



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/03127/2015

THE IMMIGRATION ACTS

Heard at Field House

On 2nd September 2015

**Decision & Reasons
Promulgated**

On 6th October 2015

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**MR SUTHARSAN BALASUBRAMANIAM
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muquit, Counsel instructed by Kanaga Solicitors

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant complains of error of law in the determination of his appeal by First-tier Tribunal Judge Boylan-Kemp. The primary ground of his challenge is that the Judge's approach to the medical evidence is legally flawed, having regard to the guidance given in *JL* (medical reports-credibility) China [2013] UKUT 145 (IAC) and the guidance on self-infliction by proxy of scarring in *KV* (scarring - medical evidence) Sri Lanka [2014] UKUT 230 (IAC).

The law

2. The guidance given in *JL* is set out in the judicial headnote as follows:

*“(1) Those writing medical reports for use in immigration and asylum appeals should ensure where possible that, before forming their opinions, they study any assessments that have already been made of the appellant’s credibility by the immigration authorities and/or a tribunal judge (*SS* (Sri Lanka) [2012] EWCA Civ 155 [30]; *BN* (psychiatric evidence discrepancies) Albania [2010] UKUT 279 (IAC) at [49], [53])). ...*

*(3) The authors of such medical reports also need to understand that what is expected of them is a critical and objective analysis of the injuries and/or symptoms displayed. They need to be vigilant that ultimately whether an appellant’s account of the underlying events is or is not credible and plausible is a question of legal appraisal and a matter for the tribunal judge, not the expert doctors (*IY* [47]; see also *HH* (Ethiopia) [2007] EWCA Civ 306 [17]-[18]).*

*(4) For their part, judges should be aware that, whilst the overall assessment of credibility is for them, medical reports may well involve assessments of the compatibility of the appellant’s account with physical marks or symptoms, or mental condition: (*SA* (Somalia) [2006] EWCA Civ 1302). If the position were otherwise, the central tenets of the Istanbul Protocol would be misconceived, whenever there was a dispute about claimed causation of scars, and judges could not apply its guidance, contrary to what they are enjoined to do by *SA* (Somalia). Even where medical experts rely heavily on the account given by the person concerned, that does not mean their reports lack or lose their status as independent evidence, although it may reduce very considerably the weight that can be attached to them.”*

3. In *KV*, the Upper Tribunal gave the following guidance, encapsulated in its judicial headnote:

“1. When preparing medico-legal reports doctors should not – and should not feel obliged to – reach conclusions about causation of scarring which go beyond their own clinical expertise.

2. Doctors preparing medico-legal reports for asylum seekers must consider all possible causes of scarring.

3. Where there is a presenting feature of the case that raises self-infliction by proxy (SIBP) as a more than fanciful possibility of the explanation for scarring:-

(i) a medical report adduced on behalf of a claimant will be expected to engage with that issue; it cannot eliminate a priori or routinely the possibility of SIBP; and

(ii) a judicial fact-finder will be expected to address the matter, compatibly with procedural fairness, in deciding whether, on all the evidence, the claimant has discharged the burden of proving that he or she was reasonably likely to have been scarred by torturers against his or her will.

4. *A lack of correlation between a claimant's account and what is revealed by a medical examination of the scarring may enable a medico-legal report to shed some clinical light on the issue of whether SIBP is a real possibility.*

5. *Whilst the medical literature continues to consider that scarring cannot be dated beyond 6 months from when it was inflicted, there is some medical basis for considering in relation to certain types of cases that its age can be determined up to 2 years.*

6. *Whilst if best practice is followed medico-legal reports will make a critical evaluation of a claimant's account of scarring said to have been caused by torture, such reports cannot be equated with an assessment to be undertaken by decision-makers in a legal context in which the burden of proof rests on the claimant and when one of the purposes of questioning is to test a claimant's evidence so as to decide whether (to the lower standard) it is credible."*

Factual background

4. The present appeal arises out of events which occurred during a visit by the appellant to Sri Lanka in February 2014 for his sister's wedding, from which he returned with what he said was fresh scarring from torture by the Sri Lankan authorities. The appellant had flown here directly from Sri Lanka on his own passport, and on his account went to his GP within a week of arrival with pain and wounds which had not healed. The respondent refused leave to remain on asylum grounds on 5th February 2015 without raising any issue as to the scarring having potentially been self-inflicted by proxy (SIBP).
5. The appellant has an accepted history of having been, at least at a low level, involved with the LTTE, which the respondent accepted. Other members of the appellant's family are said to have been involved with the LTTE and it is accepted by the judge that one of his brothers died in 1995 in combat, having joined the LTTE of his own volition. Two of his brothers are in Australia where they have refugee status.
6. The appellant produced medical reports from Mr Andres Izquierdo-Martin FRCSEd FCEM, Consultant in Emergency Medicine at the Royal Free Hospital in London, and Dr Saleh Dhumad MBChB MRCPsych MSc CBT, a consultant psychiatrist at Central and North West London NHS Trust. Mr Izquierdo-Martin examined the appellant on 13 April 2015 and Dr Dhumad examined him on 28 April 2015: only Dr Dhumad had a copy of the refusal letter to assist him. Dr Dhumad also had sight of Mr Izquierdo-Martin's report.
7. In his report on the appellant's scarring, Mr Izquierdo-Martin indicated that he had taken account of the requirements in KV and he did consider whether the injuries could have been self-inflicted by proxy. His report says this:

"Caused by a third party - This is the most likely cause, however, from inspection of the scars it is scientifically impossible to differentiate self-

infliction of injuries by proxy (SIBP) from injuries caused by torture. It is important to consider that in the case of burns inflicted by a third party it would be necessary for the subject to hold or be held still for the duration of each episode of burning otherwise the edges of the scarring would tend to be blurred or not just completely straight; the scars on the claimant's back showed some of the margins to be slightly undulated and slightly wider and this could be due to the claimant flinching during the burning of the body. Although SIBP as a possible cause cannot be discarded and has been considered, there is not presenting fact making it more than a remote possibility. Also these are not scars that are typical of any religious or cultural rituals and they were not caused by any surgical procedure."

8. He set out why he considered that the wounds in question were unlikely to have been either self-inflicted or SIBP and also a number of other means of ill-treatment which the appellant said had occurred to him in detention. Mr Izquierdo-Martin concluded, applying the Istanbul Protocol analysis at paragraph 188 thereof, that the wounds overall were 'typical' of the events the appellant described and were likely to have been caused by a third party and as described by the appellant.

9. At paragraphs 47 - 48 the judge analysed that evidence thus:

"47. ...Dr Izquierdo-Martin considered the possibility of SIBP but concluded that as there were no relevant presenting facts to indicate that the injuries may have been caused by SIBP then the appellant's account was the most likely explanation. However, Dr Izquierdo-Martin did not have sight of the relevant Home Office documentation and therefore I find that his conclusions were based upon a one-sided account presented to him by the appellant. I also note that Dr Izquierdo-Martin, on the evidence before him, did not rule out the possibility of SIBP."

Pausing there, that is an inaccurate description of Mr Izquierdo-Martin's report, which made it very clear that the scarring was 'typical of' marks caused in the way the appellant described. The Judge continued:

"48. Further, when questioned about the injuries he had suffered during his time in detention the appellant was unable to remember if he had sustained other injuries besides those on his back. I do not find it plausible that if the appellant had been detained and tortured as he describes that he would be unable to remember the other injuries he suffered as a result of the beatings inflicted upon him. Therefore I find that this adversely impacts upon the appellant's credibility on this point and so when taking all the evidence in the round I am not satisfied, even to the low standard, that the injuries were inflicted upon the appellant in the manner that he describes."

10. The Judge did not take into account the fragility of the appellant's mental health, as evidenced in Dr Dhumad's report, when assessing what the appellant would now be able to remember. In both of the medical reports the appellant was able to describe other unpleasant things which had happened to him during his detention at Veppamkulam CID camp, which it is not necessary to repeat in this decision.

11. As already stated, the record of the appellant's asylum interview and the respondent's refusal letter do not put SIBP in issue in relation to the injuries found on his body. The evidence of Mr Izquierdo-Martin was that the likelihood of the scarring being caused by SIBP was remote. The First-tier Tribunal appears to have misunderstood that evidence when considering credibility and the effect of that error was material to the outcome of the appeal.
12. When preparing his medical report, Dr Dhumad had the benefit of seeing both Mr Izquierdo-Martin's report and the respondent's letter of refusal. He concluded that the appellant was experiencing a Moderate Depressive Episode as defined in ICD-10 F 32.1 and also had post-traumatic stress disorder (ICD-10 F43.1) and an adjustment disorder (ICD-10 F43). The psychiatric evidence was taken into account only to the extent that it indicated whether this appellant could be safely returned from the support of the UK health system to the support of the Sri Lankan health system, having regard to his depression and various other problems such as posttraumatic stress disorder. In reaching a conclusion as to credibility, the Tribunal took no account of the discussion in Dr Dhumad's report of the origin of the appellant's symptoms or of his account: that is a plain error of law, because the Tribunal should have weighed all the evidence, including the psychiatric evidence, before finding the appellant's account to lack credibility.
13. Accordingly I am satisfied that the First-tier Tribunal erred in its approach to both medical reports, as to the weight given to that of Mr Izquierdo-Martin and the admissibility of the evidence of Dr Dhumad in assessing credibility. The error is material and the decision must be set aside and remade in the First-tier Tribunal.
14. Any further directions will be made by the First-tier Tribunal when the file is received there.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I have not been asked to make any anonymity order and I do not consider it necessary to do so.

Signed

Date

Upper Tribunal Judge Gleeson