Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/14115/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 November 2021	**On 10 February 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

V G
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Panagiotopoulou instructed by Yemets Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Ukraine. He appealed to a Judge of the First-tier Tribunal against the refusal on 3 October 2018 of his application for international protection.

2. The judge of the First-tier Tribunal dismissed his appeal but subsequently the appellant sought and was granted permission to appeal that decision and following a hearing on 9 October 2019 I set aside the judge's decision, preserving certain of his findings at paragraphs 36 to 39. Those findings in effect accepted the evidence of Professor Galeotti who had provided

evidence on the appellant's behalf to the effect that the appellant had been served, through his parents, with call up papers and had been convicted and sentenced in his absence.

3. Subsequently, shortly before a CMR on 16 February 2020, evidence was provided on behalf of the respondent which purported to contradict the document which was said to be the verdict of the Ukrainian Court sentencing the appellant to two years' imprisonment.

4. I adjourned the matter for written submissions to be provided as to the admissibility of this evidence and subsequently, in a decision of 14 April 2001, directed that the evidence was admitted and that it could form part of the submissions to be made at the subsequent hearing.

5. Thereafter there was a hearing before Judge O'Callaghan and me, at which among other things, it was argued by Mr Melvin, that the issue was that of the reliability of the appellant's evidence as to the conviction rather than being alleged there had been fraud. Ms Panagiotopoulou argued that fraud had been raised and would need to be established to the requisite standard and it had never been sought to overturn the factual findings. Our conclusion was it would be necessary to deal with all matters in one go.

6. At the hearing before me on 18 November 2021 the issue of how best to proceed was again canvassed and I concluded after hearing submissions from both representatives that it would be appropriate to proceed to consider both the issue of whether the test set out in AZ [2018] UKUT 245 (IAC) that only where there are identified as being very exceptional circumstances will an error of law decision be revisited or met, and thereafter it would be necessary to consider if such circumstances were made out, whether the Secretary of State's contention that the appellant's evidence was unreliable was made out.

7. In the circumstances, it was agreed that the appellant would not be able to add anything to these issues by way of further oral evidence and the matter proceeded by way of submissions only.

8. In his submissions Mr Melvin relied inter alia upon the country guidance in PK and OS [2020] UKUT 314 (IAC) and also OK [2020] UKUT 44 (IAC). He also referred to VB [2017] UKUT 79 (IAC) with reference to a verification report from the Home Office in 2016 concerning a register. VB had been allowed on the basis of scanned copies of documents. In the instant case the Home Office had used diplomatic measures to obtain documents from the Ukrainian authorities. Paragraph 7 of the skeleton explained why there were redactions and this was common practice in matters of this sort and it was hoped that that explanation would be accepted.

9. As regards the translations which were Google translations reliance was placed on paragraphs 9 onwards of the written argument. It was argued

that this had been provided in February 2021 and other than a general complaint about the evidence to show it was on the Ukrainian court portal, it was only recently that a last ditch attempt had been made to rebut the Home Office submission on this in the form of a letter from a Ukrainian lawyer. Submissions had been made on that in the skeleton. It should be treated as the documentation had been in OK.

10. On behalf of the Secretary of State it was argued that the sentencing document was not reliable. Professor Galeotti was not an expert on the documents and since 2016 he had been providing the Tribunal with expert evidence about documents from the Ukraine appearing to be genuine: however he had not been sent the court documents. He was aware of the Ukrainian web portal and could, if provided with it, have undertaken an explanation or given reasons why the document was there or was not there or why it would not be there. The document had not been put to him and that was relevant. The points made in the skeleton should be taken into account.

11. With regard to the point at paragraph 21 of the skeleton concerning the purported expert evidence from Ukraine, there were reasons why that should be treated with immense caution. It was unclear what documents had been shown to the lawyer and whether the lawyer had checked the web portal. The lawyer had quoted the wrong provision of Article 337 of the Ukrainian Criminal Code. It had only been changed in March 2021 to incorporate a two year sentence so the version relied on in this document did not rely on a prison sentence of two years.

12. Also, the Ukrainian lawyer seemed to claim that it was a secret court and hence its findings would not be on the web portal but, as was pointed out in the skeleton, the document referred to it being heard in open court and it was publicised in the local newspapers and websites seeking the appellant's presence at court and it would be irrational if the Ukrainian authorities would, in the circumstances, treat this as a secret case where he was to be sentenced to prison in absentia for draft evasion and not attending court. This should lead to a finding as to the unreliability of the Ukrainian lawyer's evidence.

13. Reference was also made to what was said about Professor Galeotti's report in Mr Melvin's skeleton argument. Ms Panagiotopoulou had produced what was said to be the original of the court document, with regard to the issue of what the Home Office said was an alteration on that document. That should be considered as part of the evidence in the round. The evidence was unreliable. The judge's findings on the reliability of the documentation had been shown to be wrong. There was a lack of objective evidence to show that Ukrainians were being systematically prosecuted and convicted of draft evasion. This was lacking since 2016 when VB had been heard.

14. With regard to the solicitor's statement of truth, she had not appeared to give evidence today and it should be treated with some caution in the overall handling of the appeal. Professor Galeotti had not been asked to check and there was late evidence. The same submission was made and considered at paragraph 93 in VB. Though the court had been telephoned to seek authentication of the document, the Tribunal had not commented and made no findings on that and there was no evidence given. Article 337 was set out at paragraph 30 of VB and the point about the error in the sentence was reiterated.

15. In her submissions Ms Panagiotopoulou argued that with regard to the criticism of her instructing solicitor not being here today, it had been suggested in the skeleton that attendance would be helpful but it had not been expressly sought and so it would be unfair to criticise her for her absence. She should be given the opportunity in writing to respond to criticism in such a case. The concerns had not been expressly stated and therefore it would be unfair.

16. With regard to VB, Mr Melvin argued with regard to the evidence of verification there. It was very unfortunate that this point was not raised in the skeleton, so we did not have the nature of that verification evidence which was mentioned by Judge Lindsley in that case. From Ms Panagiotopoulou's recollection the evidence was somewhat redacted, somewhat unreliable and the solicitor's evidence was accepted. Mr Melvin sought to draw an analogy between that and the enquiries made of the Ukrainian authorities. This was referred to at Annex A of his argument. It was argued on behalf of the appellant that there could be no comparison between the two reports. Annex A was an approach the United Kingdom authorities made to the Ukrainian government and it was not specific to this case. It was generic and did not seem to deal with the issues in this case. There was no specific request to comment on draft evasion issues and so at best it showed that the Ukrainian government said that they had started to computerise court documents and there were caveats regarding pages 2 and 3 and certain categories of cases were excluded, for example with regard to the investigative judge. The date of the request was June or July 2019. There was no suggestion on the part of the Secretary of State that all the requests had been made with a specific case in mind. She should have made a specific country information or request as was often done and specific targeted questions with regard to the details of conviction for draft evasion.

17. With regard to the "verification report" it was quite difficult to characterise its status. It was a hybrid between submissions and assertions and was not a witness statement and no such statement had been exhibited. The author was not identified: it was not a report. There were questions about its evidential value and it was not known who had done the research, whether they spoke Ukrainian or used Google Translation. The Home Office considered Google Translation to be unreliable. There was no statement of truth, as with Mr Melvin's argument concerning the solicitor.

There was no compliance with the Practice Directions. The Tribunal was asked to accept mere statements. The methodology was of extreme concern. It was not an independent assessment of the evidence as was clear from the tone and expressions used. These were submissions not independent comment, for example at page 15 the Tribunal was asked to accept what was said, but there was no way to know whether these were the correct options. The screenshots at pages 16 and 17 were not translated. With regard to the contention about the clear alteration and the reference to "clearly and disingenuously" at page 35 there were generic concerns about the production of such evidence and whether it should be admitted as reliable. If it were evidence put in by an appellant, the Home Office would not accept it.

18. Mr Melvin said efforts had been made to find the case reference number in the portal and nothing had come up. When the -k was omitted and tried at page 11 of the results it could be seen that one case was triggered but this did not include the appellant's name, which was not included. If one looked carefully by omitting the -k the answer from the web portal was a different case altogether so it was a different case reference and a different case which was unsurprising.

19. There were plenty of other problems with the report. There was a point from page 15 as referred to above that the court was asked to accept a matter of assertion only. Administrative mistakes did occur especially, if as here, the author of the report did not speak Ukrainian but was using Google Translate.

20. With regard to the cases referred to at page 19 and the six of this particular judge, it was all in Ukrainian at page 18 and very difficult to verify if the statement was accurate. With regard to page 22 and the results when they used the appellant's name, again there was no translation. It was unclear whether there was a misspelling and unclear whether it was done accurately. There was no statement of truth, it was just said, it was not the appellant.

21. With regard to pages 25 to 28 and the claim that it was a different signature than the judge's actual signature, that was simply a statement and it was not made by a handwriting expert, but in any event the signatures did not look that far apart, so that submission should be disregarded. It was known that this judge did sit in that court.

22. With regard to the tampering allegation, the original document was produced and it could be seen that it was clear on the original that it had been clarified on the copy, perhaps to assist with the purpose of translation.

23. With regard to pages 33 and 34 of the document and Article 337, this was clearly wrong. The solicitor had highlighted the error and the Home Office assertion was wrong on its own evidence. It could be seen that the two

years was a possible sentence. It was unclear what was meant by "correctional labour" and whether that meant detention but the Home Office statement was incorrect on the Home Office's own evidence.

24. As a consequence, the document relied on by the Home Office did not establish fraud and that was the gateway for seeking to reopen the findings and was now resiled from to unreliability, but that was not the case. The report went further than the application in that it was intended to deal with the court verdict document but it went beyond that at pages 35 and 36 and sought to challenge the judge's factual findings about Professor Galeotti's report. It was not open to the Home Office to do that. The judge had had the documents before him which had been examined by Professor Galeotti and made findings on them. Professor Galeotti had explained his findings. The argument should be disregarded and the matter had not been cross-appealed. It showed that the appellant had been given call up papers and had been a reservists. In any event at page 36 there were factual errors in the criticism. These were dealt with by Professor Galeotti at paragraph 17.

25. With regard to the decision in OK, Mr Melvin said no weight had been given to Professor Galeotti's report, but it did not say that. It was open to the judge and was fact-specific and could not be elevated as was sought to be done. Cases such as VB, had accepted Professor Galeotti as an expert. Likewise, with regard to page 41 of the Home Office document and the call up papers, there was a mere assertion at paragraph 21 and it invited speculation. Again there was a factual error with regard to what was said at page 45 about the office, as referred to Ms Panagiotopoulou's skeleton at paragraph 20. With regard to the comparison referred to at page 46 there was a statement that they were genuine call up papers but again there was no substantial difference. The Home Office had no forensic experience or knowledge of which we had been told.

26. It was necessary for the Home Office to allege fraud to meet the test in AZ. There was no definition of very exceptional circumstances, but it had to be exceptional. The Tribunal would otherwise be flooded by late applications after an error of law hearing and that could not be right. The test had not been met.

27. If fraud was not shown it was not open to the Tribunal to consider the reliability of the evidence and if the Tribunal disagreed the previous assessment of this document had not been shifted by this evidence or with regard to the other documents either.

28. With regard to the fresh evidence provided on behalf of the appellant, previously the Home Office had criticised him for not providing evidence to rebut fraud but he was not required to do so. Clarification had been sought via the Ukrainian lawyer. The Tribunal should consider and accept the lawyer's response. The Home Office had not sought to clarify with the Ukrainian authorities whether this was indeed the case. Mr Melvin said the

expert report and the absence of a statement of truth made it unreliable. However, it did not purport to be an expert report, like the verification report put in on behalf of the Home Office.

29. With regard to the point about the reference in the court document to open proceedings in contrast to what the lawyer said, there was also reference to a special court hearing and that was akin to what the lawyer had said. Also, with regard to the reference to the summons being published in the newspapers, that made known that he had had to attend. Mr Melvin was wrong about this. There were special court proceedings. There was no evidence from the Home Office on the point, but there was some evidence from the lawyer that closed court proceedings existed and hence such decisions were not published on the web portal. This was credible and reliable evidence which should be accepted. Ms Panagiotopoulou adopted her skeleton argument to deal with the points that had not been raised specifically in oral submissions.

30. By way of reply Mr Melvin said that reference to an open court hearing was significant and with regard to Article 337 it was paragraph 2 which had said to be the paragraph relied on where there was not at the time a sentence of two years or more.

31. Ms Panagiotopoulou had no further points to make.

32. I reserved my decision.

Discussion

33. The main issues for decision in this case are first that of the reliability of the reported court document from the Ukrainian Court which the appellant relies on to show that he has been convicted in his absence for draft evasion, and secondly, in light of my conclusions on that, whether it is right to revisit the earlier error of law finding I made, at which time the judge's findings on the documentation were accepted.

34. The judge, as noted above, accepted the evidence that the appellant had been called up and convicted and sentenced in his absence. The late challenge to this finding arises from enquiries made by the Home Office of the Ukrainian authorities which caused them to doubt the credibility of the court document produced. As noted above, after receiving written submissions I accepted that the respondent's evidence in this regard could be admitted. It is now necessary to evaluate that evidence.

35. The request was made in general terms from an unnamed person at the British Embassy in Kiev to the State Court Administration of Ukraine seeking answers to specific questions about the operation of the official web portal "Court Service of Ukraine". We have the response of the State Court Administration, dated 15 July 2019 in response to a letter of 10 June 2019. The specific questions to which answers were sought are also set

out in the letter from the British Embassy official. The questions asked seek responses in relation to such matters as when the Court Service of Ukraine first introduced a publicly available website giving details of court structure, court sittings, court judgments etc., whether the details of every decision of all courts of Ukraine had been uploaded onto the website, how far back in time did decisions available on the website reach, before the introduction of the website how was research and enquiry into court sittings, judgments and decision undertaken, how the many nationwide court decisions and court sittings differentiated from each other, whether there was any possibility of two unrelated cases bearing the same single unique case number (SUCN), how the parties to a matter before the courts received notice of the hearing date, clarification of the parameters of the search criteria used on the website and also clarification of the name search.

36. The response made it clear that the web portal had been functional since 2003, and a list is provided of the courts whose decisions can be accessed through the web portal. This appears to range down from the Supreme Court of Ukraine to decisions of local courts of general jurisdiction. It is said that access to the register can be restricted to the extent necessary for data protection purposes, in particular when a court had made a decision to review a case at a closed court hearing in order to ensure confidentiality or when law enforcement requires certain compulsory instructions to be observed. (I will come back to the restrictions shortly).

37. It is said that it has been possible to make online search of court decisions through the web portal since 1 June 2006. There are a number of data to indicate when making a search of court cases and court decisions, including the name of the court where the case is heard, the case number, the number of judicial proceeding, the surname of a judge, the date of a court decision and its type. Every court case is attributed a number which is automatically generated by the case management system and the court of the first instance remains unchanged regardless of its further progress through other court instances. It is made up of the court code of the first instance, a consecutive number of the court case and the current year/registration year, and the case number is generated according to the principle of consecutive numbering of the second part of the indicated number. Every court case is attributed a single, unique case number which is automatically generated by [a] case management system in a court of the first instance and remains unchanged. The uniqueness of the case number is preserved within each jurisdiction. Parties to the court hearing are informed of the next court hearing by registered correspondence, telephone, fax, email or other means of communication such as mobile phone. Also, it is possible to obtain information regarding a court hearing using the web portal's service "the list of court cases for review". When looking for a particular court decision on the register it is necessary and sufficient to search for the name of the court, the case number of the court and the date when a decision was made. It is said that in order to obtain a differentiated search result on a certain topic it is

best to use other search fields for structured data: the name of a court, a region of court, the instance of court review, a type of court, category of the case, the surname of a judge and content box for structured data.

38. The decision in this case, the date of 7 February 2018 and bears the case number 345/339/18-k. The judge is named as Judge R V Yakymiv and the judgment was issued, it is said, by the Kalush district Court of Ivano-Frankivsk region.

39. Among other things it says that the accused, named, had avoided military training by his deliberate and unlawful actions and committed a crime in accordance with Article 337 (part 2) of Criminal Code of Ukraine. There is reference in the first paragraph to the judgment of the case being looked into during the open court hearing on the date in question. There is also a reference lower down in the penultimate paragraph to "the special court hearing". In accordance with the requirements of the law the appellant was informed about the date and time of the hearing and the summons was issued multiple times in the newspapers and also on the website of the court.

40. Ms Panagiotopoulou has criticised the document produced by the Secretary of State in which the process undertaken in light of the guidance from the Ukrainian authorities was carried out in both general and specific terms, as can be seen from the summary of her submissions set out above.

41. As regards the general criticisms, it is essentially her point that it is unclear what this document is said to be, in that it is not an expert report, it is provided by an anonymous person and it would appear, since it is not said that they speak Ukrainian, that Google Translate may have been used which it is said the Home Office considers to be unreliable.

42. Though there is some force to these complaints, I do not consider that they materially weaken the force of the evidence before me. As I shall go on to set out, there is a description, stage by stage, of the process undertaken and what results were produced, and it does not seem to me that such a descriptive document as this essentially is, is flawed by the failure to identify the author of the report or the quality of the translation. No issue has been taken on the appellant's side with the quality of the translations where there are translations that have been provided. Nor do I consider that there is any material flaw in the redactions of the identities of the requesting individual and the responding individual. I accept that, as Mr Melvin says, this is a customary process in cases of this sort.

43. The report states that the respondent went on to the Court Service of Ukraine (CSoU) web portal and entered the case number separately into the field dealing with the case number and then the preceding number. No results were found on the case number search. Screenshots (untranslated) have been provided. The same search was carried out

though omitting the suffix -k and one result was obtained. However, the only detail that resembled the appellant's case was the name of the court and the number given on the decision. None of the dates or names of anyone mentioned indicated that the case had anything to do with the appellant. This can be seen from a comparison of the two documents.

44. The respondent then went on to locate the portion of the web portal search function relating to the court by selecting the correct options as they are said to have been from the dropdown menus in the search function and then searched for the court's entire output on 7 February 2018. Ms Panagiotopoulou criticised the author of the report for stating that they had selected the correct options when this was a matter of opinion or speculation essentially rather than something that had been proved. But it is not without relevance in my view that the appellant has not sought to challenge this by producing evidence to the contrary regarding the functioning of the process as carried out by the Secretary of State. I shall of course come on to the evidence of the Ukrainian lawyer in this regard in due course, but for now simply state that I do not consider that any material flaw in the process carried out is identified by the fact that the author of the report said that the correct options were selected. Screenshots again are provided. Seventeen cases were produced by the search in which six cases could be seen to involve Judge Yakymiv. None of the six cases concerned the appellant and nor did any of the other cases dealt with by any of the other judges on that day in that court.

45. The respondent then conducted a search by the appellant's surname at the court in question. Three results were obtained, and screenshots and translations are provided. Of those three results none features the appellant or Judge Yakymiv or the date of the purported judgment.

46. The respondent then expressed concerns as to whether the copy of Judge Yakymiv's signature provided on a page concerning property, income and expense declarations of the court's judges contrasted with the signature on the judgment. It is conceded that the Secretary of State is not an expert in graphology but it is submitted that the two signatures are not alike. It is also submitted that the court's decision has clearly been altered, as a manuscript amendment can be seen in the faded typescript on the second line down of the extract provided.

47. I think it is worth commenting on these two matters at this particular stage. The first point is that of the signature of the judge. Like the Secretary of State, I am not an expert in graphology, but it does not seem to me that there are material differences between the two signatures that have been provided. It is very much an impressionistic matter, but I do not see any materiality in this point of criticism that is made on behalf of the respondent.

48. As regards the reported alteration on the court document, though it is the case, as argued by the respondent, that the number 2 of the copy she has

provided does appear to have been by written by hand, I am satisfied from the original produced by Ms Panagiotopoulou at the hearing that the enhancement of the number 2 is simply a consequence of a faded copy by way of photocopy. On the original document the number 2 can be clearly seen as untampered with. I therefore do not accept this element of criticism made by the Secretary of State.

49. The next point argued on behalf of the respondent concerns the appellant's contention that he had been sentenced to two years' imprisonment for failing to answer the call to mobilisation under Article 337 Clause 2 of the Criminal Code of Ukraine. The sentence is set out on the purported court document with that wording at part 2, Article 337 of two years' imprisonment by way of punishment.

50. The Secretary of State refers to Article 337 Clause 2 of the Criminal Code of Ukraine which states as follows:

> "2. Evasion of a conscript from training (or testing) or special fees – shall be punishable by a fine of up to 70 tax-free minimum incomes, or arrest for a term up to six months".

51. It is true, as Ms Panagiotopoulou argued, that a person can be sentenced to correctional labour for a term of up to two years under Article 337 paragraph (1) for evasion of a conscript for military registration after a warning issued by the relevant military commissariat, but it seems to me that the Secretary of State is right to be concerned, as she is in this regard, that the conviction was under Article 337 part (2) which, as noted above, carries a maximum imprisonment sentence of up to six months. It appears that more recently, the sentence can be one of two years, but that was not the position at the time of the purported conviction.

52. The Secretary of State goes on in this document to criticise the evidence of Professor Galeotti with regard to the appellant's military service booklet and call up papers.

53. In this regard, I consider that Ms Panagiotopoulou is right to argue that this challenge is not appropriate for consideration at this stage. The reason why the case was in effect reopened to revisit the error of law finding was because of the evidence produced by the Secretary of State specifically concerning the court document. No earlier challenge had been made to the report of Professor Galeotti, and I do not consider that such a challenge can be attached parasitically to the arguments with regard to the court document. The evidence of Professor Galeotti was accepted by the judge and I consider that that evidence has to be taken together with the evidence concerning the court document as part of the evidence as a whole, to be considered as to reliability and the possible revisiting of the error of law finding.

54. I turn now to the evidence provided most recently on behalf of the appellant as regards the reliability of the Ukrainian Court documentation. A request was made to a Ukrainian solicitor who was recommended to the appellant and who was therefore approached by the appellant's solicitor as regards first whether he agreed with the ambit of the register as summarised in the Ukrainian authority's letter to the FCO, whether this was a complete and accurate portrayal of the register and its contents and whether there are any cases that would be excluded from the register and if so what type and why. He was also asked whether he could confirm whether the appellant's conviction appeared on the system and if not why, and whether there were any other points arising from the communication from the Ukrainian authorities that he considered to require clarification.

55. In his reply, the solicitor, Mr Voznyi, said that the letter from the state judicial administration of 15 July 2019 set out general issues regarding the functioning and the scope of the unified state register of judgments, which was not complete and did not cover all the issues to which he could not agree. He focussed in particular on the fact that in accordance with Article 2 of the Ukraine law "on access to court decisions" the access to court decisions may be limited if the trial took place in a closed court session, the court session is published with the exception of information that by the court decision on the case in a closed court is the subject of protection from disclosure. As defined by law in some cases, a court decision rendered in a closed court session shall not be made public or published in the Unified State Register of Court Decisions for the purpose of not disclosing classified information. In accordance with Article 4 of the same law restriction on the right to free use of the official web portal of the judiciary of Ukraine is allowed to the extent which is necessary to protect the information that the court decides to protect on the case in closed court. He refers to criminal offences and to the criminal code including Article 337. It says that these provisions refer to section No XIV of this code of criminal offences in the section of protection of the state secrets, inviolability of the state borders ensuring the conscription and mobilisation as those that interfere with the state secret such as Article 337. He said that it is incorrect for the defendant to claim that part 2 of Article 337 of the Criminal Code of Ukraine does not contain any other sanction of punishment as seen from the section of punishment, it is punishable, among other things, by forced labour for up to two years. He says that criminal proceedings under this article contain information which, in accordance with Article 8 of the law of Ukraine on state secrets is classified as a state secret. He says that the procedural decisions must not contain information that constitutes a state secret. He goes on to set out various provisions of the law of the Ukraine on state secrets which include within the definition state security and law enforcement and in the section of defence content of strategic and operational plans and other documents to combat management preparation and conduct of military operations, strategic and mobilisation deployment of troops as well as other key indicators that characterise the organisation number, location, combat and mobilisation readiness, combat and other military training,

armament and logistical support of the armed forces of Ukraine and other military formations. He concludes that the absence in the unified state register of a verdict of the Kaluga city district court of Ivano-Frankivsk region from 7 February 2018 on the appellant's conviction under part 2 of Article 337 of the Criminal Code of Ukraine is that it contains information that is classified as a state secret and is not subject to a disclosure.

56. An immediate difficulty with this evidence is that it does not explain why a document has been produced which purports to be the verdict of a court sentencing the appellant to two years' imprisonment for draft evasion if indeed it was a closed court session. Nor does it explain why, other than the fact that the law now reflects this change, the appellant was purportedly sentenced to two years' imprisonment at a time when it seems clear from part 2 of Article 337 that a two year sentence was not applicable. It is also unclear to me why a person's failure to mobilise would be characterised as a state secret, even bearing in mind the various definitions that Mr Voznyi provides from the law of Ukraine on state secrets. Nor have any examples been given of the use of the state secret criteria to exclude similar cases. In short, I am not satisfied that this evidence provides any persuasive basis for concluding that the State Secrets Law would be applied in the case of a person who had simply failed to report for military service, bearing in mind also the fact that the purported decision itself refers to an open court hearing. The fact that it goes on subsequently in the decision document to refer to a special court hearing looking into the criminal case is inconsistent with what was said about the open court hearing and in my view casts further doubt upon the weight to be attached to this document.

57. Bringing these matters together, I consider that the appellant has not shown that the purported court document is reliable documentation for the purposes of establishing the credibility of that document. As noted above, from Tanveer Ahmed, it is for the claimant to show that a document on which he seeks to rely can be relied on. In my view the Secretary of State's report/evidence has cast sufficient doubt on the purported court document that even bearing in mind the further evidence of the lawyer from the Ukraine, I consider that it has not been shown to be a reliable document and hence casts material doubt on whether or not the appellant has been convicted. As noted above, I do not consider that it is open to the respondent to challenge, at this stage, the expert evidence of Professor Galeotti, but of course that does not deal with the court document and simply addresses the military card and the call up papers. They are of course relevant documents to be considered in the round, but the essential claim of the appellant that he is at risk of Article 3 ill-treatment on account of failing to attend for military service has been cast into real and material doubt as a consequence of the evidence produced by the Secretary of State.

58. As was set out at paragraph 38 in Tanveer Ahmed, in asylum and human rights cases it is for an individual claimant to show that a document on

which he seeks to rely can be relied on. The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.

59. The ancillary question however is whether it is appropriate to revisit my earlier error of law finding in light of the views that I have reached on the unreliability of the purported court conviction document. It is clear from what was said by the Upper Tribunal in AZ, and as is set out in Practice Direction 3.7, that the Upper Tribunal has jurisdiction to depart from or vary its decision that the First-tier Tribunal made an error of law such that that decision should be set aside under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. The jurisdiction is however to be exercised only in very exceptional cases.

60. I am satisfied that this is a very exceptional case. It seems to me that where, as in this case, a document, which is central to the appellant's claim, and which had not effectively been challenged by the Secretary of State before the First-tier Judge is subsequently shown to be unreliable, that that can and must in this case amount to a very exceptional circumstance. It is not necessary for fraud to be alleged. The document is pivotal to the appellant's case. Without it, his claim would succeed, since it is common ground that the country guidance from 2020 maintains the earlier view that conditions in Ukrainian prisons are Article 3 non-compliant. As a consequence, I consider that this is a very exceptional case, and as a consequence I have revisited the earlier error of law finding and find that the judge did materially err in law in accepting that the purported court document was a genuine document. Having considered all the evidence in the round, the consequence of this is that the claim cannot succeed since that document cannot be relied on. The guidance in PK and OS [2020] UKUT 314 (IAC) is applicable and it is clear from that guidance that the appellant is not at risk. He does not face a real risk of Article 3 ill-treatment on return to Ukraine since he has not been convicted in his absence of failure to attend call up, and there are no other applicable risk factors. He is not of interest to the authorities. His appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 28 January 2022

Upper Tribunal Judge Allen