

Case law on the use of medical/medico-legal reports in court proceedings



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This presentation

- *KV (Sri Lanka) v Secretary of State for the Home Department* [2019] UKSC 10
- *SA (Somalia) v Secretary of State for the Home Department* [2006] EWCA Civ 1302
- *Mehmet Eren v Turkey (2008) (Application No 32347/02)*

KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10

- Key recent case- well worth understanding in detail
- Sri Lankan Tamil alleging torture and claiming asylum
- Branding scars on back- hot metal rod
- Question of self-infliction by proxy
- FtT dismissed appeal but made an error of law
- UT held the case was appropriate vehicle to provide guidance on medical scars caused by torture- Helen Bamber Foundation intervened



KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10

- UT dismissed the appeal in a massive decision (78 pages)
- UT issued guidance to those preparing medico-legal reports in relation to scars from asylum-seekers who allege them to be the product of torture where self infliction by proxy (SIBP) is more than a fanciful possibility
- However on appeal, CA considered that wounding SIBP was generally so unlikely that it was inappropriate to issue the guidance- CA disagreed with the suggestion in the guidance that medical experts should routinely consider SIBP even when not canvassed by the Home Office as being a reasonably possible explanation of the asylum-seeker's scarring (unclear where we stand on this as CA overruled- more on this later)

KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10

- In KV's case, the medical evidence concluded that his scarring was consistent with his account- 'perfect' branding in areas where he said he was unconscious when it happened- 'imperfect' branding where he said he was conscious (and thus his pain receptors and reflexes reacted to the branding by flinching etc)
- Doctor's conclusion was that his clinical findings were "highly consistent" with KV's account of torture- using Istanbul Protocol wording
- Court of Appeal strangely challenged this approach- said it was straying too far outside his remit to comment on his story:
- *“In my judgment, at this point he rather trespassed beyond his remit as an expert medical witness into the area where it was for the UT to make an assessment of all the evidence” [34]*

KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10

- Supreme Court: this approach was wrong: clearly erroneous
- *“In their supremely difficult and important task... 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”*

KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10

- Noted had the doctor in that case limited the report to saying the scarring was caused by a hot metal rod, that wouldn't be terribly helpful
- “Trauma described” in IP= claimant's account- CA definition was too narrow
- Therefore- possible (and, I would suggest, desirable) to link findings under IP to the appellant's account
- However- word of warning- unless injuries are diagnostic, not a good idea to say you believe the appellant (and even then prob not worth it)

KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10

- SC said:

“*[after discussing diagnostic/not consistent under IP]* ...Where, however, more usually, the expert places his or her conclusion within categories (b), (c) or (d), there is no room, nor sanction in the protocol, for the expression of belief or otherwise in the account given. **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).** Indeed, in an asylum case in which the question is only whether there is a real possibility that the account given is true, not even the decision-maker is required to arrive at an overall belief in its truth; the inquiry is into credibility only of a partial character.”

SA (Somalia) v Secretary of State for the Home Department [2006] EWCA Civ 1302

- Cited with approval in KV: important as it sets out what a medical report is for
- the task for which an asylum-seeker tenders a medical report is to provide *"a clear statement as to the consistency of old scars found with the history given ..., directed to the particular injuries said to have occurred as a result of the torture or other ill treatment relied on as evidence of persecution"*.
- Emphasises that consistency is an expert question for the medical report- should not be left to the Court or Tribunal

SA (Somalia) v Secretary of State for the Home Department [2006] EWCA Civ 1302

- CA also gave some pointers on writing medical reports
- *“It is also desirable that, in the case of marks of injury which are inherently susceptible of a number of alternative or “everyday” explanations, reference should be made to such fact, together with any physical features or “pointers” found which may make the particular explanation for the injury advanced by the complainant more or less likely.”*
- Also emphasises importance of IP

Mehmet Eren v Turkey (2008) (Application No 32347/02)

- Also cited in KV
- ECtR case- ill treatment in police custody in Turkey
- Para 43- Court it relied upon the conclusion of a medical report about the consistency of the clinical findings with the applicant's account of serious ill-treatment while he was in police custody- court regarded it as conclusive evidence of ill-treatment for the purpose of a finding that Article 3 ECHR had been violated
- Medical reports can be decisive!
- Court *again* emphasised the importance of the IP

Takeaways from the case law

- Case law emphasises the primacy of the IP- follow it closely
- Express an opinion on consistency with story- but do not say you believe the story. Important to bear in mind objectivity part of IP- when describing account use language like “he/she reports that X occurred”
- Unclear where we stand on considering evidence of self-infliction- my advice to medical experts has always been include it anyway- despite it being implausibly unlikely in the vast majority of cases, some judges may think about the possibility, so good to head this off

(Same goes for likelihood of faking mental illness symptoms e.g. PTSD- common perception is it is easy to fake when the symptoms are quite specific)

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it closely

do not say you believe the

e of self-infliction- my advice
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Thank you for listening

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