



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00061/2018

THE IMMIGRATION ACTS

Heard at Field House
On 3 November 2021

Decision & Reasons Promulgated
On 23 November 2021

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

TS
(Anonymity order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Wass, counsel instructed by David Benson & Co

For the Respondent: Mr T Melville, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Sri Lanka born on 19 October 1985. He appeals against a decision of Judge of the First-tier Tribunal Bart-Stewart sitting at Taylor House on 31 January 2018 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 15 December 2017. That decision was to refuse the Appellant's application for international protection. For the reasons we set out

at [11] and [12] below the case comes before us following remittal to the Upper Tribunal from the Court of Appeal.

2. The Appellant left Sri Lanka on 3 April 2016 using a false French passport travelling to Paris. He told the Respondent he arrived in the United Kingdom the following day 4 April 2016, clandestinely. He claimed asylum on 26 April 2016. For the purposes of this appeal, the basis of the Appellant's claim was that he had been arrested twice in 2016, on January 25 and March 1, having accused the army/CID of killing his brother. On the second occasion he was tortured by being beaten with sticks and burnt with heated rods. He left detention on payment of a bribe.

The Medical Evidence

3. The Appellant relied on a medical report from Doctor Baha Al-Wakeel as support for his claim to have been tortured. At [45] of her determination Judge Bart-Stewart examined the doctor's report in some detail. She noted that the doctor had an active clinical practice as an accident and emergency consultant and dealt with many cases of trauma. He had wide experience in preparing medico legal reports and scarring reports in line with the Istanbul protocol. The doctor was familiar with the case of **KV (scarring - medical evidence) Sri Lanka [2014] UKUT 230 in** the Upper Tribunal. He considered whether any of the scars that the Appellant attributed to being caused by torture could have been caused by self-infliction or self-infliction by proxy. There were areas of scar tissue on the chest back and legs and linear scars on the chest, back and left shoulder and small linear scars above both ankles. All except the scars on the legs were consequences of the same causation that is burning by a metal object. They were irregular in shape and horizontally situated above the ankles. They were typical of burns caused by hot metal objects and supported the description of the Appellant.
4. They were unlikely to have been caused by skin infections such as a boil or insect bites or infected wounds. They were extremely unlikely to be due to an accidental injury owing to the regularity of the shape of the scars, the number and the fact that they were caused by application over a long time rather than just touching of the skin as might happen during an accidental injury. It was unlikely the scars were inflicted by the Appellant himself due to their positioning. The scars were of many months age and they were nearly fully mature. It was difficult to give a precise age but psychological trauma due to the torture was still active.
5. At [17] the Judge summarised the Respondent's objections to the report of Doctor Al-Wakeel. The doctor had said that the Appellant's injuries were typical of the explanation given by the Appellant and highly unlikely to be caused by any other method including self-harm or the use of a friend for asylum purposes. The wounds were assessed and concluded to be of many months age which supported the Appellant's claim that they were caused in March 2016. There were photographs of the scarring across the Appellant's body. At paragraph 48 of the refusal letter, the Respondent noted that when expressing a (final) conclusion the

doctor did not use the terms expected such as “consistent with” “highly consistent”, “typical of” or “diagnostic of”. Rather the doctor had said the scars were caused by being intentionally injured but the Respondent concluded from that that the doctor did not certify that the scars were caused by torture.

The Decision at First Instance

6. At [49] the Judge noted the wording used in the report that the scars were typical of the events described by the claimant of being intentionally burned. The doctor had no doubt that the injuries were caused by being intentionally injured. The most likely explanation was that he was severely tortured as described by the Appellant. “Typical of” would describe a lesion with an appearance that was usually found with this type of trauma but where there were other possible causes. At [50] the Judge considered the authority of KV in the Upper Tribunal although she had noted at the beginning of her determination that she had been referred to the Court of Appeal decision in that case.
7. The allegation of self-infliction by proxy had not been raised by the Respondent but by Doctor Al-Wakeel himself although it was not incumbent on medical experts to refer to the possibility if it had not been raised as an issue previously. At [52] the Judge expressed some scepticism that the Appellant would have been released by the authorities if they were also interested in questioning the Appellant’s sister in law and there was no explanation why the CID had not gone to the sister in law to warn her off the case.
8. At [55] the Judge referred to the Appellant’s GP records which were attached to the report of Doctor Dhumad. The Appellant had registered with a GP on 13 May 2016 shortly after arrival in the United Kingdom when his symptoms should have been most acute having been subjected to over two weeks of severe torture and trauma. However, there was no indication of that in the GP notes. The Appellant had a new patient health check, numerous diagnostic tests relating to high blood pressure and thyroid problems. There were many consultations with the GP before the refusal of the Appellant’s asylum claim but it was only on 11 January 2018 after the Appellant’s application was rejected by the Respondent that there was then a report of poor sleep pattern, persistent headache, depression. The Judge found it unlikely that the GP had omitted these symptoms if the Appellant presented with any of them before his asylum claim was refused. The Judge concluded at [55]: “I find this undermines the credibility of his claim that he had been subjected to torture shortly before arriving in the United Kingdom.”
9. The Judge noted at [57] that the medical report confirmed there were other possible causes for the scars which were not diagnostic of being caused in the way described by the Appellant. The Judge did not accept that the Appellant had made a public complaint or was involved with issuing a case against the authorities and did not accept that the Appellant had been arrested and tortured. She found that medical care was available in Sri Lanka and dismissed the appeal.

The Onward Appeal

10. The Appellant appealed against this decision on 20 March 2018 in grounds settled by counsel who had appeared at first instance. The relevant ground for the purposes of this appeal was Ground 2 - Assessment of the Medical Evidence (which became ground 3 in the Court of Appeal). This argued that the FTTJ had materially erred in law by finding that the "typical" finding as to the Appellant's scarring made in the medical report was not corroborative of the Appellant's account of being ill-treated by the authorities. The FTTJ had completely misunderstood the rationale of **KV** in that she found that as there were other possible causes for the injuries, that permitted her to reject the causation of the Appellant's scarring. The Respondent had demonstrably failed to particularise any presenting or clinical features that supported an alternative causation. The FTTJ's finding that the Appellant had not provided any reason why the authorities would have an interest in the Appellant and his brother amounted to a conclusion by the Judge that the Appellant was not arrested and tortured as claimed.
11. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Kelly who refused permission on this ground but granted permission on the Appellant's sur place activities. Deputy Upper Tribunal Judge Harris sitting at Field House on 17 May 2018 found no material error of law in the First-tier Tribunal decision and dismissed the appeal. The Appellant appealed to the Court of Appeal which allowed the appeal on the basis of ground 3 of the Appellant's grounds of appeal only namely the First-tier Tribunal's treatment of Doctor Al-Wakeel's medical report of 27 October 2016 [in fact the report is dated 11 November 2016, the examination of the Appellant was on 27 October 2016] in relation to scar tissue on the Appellant's body. The other grounds of appeal were refused permission by the court and were no longer pursued by the Appellant.
12. The appeal was remitted to the Upper Tribunal for it to consider whether the First-tier Tribunal materially erred in law in its treatment of the medical evidence as aforesaid. Lord Justice Singh considered that the Upper Tribunal should examine ground 3 of the grounds of appeal in light of the Supreme Court decision in **KV (Sri Lanka) UKSC 10** as this ground met the criteria for a second appeal and in any event there was a compelling reason for the Appellant's appeal to be heard on that ground only.

KV (Sri Lanka) UKSC 10

13. This case involved a Sri Lankan Appellant who told the Respondent that he had been arrested and tortured by the authorities. He had five long scars on his back and two shorter scars on his right arm, all of which were on any view the product of branding with a hot metal rod. He produced a scarring report from a medical expert, Doctor Zapata-Bravo who said the scars on the Appellant's body were highly consistent with the account given as to their

causation. The Court of Appeal [2017] EWCA Civ 119 were concerned with whether in saying this, the doctor had trespassed on the proper role of the tribunal in assessing the credibility of the Appellant's claim, and whether he should have confined himself to an account of the mechanism of the injuries. They stated at paragraph 33 of their Judgement:

"In making this latter statement [that his findings were highly consistent with KV's story], Dr Zapata-Bravo seems to have moved from an assessment whether the relevant lesions (i.e. the burns scars) could have been caused by the trauma described (i.e. the application of a heated metal rod) - a matter on which he was capable of giving a view based on his medical expertise and which he had already addressed by saying that the scars were *diagnostic* of such trauma - into an expression of view that he was disposed to accept the claimant's account of how heated metal rods came to be applied to his skin. Dr Zapata-Bravo seemed to use the Istanbul Protocol 'highly consistent' classification, but inappropriately in relation to the claimant's story, which is something different from 'the trauma' to which that classification is expressly directed."

14. The Supreme Court disapproved of this approach and overturned the Court of Appeal's decision. They stated at paragraph 20 of their judgment:

"In their supremely difficult and important task, exemplified by the present case, of analysing whether scars have been established to be the result of torture, decision-makers can legitimately receive assistance, often valuable, from medical experts who feel able, within their expertise, to offer an opinion about the consistency of their findings with the asylum-seeker's account of the circumstances in which the scarring was sustained, not limited to the mechanism by which it was sustained. Had the contribution of Dr Zapata-Bravo been limited to confirming KV's account that the scarring was caused by application of a hot metal rod, it would have added little to what was already a likely conclusion. But, when he proceeded to correlate his findings of a difference in the presentation of the scars on the back and those on the arm with KV's account of how the alleged torture had proceeded, he was giving assistance to the tribunal of significant potential value; and it never suggested that he lacked the expertise with which to do so."

15. However, the expert could not usurp the function of the Tribunal. Giving two examples of Istanbul protocol compliant conclusions the Supreme Court added at paragraph 25 of their judgment:

“[Category] (a) would be where the expert uses phrases such as “Not consistent ... could not have been caused by the trauma described” that would be tantamount to disbelief in the accuracy of the description given by a claimant. [Category] (e) is “Diagnostic of ... could not have been caused in any other way than that described” in relation to one of the scars. Such a diagnosis was indeed tantamount to belief in the accuracy of the description of how that scar had been caused. The conclusion about credibility always rests with the decision-maker following a critical survey of all the evidence, even when the expert has placed his conclusion within category (a) or (e).”

The Hearing Before Us

16. In consequence of the remittal of the appeal to the Upper Tribunal the matter came before us to determine whether there was a material error of law in Judge Bart-Stewart’s determination such that it fell to be set aside and directions given for the rehearing of the appeal. If there was not, then the decision at first instance would stand.
17. For the Appellant, counsel, who had not represented the Appellant below acknowledged that this appeal had been remitted on one ground only the Judge’s treatment of Dr Baha Al-Wakeel’s report. The Judge found that because the doctor had said the scars were typical that left open other possible causes. The Judge’s use of that to reject the claim was in error, because she was ignoring the different gradients under the Istanbul protocol. Dr Baha Al-Wakeel did follow the practice direction. The scars fell within category (d) that they were typical of the causation asserted but there were other possible causes. The Judge had failed to consider the doctor’s opinion when he looked at the possibility of other causes. The Appellant’s scarring was unlikely to be accidental and quite unlikely to be by proxy. The doctor did not explain why he used the terminology “typical”, but he was abiding by the relevant protocol. The Judge did not acknowledge that the doctor had gone through the likelihood of other causes she merely said there were other possible causes. By commenting that the expert had not said the scars were diagnostic the Judge was implying that unless the scarring met the highest of tests the case could not be successfully proved.
18. The GP records were more relevant to the Appellant’s mental health and therefore they had not been provided to Dr Baha Al-Wakeel before he prepared his report. The GP evidence had to be approached with caution. It related to May 2016 when the Appellant had recently arrived in the United Kingdom and first saw his GP. It seemed to be suggested that the scars were not present when the Appellant arrived in the United Kingdom but were present and seen in October by Doctor Baha Al-Wakeel. The Judge dealt with the issue of self-infliction by proxy with the lightest of touches. It was only dealt with briefly at paragraph 51 of the determination and then only to say that it was ruled out by Dr Baha Al-Wakeel. The Judge had not criticised Doctor Baha Al-Wakeel’s report in any way, nor had she found that his

conclusions could not be reached. The Respondent had urged such a course on the Judge but that had not been adopted by her.

19. The Judge had looked firstly at the scarring report. The rest of the credibility findings flowed from her original finding that there may be scars but there were other possibilities as to their causation. It could be seen at [57] that the Judge's starting point was the scarring report. Everything was looked at from the point of view of whether it fed into the narrative created and the start of that narrative was a finding that the Appellant was incredible based on the Judge's flawed analysis of the scarring report. What the Judge did was to say that because the scarring was not diagnostic that was sufficient to justify her rejection of the report. The Judge appeared to say that the use of the word "typical" left the door open [to other causes] but she did not say how open. What the Supreme Court did in KV was to move a consideration of medical evidence back to a more basic consideration of the practice direction and the Istanbul protocol rather than setting down guidelines itself.
20. For the Respondent, reliance was placed on a skeleton argument that the Presenting Officer had prepared. As the doctor had said the scarring was typical of the causation asserted but had not said that it was diagnostic, the tribunal was entitled to consider the scarring report alongside all the other evidence. The expert had gone beyond his remit when saying that he had no doubt that the injuries were caused by being intentionally injured and that the most likely explanation was that the Appellant was severely tortured. The Appellant's case was that the events of torture took place in early 2016 some seven years after the conflict in Sri Lanka ended. The adverse credibility findings by the Judge outweighed the weight to be attributed to the scarring report.
21. In oral submissions the presenting officer said that the Respondent took issue with the Appellant's submission that this was only about the scarring report, rather it was part of a credibility finding. The Judge set out her findings on the lack of documentary evidence, there was nothing for example from a lawyer in Sri Lanka. The starting point was not therefore the scarring report instead it was a holistic consideration by the Judge of all the evidence. Despite the overturning of the Court of Appeal decision in KV by the Supreme Court, the findings made by the Judge in this particular case were unassailable. It was not the case that the Supreme Court by its decision had given a scarring report any weight above that which the tribunal would normally give it.
22. In conclusion the Appellant's counsel argued that while the scarring report was not the starting point for the Judge, the way she had approached the report was in error. The findings referred to by the Presenting Officer came after the consideration of the scarring report and therefore everything fed into that. In the event that an error of law was found the case should be remitted back to the First-tier Tribunal.

Findings and Discussion

23. As a result of the order made by the Court of Appeal when remitting this case back to the Upper Tribunal, the only issue in the case is whether there was a material error of law by the Judge in her determination concerning the way she dealt with the medical evidence on scarring. The medical evidence for these purposes is in two parts, the first is the report of Dr Baha Al-Wakeel the second is in the general practitioner medical records which were before the psychiatrist Dr Dhumad but not it appears in front of Dr Al-Wakeel. Before setting out her conclusions the Judge summarised the contents of Dr Al-Wakeel's report (see [3] and [4] above). In oral submissions to us the Judge was criticised for setting out the report and then, it was argued, concluding from the expert's use of the words "typical of" that not only there could be other causes of the burns on the Appellant's body but in effect there must be. It was further argued that the Judge was impliedly suggesting that unless the burns were diagnostic of the cause claimed by the Appellant, they could never support the Appellant's credibility.
24. We do not accept that argument. The Judge of necessity had to set out her conclusions in some form of order. Had she dealt with the other credibility issues in the case first and then gone on to consider the medical report she would be open to the criticism under the principle laid down in the case of **Mibangi v Secretary of State for the Home Department [2005] EWCA Civ 367** that she had come to a conclusion on credibility and dealt with the medical report as something of an afterthought. The Judge was correct to analyse Dr Al-Wakeel's report first before going on to deal with credibility issues in the case such as the lack of supporting evidence from a Sri Lankan lawyer. The assessment of credibility in this case by the First-tier Judge was an holistic exercise in which the Judge carefully considered all the relevant evidence before arriving at her final conclusions.
25. The Judge was referred to the Court of Appeal decision in **KV** but as that decision was overturned by the Supreme Court who disapproved of certain remarks made by the Court of Appeal (see [14] above) it was considered that the Judge's analysis of the scarring evidence should be re-examined by the Upper Tribunal. The main difference between the Court of Appeal decision and that of the Supreme Court was that the Court of Appeal had sought to limit the role of the expert in a scarring case by limiting the definition of the trauma suffered by a claimant which the expert could properly look at. The Supreme Court took a wider view of what was meant by trauma and emphasised that the fact-finding tribunal should be prepared to be assisted by the expert's views on the causation of scarring. It remained the case that the final decision on the credibility of the claimant's account rested with the Judge; the expert could not usurp the function of the tribunal.
26. Applying that ratio the question in this case becomes, if the Judge had had the benefit of the guidance from the Supreme Court (which came out almost exactly a year after the Judge decided the instant case) on how to approach medical evidence

of scarring, whether it would have made a material difference to the outcome in this case? Whilst the expert used the language of the Istanbul protocol in referring to the burn marks as being typical of a causation due to torture, the expert also used language which was not in the Istanbul criteria in his final conclusion. There he stated: “overall my expert opinion I have no doubt that the injuries were caused by being intentionally injured being the most likely explanation [our emphasis] that he was severely tortured as described by the claimant”

27. The Judge did consider carefully the choice of words of the expert but given that the expert was not putting his opinion on the highest level that is to say category (e) she had to consider the possibility of other causes. The Supreme Court were concerned with the potential situation where there were only two possible causes and a Judge ruled out one of those causes. In that situation logic dictated that the Judge must have formed the view that the remaining cause was the correct one. However we do not consider that the evidence in this case which the Judge received in this case was in such a binary form.
28. It was relevant for the Judge to consider the GP records which unfortunately Dr Al-Wakeel did not see. The Appellant registered with his GP very shortly after arriving in the United Kingdom which in turn was very shortly after he said he was severely ill-treated in detention. The GP records make no reference to any complaints from the Appellant as to the after-effects or otherwise of the ill-treatment he claims to have suffered. There is no record that he showed any marks on his body to the GP or that he required any treatment in this country for what he claimed to have sustained in Sri Lanka. It was argued before us by the Appellant that little weight should be placed on the GP records since they were mostly concerned with the Appellant’s mental state. The difficulty with that argument is that the Appellant only began to report symptoms of mental ill-health after he had received a refusal of his application for asylum from the Respondent. It was evident that this omission in the GP records troubled the Judge and tended to undermine in her eyes the credibility of the Appellant’s account. As Dr Al-Wakeel had not seen them, his report could not give the Judge any assistance on that issue.
29. Both the Court of Appeal and the Supreme Court were at pains to stress how unusual if not impossible it was for there to be a case of injuries being self-inflicted by proxy. It was not for the Judge to speculate whether that was the reason for the Appellant’s injuries. Nor was it necessary for the Judge to speculate further that the Appellant could not have had those injuries when he arrived in the United Kingdom because he did not make them clear to the GP. Nor was it necessary for the Judge to conclude that they must have been inflicted at some time between the Appellant’s arrival and the report in October when he saw Dr Al-Wakeel.
30. The doctor acknowledged that it is difficult to put an age on scars. Those shown to him could have been inflicted at the time the Appellant suggested or later. It was in fact Dr Al-Wakeel himself who raised the issue of whether the scarring could have been caused by self-infliction by proxy that is to say intentionally by another

individual with the Appellant’s consent. It was not incumbent upon him to raise the issue in the absence of it being raised by the Respondent nevertheless he did so since the scarring was typical of being deliberately inflicted. Self-infliction by proxy remained one of a number of possible causes of the Appellant’s injuries but it was not for the Judge to speculate on which of the possible causes might have led to the injuries on the Appellant. The burden was on the Appellant, he had to prove his case to the lower standard that there was a reasonable chance that matters had occurred in the way he said. The Supreme Court decision in **KV** was not authority for the principle that scarring reports will always be accepted at face value as proving the Appellant’s claim, rather they must be looked at in the round with all the other evidence. This is so even where, as the Supreme Court itself says, the expert states that scarring is diagnostic of the explanation given by the Appellant which is category (e), the highest standard.

- 31. The Judge did consider all the evidence in the round. She did use the report from the expert to assist her with what the Supreme Court acknowledges is the difficult task of decision-makers in this area, but her conclusions were her own and they were open to her on a holistic examination of all of the evidence in the case. Ultimately the assessment of the evidence was a matter for the Judge and the grounds of onward appeal and submissions made to us amount to no more than a disagreement with the Judge’s decision. They do not disclose any material error of law on the Judge’s part and we dismiss the Appellant’s onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold the decision to dismiss the Appellant’s appeal

Appellant’s appeal dismissed

The Appellant shall be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise, and be referred to as TS. 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 a contempt of court

Signed this 17th day of November 2021

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and we have dismissed the appeal and therefore there can be no fee award.

Signed this 17th day of November 2021

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Judge Woodcraft
Deputy Upper Tribunal Judge