

Asylum and Immigration Tribunal

**RT (medical reports - causation of scarring) Sri Lanka [2008] UKAIT
00009**

THE IMMIGRATION ACTS

**Heard at Field House
On 7 December 2007**

Before

**SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE SPENCER**

Between

RT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Where a medical report is tendered in support of a claim that injuries or scarring were caused by actors of persecution or serious harm, close attention should be paid to the guidance set out by the Court of Appeal in SA (Somalia) [2006] EWCA Civ 1302. Where the doctor makes findings that there is a degree of consistency between the injuries/scarring and the appellant's claimed causes which admit of there being other possible causes (whether many, few or unusually few), it is of particular importance that the report specifically examines those to gauge how likely they are, bearing in mind what is known about the individual's life history and experiences.

Representation

For the appellant: Mr J Martin of Counsel instructed by Nag & Co

For the respondent: Ms Z Kiss, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Sri Lanka and is a Tamil. This is a reconsideration of a determination by Immigration Judge D J Baker notified following a hearing on 24 July 2007 dismissing the appellant's appeal against a decision dated 21 May 2007 refusing to grant asylum and a decision of the same date refusing leave to enter the United Kingdom. To avoid confusion we should mention that there are two "Martins" referred to in our decision: one Mr J Martin of Counsel; the other, Mr A Martin who is a Consultant in Accident and Emergency medicine. They are not related.
2. The basis of the appellant's account was that his brother had joined the LTTE after his father had been killed in 1991 and he himself had joined the LTTE in 1995 and had military training. The LTTE sent him to Mullaithivu to gather information on the army, to Vanni to recruit for them and to Jaffna to gather intelligence. In August 2000 he was arrested by the army, detained and tortured. He escaped from the hospital (where he had been transferred) and went back to Vanni. He subsequently left the LTTE and went to Colombo from where he arranged his departure from Sri Lanka with the help of an agent.
3. Upon this account the immigration judge made mixed credibility findings. She found that the appellant was a Tamil who had (shop) employment in Jaffna, that his father was killed in 1991 during a bombing incident and that his brother had joined the LTTE and had been in the UK since before the appellant's arrival. She also accepted that:

"... the appellant had become involved with the LTTE and assisted them at a low level by providing some information to them and putting up posters whilst working in a shop in Jaffna. Prior to that he helped the movement and was involved in publicity and publicising the movement for school children."
4. However she found that his claim to have been arrested by the Sri Lankan army and tortured and to have escaped from hospital was a fabrication. She stated:

"62. I have considered the risk factors to this Appellant on the basis of my findings of fact. I have found that he has not been of previous interest to the authorities and has not been detained so there will be no records held which would place him at risk. He did not escape.

63. He has been a low level member of the LTTE but a significant period of time has elapsed since he was in Sri Lanka. His brother was a member of the LTTE but had come to the UK before the Appellant left Sri Lanka. He is not extensively scarred and the objective evidence suggests the scars would not put him at risk per se. No recent evidence was placed before me as to the likely situation at the airport. Paragraph 32.13 of the May [2007] COIR indicates that most are questioned briefly and are not asked about asylum claims.

64. In the light of the objective evidence, I find as a fact that he would not be at risk of persecution or a breach of his human rights on arrival at the airport.

65. As a Tamil in Colombo he is more likely to attract attention from the authorities than a Sinhalese, as is clear from the objective evidence. However, he is not known by the authorities to have been a member of the LTTE previously and has not been involved in fighting. Clearly the situation has changed since Jeyachandran was decided but there is insufficient evidence before me that the Appellant is more at risk than any other Tamil in Colombo and I find that he has not discharged the burden of proving even to the low standard required that he faces a real risk of persecution or a breach of his human rights under Article 3 if returned to Colombo.

66. As I do not find that he escaped from the LTTE or that he spent time in the custody of the army, I do not find that he would be targeted by the LTTE, in Colombo or elsewhere.”

5. The grounds for review were twofold. It was submitted first of all that the immigration judge had erred in law in failing to give considerable weight to Mr A Martin’s opinion in his medical report on the appellant that one of his scars was “highly consistent with” the account he gave of ill treatment at the hands of the Sri Lankan army: in paragraph 48 of the determination she stated that the report did not preclude the possibility that the injuries were caused by other means. But, the grounds stated, “to establish his case on the reasonable likelihood (sic) test the appellant does not need to go that far.” Given the lower standard of proof, “scars which are consistent are capable of being probative and scars which are highly consistent will be probative unless there is good reason to reject them”. In support of this submission the grounds cited Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367 and SA (Somalia) v Secretary of State for the Home Department [2006] EWCA Civ 1302. In the latter case the Court noted that the difference between findings of “consistent with” and “highly consistent with” was elaborated by the Istanbul Protocol as follows:

“(b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;

(c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;”

6. It was significant in the appellant’s case, added the grounds, that he had had some LTTE training but following that had been engaged in work where he was not likely to sustain the injuries which he had.
7. The second ground for review complained that the immigration judge’s findings were incomplete and irrational.
8. The grounds also made reference to the recent Tribunal country guidance case of LP (LTTE Area-Tamils-Colombo) Sri Lanka CG [2007] UKAIT 00076, but as Mr Martin conceded, the guidance in this case would only come into play if we found errors in the immigration judge’s findings of fact, in particular in the finding that the appellant had not been detained.

9. Dealing with the second ground first, we find that its contents amount to no more than a series of disagreements with the immigration judge's findings of fact. We see no flaw in the immigration judge treating as adverse to the appellant the fact that whereas at interview he failed to give dates for when he was detained and when he was transferred to hospital, he was able in subsequent statements to give precise dates for both events. It was also open to her to count against the appellant that the dates for his detention and transfer to hospital which he gave at the hearing (as being 23 August and end of September 2000 respectively) were different from those that he gave in the "history" section of his medical report, where he is recorded as stating that he escaped from hospital on 23 August 2000. The immigration judge considered the appellant's explanation for this discrepancy - that he only gave an approximate date to the doctor who fixed on that particular date - and was quite entitled to find it unsatisfactory. We see nothing wrong with the further findings of implausibility which the immigration judge made in relation to the appellant's account of how he was identified to the army in his shop as an LTTE member. Again the immigration judge did not find plausible that having identified the appellant as an LTTE member and subjected him to torture, the army should transfer him to hospital but not bother to guard him. There is no reason to think in this context that the immigration judge overlooked the appellant's claim at paragraph 14 of his witness statement that there were soldiers at the hospital. The appellant had clearly stated at the hearing that he was unguarded. We also find unexceptionable the immigration judge's assessment that it would have been a remarkable coincidence if there had been someone at the hospital who was, as the appellant had claimed, at once (1) a friend of his father (who had died in 1991), (2) someone able to recognise the appellant and (3) someone prepared to put himself at risk to assist the appellant's escape. The immigration judge also found implausible the appellant's claims not to have had contact with his mother since 1995, not to know that he was travelling to the UK and (despite having accepted that he travelled on two planes and caught a train) not to know which countries he had travelled through before arriving in the UK.

10. The grounds pointed out, as a criticism of these findings, that the fact that something is highly unlikely or a coincidence does not mean that it is untrue. But there is no basis for considering that the immigration judge was unaware of such distinctions: she simply did not find, viewing the evidence in the round, that key difficulties which had been identified in the appellant's evidence had been adequately explained.

11. The point made in the grounds at paragraph 9 appears to assert that, since the immigration judge had accepted that the appellant had a brother who had been a member of the LTTE and that the appellant himself had been involved with the LTTE, these facts, taken together with the medical evidence that he bore some scars which were highly consistent with having been tortured, should have led her to

accept that he had been arrested and tortured. But there was nothing irrational or inadequately reasoned as to why she was prepared to accept some parts of the appellant's account but to reject others.

12. The second ground for review also incorporated a submission that the immigration judge failed to make a finding on the appellant's claim to have been assisting the LTTE's intelligence by observing army movements and passing that information on: this was said to be a core part of the appellant's claim. However, whilst the immigration judge may be criticised for failing to make specific findings on the intelligence-gathering claim, it is sufficiently clear that she considered it undermined by deficiencies in his overall account. The immigration judge's finding at paragraph 45 that the appellant was only involved with the LTTE at a low level properly reflected her overall assessment of the appellant's account of his LTTE-related activities.

13. We have left the first ground (which concerns the treatment of the medical evidence) until last because it seems to us that the main argument raised therein merits more careful attention. This ground also asserts that in coming to her conclusion the immigration judge did not mention the medical evidence at all, but that was rightly not pursued by Mr Martin, since the section of her determination setting out findings plainly includes para 48 which does mention the medical report. The main argument raised, therefore, concerned whether the immigration judge had given due weight to the medical report.

14. The doctor who wrote the report was Mr A Martin, a Consultant in Accident and Emergency Medicine at the Royal Free Hospital, Hampstead, London. He interviewed and examined the appellant on 13 July 2007. In a subsection headed "History" he noted that the appellant had said he was a member of the LTTE who after training had been assigned to the Intelligence Division and had to gather information from army places. His report then records the appellant's description of his arrest in July 2000, his ill-treatment whilst in detention and his escape (said in the report to be 23 August 2000). He stated that his examination revealed that the appellant had scars on his head, upper limbs and lower limbs. Having described these one by one he continued:

"Mr R said that the injury on the scalp was caused by being hit by the butt of a rifle. The scar is consistent with an injury caused by blunt trauma and as such consistent with the client's description of events.

Mr R's scars on the right eyebrow, nose and upper lip are consistent with injuries caused by blunt trauma and though impossible to be precise the instrument/weapon/surface they could have been caused by being pushed against a wall, punched and hit with (sic) sticks as described by the client.

The hyper-pigmented area on the right forearm is typical of post-inflammatory changes after blunt trauma and the appearance is highly consistent with the events described by the client of being beaten with batons or sticks.

The indented scar on the thigh is consistent with a penetrating injury and it could have been caused by being stabbed with a hard pipe and this would also be consistent with the shape of the scar.

The patient's scars do not result in any functional limitation and do not require any treatment on clinical grounds. The appearance of the scars is consistent with the time span described by the client.

CONCLUSION:

The scars present on Mr R's body, although not possible to [sic] precise as to whether the injuries were caused accidentally or not, are highly consistent with the events described by the client.

..."

15. In submissions before the immigration judge Counsel had pointed out that it was obvious from the appellant's appearance that his nose had been broken and that this report detailed the injuries found and then, importantly, differentiated between scars which were consistent and those which were highly consistent with the appellant's given history.

16. The immigration judge set out her findings on the medical report as follows:

"43. The history section of the medical report is based purely on the information provided by the Appellant and cannot be regarded as corroboration. The scars identified are said to be in some cases consistent with his description of events and "could" have been caused in the manner described. The scar on the right forearm is said to be "highly consistent" with being beaten with batons or sticks. The scars are said to be consistent with the time span described. In the conclusion, however, Dr Martin states "the scars present on Mr R's body, although not possible to be precise as to whether the injuries were caused accidentally or not, are highly consistent with the events described by the client". The report does not undermine the Appellant's claim but neither does it prove that his account is true and there could have been other causes of the scars identified."

17. At para 48 she returned to the same subject, stating:

"48. The medical report does not preclude the possibility that his scars were accidental or prove that they were not caused by other means".

18. (Later on (at para 63) she also dealt with the issue of whether the appellant's scarring would cause the Sri Lankan authorities to view him adversely on return: she decided that it would not. But it is not this aspect of the scarring issue which is in question here.)

19. As already noted, the grounds submitted that the above assessment betrayed an error of law since it failed to give an adequate reason for not taking into account the doctor's opinion that some of the scarring was "highly consistent with" the appellant's given history and effectively failed to apply the lower standard of proof.

20. We turn first to analyse the doctor's report. Several features are noteworthy.
21. First, faced as he was with having to assess scars stated by the appellant in his history as arising from injuries inflicted as long ago as 2000, he properly took their age into account, stating "[t]he appearance of the scars is consistent with the time span described by the client."
22. Secondly, of the scars he assessed the doctor found five of them (those on his scalp, his right eyebrow, nose and upper lip and thigh) "consistent with" the appellant's attribution and one (the scar on the appellant's right forearm) "highly consistent" with the appellant's attribution. Given this distribution of findings, we find it extremely odd that in his "Conclusion" the doctor should state that "[t]he scars [plural] present on Mr R's body...are highly consistent with the events described by the client." On his own specific findings only one out of five was "highly consistent".
23. Thirdly, although finding the scar on the right forearm "highly consistent " with being beaten with batons or sticks, the doctor did not venture any clear opinion about other possible causes, let alone about whether any other possible causes were likely or more or less likely. To the extent that any opinion of his on this question can be gleaned from his report it would appear that he simply considered that it was "not possible to be precise as to whether the injuries were caused accidentally or not".
24. Fourthly, there is nothing in the "History" section of the report to indicate that the appellant had given any details about his life history prior to his arrest and detention and ill treatment beyond outlining his time with the LTTE, first doing training then being assigned to the Intelligence Division to gather information from army places. There was no record of the appellant telling him about his work in a shop in Jaffna.
25. Bearing in mind these features of the doctor's report, it is instructive to see how it measures up to the guidance given in SA (Somalia) which was one of the cases cited in the appellant's grounds for review. At paras 28-32 Sir Mark Potter P stated:

" 28. In any case where the medical report relied on by an asylum seeker is not contemporaneous, or nearly contemporaneous, with the injuries said to have been suffered, and thus potentially corroborative for that very reason, but is a report made long after the events relied on as evidence of persecution, then, if such report is to have any corroborative weight at all, it should contain a clear statement of the doctor's opinion as to consistency, 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. 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.

29. In cases where the account of torture is, or is likely to be, the subject of challenge, Chapter Five of the United Nations Document, known as the Istanbul Protocol, submitted to the United Nations High Commissioner for Human Rights on 9 August 1999 (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) is particularly instructive. At paras 186-7, under the heading "D. Examination and Evaluation following specific forms of Torture" it states:

"186... For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution

- (a) Not consistent: the lesion could not have been caused by the trauma described;
- (b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;
- (c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;
- (d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;
- (e) Diagnostic of: this appearance could not have been caused in anyway other than that described.

187. 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 (see Chapter IV.G for a list of torture methods)."

30. Those requested to supply medical reports supporting allegations of torture by asylum claimants would be well advised to bear those passages in mind, as well as to pay close attention to the guidance concerning objectivity and impartiality set out at paragraph 161 of the Istanbul Protocol.

31. Briefly continuing comparison of the instant case with the case of *Mibanga*, in that case the factors relevant to credibility plainly included Dr Norman's express medical opinion as to the causation of the injuries and it was thus impermissible to determine the central question of credibility without having regard to that opinion expressed. In the present case there is no comparable opinion. The adjudicator and the Tribunal both considered, rightly in my view, that the explanations for the injuries which I have highlighted in paragraph 22 above came from the appellant and not from Dr Madan. He, like the adjudicator, was dependent entirely upon the explanations given by the appellant and there is nothing in his report to indicate that he stood back and considered them objectively for the purpose of his report. Because the explanations came directly from the appellant and were not the subject of separate, critical consideration by the doctor, the adjudicator was entitled not to regard them as medical opinion of the kind being dealt with in *Mibanga*.

32. Having said that, it does not detract in any way from the force of the decision in *Mibanga* to the effect that, where there is medical evidence corroborative of an appellant's account of torture or mistreatment, it should be considered as part of the whole package of evidence going to the question of credibility and not simply treated as an "add-on" or separate exercise for subsequent assessment only after a decision on credibility has been reached on the basis of the content of the appellant's evidence or his performance as a witness."

26. We do not know if the doctor (Mr A Martin) was familiar with the Istanbul Protocol guidelines, but his report does show an appreciation of the difference between two degrees of consistency: “consistent with” and “highly consistent with”; in that respect his report might be said at first sight to reflect a good working knowledge of the Protocol guidelines or at least the thinking (widely-shared internationally) behind them. As already noted, however, his “Conclusion” that the appellant’s scars were “highly consistent” with the appellant’s account of causation went significantly beyond his own specific findings on the individual scars.
27. Be that as it may, his findings did still identify one scar as “highly consistent with” the appellant’s account of being beaten with batons and sticks. The appellant’s submission is that the immigration judge erred in failing to attach due weight to that particular finding; she should, it is submitted, have found them presumptively probative.
28. In this regard, however, it is important to recall what SA (Somalia) has to say about the issue of causation. At the end of para 28 it is stated that:
- “It is also desirable that, in the case of marks or 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.”
29. The medical report in this case failed to attempt any such reference. Given that the doctor did at least recognise the possibility of “accidental” causes, this failure was all the more marked.
30. Having analysed the medical report we must next turn back to look more closely at what the immigration judge made of it.
31. We agree with Counsel that the immigration judge’s approach to the report is open to criticism. To say merely that “there could have been other causes of the scars identified” and that the report “does not preclude the possibility that his scars were accidental or prove that they were not caused by other means” did not show that she fully appreciated the potential significance of the one finding of “highly consistent with”. Applying Istanbul Protocol criteria, the latter finding was not one which left open there being “many” other possible causes; it confined it to “few” other possible causes. However, we do not consider that this failing on the part of the immigration judge amounted to an error of law because, the particular medical report in question failed to say anything about other possible causes, whether understood as many or few. It did not even begin to engage with the issue of the relative likelihood of (the few) other possible causes. Put simply, as to causes it was simply agnostic.

32. It will be apparent from what we have just said that we reject Counsel's contention that given the lower standard of proof a finding that scars which are found "highly consistent" with the claimed cause should be regarded as probative "unless there is good reason to reject them". If the result of a finding of "highly consistent with" is that there are few other possible causes, that in itself says nothing about which of these few is more or the most likely. There is no basis, without more, for saying one is to be preferred. There is no basis, without more, for saying that the one cause found "highly consistent with" is to be accepted, "unless there is a good reason to reject..." it. It would have been different if Mr A Martin's report had gone on to evaluate the relative likelihood of (the few) other possible causes and had concluded the appellant's attribution was the most likely. But, as already noted, it failed to do this.
33. This shortcoming of the report was accentuated by the fact that the scarring concerned was to the appellant's right forearm, which was a part of the body which a person would use in an active way in many everyday work and home situations; and, on the account given by the appellant, there were at least two alternative explanations for the scarring which merited consideration: one was his claim that he had trained with the LTTE for two months, using weapons (an AK 47) and the other was that he had worked in a shop. The doctor had been made aware of the former, but not, it seems, the latter. Whilst the appellant did not assist the doctor by failing to volunteer as part of his "history" his work experience in a shop, in our view a medical report seeking to assess the causation of scarring should always seek to establish, as part of an appellant's history, whether there are any home, social or work-related activities which may cast light on other possible causes of the injury/scarring.
34. We note that the grounds for review sought to argue that the appellant's shop work was "work where he was not likely to sustain such injuries". But the issue here is not how we should assess the shop work in terms of it being or not being a likely cause; it is simply about the immigration judge's assessment of a medical report that contained no examination or evaluation of such matters.
35. In the absence of any evaluation by the doctor of whether such causes were more or less likely, the assessment that such scarring was "highly consistent" did not, as the immigration judge rightly concluded, prove the appellant's claim as to how it was caused.
36. Hence it can be seen that SA (Somalia) does not advance the appellant's case in the way argued for in the grounds for review.
37. We would emphasise, however, that in cases that feature medical reports as evidence of injuries having been caused by actors of

persecution or serious harm, SA (Somalia) should be treated as a landmark case, giving guidance on a number of matters.

38. First, it reconfirms the validity of the IAT's proposition in HE (DRC-Credibility and psychiatric reports) [2004] UKIAT 00321 as reformulated in Mibanga and in MO (Algeria) [2007] EWCA Civ 1276 that a decision-maker or immigration judge must deal with a medical report as an integral part of the findings on credibility and must not artificially separate that evidence from the rest of the evidence and reach conclusions as to credibility without reference to that medical evidence (para 32).

39. Secondly, it clarifies that the principal purpose of a medical report in asylum-related cases is "to corroborate and/or lend weight to the account of an asylum seeker by a clear statement as to the consistency of old scars found with the history given" (para 27).

40. Thirdly, it establishes (at paras 29-30) that chapter five of the Istanbul Protocol is to be seen as a particularly instructive source of guidance, in particular what it said in the Protocol at paras 186-7 under the heading "D. Examination and Evaluation following specific forms of Torture" as follows:

"186... For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution

- (a) Not consistent: the lesion could not have been caused by the trauma described;
- (b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;
- (c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;
- (d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;
- (e) Diagnostic of: this appearance could not have been caused in any way other than that described.

187. 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 (see Chapter IV.G for a list of torture methods)."

41. Commenting on this the Court stated at para 30:

"Those requested to supply medical reports supporting allegations of torture by asylum claimants would be well advised to bear those passages in mind, as well as to pay close attention to the guidance concerning objectivity and impartiality set out at paragraph 161 of the Istanbul Protocol."

42. Fourthly, SA (Somalia) emphasises the importance of a medical report whose findings on consistency express the fact that there are other possible causes (whether many, few or unusually few),

specifically examining those to gauge how likely they are, bearing in mind what is known about the individual's life history and experiences.

43. The last-mentioned point is of particular importance in this case. From para 186 of the Istanbul Protocol it can be seen that in the five-fold hierarchy of degrees of consistency between the injury and "the attribution", that of "highly consistent with" ranks third and is specified as meaning that "the lesion [injury] could have been caused by the trauma described, and there are *few* other possible causes". The reference to "*few* other possible causes" is clearly to be contrasted with the specification given of a simple finding of "consistent with" (the second degree of consistency listed) where it is specified that "there are *many* other possible causes". However, precisely because in the case of a finding of "highly consistent with" the range of possible causes is described as being much more limited ("there are *few* other possible causes"), it is all the more important that a doctor who makes such a finding goes on to assess whether those few other possible causes could adequately explain the scarring and gives an assessment of whether they are more or less likely. A failure to do so will considerably weaken the report as corroborative or supportive of an appellant's case.
44. From Counsel's submissions we glean that he would object to the above summary of the guidance approved by SA (Somalia) on the basis that the Court only characterised this last point as "desirable" rather than as essential. However, we do not think by the use of the adjective "desirable" the Court meant in any way to suggest that it was not an extremely important consideration - when assessing the relevance of a medical report to the question of causation of injuries or scarring - to address matters in the way set out in paragraph 28. If all that a doctor does is say that the scarring/injury is "highly consistent" with the claimed history, without also addressing the relative likelihood of the few other possible causes, the report will clearly be of less potential value than if it does. As illustrated by the evidence in this case, it may properly lead an immigration judge to find that a finding of "highly consistent" has very limited value.
45. For the above reasons the immigration judge did not materially err in law and accordingly her decision to dismiss the appellant's appeal must stand.

Signed:

Dr H H Storey