Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03234/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 3 September 2013	**On 30 September 2013**
Prepared 4 September 2013	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR V D
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Shoeb, Solicitor
For the Respondent: Mr T Melvin, Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Armenia born on 6 September 1986. He appeals, with permission, against the determination of First-Tier Tribunal Judge Ross, dismissing his appeal against the decision of the respondent made on 3 April 2013 to refuse him asylum and to remove him from the United Kingdom.

© CROWN COPYRIGHT 2013

2. On 26 April 2013, First-tier Tribunal Judge Easterman granted permission to appeal to the Upper Tribunal and the matter then came before me, sitting at Harmondsworth, on 14 May 2013. For the reasons set out in the decision of 16 May 2013, annexed to this determination, I was satisfied that the decision of First-tier Tribunal Judge Ross did involve the making of an error of law, that it should be set aside and should be remade on the basis that there were no findings of fact which could or should be preserved.

The Appellant's Case

3. The appellant first became actively involved in Armenian politics during the February 2008 protests against what was seen as a rigged presidential election. He was detained by the authorities, ill-treated, and later released without charge as part of the presidential election protests on 1 March 2008. Subsequent to that he set up a group opposed to the current regime and from 2010 onwards was involved with their group in the organising of meetings and demonstrations together with other opposition groups. He was, on account of his activities, detained, beaten and ill-treated by the authorities on several occasions. He continued to give speeches and to organise meetings and had also a presence on-line, setting up a profile for his organisation on Facebook. He still maintains that profile, and the name.

4. In August 2011 the appellant travelled to the United Kingdom with a Tier 5 visa issued for him as a religious missionary. He remained here for some three months, returning to Armenia in October/November 2011. He did so as pressure had been put on his family. On return he continued his activities and continued to have problems with the authorities. He was followed, his phone was listened to and he was beaten on some occasions.

5. Finally, as a result of a severe beating, he travelled back to the United Kingdom on 12 March 2013, using his own passport and claimed asylum on arrival. The appellant fears that if he returns to Armenia, he will face persecution on account of his activism in opposition to the current regime.

The Respondent's Case

6. The respondent's case is set out in the refusal letter dated 3 April 2013 as supplemented by written submissions produced by Mr Melvin prior to the hearing. In summary, although accepting the appellant's identity and nationality the respondent was not satisfied that the appellant had participated in the protests on 1 March 2008 or that he held a political opinion. He did not accept either that he was the founder of Freedom of Speech, write for the Freedom of Speech organisation and given his lack of knowledge of the party's establishment, his inability to state whether it was legal or not and his vague answers given to whether the organisation kept records of the protests and meetings of its activities.

7. The respondent did not accept that the appellant had been arrested as claimed given his unclear answers about the number of occasions that he had been beaten. She considered that his unproblematic departure from Armenia in August 2011, return

later that year and departure again in March 2013 was inconsistent with his claim that he was of adverse interest to the authorities.

8. The respondent considered also that, even if the appellant's account is true, there existed in Armenia a sufficiency of protection for him and in any event, it would be reasonable to expect him to relocate outside Yerevan where his difficulties had arisen. The respondent considered also that the appellant's removal from the United Kingdom would not be in breach of Articles 2, 3 or 8 of the Human Rights Convention or that he was entitled to remain in the United Kingdom under Appendix FM or paragraph 276ADE of the Immigration Rules.

9. In his response to the refusal letter the appellant sets out in his witness statement of 12 April 2013 that he had not given a vague description of the 2008 protest, had not given vague answers since he went to many meetings, that he was an active political activist and that he had worked in different roles between 2008 and May 2010, becoming more active from May 2010 attending meetings with other groups (42 to 45) and that he had given information about this during his interview. He stated also that in 2008, 2010 and 2011 he sustained head injuries [53] and since then his memory has been very bad. He said that returned to Armenia because of the pressure put on him by the police.

Hearing on 3 September 2013

10. Immediately prior to the hearing on 14 May 2013, the respondent released the appellant and thus he ceased to be subject to the Fast Track procedural rules. He had been transferred to Manchester and it was therefore not possible to remake the determination on that that occasion. Further, it appeared from the medical reports produced at that hearing that the appellant may not be capable of giving oral evidence which, it now appears, is the case. For that reason, although the appellant was present before me, he did not give evidence.

11. I heard submissions from Mr Shoeb and Mr Melvin. In addition, I had the following documents before me:

    (a) The respondent's bundle ("RB").

    (b) Appellant's consolidated bundle ("AB").

    (c) Appellant's supplementary bundle ("ASB").

    (d) Initial medical report of Dr Garwood, 5 August 2013.

    (e) Respondent's written submissions.

    (f) Appellant's skeleton submissions.

    (g) Bundle of additional articles written by the appellant with translations (undated).

12. Mr Shoeb submitted that, in the light of the medical report from Dr Garwood, that it would not be appropriate to call the appellant to give evidence. He submitted that although the appellant had been able to give some details of what happened the fact that he could not give full details was not a matter which should be held against him; that he had suffered serious injuries which, according to the doctor, had occurred on different occasions; the objective evidence corroborates the timing of the demonstrations and it was unreasonable to expect him to have produced photographic evidence of his presence at the demonstration in 2008.

13. Mr Shoeb submitted that the centrepiece of the appellant's activities are in relation to Facebook which has an important role to play in Armenia and the fact that the appellant did not belong to an official party with a manifesto of policies did not preclude him from being an activist, it being credible that Facebook would create a political profile such that the state would have an adverse interest in him. Mr Shoeb submitted that even if the appellant's activities did not trigger adverse interest in him at the point of return, his willingness to return in 2008 indicated that he would do so in future and the extent of his activities can be discerned from over 7,000 people who follow his Facebook page which is still active.

14. Mr Shoeb submitted that it was clear from the background evidence that the state monitors activists, including telephones, and so it was possible that the appellant's identity was known to the authorities. He submitted that the police were able to act with impunity and there is no possibility of redress against them. He submitted that the appellant had provided sufficient explanation for why he had returned to Armenia that if he were to return, and to continue campaigning he would face difficulty. He submitted that the appellant's profile had not gone away and that, given that the level of suppression in Armenia ebbed and flowed, it is likely that the appellant would be at risk in any future crackdown. He submitted that the appellant's past persecution was indicative of future risk and that this was consistent with the pattern of injuries occurring at different times in the past.

15. Mr Shoeb did, however, concede that the articles produced at the hearing were poorly translated and added little, after I pointed out to him that the translations did not bear any dates although the originals appeared to bear a date.

16. In reply, Mr Melvin submitted that the appellant was not credible and had failed to give sufficient evidence in support of his claims. He submitted that the evidence of the organisation the appellant claimed to have founded is lacking and that there was nothing beyond the 7,000 Facebook followers. The articles concerned migration and little to show any specific political opposition to the Government of Armenia.

17. Mr Melvin submitted also that there is a healthy opposition now in Armenia and that although there were violent demonstrations in 2008, it which it was possible that the appellant had been involved, there were tens of thousands of people in the street at the time and demonstrations since then had been mainly peaceful. He submitted that it cannot be said that the appellant was a famous or well-known activist when there was nothing to show that he was the head of the organisation who would have

come to the notice of the authorities leading to his ill-treatment or detention. He submitted further that if the appellant had been arrested on as many occasions as claimed, he would not have been able to leave.

18. Mr Melvin submitted that the appellant had failed to provide any evidence that he or his followers had made any complaints to the authorities about his ill-treatment and arrests and the fact that he now appears to be suffering from ill-health that he had been passed fit for missionary work (RB, C40,41) and that Dr Garwood's evidence should be viewed with a degree of scepticism. He submitted that the photographs of what appeared to be a room ransacked, presumably belonging to the appellant or his parents was of little evidential value given that there was no evidence to show what this was. He asked me to note that not a single person has produced any evidence in the form of a letter of support and that the appellant would not be at risk on return.

19. Mr Shoeb, in reply, agreed that Article 8 was not in issue submitting that it would be unreasonable to expect evidence to be adduced by the appellant in the form of statements or letters from people with whom he had associated given that this could be treated as self-serving. He submitted that the people with whom he had been associated would not have been able to give accounts of what the appellant had suffered and submitted that I should take into account the practical difficulties there had been, partly as a result of funding, in the appellant adducing evidence in support of his claim.

20. Mr Shoeb submitted that, as a political activist, the appellant would be compelled to act in a like manner on his return and that, the only reason he would not do so, was fear of persecution. Thus, this appeal ought to be allowed.

Determination and reasons

21. In coming to my determination I have considered the totality of the evidence before me and I have applied throughout the lower standard of proof applicable to asylum claims, bearing in mind also the guidance given at paragraph 210 of the UNHCR handbook, and bearing in mind also that the appellant is, for the reasons set out below [26]-[32], a vulnerable adult. The burden is on the appellant to show that he has a well-founded fear of persecution or that there are substantial grounds for believing that his rights under the Human Rights Convention would be breached. In order to qualify for international protection the appellant must meet the requirements of the Qualification Regulations and the provisions set out in the Statement of Changes in Immigration Rules (CM6918, 18 September 2006), both of which implement Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or a person who otherwise needs international protection and the content of the protection granted.

22. Since it regained its independence in 1991 Armenia has been dominated by the Republican Party of Armenia and there have been numerous and significant flaws with the presidential elections. The US State Department Report for 2012 (AB 15ff) indicates that the most significant human rights problems were limitations on the

citizens' right to change their Government; freedom of speech; arbitrary arrest; and the lack of independence of the judiciary. The report indicates [16] that the police reportedly beat citizens during arrest and interrogation, that the authorities continued to arrest and detain criminal suspects without reasonable suspicion and to detain individuals arbitrarily due to opposition, affiliations or activities. Torture, whilst prohibited by law, is employed regularly with few cases of police mistreatment being reported due to fear of retaliation. It appears elsewhere [18] that there was an atmosphere of impunity which contributes to the increase in abuses on the part of the police. That said, it appears that the detention of individuals with political affiliations of those in activities perceived to be in opposition to the Government appears to have declined [20] but it appears that law enforcement bodies tapped telephone communications and e-mail correspondence of individuals whom the Government wished to keep under scrutiny including human rights activists and the political opposition [24]. There are significant restrictions on freedom of speech and perhaps unsurprisingly on-line websites are said to be the country's most independent information sources with social media such Facebook and YouTube asserting a small but growing influence on social discourse [24].

23. It is evident from the material before me that the demonstrations in February 2008 which were violently suppressed on 1 March 2008 are well documented. They began as a protest against alleged electoral fraud in the Armenian presidential elections of 19 February 2008. Large numbers of people had been involved in demonstrations during the day, with hundreds camping out overnight and an attempt was made on the morning of 1 March 2008 to disperse the several 7,200 people who remained overnight. Subsequent to that a demonstration protesting this took place in front of the French Embassy. That too was suppressed and later it appears that violence and looting erupted, possibly under the influence of agent provocateur.

24. It appears that since the events of February/March 2008 there had been further demonstrations as a result of the suppressions of 2008, most notably between 19 January and 25 November 2011. Partly as a result of this, it appears that the 2013 elections were less corrupt, resulting in the election of a number of opposition parties to the parliament. Nonetheless, serious allegations of electoral fraud have arisen.

25. The appellant has produced a number of photographs which appear in the respondent's bundle. He has also produced evidence of his Facebook account and that he has 7,000 followers; he has also produced articles he has written. He did not, however, give oral evidence before me. I draw no inferences adverse to him from that, and in the light of the medical reports, his decision not to give evidence is understandable.

26. The medical reports on the appellant have been prepared by Dr Alfred Garwood who is a qualified physician, a Member of the Royal College of Surgeons and approved under Section 12 of the Mental Health Act 1999. He interviewed the appellant for an hour and 45 minutes at Harmondsworth Detention Centre on 11 May 2013 finding three types of scars: a temple bone injury, an injury to the thigh and three small scars to the skull. In addition, Dr Garwood used the mini mental

state examination, revealing significant memory impairment, noting that "this was global memory impairment but particularly more severe impairment of short term memory was noted". There appeared to be less cognitive dysfunction but he noted that the clinical presentation was familiar to him having been limited as he had seen it in a number of patients with traumatic brain injuries.

27. Dr Garwood also noted that the appellant had symptoms of post-traumatic stress disorder concluding that the scar on the appellant's temple showed the characteristics that it was caused by severe force from a heavy man-made object, the force being required to cause a depression in the skull being of a high order and a blow with a rifle butt as claimed by the appellant is highly consistent.

28. Dr Garwood noted that the injuries to the thigh appears to be a penetrative injury such as a bullet wound and the injuries to the scalp are diagnostic of injuries caused by splitting of the skin at the same time caused by baton injuries. Dr Garwood considered the memory and cognitive impairment is diagnostic of brain injury, it being likely that the blow causing the temple scarring caused internal bleeding such as a subdural haemorrhage.

29. The updated medical report dated 12 July 2013 (AB, 149 to 163) addresses the questions:

    (i) Does the claimant have the mental capacity to give evidence?

    (ii) If the claimant would give evidence could this be relied upon?

30. Dr Garwood concluded that the appellant would not retain adequate or accurate details of what he been has asked or his answers to the questions as his impaired condition is of a nature and degree that he will not adequately understand some questions put to him and would not reliably understand the content of the questions, and thus the accuracy of his answers would be unreliable. He concludes "his brain injury causes him to be unfit to give evidence".

31. Finally, Dr Garwood explains in a supplementary report in some detail that palpation of the appellant's temple scar showed an indentation which is perfectly linear and the shape of an inverted regular wedge and that the injury from which the appellant suffered was a depression fracture. In such injuries the fracture requires the nature of the causative object which in this case had a linear regular shape as not occurring in nature. He notes also that a neurological examination listed a degree of loss of spatial awareness and fine digital control indicating likely damage to the brain and the mini mental state test is of a type undertaken by all general medical practitioners and those who care for the mental health of the elderly.

32. In the light of these details, and having had regard to his qualifications, I am satisfied that Dr Garwood is competent to give expert evidence both as to the physical injuries the appellant has incurred and as to his cognitive ability. The report gives significant detail as to the injuries to the appellant's skull and I am satisfied that this, together with the neurological examination, the difficulties identified both in terms of motor

control and in recall are consistent with the appellant having suffered a blow to the head from a weapon as a result of which he suffered brain damage. I accept that this has affected his recall, in particular short term memory. I have no reason to doubt, given the doctor's findings, that the appellant is not fit to give evidence that would be reliable.

33. The difficulty with this conclusion for the appellant is that it would tend to indicate that what he said in interview is also unreliable. While that is capable of explaining any ability to recall events and inconsistencies, it also renders less reliable what he did say.

34. Further, the same concerns apply to a witness statement. No satisfactory basis has been put forward as to why what was said in an interview would be any more reliable than what was said in court. If, then, the appellant's evidence is unreliable, there is little reliable evidence as to what the appellant said had happened to him in Armenia and why he is at risk on return.

35. Given the appellant's lack of capacity to give evidence, I have paid close attention to the guidance given in paragraph 210 of the UNHCR Handbook:

> 210. It will, in any event, be necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant, or from his guardian, if one has been appointed. It may also be necessary to draw certain conclusions from the surrounding circumstances. If, for instance, the applicant belongs to and is in the company of a group of refugees, there is a presumption that he shares their fate and qualifies in the same manner as they do.

36. It is with that in mind that I have gave directions to the appellant's solicitors that it may be appropriate and/or useful for contact to be made with the appellant's associates in Armenia with a view to getting some degree of evidence about his activities, the organisations with which he was involved and any indicators of difficulties he had had. I have also taken these observations into account in assessing credibility and the claim as a whole.

37. Despite being given the opportunity to obtain material of the type identified in paragraph 210, this has not been done. I do not accept Mr Shoeb's submission that this would have been characterised as "self-serving" and I bear in mind that it was his firm who relied upon paragraph 210 in their representations to the respondent.

38. The fact that in an adversarial system one's opponent may describe evidence as self-serving is not a good reason not to seek to adduce it. Further, the explanation that there would be little that could be adduced, given the informal nature of the appellant's organisation, and of the political opinions of opposition activists in Armenia carries little weight. In his interview the appellant answers at length details about the organisation he had founded stating (Q53) he was famous all over Armenia, that the group he had formed started in 2010 (Q21) and he describes his

organisation organised demonstrations (Q58), that they were involved with other groups (Q60), several of which including Hak and Jarangut Yun being political parties. He describes his organisation as having a symbol, which he drew (Q63). He also said (Q82) that he told these political parties about the difficulties he had had and (Q109) that his organisation was not organising just their own meetings but also taking part in other meetings with other political parties with whom they cooperated.

39. In addition, the photographs which appear of the appellant with various different people (RB, C2 to C21) including several of him giving speeches also include photographs which he says (Q13) "this is the office where I work for my group, this was in Yerevan, I was the leader".

40. The picture that the appellant is giving is of an organisation structured enough to have an office and a leader. This is entirely different from the picture painted by Mr Shoeb. I consider that it was in all the circumstances of this case reasonable to have expected some evidence from the appellant's organisation and/or other organisations with whom he had been involved.

41. The letter from the appellant's father is lacking in detail and refers to him and his family being harassed and to the appellant having been beaten. Again it contains no dates or any details. It is therefore difficult to attach much weight to it, and as a family member, it is likely that he wishes to assist his son.

42. I accept that the appellant has started a Facebook page with over 7,000 followers which is indicative that he has a profile which is more than just having a lot of friends. The content of the Facebook page is unclear as there are no translations of, for example, his comments on demonstrations or calling people to attend them. Those articles which have been produced, very late in the day, and in what are accepted by Mr Shoeb to be poor translations, add little. The articles, are relatively short, undated with the exception of one dated July 2013 and concern for the most part concerns economic migration from Armenia due to the situation brought around by the current regime.

43. Whilst there were documents in Armenian also at Annex C of the respondent's bundle, translations do not appear there although one of the documents appears to be a contract for the provision of services but the appellant is employed by the "Public Journalist Club" his employment being to distribute within social networks, media centres, press releases and communications. If, as it appears, the appellant was employed by the media centre it is perhaps unsurprising that he appears in photographs taken at the media centre. What he is doing in the photographs is of course dependent on other evidence which is, given the appellant's mental state, unreliable. It is also surprising that no attempt appears to have been made to ask the employer for any confirmation of his activities.

44. Similarly, the appellant's job would appear to involve the dissemination of material in social networks which Facebook is. It is not possible to discern whether his page is

being maintained as part of his job, or whether it is as a political activist, or whether he would be so perceived by the authorities.

45. I accept that although poorly translated, the appellant has written some articles (see ASB) which appear, in a general sense, to be political. It is not, however, clear how wide is the circulation of the articles, or that they are of a character likely to arouse adverse interest, given that they are general in nature, concerned for the most part with claims that the country is being run in such a way that its citizens are leaving for economic reasons. These are not articles making specific allegations against named individuals or organisations.

46. There are translations (AB pp63-64) of letters written by the appellant stating that he has been subject to interrogations and persecution in which [page 64] he appears to be saying that he had gone into the police to try to report things and he has been subject to blackmail (page 63). This appears inconsistent with his statements elsewhere that he had not attempted to report things to the police. Given the documented unreliability of his evidence, an assertion he puts forward supported by his own expert medical opinion, I draw no inferences from this in terms of credibility, but does indicate difficulty in recall.

47. Taking these factors into account and treating the evidence as a whole, I consider that there is insufficient reliable evidence to show that the appellant was a political activist either in 2008 or subsequently. I accept that the appellant has been ill-treated in the past in light of the medical report and I accept also, given Dr Garwood's reports that the injuries occurred at different times. He does not, and this is not a criticism of the doctor, give any timescale for the scars indicating either their age, or how long may have elapsed between them.

48. As the appellant's evidence is not, it is not possible to conclude how long ago the injuries occurred or more importantly, who inflicted them or in what context. The evidence of detentions and consequent ill-treatment other than in connection with the February/March 2008 incidents is vague and lacking in detail. That may well be due to the appellant's impaired recall, but even allowing for that, I consider the evidence of continued adverse interest is insufficient to persuade me that the authorities did continue to pursue him and I note he was able to leave the country on two occasions using his own passport. While I accept that his injuries were inflicted while in detention, I am not satisfied that this, given the lack of reliable evidence of continued interest in him, indicative that the appellant would now be at risk on return to Armenia.

49. There is a significant absence of material relating to the organisation the appellant claims to have founded. As noted above, I do not accept the submission that this organisation is so unstructured

50. In the absence of reliable evidence of continuing adverse interest in him on the part of the authorities I am not satisfied that the appellant is or was a political activist nor over and above what he has placed on his Facebook page. Whilst I accept that he has

7,000 followers and it is likely that his page will have come to the knowledge of the Armenian authorities, I am not satisfied that this is in itself sufficient, absent any other reliable evidence of his activities, to bring him to the adverse attention of the authorities on return, particularly as the contents of the page are unclear,

51. Whilst I accept that Facebook is important, there is little or no evidence to show what steps the Armenian authorities take against those who maintain groups on Facebook or other social media, let alone those who may be posting on Facebook as part of their professional duties. Further, without any details of the content, it is difficult to make an assessment as to how this is likely, given the absence, for example, of specific allegations, that this is likely to incur adverse attention.

52. For these reasons, I consider the appellant has failed to satisfy me that he will, on return to Armenia, be at risk of ill-treatment on the part of the authorities. Further, I do not accept that he will continue his activism in such a way as would incur the adverse attention of the authorities. He may well continue his Facebook page but I am not satisfied that this is sufficient to bring him to the attention of the authorities. I find further that he has failed to demonstrate that the Armenian authorities maintain any adverse interest in him

53. For these reasons, I find that the appellant has failed to satisfy me that his removal to Armenia would be in breach of the United Kingdom's obligations under the Refugee Convention or Articles 2 or 3 of the Human Rights Convention.

54. Mr Shoeb conceded that Article 8 is not engaged in the facts of his case and accordingly, I am not satisfied on the evidence before me that removing the appellant to Armenia would be a breach of the United Kingdom's obligations pursuant to Article 8 of the Human Rights Convention nor am I satisfied that it would be contrary to the provisions of the Immigration Rules.

Signed Date

Upper Tribunal Judge Rintoul

ANNEX –ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: AA/03234/2013

THE IMMIGRATION ACTS

Heard at Harmondsworth
On 14 May 2013

Determination Promulgated

……

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

V D
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Enright, Solicitor
For the Respondent: Mr G Phillips, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Armenia born on 6 September 1986. He appeals with permission against the determination of First-tier Tribunal Judge D Ross promulgated

on 17 April 2013 dismissing his appeal against the respondent's decision of 3 April 2013 to refused him asylum and to remove him from the United Kingdom.

2. The basis of the appellant's claim is that he is a political activist, opposed to the government of Armenia. He was first detained during demonstrations on 1 March 2008, and has been arrested on numerous occasions since then, but always released. He has suffered serious head and other injuries whilst detained, the head injuries causing memory problems. He has founded a group – Freedom of Speech - and in 2010 he set up a Facebook page about Freedom of Speech which was critical of the government and has over 7000 members. That has brought him to the adverse attention of the authorities. In 2011 he came to the United Kingdom as a missionary, having obtained a tier 5 visa, but returned to Armenia after a few months due to threats and violence towards his family from the police. In 2013 the appellant returned to the United Kingdom, claiming asylum on arrival, as he had been threatened by persons unknown.

3. The respondent considered the appellant's claim within the Fast Track procedure. She did not accept the appellant's account, finding it evasive, inconsistent and lacking in detail particularly in respect of the organisation he claimed to have founded. She considered also that, if true, there was a sufficiency of protection for him in Armenia, or in the alternative, that it would be reasonable to expect him to relocate within his own country.

4. On 3 April 2013 the appellant's representatives wrote to the respondent requesting that the appellant be removed from the Fast Track procedure. That request was rejected, the respondent stating that no diagnostic findings had been made with regard to the appellant's account of ill-treatment.

5. The appeal against that decision came before First-tier Tribunal Judge D Ross, within the Fast Track procedure. Immediately prior to the hearing, the respondent served on the appellant a medical report which discloses that the doctor had concerns that the appellant may have been the victim or torture; that he had scars; and, occasional amnesia following a head injury.

6. The appellant then made an application for the appeal to be adjourned in order for a detailed medical report to be prepared. That application was refused.

7. Judge Ross dismissed the appeal, finding that:
    i. He had sufficient evidence of the appellant's injuries from the doctor's report and that it as not likely that a new report would be able to add much [14];
    ii. The appellant had three separate injuries to hi head which may explain why he was vague in his description of events [14];
    iii. The appellant had been present at the demonstration in March 2008 and had been arrested and injured following it [20], but that he had not suffered other assaults, given his inability to recall descriptive details
    iv. The appellant has a Facebook page "V Freedom D" with over 7000 followers but which makes no reference to his political activities [21];

v. The appellant had not proved that he had given a speech at the Media Centre [22], although it was clear that he had been there;
vi. The appellant had not given a proper explanation for his returned to Armenia in 2011, noting he had done so without being stopped on arrival [22]; that it was not clear why the authorities were putting pressure on his family while he was out of the country; and, that he had not explained adequately why he had decided to leave in 2013 if, as before, the authorities were putting pressure on his family.
vii. There was a marked lack of evidence to show that the appellant is, as he claims, an important anti-government activist [25];

8. The appellant sought permission to appeal to the Upper Tier on the grounds that:

i. It was procedurally unfair not to remove the appeal from the Fast Track and/or adjourn it to allow for an additional medical report, given the report that indicated the appellant had been tortured and suffers from memory loss;
ii. The judge had been inconsistent in accepting head injuries as an explanation for vagueness [11] in description of events, but not in his description of other assaults [20];
iii. The judge's findings that the appellant was not a well-known political activist was contrary to the evidence before the court.

9. Permission to appeal on all grounds was granted by First-tier Tribunal Judge Easterman on 25 April 2013. Subsequent to that, on 13 May 2013, the appellant was released from detention and so the appeal is no longer subject to the Fast Track Procedure rules. The appellant was, it appears accommodated overnight with a view to being sent to NASS accommodation in Liverpool the date of the hearing which, of necessity, proceeded in his understandable absence.

Did the determination of the First-tier Tribunal involve the making of an error of law?

10. Mr Enright submitted that on the basis of the medical report from the detention centre doctor, it was apparent that he had concerns that the detained had been the victim of torture, suffered from memory loss, and that this in itself indicated he should not be detained or the matter retained within the Fast Track. He submitted also that the need for an appropriate medical report was shown by the judge's inconsistent handling of the memory problems and the guidance in the UNHCR handbook.

11. Mr Philips submitted that the medical report before the judge simply repeated what the appellant had told the doctor, and that an adjournment would have been speculative, the appellant's representatives having failed, contrary to the Fast Track rules to provide a date within which the appeal could be relisted. He submitted further that the delay in serving the doctor's report had been due to the appellant on whom it had been served failing to pass it to his representatives.

12. Mr Philips submitted further that the judge's findings had not been inconsistent with respect to the findings as to the appellant's memory loss as an explanation for different events.

13. Whether or not to adjourn the appeal or to take it out of the Fast Track was a matter for the judge's discretion, but the question to be asked is was the decision not to do so fair? Where an appellant seeks to be allowed to establish by contrary evidence that the case against him is wrong, the question will always be, whatever stage the proceedings have reached, what does fairness demand? In this case, discrepancies in this evidence had been held against him, and a medical report, indicating he may be the victim of torture and that he may suffer from memory problems had been adduced.

14. As was noted in SH (Afghanistan) [2011] EWCA Civ 1284 [15]:

> …….Tribunals, like courts, must set aside a determination reached by the adoption of an unfair procedure unless they are satisfied that it would be pointless to do so because the result would inevitably be the same. Both Simon Brown LJ and Dyson LJ reminded themselves, as all faced with the argument that the result would inevitably be the same must remind themselves, of Megarry J's evocation of the essence of justice in *John v Rees* [1970] Ch 345,402:-

15. The report from the detention centre doctor was prepared under rule 35. While it is based on what the appellant told the doctor, it would not be proper to consider it simply as a record of that, given that the doctor gives his professional evaluation at section 3 that he has concerns that the appellant had been the victim of torture. The wording mirrors that of rule 35 which places him under a duty to report such concerns.

16. The respondent' policy is, as is set out in the refusal letter, that those in respect of whom there is independent evidence of torture should not be kept within the Fast Track.

17. It is in the circumstances difficult to see the detention centre doctor's report as anything other than independent evidence of torture, indicating that the matter should not have been retained within the Fast Track.

18. I note Mr Philips' submission that the report in question was served on the appellant under cover of a letter dated 10 April 2013, but that does not take account of the difficulty, the appellant being in detention, of him passing it to his representatives.

19. The Fast Track rules permit an adjournment only if a future date within 10 days is identified, and as Mr Philips submitted, it is not clear that this was done. While I note Mr Enright's submission that he had undertaken to do so, it is not clear from the record of proceedings that his had been noted.

20. That said, the report did indicate head injuries, and the judge appears to direct himself [11] that this may account for vagueness in description. The determination does therefore show that the judge was aware of the possible problem yet it appears [20] that he has confined himself to considering that only recall of dates would be affected rather than other details. The determination does not disclose any proper evidence for such a conclusion. Having accepted that the appellant's head injuries may account for problems in recall, it was incumbent on him to explain adequately why he accepted that explanation for some problems but not others. I consider that he has not done so.

21. In addition, in the light of the report from Dr Garwood, it could not reasonably be said that adjourning the appeal would have made no difference.

22. For these reasons, I am satisfied that in this case, there was procedural unfairness in refusing to adjourn the appeal or take it out of the fast track procedure in order that a full medical report on the appellant could be undertaken. I am satisfied that the lack of such a report was material, given that the appellant's inability to recall details may be due to head injuries, and as that inability gave rise to adverse credibility findings.

23. I consider that in the circumstances, the determination must be set aside and re-made. Given that the errors identified affect the credibility findings, there are no findings of fact which could or should be preserved but nonetheless, given the appellant's medical condition it is not apparent that he will be giving further oral evidence.

Signed Date: 16 May 2013

J K H Rintoul
Judge of the Upper Tribunal