respect of the human rights (article 8) appeal.
28. Paragraphs [75]-[77] of the First-tier Tribunal’s decision are preserved.
29. The resumed hearing will take place in the First-tier Tribunal at Hatton Cross, to be heard by any Judge except Judge Pears.

30. An anonymity order is confirmed.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 22 July 2022