Medico-Legal Reports & their importance in immigration & asylum cases – 21st September 2021

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IMMIGRATION AND PUBLIC LAW
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INTRODUCTION

- Commissioning and using MLRs in Covid times.
- The API and how this relates to MLRs.
- MLRs in asylum and other relevant cases touching on the Supreme Court's judgment in *KV v SSHD* and other relevant recent cases.
- How we can use the recently disclosed guidance on how to consider MLRs in unlawful detention cases.
    - Rule 35 reports.
    - Independent MLRs.
- The proposals in New Immigration Plan to instruct joint experts.

Guidance from *KV v SSHD*

- Compliance with the *Istanbul Protocol* cannot be overstated.
- Relevant in asylum or human rights claim and potentially in trafficking claims.
- Whilst the courts have been careful to make clear that the ultimate decision on whether an individual's account of being detained and tortured is credible is one for the fact-finder (SSHD or the Tribunal), nevertheless it has also been acknowledged that the expert has the expertise and is not going beyond his role in giving his or her own conclusions on whether the individual has been tortured or whether he/she is of the opinion that their scars were caused by torture and/or the trauma they suffer is the result of torture.
- The role that a medical report can play in the assessment of credibility is one of significance and due weight should be given to it.

Guidance from *KV v SSHD*

- In *KV v SSHD* [2019] UKSC 10, the Supreme Court gave consideration to the value and weight to be attached to MLRs when assessing the credibility of an individual's account.
- The issue of scars Self-Inflicted by proxy (SIBP) had been considered by the Upper Tribunal and the question of whether medical reports should address this issue.
- Importantly for KV and other Tamil asylum seekers, the SC did put to bed the notion that every medical report should expressly consider whether SIBP was more than a remote possibility.
- The CA had already concluded that the UT should not have given guidance on this issue and that SIBP was very rare but the SC made that clear beyond doubt.
- The Supreme Court's judgment is also significant for other reasons.

Guidance from *KV v SSHD*

- It made clear the importance of the role of MLRs in the assessment of credibility of an individual's claim to have been tortured.
- The majority of the CA in *KV* had narrowed the value and role of the MLR in asylum claims, taking the view that an MLR could only assess whether the scarring/injuries on an individual were *consistent/highly consistent/typical/diagnostic* of the mechanism used to injure the individual (in the case of *KV* being burnt with a metal rod) and <u>not</u> the circumstances in which that took place and more significantly whether the applicant had been tortured.
- The CA had taken the view that a doctor giving an opinion on the likelihood that the individual had been tortured in the manner claimed went beyond his expertise.

Guidance from *KV v SSHD*

- Lord Wilson in the SC however made it very clear that this was incorrect and if that was the purpose of an MLR, it would add very little to an individual's case. See para 20:

"20. In this further appeal the Home Secretary has felt unable to defend the observations of the majority and, with the benefit of the full argument which the Court of Appeal never enjoyed, nor, to be fair to counsel, never invited, it is clear that they are erroneous. 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."

Guidance from *KV v SSHD*

- Lord Wilson also reiterated that medical experts should assess individuals with reference to and applying the ***Istanbul Protocol*** (citing *SA (Somalia) and RT (Sri Lanka)*).
- The CA had suggested that the Practice Direction of the Tribunal in relation to expert evidence was the only document experts should consider and apply.
- Lord Wilson said **no** - whilst the PD was important, it did not expressly deal with MLRs relating to torture and it made clear the importance of the role of the *Istanbul Protocol* and the use thereof by doctors when preparing MLRs.
- So what can we take from *KV* and in practical terms how does it assist doctors?

Guidance from *KV v SSHD* & other cases

- Highlights the importance of an MLR, which sets out in detail:
  - The **circumstances** surrounding the claimed ill treatment and the claimed ill treatment itself;
  - A full assessment of all injuries applying the *Istanbul protocol* in assessing likely **causation** (including consideration of other possible causes);
  - A **consideration as to whether** an individual may be feigning their symptoms;
  - That an individual's account is not taken at face value but is **based upon a physical and clinical assessment** of the individual before them; and
  - An overall **conclusion on the degree of consistency** with the individual's account of torture.
- In *MN v SSHD* [2020] EWCA Civ 1746 (a trafficking case), the CA adopted the SC's analysis in *KV*.
- See §121 onwards for a consideration and review of relevant authority on the issue of MLR.
- In any case, where there is physical evidence of torture or psychological evidence of mental health linked to past trauma, reports should be obtained in support of an individual's claim. MLRs are highly material to any assessment of credibility.

Rule 35 Reports

- Rule 34 & 35 - Detention Centre Rules (DCR) 2001 (amended by the Detention Centre (amendment) Rules 2018 - almost identical to the Short-Term Holding Facility Rules 2018):

Medical examination upon admission and thereafter

34.—(1) Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered medical practitioner in accordance with rules 33(7) or (10)) within 24 hours of his admission to the detention centre.

(2) Nothing in paragraph (1) shall allow an examination to be given in any case where the detained person does not consent to it.

(3) If a detained person does not consent to an examination under paragraph (1), he shall be entitled to the examination at any subsequent time upon request.

- Mandatory for each detainee to be given physical and mental examination within 24 hours failure can render detention unlawful see also the case of *R (SW) v Secretary of State for the Home Department* [2018] EWHC (Admin) §87-89

What is a Rule 35 Report looking for ?

- Set out in the Rules:

(i) Anyone whose health 'is likely to be injuriously affected by continuous detention', which if reported by way of Rule 35, is to be considered, ***Level 3 evidence*** (35(1))

(ii) Anyone who is suspected of having suicidal intentions, with a requirement for such an individual to be placed under special observation for the record of any treatment, for as long as those suspicions remained. However, such evidence will not always necessitate a review of appropriateness of detention (35(2))

(iii) Anyone who may have been a victim of torture, a declaration of which will amount to ***Level 2 evidence*** *at the very least. Such a report need not comply with the Istanbul Protocol, but will be placed on a detainee's medical record.* (35(3))

- **Adult at Risk Policy – 25th May 2021**

i. Highlights indicators of whether an individual may be particularly vulnerable to harm, and therefore at risk in detention, (referred to as 'risk factors').

ii. Once an individual has been identified as being at risk, by virtue of them exhibiting an indicator of risk, consideration should be given to the level of evidence available in support, and the weight that should be afforded to the evidence, in order to assess the likely risk of harm to the individual if detained for the period identified as necessary to effect their removal (see page 14 og guidance for different levels of evidence).

Independent Medico-Legal Reports

- When instructing someone to provide a medical report, then best to ensure that instructions include a focus on the definitions of those who are considered **vulnerable** as set out within the adult at risk policy.
- Where MLR is produced, the guidance highlights that '**very strong reasons**' would be needed to disagree with it.
- Unpublished guidance on detaining vulnerable migrants reinforces this (discovered in FOI during a challenge by case of *AK* – not reported - facts in public domain):

i. Home Office made a concession in an unlawful detention claim.

ii. Disclosed internal guidance.

iii. The Home Office accepted a consultant report ought to have been categorised as Level 3 evidence under the 'Adults at Risk in Immigration Detention' ('AAR') policy.

iv. If it conflicts with information from IRC Healthcare (as it did in this case) and if no concerns with MLR, the Healthcare record should not 'displace' an independent MLR for the purposes of reviewing detention under the AAR policy and should be considered as the most recent professional evidence. Caseworkers reminded that Dr carrying out MLR assessment is an expert in their field.

Disclosed Documents – see FoI response (link below)

- The documents disclosed included :

1) Adults at Risk Returns Assurance Team - '*Medico-Legal Reports (MLR) – Guidance and Frequently Asked Questions* dated June 2018;
2) An email chain dated June 2018;
3) An email chain dated December 2018.

New Plan for Immigration: panel of / joint experts ?

- The New Plan for Immigration announced the proposal for a new system for creating a panel of pre-approved experts (e.g. medical experts) who report to the court, or require experts to be jointly agreed by parties.
- Not brought forward in the Nationality & Immigration Bill, except in context of age assessment with a proposal for a decision-making function in the Home Office, referred to as the national age assessment board (NAAB) – see §610 onwards of Explanatory Notes.
- The Government has published this in its Consultation Response document:
  - *The Government has decided not to establish a panel of experts but intends to take forward work on the joint instruction of experts in immigration and asylum proceedings through proposing changes to the Tribunal Procedure Rules.*

Practice Directions

- *Practice Directions for the Immigration and Asylum Chamber of the First-tier Tribunal and the Upper Tribunal* - **see §*10 Expert evidence***
  - *10.1 – Duties for the party who instructs an expert.*
  - *10.2-6 – Duty of the expert to assist the Tribunal - paramount and overrides any obligation to anybody else, and should be uninfluenced by pressures of litigation. Expert should consider all material facts, including those which may detract from opinion, and make clear when question/issue outside of expertise or not able to reach a conclusion.*

- The Practice Direction goes on to set out the required content in expert reports – see §10.9 inc. qualifications & expertise, sources relied upon, a summary of facts and instructions where material to assessment and conclusions, details of who carried out assessment/examination, reasons for opinion/ranges of, summary of conclusions, and statements of truth/understanding of/compliance with duties (see §10.10-11) etc…

Practice Directions – cont.

- The *Joint Presidential Guidance Note on Child, Vulnerable Adult and Sensitive Witnesses (No. 2 of 2010)* provides further guidance on the needs of children and vulnerable witnesses. It is good practice to consider whether the guidance applies to your client and to ask an expert to give an opinion. For example, the guidance reminds judges that:
  - *...Some forms of disability cause or result in impaired memory;*
  - *The order and manner in which evidence is given may be affected by mental, psychological or emotional trauma or disability;*
  - *Comprehension of questioning may have been impaired. (10.3 Assessing evidence)*
- See also *SB (vulnerable adult: credibility) Ghana* [2019] UKUT 398 (IAC).
  - *(1) The fact that a judicial fact-finder decides to treat an appellant or witness as a vulnerable adult does not mean that any adverse credibility finding in respect of that person is thereby to be regarded as inherently problematic and thus open to challenge on appeal.*
  - *(2) By applying the Joint Presidential Guidance Note No 2 of 2010, two aims are achieved. First, the judicial fact-finder will ensure the best practicable conditions for the person concerned to give their evidence. Secondly, the vulnerability will also be taken into account when assessing the credibility of that evidence.*
  - *(3) The Guidance makes it plain that it is for the judicial fact-finder to determine the relationship between the vulnerability and the evidence that is adduced.*

Contact Details

- Q&A & Thank yous.

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