



6 March 2019

THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of his family in connection with these proceedings.

PRESS SUMMARY

KV (Sri Lanka) (Appellant) Secretary of State for the Home Department (Respondent)
[2019] UKSC 10
On appeal from [2017] EWCA Civ 119

JUSTICES: Lady Hale (President), Lord Wilson, Lady Black, Lord Briggs, Lord Kitchin

BACKGROUND TO THE APPEAL

KV, who is a Sri Lankan national of Tamil ethnicity, arrived in the UK in February 2011 and claimed asylum. He has scars on his arm and back which he says are the result of torture, but the Home Secretary's case is that they were self-inflicted by proxy ("SIBP"), that is, by another person at his invitation.

KV's account is that although he was not a member of the LTTE ("Tamil Tigers"), he used to melt gold for them. He says he was detained and tortured by the Sri Lankan government, who sought to extract information about where the gold and other valuables were kept. He alleges that the government applied hot metal rods to his arm while he was conscious, the pain rendered him unconscious, and that while he remained unconscious they applied the rods to his back.

He appealed unsuccessfully to the First-tier Tribunal ("FTT") against the Home Secretary's refusal of his claim for asylum. The Upper Tribunal (the 'tribunal') reheard his appeal as the FTT's decision had been vitiated by an error of law. The tribunal found various aspects of KV's evidence unconvincing but recognised that if his scarring was indeed caused by torture then there was a real possibility his story was true. Dr Zapata-Bravo, a medical expert, advised that the scars were caused by burning with a hot metal rod. Furthermore, the scarring on KV's arm had blurred edges but the scarring on his back had such clearly-defined edges that he must have been unconscious while the burns were inflicted. He concluded that his clinical findings were "*highly consistent*" with KV's account of torture, and that it was unlikely the scars were SIBP.

The tribunal nevertheless dismissed KV's appeal, finding that "*(i) it was clinically unlikely, given their precise edging, that his scarring could have been inflicted unless he was unconscious; and (ii) that it was clinically unlikely a person could remain unconscious throughout multiple applications of hot metal rods to his arms and back, unless he was anaesthetised ...*".

On appeal, the Court of Appeal ("CA") held by a majority that the assessment made by the tribunal was legitimately open to it and could not be criticised as perverse or irrational. Furthermore, it was beyond Dr Zapata-Bravo's remit as an expert medical witness to state his opinion that his findings were "*highly consistent*" with KV's account of torture as a whole. Elias LJ dissented.

JUDGMENT

The Supreme Court (Lady Hale, Lord Wilson, Lady Black, Lord Briggs and Lord Kitchin) unanimously allows the appeal and remits KV's appeal against the refusal of asylum to the Upper Tribunal for fresh determination. Lord Wilson gives the only judgment.

REASONS FOR THE JUDGMENT

The 1999 *“Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment”*, known as the *“Istanbul Protocol”*, guides medical experts to indicate for each lesion the degree of consistency between it and the cause given by the patient, on a scale from *“not consistent”* to *“diagnostic of”*. The Istanbul Protocol provides that *“ultimately, it is the overall evaluation of all lesions, and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story...”*. Thus, in concluding that his clinical findings were *“highly consistent”* with KV's account, Dr Zapata-Bravo framed his conclusion in accordance with the Istanbul Protocol [15]-[17].

In the Supreme Court, the Home Secretary felt unable to defend the CA's observations that Dr Zapata-Bravo had gone beyond his remit. In their difficult task of analysing whether scars are the result of torture, decision-makers can legitimately receive assistance from medical experts who feel able to offer an opinion about the consistency of their findings with the asylum-seeker's account about the circumstances in which the scarring was sustained, not limited to the mechanism by which it was sustained. The CA's suggestion that the references in the Istanbul Protocol to the *“trauma described”* relate only to the mechanism by which injury is said to have been caused is too narrow a construction of the word *“trauma”* [20]-[21].

On the other hand, unless an expert finds that the trauma described is either *“not consistent with”* or *“diagnostic of”* the alleged torture, it would be beyond his or her remit to state that he or she *“believed”* the appellant. The conclusion about credibility always rests with the decision-maker following a survey of all the evidence [25].

This approach is consistent with that of the Court of Appeal in a previous case of alleged torture, and that of the European Court of Human Rights [22]-[23]. An expert investigating an allegation of torture should recognise the Istanbul Protocol as equally authoritative to the relevant Practice Direction on expert evidence in immigration and asylum cases at the FTT and the tribunal [24].

As for the decision of the tribunal, Elias LJ in his dissenting judgment had noted various problems with the tribunal's reasons for rejecting KV's account of torture [26]. In particular, the tribunal's summary of the doctor's evidence lacked apparent awareness that the scarring with precise edging was only on KV's back, and addressed a hypothesis, not advanced by the doctor or KV, that KV was unconscious while the hot metal rods were applied to his arms as well as to his back [28].

Given KV's serious lack of credibility in several areas, the tribunal was correct to address the possibility of wounding SIBP. However, when the tribunal concluded that there were only two real possibilities – either that KV had been tortured or that the wounding was SIBP – and when it rejected the former, it failed to take into account the fact that self-infliction of wounds is inherently unlikely. There is evidence of extensive torture by state forces in Sri Lanka at the relevant time. By contrast, evidence of wounding SIBP on the part of asylum-seekers is almost non-existent. It is an extreme measure for a person to decide to cause himself deep injury and severe pain. Moreover, if KV's wounding was SIBP, the wounds on his back could only have been inflicted under anaesthetic so he would have needed the assistance of someone with medical expertise. The Supreme Court approves Elias LJ's view that very considerable weight should be given to the fact that injuries which are SIBP are likely to be extremely rare [31]-[35].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

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