Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/01682/2015**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 24th May 2016	**On 2nd June 2016**

Before

UPPER TRIBUNAL JUDGE COKER

Between

M E
(ANONYMITY ORDER MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Brown, counsel, instructed by Greater Manchester Immigration Aid Unit
For the Respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. 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 original Appellant/parties in this determination identified as ME. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. The appellant was granted permission to appeal on the grounds that it was arguable that the First-tier Tribunal judge erred in law in refusing to adjourn to enable the appellant to obtain medical evidence as to the existence and extent of scarring.

2. The appellant, an undocumented Kurd from Iran, gave oral evidence that he had been tortured by Etalat who had damaged his testicles and attempted to write sentences on his bare bottom. There was no medical evidence to that effect and it seems from the First-tier Tribunal decision that Mr Brown, who appeared for ME before the First-tier Tribunal was as much taken by surprise by this evidence as was the judge.

3. The judge correctly refused to permit the appellant to show the claimed scars. The appellant claimed he had been too embarrassed to mention the extent of the torture and scarring previously. Mr Brown asked for an adjournment to enable a medical report to be obtained. First-tier Tribunal Judge D N Harris refused to grant an adjournment.

4. In submissions Mr Brown asked the judge to accept the presence of the scarring even though it had been disclosed late and noting that the appellant had previously referred to ill treatment. The First-tier Tribunal judge in his findings does not accept the appellant's contention that he was too embarrassed to mention the scarring earlier and that it was not credible that he would not have informed his GP. He found that the issue of scarring was a matter introduced to attempt to bolster a weak asylum claim and that the fact they are raised at such a late stage is damaging to the credibility of his testimony.

5. This is an unfortunate handling of what might be a vulnerable witness. The refusal to grant an adjournment to ascertain whether the scars existed or not and then to find that the late disclosure of such scarring in effect meant that they did not is unacceptable. The finding by the judge that a contention that the appellant had been too embarrassed to refer to them previously as being 'completely without substantiation' is very strong language to use against someone who might be vulnerable and might have been assaulted and mistreated in the manner he claims.

6. It may of course be the case that there are no scars or that they could not be consistent with the mistreatment claimed. Late disclosure may be of relevance to the extent that they corroborate his claim for asylum. But the total dismissal of such a claim in the circumstances of this appeal is not acceptable. Although it may be that those who provided legal assistance to this appellant ought to have questioned the appellant more closely as to his claimed ill treatment, the refusal to grant an adjournment in the face of such serious claims and then to hold the late disclosure against the appellant and find, in effect, that the scars do not exist has not enabled this appellant's case to be considered with the anxious scrutiny required.

7. If there is scarring as claimed the existence of that scarring is an element of the evidence that any responsible judge would consider in the context of the evidence as a whole. This does not mean that the other credibility problems the appellant has are of no importance but in an asylum appeal it is of critical importance that *all* evidence is properly considered.

8. The judge materially erred in law in failing to grant an adjournment to enable evidence to be produced.

9. I set aside the decision to be remade.

10. The failure to grant an adjournment means that there has been no effective hearing of the appeal and the findings made cannot be relied upon. That does not of course mean that evidence given by the appellant and recorded in the First-tier Tribunal decision will not be available to the judge who determines the appeal in the future. But the findings are set aside. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal.

11. The Practice Statement dated 25th September 2012 of the Immigration and Asylum Chamber First-tier Tribunal and Upper Tribunal states:

> 7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

12. In the circumstances of this appeal I remit the hearing of the appeal, no findings preserved, to the First-tier Tribunal for rehearing by a judge other than First-tier Tribunal Judge D N Harris.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remit the hearing of the appeal to the First-tier Tribunal, no findings preserved.

Date 24th May 2016

Upper Tribunal Judge Coker