Case No: C4/2010/0976

Neutral Citation Number: [2012] EWCA Civ 521
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
MR JUSTICE BURNETT
CO/9651/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2012

Before:

LORD JUSTICE RIX
LORD JUSTICE MOSES
and
MR JUSTICE BRIGGS

- -

Between:

R (ON THE APPLICATION OF AM)	**Appellant / Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent / Defendant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Nick Armstrong (instructed by **Wilson Solicitors LLP**) for the **Appellant / Claimant**
Mr Jeremy Johnson QC (instructed by **Treasury Solicitors**) for the **Respondent / Defendant**

Hearing dates : Thursday 12th January 2012

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Judgment

Lord Justice Rix:

1. These proceedings concern AM's (the appellant's) claim that she was illegally detained, purportedly pursuant to paragraph 16(2) of the Immigration Act 1971 as an illegal immigrant pending removal, in the period between 10 October and 13 November 2008. On 13 November 2008 she was granted bail by the AIT and her detention ceased. On 10 October 2008 she had been in detention since 11 April 2008, but it was only on 10 October that her claim for judicial review was issued and served by new solicitors, Wilson Solicitors LLP, following their service on the previous day, 9 October, of fresh material and representations concerning her claim to asylum. That material included two reports prepared by Lucy Kralj of the Helen Bamber Foundation dated 7 October 2008 concerning the appellant's mental health and scarring.

2. In the light of that fresh material and in particular Ms Kralj's reports the question arose whether, pursuant to the Secretary of State's *Enforcement Instructions and Guidance* (the "Guidance"), the appellant should have been regarded as unsuitable for detention and therefore released. The critical provisions of the Guidance for the purposes of this appeal are parts of its para 55.10 as follows:

> "The following are normally considered suitable for detention in only very exceptional circumstances…
>
> ● those where there is independent evidence that they have been tortured…"

3. The appellant submits that Ms Kralj's reports contained independent evidence that she, the appellant, had been tortured and that on that basis the Secretary of State should have released her from detention from 10 October 2008 or shortly thereafter, but in any event before her actual release on 13 November. On 4 November 2008 the Secretary of State had replied to the fresh representations, rejecting them as constituting a new claim for asylum, and wholly discounting the reports of Ms Kralj in the light of the appellant's previous lack of credibility.

4. The essential issue on this appeal therefore is whether Ms Kralj's reports contained independent evidence that the appellant had been tortured. The Secretary of State, below the defendant and in this court the respondent, denied that it did. She submitted that because the reports were based on the appellant's own information it did not constitute "independent evidence". The judge below, Mr Justice Burnett, agreed, and in any event found that there were very exceptional circumstances justifying detention. In his judgment of 31 March 2010, [2010] EWHC 684 (Admin), he put the matter as follows:

> “24. The scarring report provided independent evidence that the claimant bore scars in nine areas, two of which she attributed to childhood injury. Of the remaining seven, the first was adjudged by Ms Kralj to be “highly consistent” with the explanation provided to her by the claimant of how she came by it. But it could have been caused by ‘any superficial burn with a solid instrument.’ The balance of the scars were consistent with having been intentionally inflicted by other people. It is clear, not only from the scarring report but also from the narrative part of Ms Kralj’s assessment report, that she believed the claimant, taking everything she said at face value. She was unaware of the history since the claimant’s arrival in this country including a judicial determination that she was not truthful in her accounts. Whether the scars were or were not the result of torture could only be judged by reference to the claimant’s account of what had occurred. Ms Kralj’s scarring report provided independent evidence that the claimant has the nine scars identified. It was independent evidence that seven of them were consistent with deliberately inflicted injury. But the report did not provide independent evidence that the claimant had been tortured because that depended upon accepting the claimant’s account how they were caused…
>
> 27. The letter refusing to defer removal made it plain that the UK Border Agency considered the fresh representations, coming so shortly after the failure of a differently expressed challenge, to be a try-on. By the time the letter of 4 November was written and the decision was taken to maintain detention and oppose bail the Secretary of State’s considered view of the new representations was clear. On any view it was appropriate to maintain detention whilst the representations were being considered. Even if there were any evidential basis upon which the claimant could show that she was either mentally ill or there was independent evidence of torture, paragraph 55.16 of the Instructions and Guidance is not in absolute terms but contemplates detention being maintained in very exceptional circumstances. The immediate background to the receipt of these representations provided ample material to support detention very exceptionally pending a decision to apply for judicial review.”

AM’s immigration history

5. As the judge observed, the appellant had previously been adjudged to be lacking (indeed totally lacking) in credibility. However, the tribunals which had considered her evidence had not known about her scarring. Ultimately, but after a long history of failure, the appellant succeeded in her asylum claim in a determination of the First Tier Tribunal dated 23 June 2010. That was after the judgment of Burnett J below. The FTT found that she had been detained in Angola, raped and tortured as claimed, and that her scars were the result of violent abuse or torture.

6. AM's immigration and earlier litigation history can conveniently be taken from the judge's account:

> "3. The claimant is Angolan. She arrived in the United Kingdom in May 2007 on a visitor's visa which ha[d] been issued on 2 January. On 1 June 2007 she applied for asylum which was refused on 30 June 2007. On the same day a decision was made to remove the claimant to Angola as an illegal entrant. She exercised her right of appeal to the Asylum and Immigration Tribunal ("AIT"). Although the claimant had the benefit of legal representation before the appeal hearing she appeared in person before the Immigration Judge on 27 September 2007. Her appeal was rejected in a determination dated 2 October 2007. She claimed asylum on the basis that she would be persecuted as a result of her membership of the youth wing of the Front for the Liberation of the Cabinda Enclave. She claimed to have been arrested in December 2006, to have been beaten and sexually assaulted. The immigration judge did not believe the claimant and concluded:
>
> > "…37. I believe none of the Appellant's evidence; I find that she is an Angolan national who can be returned to Angola where nobody would have any adverse interest in her. She has no credibility whatsoever. I have taken into account section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. She has given evidence to both the Home Office and to myself which was designed or likely to conceal information or mislead. She has not answered questions honestly that had been put to her both in relation to her interview with the Home Office and when giving her testimony before me."
>
> 4. The claimant sought a reconsideration of her appeal. The Senior Immigration Judge refused the application, as did Lloyd Jones J.
>
> 5. On 11 April 2008 the Secretary of State detained the claimant pending removal. She remained in detention until released on bail on 13 November 2008. On 7 May 2008 solicitors acting for the claimant made representations which they suggested amounted to a fresh claim for asylum. Nothing new was advanced in support of the claim. In particular it was not suggested that the claimant had been tortured or was mentally ill. The Secretary of State rejected those submissions on 10 July 2008. A fortnight later the claimant lodged a claim for judicial review of that decision. Permission to apply was refused on paper by Goldring J on 7 August 2008. He considered the claim to be totally without merit and described it as 'hopeless'. The application was renewed orally but refused on 22 September 2008. In the meantime the claimant had made two unsuccessful applications for bail. On 11 August Immigration Judge Khan refused bail in these terms:
>
> > "…I am satisfied that there is a materially greater than normal risk of her absconding because of her previous failure to report. Furthermore, no sureties have been offered and despite the applicant having NASS accommodation, there would appear to be little incentive for her to

> comply with bail conditions. The risk of absconding is too high for bail to be granted."

> 6. Nothing had changed when the next application was heard on 1 September 2009, save that a surety had been found who was not thought satisfactory by the Judge. Additionally, the Immigration Judge considered the recent refusal of permission to apply for judicial review a significant factor i[n] evaluating the risk of absconding. On 28 September 2008 the Secretary of State set removal directions for 13 October."

7. It was just a few days earlier that the appellant obtained representation by her current solicitors, following her attendance at an advice surgery at Yarl's Wood detention centre. They referred her to the Helen Bamber Foundation and she attended there on 4 October 2008 and was seen by Ms Kralj. Up to that time she had not adduced any witness statement, medical or other expert evidence in support of her claim. However, her new representations of 9 October 2008 fared no better. The judge picks up the story:

> "7…Those representations were rejected as not amounting to a fresh claim on 4 November. That rejection was followed by further representations contained in a letter dated 7 November which enclosed a statement from the claimant herself and Mr Bridgland's report. By letter dated 13 February 2009 those representations were not accepted as amounting to a fresh asylum claim. Further material was sent to the Secretary of State on 6 March 2009 comprising a report from the Medical Foundation for the Care of Victims of Torture, a report from Dr Arnold, a wound and scar specialist and further material from Mr Matuno. As a result of considering that new material the Secretary of State concluded that there was a fresh claim for asylum, but rejected it. In the result, a fresh right of appeal to the AIT was generated, which for reasons which are not material to this claim, has not yet been heard."

8. However, in the meantime the appellant had been released from detention, on bail, by the AIT itself, on 13 November 2008. The final, successful, application for bail was lodged with the AIT on 7 November 2008. The grounds were that the appellant was a victim of torture, that she was unlikely to abscond, and that her removal was no longer imminent. Bail was opposed by the Secretary of State. Summary grounds of opposition in the appellant's judicial review proceedings were also lodged on 7 November 2008. As of that time the appellant's claim for false imprisonment had not yet been intimated.

The Guidance

9. Relevant provisions of the Guidance are as follows:

> "**55.5 Factors influencing a decision to detain…**
>
> 1. There is a presumption in favour of temporary admission or temporary release.
> 2. There must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.
> 3. All reasonable alternatives to detention must be considered before detention is authorised.
> 4. Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified…
> 5. Each case must be considered on its individual merits.
>
> The following factors must be taken into account when considering the need for initial or continued detention:
>
> **For detention:**
>
> [A number of factors were here illustrated in bullet-points, such as the likelihood of removal, a history of absconding, previous failure to comply with conditions of bail, a determined attempt to breach immigration law such as clandestine entry, etc.]
>
> **Against detention:**
>
> …
> - Has the subject a history of torture?
>
> …
>
> **55.10 Persons considered unsuitable for detention**
>
> Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated IS accommodation or elsewhere…
>
> The following are normally considered suitable for detention in only very exceptional circumstances…
>
> - those suffering from serious medical conditions or the mentally ill;
> - those where there is independent evidence that they have been tortured…"

The Kralj reports

10. I pick up the findings of the judge as follows. The core contention in the letter of 9 October 2008 was that the Immigration Judge had been wrong on the question of credibility and that AM's previous failure to describe the treatment she had received at the hands of Angolan soldiers or her scarring was because of the sexual nature of the events. The report from Ms Kralj provided the substance on which AM relied. Ms Kralj is a registered nurse then working as clinical co-ordinator at the Helen Bamber Foundation. She had worked as a specialist nurse for asylum seekers across four health trusts prior to that. Ms Kralj had the benefit of a draft statement by AM dated 3 October 2008 but no other documentation, such as AM's original asylum interview, the Secretary of State's rejection letter, the Immigration Judge's determination or the history of unsuccessful applications in legal proceedings.

11. In the "Conclusion" of her main report Ms Kralj wrote:

> "[AM] is a grossly traumatized young woman who has never received support or therapeutic intervention to assist her in the aftermath of her immense trauma and multiple bereavements. She is a very private person who does not like to express her emotions in the company of others and lives with feelings of deep and intense shame and self disgust. She is prone towards understatement and tends to require great encouragement to speak in a freely associative manner. However, once she begins to speak the content of her thoughts and feelings are intrinsically linked to her trauma.
>
> [AM] has experienced profound alterations in her sense of personal identity and her ability to make sense of the world within her system of faith. This has led to a deeply shaken sense of herself within the world. [AM] is in a very fragile mental state and a deterioration would, without a doubt, require formal psychiatric intervention. However, due to her feelings of shame and stigmatization, coupled with a fear of authority figures, I find it highly unlikely (a near certainty) that [AM] would not avail herself to the services of professionals independently. This suspicion is supported by her inability to access therapeutic services in the UK, even during times when [AM] felt that she was actually losing her mind. She tends to isolate herself socially – which is known to be a poor prognostic marker for a number of mental health complaints but has specifically been found to be a poor prognostic marker following rape (Little & Breltkopf (2006)).
>
> [AM] certainly meets the criteria for treatment at the Helen Bamber Foundation and should such an opportunity arise, I will certainly offer [AM] long term therapeutic support and psychiatric assessment."

12. Ms Kralj also produced a scarring report detailing scars on the right arm and both legs, most of which AM stated were the results of torture. Nine areas of scarring were identified. Two were attributed by AM herself to childhood mishaps. Of the

seven others Ms Kralj's conclusions were, in the judge's own summary, as follows:

> "(i) Scarring A: Old burn injuries on the arm which were 'highly consistent' with the account given by [AM] but could have been caused by a superficial burn with any solid instrument.
> (ii) Scarring B: [AM] had no recollection of how this faint 0.5 cm scar on her right wrist was caused. It could have been caused by a shard of glass or small blade, and could have been self-inflicted or inflicted by another.
> (iii) Scarring C: A large scar on the right thigh the cause of which, beyond being the result of torture, [AM] could not recollect. It was consistent with being caused by a blade or shard of glass. The failure to recollect how this injury occurred was not remarkable given [AM's] 'dissociation'.
> (iv) Scarring E: Two faint areas of scarring on the left shin. [AM] said it was inflicted during her incarceration but could not remember when or how. It could have been caused by a blade, a nail or a sharp piece of wood.
> (v) Scarring G: A small scar on the left foot caused when a soldier pressed a burning fork on the skin. 'The injury would have been superficial and could have been caused by another burning object not pressed hard against the skin. However, there is no reason to disbelieve the account given by [AM].'
> (vi) Scarring H: A small scar on the left foot consistent with a puncture injury with evidence of infection. The claimant accounted for this injury as being caused by a piece of glass being thrown onto her foot.
> (vii) Scarring I: The worst of the scars, measuring 7cm x 1 cm on the inner left thigh. It was described by the claimant as being the result of a laceration inflicted by a razor blade which was not sutured until she escaped from custody. There was some infection. Ms Kralj explained that only a very sharp and hard object could have caused this injury." The word Ms Kralj used was "inconceivable" that any other instrument could have caused this injury."

The Istanbul Protocol

13. Ms Kralj's scarring report began by stating that "I confirm that I have read and understood the Istanbul Protocol".

14. The Istanbul Protocol (the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, submitted to the United Nations High Commissioner for Human Rights on 9 August 1999) is of international importance and regard where an account of torture is or is likely to be the subject of challenge. Paras 186/7 of Chapter Five, under the heading "D. Examination and Evaluation following specific forms of Torture", state:

> "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…"

15. It is clear from Ms Kralj's opening statement in her scarring report that she had regard to the Istanbul Protocol. Her description of "highly consistent" for scarring A is clearly a direct use of the Protocol's categorisation. It is the highest categorisation other than "Typical of" and "Diagnostic of". See also her use of "consistent with" for scarring C (the next highest categorisation). Ms Kralj's description of scarring I as being inconceivably caused by anything other than a blade or shard of glass is tantamount to the highest categorisation of "Diagnostic of".

16. It is plain that Ms Kralj believed AM, and the judge so found: see his para 24 cited above, where he said – "It is clear, not only from the scarring report but also from the narrative part of Ms Kralj's assessment report, that she believed the claimant, taking everything she said at face value".

17. However, I would not agree that Ms Kralj was merely taking everything AM said "at face value". She was reporting as an experienced assessor in such matters, and she was conducting a "health assessment". Her biography was included with her reports. She was not medically qualified as yet, but she had a wealth of relevant experience. Apart from being the clinical co-ordinator of the Helen Bamber Foundation, she was a senior trainee in psychotherapy on a Masters level study programme, closely supervised by an experienced psychotherapist (Dr Gottesman) and consultant psychotherapist (Dr Maginn). She had a certificate from the Tavistock and Portland Clinic in Working with Refugee Families and significant experience working with torture survivors. She is an honorary lecturer at King's College. She has a long list of publications to her credit. Her report set out her detailed findings of AM. It is of course true that her assessment was conducted without the benefit of knowledge of AM's litigation history. But then that litigation was conducted without the benefit of Ms Kralj's reports.

The Secretary of State's response

18. The Secretary of State's immediate response to these new representations and the judicial review claim came in the form of a letter from the UK Border Agency ("UKBA") dated 11 October 2008. That stated that in the light of the appellant's previous immigration history the Secretary of State would not comply with the usual policy of deferring removals pending the outcome of the claim. The letter did not engage with the substance of the representations. As a result the appellant sought and obtained an injunction against removal from Mr David Elvin QC on 13 October 2008. On 15 October 2008 the appellant wrote to the Secretary of State asking why she was still in detention.

19. The Secretary of State responded to these new representations by letter dated 4 November 2008, refusing to accept those representations as a fresh claim. The letter was included with the Secretary of State's acknowledgment of service and summary grounds of opposition dated 7 November. After emphasising the Immigration Judge's rejection of AM's credibility, the letter of 4 November continued:

> "Nevertheless despite those adverse findings of credibility your client's case has again been reviewed in light of the medical assessment and scar report. However, it is noted that contrary to your assertion that the new objective evidence supports your client's account, it is noted that the scars referred to in the report are slight and mainly restricted to the legs and there is no clear evidence that the scarring was obviously the result of torture or detention…
>
> Furthermore in considering your client's failure to recall how many of the scars are caused it is contended that if your client had been detained and tortured as claimed, then the precise circumstances of these events would have been so searing as to have engraved themselves including the date and period of detention upon your client's memory, the fact that your client was unable to recall the exact date and length of her detention coupled with her failure to recall the details of her alleged torture has further damaged her credibility…In the circumstances the medical assessment takes your client's case no further.
>
> …In the circumstances it is considered that the timing and circumstances of these late submissions, when taken together with the serious doubts about your client's credibility are just another attempt in a long series of attempts to frustrate your client's removal to Angola…
>
> …Moreover, it should be pointed out the Home Office Country Information Policy Unit has the benefit of a wide range of sources which includes information provided by the United States Department, the UNHCR,

Amnesty International, the Refugee Council and the Foreign Commonwealth Office. Therefore the situation in Angola is constantly monitored, and in view of the lack of independent corroborative evidence in your client's case there is no reason to believe that your client would suffer persecution from the Angolan authorities.

Therefore in the absence of any independent countervailing evidence from a reliable source it is not accepted that your client has experienced any difficulties in Angola…"

20. The appellant's claim for unlawful detention was raised by her solicitors' letter dated 1 December 2008 and her judicial review claim was amended on 22 December to include it.

21. On 25 March 2009, following still further representations, the Secretary of State, whilst rejecting them, finally accepted that all the material taken together amounted to a fresh claim.

22. Evidence has been filed in these proceedings on behalf of the Secretary of State by Angus MacDonald. In his statement he said –

> "16. It is not discernible from the Secretary of State's records whether or not the reviewer of the claimant's continued detention had taken into account the Claimant's further submissions of October 2008, including the medical evidence of the Helen Bamber Foundation. However, on 4 November 2008 the Defendant served the Claimant with a decision refusing to treat the Claimant's further submissions of 9 October 2008 as a fresh claim, and the Claimant's detention was subsequently maintained. At pages 1 and 2 of the letter the Defendant also specifically considered and rejected the Claimant's assertion that she had been the victim of torture and, for the reasons set out in the letter, I consider that the Claimant is not a person for whom detention is unsuitable under UKBA's Enforcement Instructions and Guidance at paragraph 55.10. This view was maintained in the Secretary of state's letter of 13 February 2009, including the previous findings in respect of the Claimant's report purporting to show the Claimant is a victim of torture…"

The legal framework

23. There was no apparent difference between the parties as to the legal framework relevant to this claim. Any differences arose on the application of the test.

24. Thus, para 16(2) of Schedule 2 to the Immigration Act 1971 gives the Secretary of State the power to detain a person liable to be removed from the country pending a decision whether or not to give directions for removal and pending removal in pursuance of such directions. However, limitations on the analogous power of detention under the 1971 Act's Schedule 3 (deportation cases) as articulated by Woolf J in *R v. Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704 and distilled by Dyson LJ in *R (I) v. SSHD* [2002] EWCA Civ 888, [2003] INLR 196 at [46] are equally applicable to Schedule 2 cases: and were approved in *R (Lumba) v. SSHD* [2011] UKSC 12, [2011] 2 WLR 671, see at [22] per Lord Dyson JSC.

25. In this connection the Secretary of State has published policy guidance (the Guidance), which, although it has the quality of policy rather than law, can, where that policy has not been applied, render the Secretary of State liable for the tort of false imprisonment. Thus the Secretary of State is obliged to follow policy absent good reason not to do so and, where the breaches bear directly upon detention may, by vitiating authority for detention, sound in damages for false imprisonment: see *Lumba* and *R (Kambadzi) v.SSHD* [2011] UKSC 23, [2011] 1 WLR 1299. Causation goes to damages not liability (*ibid*).

26. The decision on such questions is for the court itself, and does not depend on the application of *Wednesbury* principles of review: *R(A) v. SSHD* [2007] EWCA Civ 804 at [71] *per* Keene LJ, and *Anam v. SSHD* [2010] EWAC Civ 1140 at [77] *per* Maurice Kay LJ.

27. At the liability stage, the burden of proving lawfulness is on the Secretary of State: *Lumba* at [44].

28. So the issue in this case is whether the judge was right to find (a) that there was no independent evidence of torture, and (b) that, even if there was, there were in any event very exceptional circumstances why detention should have been maintained.

Independent evidence of torture

29. In my judgment, Ms Kralj's reports constituted independent evidence of torture. Ms Kralj was an independent expert. She was expressing her own independent views. As the judge himself said, her scarring report provided independent evidence of AM's scarring, and that seven of the scars were consistent with

deliberately inflicted injury. If they were deliberately inflicted, who had inflicted them? It may have been in theory possible that they were deliberately inflicted by AM herself, or even by another person for some reason other than torture, but that would not be likely. It was not a thesis that Ms Kralj put forward. On the contrary, it is evident from her assessment that she believed that AM had suffered torture and rape and that those misfortunes had rendered her the "grossly traumatized" woman that she found her to be, with "feelings of deep and intense shame and self disgust", "feelings of shame and stigmatization", and a "fragile mental state". Those findings are Ms Kralj's interpretation of what she found, they are not the mere assertions of AM.

30. On the contrary, as Ms Kralj repeatedly observed, AM was reticent and understated. As the judge himself rightly stated, Ms Kralj "believed the claimant". That belief, following an expert examination and assessment, also constituted independent evidence of torture. Ms Kralj's belief was her own independent belief, even if it was in part based on AM's account. However, the judge was mistaken to suggest that such belief was merely as a result of "taking everything she said at face value". A fair reading of her reports plainly went very much further than that. If an independent expert's findings, expert opinion, and honest belief (no one suggested that her belief was other than honest) are to be refused the status of independent evidence because, as must inevitably happen, to some extent the expert starts with an account from her client and patient, then practically all meaning would be taken from the clearly important policy that, in the absence of very exceptional circumstances suggesting otherwise, independent evidence of torture makes the victim unsuitable for detention. That conclusion is a fortiori where the independent expert is applying the internationally recognised Istanbul Protocol designed for the reporting on and assessment of signs of torture. A requirement of "evidence" is not the same as a requirement of proof, conclusive or otherwise. Whether evidence amounts to proof, on any particular standard (and the burden and standard of proof in asylum cases are not high), is a matter of weight and assessment.

31. The only reason ultimately given by the judge for not accepting Ms Kralj's reports as independent evidence of torture is contained in the last sentence of his para 24, where he said: "But the report did not provide independent evidence that the claimant had been tortured *because that depended upon accepting the claimant's account how they were caused"* (emphasis added). If the judge was talking about Ms Kralj's belief, that was plainly independent evidence, even if it depended in part on formulating her opinion in the light of AM's account. If, however, the judge was referring to the "acceptance" by the Secretary of State, that is neither a matter of evidence, nor is it independent, and the judge would be adding a new requirement, not mentioned in the Guidance, to qualify the Secretary of State's policy.

32. I therefore conclude that, irrespective of whether the burden of proof falls on the Secretary of State or on AM, Ms Kralj's reports constitute independent evidence that AM had been tortured.

"Very exceptional circumstances"

33. On that basis, the next question which arises is whether, despite that independent evidence, there were here very exceptional circumstances in favour of maintaining AM's detention. In my judgment, there were not.

34. The judge considered that there were, which he referred to compendiously at the end of para 27 of his judgment by saying: "The immediate background to the receipt of these representations provided ample material to support detention very exceptionally pending a decision on permission to apply for judicial review". It is not entirely clear what factors the judge was taking into account in that sentence, especially bearing in mind that the assessment of very exceptional circumstances is ultimately for the court. However earlier in his judgment the judge had mentioned such things as the Secretary of State's assertion that the new representations were a try-on when set against the background of the total failure of AM's asylum claim to date; the AIT's view that AM was totally lacking in credibility; the previous refusal of bail on the ground of "a materially greater risk of her absconding" (as Immigration Judge Khan had put it); and Goldring J's view that a previous judicial review claim (lodged in July 2008) was totally without merit and hopeless.

35. In this court Mr Jeremy Johnson QC for the Secretary of State relied on similar factors. However, such factors reflect the position *before* the new representations of 9 October 2008 and the new judicial review claim of 10 October 2008 based on those new representations had been made. Previously, AM had been (very largely) unrepresented, had made no witness statement, and had not been referred to the Helen Bamber Foundation. Previously there had been no health assessment and no report of scarring. Moreover, AM was neither an offender nor an absconder. Despite what Immigration Judge Khan had said, the facts reveal, stated on a single sheet of paper dated 30 October 2008 produced by UKBA itself, that AM had reported 34 times, had reported late on a single occasion, and had failed to report ("No shows") only 6 times, with the explanation of "subject unwell" against at least 4 of those times. Despite these facts, the Secretary of State in her opposition to bail had referred to the "risk of absconding"; and had also erred (as the judge had to remark) in saying that she had "presented a false passport on arrival". The real complaint was that a notice had been issued to her for having falsely obtained a visitor's visa, not for having presented a false passport.

36. In my judgment, however understandable it may have been that the Secretary of State was guided by the past results of AM's unrepresented litigation as an asylum seeker, she failed to give due regard to the significant change which had occurred with the representations of 9 October and the Kralj reports. These had to be considered on their own merits, however much scepticism may have been generated from the past, and on their own merits it was wrong to have described them as a "try-on". In any event, the Secretary of State did not at the time invoke the exception of "very exceptional circumstances". I do not rely on subsequent events for my conclusion that there were not here those "very exceptional circumstances" that could have justified a departure from policy, but merely point out that my conclusion is at any rate consistent with the subsequent decisions of the AIT to grant AM bail and of the FTT to allow her asylum appeal.

Conclusion

37. These were the reasons for which I therefore concluded at the hearing of this appeal that the Secretary was in breach of her policy and liable for the tort of false imprisonment of AM. We announced our decision at that time, and also our decision that liability commenced as from 24 October 2008, since we allowed two weeks for the Secretary of State to consider her position in the light of the new developments. We directed that both parties have liberty to restore the matter before a master of the Queen's Bench Division in order to resolve any issue of damages that they should be unable to agree.

Lord Justice Moses :

38. I agree.

Mr Justice Briggs :

39. I also agree.