Secretary of State for the Home Department v The Queen on the Application of BA (Eritrea)

The Queen on the Application of ST (Sri Lanka) v Secretary of State for the Home Department

Case Nos: C4/2015/0151/QBACF, C4/2015/1655/QBACF

Court of Appeal (Civil Division)

12 May 2016

[2016] EWCA Civ 458

2016 WL 02641906

Before: Lord Justice Elias Lord Justice Lewison and Lord Justice David Richards

Date: 12/05/2016

On Appeal from QBD, Administrative Court

His Honour Judge McKenna (1) Appellant

Professor Elizabeth Cooke (2) Appellant

CO17099/2013

Hearing dates: 19 and 20 April 2016

Representation

Ms Stephanie Harrison QC and Ms Jo Wilding (instructed by Fadiga & Co) for the First Appellant.

Mr Zainul Jafferji (instructed by The Tamil Welfare Association — Newham) for the Second Appellant.

Mr Rory Dunlop (instructed by Government Legal Department).

Judgment

Lord Justice Elias:

1 The Secretary of State has a range of broad statutory powers to detain individuals for immigration purposes, including powers to detain: (i) those seeking entry, pending a decision whether to grant leave to enter (Paragraph 16 of Schedule 2 to the Immigration Act 1972); (ii) those who are liable to administrative removal including illegal entrants, overstayers, and those in breach of their conditions (Paragraph 16 of Schedule 2 to the Immigration Act 1972); (iii) those liable to deportation (Paragraph 2 of Schedule 3 to the 1972 Act; and (iv) foreign criminals sentenced to 12 months' imprisonment or longer, pending a decision to deport (Section 36 UK Borders Act 2007). The power to detain is subject to two main sources of limitations, the so called Hardial Singh principles (so named because they were first formulated in the judgment of Woolf J in R (Hardial Singh) v Governor of Durham Prison [1983] EWHC 1 (QB)) and Home Office policies which in various ways regulate detention. Of particular relevance in this case is the policy set out in Chapter 55 of the Enforcement Instructions and Guidance ('EIG').

2 The Hardial Singh principles identify how the power to detain pending removal should be

exercised. They were summarised by Dyson LJ (as he then was) in *R (I) v Secretary of State for the Home Department [2002] EWCA Civ 888* paras. 46-47 in a formulation which was approved by the Supreme Court in *R (Lumba and Mighty) v SSHD [2011] UKSC 12* para. 22 per Lord Dyson:

> "i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;"
>
> ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
>
> iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
>
> iv) The Secretary of State should act with reasonable diligence and expedition to effect removal."

3 The Hardial Singh principles restricting the power to detain are supplemented by the Home Office Policy. Chapter 55.10 of the EIG recognises that for certain categories of person detention will normally be inappropriate even where the Hardial Singh principles are otherwise satisfied. There is always a presumption of liberty even for those illegally in the country, but it is heightened for persons falling within the relevant categories. However, the presumption may still be rebutted where there is a sufficiently strong public interest to justify detention.

4 One of the categories identified is persons in respect of whom "there is independent evidence that they have been tortured". Sometimes that evidence will be provided by an appropriate medical practitioner pursuant to Rule 35 of the Detention Centre Rules 2001 . The principal issue arising in both these cases is when a Rule 35 report can be said to constitute such independent evidence. A related question is whether, even where it does constitute such evidence, it would nonetheless be appropriate for detention to continue. The case of ST also raises a number of additional issues which I will address separately.

5 If in detaining a person the Secretary of State acts in breach of public law principles material to the decision to detain, the detention will be unlawful and will amount to false imprisonment: see the Lumba and Mighty case. However, the decision of the Supreme Court in that case also established that if the Secretary of State shows on the balance of probabilities that the individual would have been detained even had the law been properly applied, any damages will be nominal.

The relevant policy provisions

6 Paragraph 55.5 of the EIG states that there is a presumption in favour of temporary admission or temporary release even for those liable to be removed from the UK. It is only if there are no reasonable alternatives to detention that it should be authorised, and there must be strong grounds for believing that a person would not comply with any conditions of release.

7 Paragraph 55.10 identifies certain categories of case where the presumption against detention is particularly heightened. The relevant provisions are as follows:

> "Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.
>
> In criminal casework cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.

> The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons …"

8 There is then a list of categories including unaccompanied children, the elderly, pregnant women, persons suffering from serious medical conditions or serious mental illness which cannot be satisfactory managed in detention, and

> "Those where there is independent evidence that they have been tortured."

9 The general presumption in favour of liberty, reflected in paragraph 55.5, ought in many, perhaps most, cases to be sufficient to ensure that a person is not detained pending removal. Paragraph 55.10 is important with respect to those persons who are considered to be a real risk of absconding or committing offences – and where they have been detained, that fact alone would suggest that they fall into that category — but not such a grave risk as to overcome the particularly strong presumption in favour of release. The factors militating against release must be particularly powerful once independent evidence of torture is established.

10 Once someone is detained, Rule 34 of the Detention Centre Rules 2001 requires that person to be examined both physically and mentally by a medical practitioner within 24 hours, unless the person objects. The medical practitioner may produce a report issued pursuant to Rule 35 and sometimes this may constitute independent evidence of torture.

11 Rule 35 is, so far as is relevant, as follows:

> **"Special illnesses and conditions (including torture claims)**
>
> (1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention …
>
> (3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.
>
> (4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay."

12 There is a pro-forma document which is typically used to provide the report and it includes in part boxes which the medical practitioner is expected to tick where appropriate.

13 There is a Detention Services Order, 17/2012, which provides further guidance on the application of Rule 35 and focuses in particular upon those reports which suggest that a detained person may have been the victim of torture. The Order deals specifically with the procedures for recording and dealing with such reports. Paragraphs 20 to 25 deal with the approach which medical practitioners should take when preparing and writing reports under Rule 35 :

> "20. If the medical practitioner is concerned that a detainee may have been a victim of torture, he/she must always submit a Rule 35(3) report. Rule 35 places medical practitioners at the centre of the process and fundamentally it is for the medical practitioner to decide if he/she has concerns in a professional capacity that a detainee may have been the victim of torture. The medical practitioner should **always** state clearly the reasons why he/she has concerns arising from the medical examination – specifically the medical evidence which causes these concerns, including **all** physical and mental indicators [emphasis in the original]."
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> 21. The medical practitioner has no obligation to report an allegation from a detainee if this allegation does not cause the medical practitioner him/herself to be concerned, in the context of the overall medical examination, that the person may be a victim of

> torture. However, if an allegation does cause the medical practitioner to be concerned, then he/she should report it. The medical practitioner should set out clearly if his/her concern derives from an allegation with no or limited medical evidence in support.
>
> 22. Where there is medical evidence in support of an allegation, the medical practitioner must set out clearly all physical and mental indicators in support of his/her professional concerns. He/she should record any mental or physical health problems that are relevant to the torture allegation.
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> 23. Where possible, the medical practitioner should say why he/she considers that the person's account is consistent with the medical evidence. This means that the medical practitioner should ask to see any scars and record what he/she sees, including on a body map and, where possible, assess whether it is in his/her view medically consistent with the attribution claimed by the detainee. The medical practitioner should consider whether the injury, health problem or other indicator may have other possible explanations which do not relate to torture. The medical practitioner must identify any medical evidence which may be contrary to the account given by the detained person.
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> 24. To help decide whether there is cause for concern, it may also be helpful to ask detainees about:
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> • When the torture allegedly took place;
>
> • How the injuries/mental health issues arose;
>
> • How the torture is currently affecting them.
>
> 25. A Rule 35 report is a mechanism for a medical practitioner to refer on concerns, rather than an expert medico-legal report and so there is no need for medical practitioners to apply the terms or methodology set out in the Istanbul Protocol. Medical practitioners are not required to apply the Istanbul Protocol or apply probability levels or assess relative likelihoods of different causes but if they have a view, they should express it."

14 The effect of these paragraphs may be summarised as follows. A medical practitioner should always make a Rule 35(3) report if he or she has cause for concern that the detainee may have been tortured. A medical practitioner may have such concerns even where there is no independent medical evidence supporting the account of torture, but where it is medical evidence which causes or contributes to the cause for concern, all relevant evidence, including both physical and mental indicators, should be identified. The medical practitioner should say, if possible, whether the account is consistent with visible scarring but also the extent to which scarring may have other obvious causes; and he should identify medical evidence which is inconsistent with the detainee's account.

15 Each detainee will have a specific officer responsible for managing his or her detention. The Rule 35 report will be communicated to that officer who must respond within two working days to the medical officer providing the report. The response must address the concerns raised in the report and state whether detention is being maintained or not, and in either case give reasons for the decision (para. 34). If the practitioner is not happy that his concerns have been properly addressed, he can take the matter to a higher authority (para. 27):

> "There is also further guidance given to responsible officers in a document entitled "Detention Rule 35 Process" about how to consider, manage and respond to a Rule 35 report. The following advice is given with respect to how to determine when a Rule 35 report constitutes independent evidence of torture:
>
> > "Because each case will be different, it is not possible to provide definitive guidance on when a Rule 35 report will constitute independent evidence of torture. However, it must have some corroborative potential (it must "tend to show") that a detainee has been tortured, but it need not definitively prove the alleged torture. The following pointers may

assist:

> • A report which simply repeats an allegation of torture will not be independent evidence of torture;
>
> • A report which raises a concern of torture with little reasoning or support or which mentions nothing more than common injuries or scarring for which there are other obvious causes is unlikely to constitute independent evidence of torture;
>
> • A report which details clear physical or mental evidence of injuries which would normally only arise as a result of torture (e.g., numerous scars with the appearance of cigarette burns to legs; marks with the appearance of whipping scars), and which records a credible account of torture, is likely to constitute independent evidence of torture."

16 One of the issues in this case, which I address below, is whether these three examples or "pointers", as they are termed, are consistent with a proper analysis of what constitutes independent evidence of torture.

17 The document goes on to identify what might constitute "very exceptional circumstances" which might under EIG paragraph 55.10 render the detention appropriate notwithstanding evidence of torture:

> "Very exceptional circumstances could arise where, for example, release would create an unacceptably high risk of absconding, of reoffending or of harm to the public. There will not be very exceptional circumstances in the case of a routine detention absent other reasons, e.g., a removal without a high absconding risk or harm issue — see Ch. 55 of the EIG . The full circumstances applicable to the detainee and their reasons for detention must be considered, in order to establish whether there are very exceptional circumstances that mean detention is appropriate notwithstanding the Rule 35 report.
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> In some cases where the Rule 35 report is accepted as independent evidence of torture, there may nevertheless be further information which renders the overall account of torture wholly incredible. Such information may form the basis of an assessment that there are very exceptional circumstances making detention appropriate.
>
> For instance, it may be right to detain in very exceptional circumstances if, despite there existing independent evidence of torture, there is a court determination which was made with sight of a full medico-legal report and which dismisses the account of torture, or there is evidence such as visa match evidence which very clearly shows that at the time the detainee claims to have been tortured in one location, he was in fact enrolling biometrics and applying for a visa in another location ….."

The principles of construction of the policies

18 Certain principles are now well established when construing policies of this nature. First, the burden of establishing lawfulness lies on the Secretary of State: Lumba , para. 44. Second, construction of the policy is a matter for the court: see e.g In *Re McFarland [2004] UKHL 17; [2004] 1 WLR 1289* , although Lord Steyn at para. 24 said that a policy should not be subject to the same fine analysis as would be appropriate for a statute; and, specifically in the context of Chapter 55, Rix LJ in *R (On the application of AM) v Secretary of State for the Home Department [2012] EWCA Civ 521* , para. 26, citing further authority. Third, the policy must be considered in the round, having regard to the context and purpose of the policy: see *MD (Angola) v Secretary of State for the Home Department [2011] EWCA Civ 1238* paras. 14-16 where Maurice Kay LJ referred to the need for a "pragmatic and purposive construction".

19 The purpose of not subjecting those who may have been subject to torture to detention save

at least where there is very strong justification is, as Burnett J, as he then was, pointed out in *R (on the application of EO and others) v Secretary of State for the Home Department [2013] EWHC 1236 (Admin)* para.59, that those who have suffered torture in the past are, in general at least, disproportionately adversely affected by detention. We were told that the origin of the policy was a government White Paper entitled "Fairer, Faster and Firmer" which had stated that evidence of torture should weigh heavily against detention "whilst an individual's asylum claim is being considered." That White Paper did not, however, address the situation where a rejected asylum seeker is detained after a tribunal had already considered evidence of torture and rejected it.

When is a Rule 35(3) report independent evidence of torture?

20 This question lies at the heart of these two appeals. We have been referred to a number of authorities which bear upon this question. I would, however, preface my discussion of this issue by emphasising, as the courts have stressed (for example, EO para. 67) and as the guidance in the Detention Rule 35 Process correctly asserts, that no definitive guidance can be provided because the issue is fact sensitive. Any general observations must be treated as simply that – what the guidance refers to as "pointers" giving some indication of how a Rule 35 report might be expected to be analysed in particular factual contexts. I make certain general observations on this question, albeit with some hesitation, because Ms Harrison QC, counsel for BA, has criticised the examples or pointers contained in the guidance on the grounds that they improperly suggest that the proper scope of the concept of independent evidence of torture is narrower than an objective interpretation of Chapter 55(10) requires.

21 Mr Dunlop, counsel for the Secretary of State, submits that it is meaningless to say that the later guidance is inconsistent with the policy in Chapter 55. The Secretary of State can change her policy and therefore the later policy should if necessary be taken to have varied the earlier one. In my judgment that would only be so if, properly construing the policies, that was the intention of the later policy. In this case the Detention Rule 35 Process document does not purport in any way to alter the scope of Chapter 55; it is merely providing some assistance to caseworkers as to how to interpret Rule 35 reports. In my view, it is legitimate for Ms Harrison to submit that the examples are not consistent with a proper understanding of the scope of that concept of independent evidence of torture. It is no answer to say that they do not have to be because they are rewriting the definition.

The authorities

22 The only Court of Appeal judgment raising the question of what constitutes evidence of torture is AM , although the report in issue was not a Rule 35 report. The appellant in that case had been detained pending removal. Her complaints of torture had been rejected by the Asylum and Immigration Tribunal who found that she totally lacked credibility. She subsequently obtained two reports from Mrs Kralj who, although not a doctor, worked in The Helen Bamber Foundation, was highly experienced in assessing torture victims, and was a trained and highly educated psychotherapist. Her reports were in fact much more detailed than a Rule 35 report would be and they applied the principles referred to in the Istanbul Protocol. Mrs Kralj identified various scars on the body, said that some were consistent with torture and that one could not have been caused other than in the way described. She believed the account of the applicant. The Secretary of State initially refused to accept these new representations as a fresh claim or as independent evidence of torture. The judge agreed that this was not independent evidence of torture, because Ms Kralj had simply believed the claimant "taking everything she believed at face value".

23 The Court of Appeal (Rix and Moses LJJ; Briggs J) upheld the appeal. Rix LJ was in no doubt that this was independent evidence of torture (paras 29-30):

> "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.
>
> 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"."

24 Rix LJ went on to find that there were no exceptional circumstances which justified detention. The earlier finding that the applicant was not credible did not do so not least because the earlier assessment of credibility had been made with no medical report and without any appreciation that there was evidence of scarring.

25 There have been a number of High Court decisions which have considered the question of what constitutes independent evidence in the context of Rule 35 reports. They say that the mere recounting of the detainee's account of torture or symptoms will not typically be enough to constitute independent evidence of torture. I will only mention some of them.

26 In *R (EH) v Secretary of State for the Home Department [2012] EWHC 2569 (Admin)* the Rule 35 report was by a nurse (as it then could be) and stated that the detainee had alleged that some scarring on his head had been caused by torture. Lang J held that the Secretary of State was entitled to conclude that this was not independent evidence of torture (para.167):

> "I do not accept the contention by the Claimant that the entries on the Rule 35 Form amounted to "independent" evidence of torture. The nurse was merely completing a pro forma which required her to ask whether the detainee was a victim of torture, and if the reply was in the affirmative, she was required to complete a Rule 35 form. The extent of her medical assessment of him was to observe that he looked "very anxious" and that he had scarring, which he told her was the result of torture. She did not purport to conduct any psychological or physical examination which could assess the likelihood of the Claimant having suffered torture, nor was she qualified to do so."

27 To similar effect is the following observation of Carr J in R (SN) v Secretary of State for the Home Department [2013] EWHC 1974 (Admin) para. 93:

> "… the Rule 35 report did not constitute independent evidence of torture. It recorded the Claimant's assertions of torture and the presence of multiple small circular scars to his arms and legs and linear scars to his knees. No medical opinion as to, let alone support for, the veracity of the Claimant's assertions or of any connection between the scars and

> his assertions was expressed. It was no more than the Claimant's say-so. Whilst the maker of a Rule 35 report is not obliged to express an opinion and such a report is "at least capable of constituting independent evidence" (see D & K) (supra) at paragraphs 116 to 118), this report did not go further in effect than recording the Claimant's assertions. As was submitted for the Defendant, if the Rule 35 report is to be treated as constituting independent evidence, every detainee who merely asserts torture and shows some scars will be entitled to release absent very exceptional circumstances."

28 The point was emphasised again by Ouseley J in R (Detention Action) v Secretary of State for the Home Department [2014] EWHC 2245 para. 123:

> "Of course, a mere concern based on no more than a repetition of the applicant's claim cannot be independent evidence. The mere fact of a Rule 35(3) report expressing concern does not mean that the detainee is not fit for detention or that he should be released."

29 The first example in the guidance adopts this approach. It says that "A report which simply repeats an allegation of torture will not be independent evidence of torture".

30 Ms Harrison QC, counsel for BA, submits that these observations set the bar too high. Once a doctor ticks the relevant box to show that he or she has concerns that the applicant may have suffered from torture, that constitutes independent evidence of torture. Even where there is no independent medical evidence backing up the doctor's concerns, the fact that the doctor expresses concern thereby showing that he considers that the detainee's account of torture may be true, is enough. The doctor brings a medical perspective and typically some experience of assessing torture accounts, and the doctor's belief that the account may be credible itself adds something of significance which lends support to the applicant's case. Ms Harrison concedes that it may not be enough for the doctor simply to repeat the allegations without more, but once the doctor expresses a concern, with the implication that the account may be true, that satisfies the test of independent evidence and the heightened presumption of release arises.

31 I do not agree. A doctor may have no reason to doubt an account given by the patient. Indeed, in general one might expect the doctor at least to start from the premise that the detainee is speaking the truth, and typically, absent any other evidence, there is likely to be no reason to cast doubt upon the veracity of the account. But in the absence of any medical support for the account, the doctor will usually only be taking the story in good faith and alerting the responsible officer to the fact that the detainee claims to have been tortured and could be telling the truth.

32 I would accept that there may be cases where the reports of particularly experienced doctors may carry greater weight where, for example, they are able to point to some features of the account, or the circumstances in which it was given, which they believe tend to support the claim. But the mere recitation of an account of torture coupled with the fact that the doctor does not find it inherently incredible would not in my view be enough.

33 The position is no different even if the doctor also describes injuries or scarring which are visible on the body of the patient but does not relate them in any way to the account, as in the case of SN (para. 27 above), although I would assume that will be very rare.

34 Furthermore, in those circumstances the responsible officer may be expected to ask for clarification at least if there is reason to believe that the scarring might have been caused by the torture alleged to have occurred. This is envisaged by the Process Guidance para. 2.2.

35 Ms Harrison suggests that there is an injustice in this approach. It means that where there is no independent medical evidence of torture – and that may be the case for many rape victims, for example — the asylum seeker cannot benefit from this provision even if he or she has in fact suffered torture. They suggest that it would be contrary to the policy underlying the provision if such asylum seekers were to be left unprotected.

36 I do not agree. There are conflicting concerns here. Those who can produce some independent evidence that they have been subject to torture should have the benefit of the doubt and not be detained, at least pending a determination of their claims. However, it would

undermine the public interest in ensuring proper immigration control if all those who alleged torture should, absent very exceptional circumstances, automatically be released provided a doctor was willing to say that the account was at least arguably credible.

37 In any event, it is a perfectly cogent policy for the Secretary of State to adopt. It is also pertinent to note that even where the Rule 35 report does not constitute independent evidence of torture thereby establishing the heightened presumption of liberty, it is still relevant evidence which must be considered when deciding whether to continue detention or not.

38 Accordingly, in my view the first example in the guidance is apt.

39 In my judgment, therefore, the guidance is right to say that the independent evidence should have corroborative *potential* (and I would emphasise that word). It must be capable of lending some support to the detainee's case. In general, it seems to me that where a doctor asserts that the scars or wounds are consistent with the account given by the patient, that is likely to constitute independent evidence of torture. It has the potential to corroborate the account.

40 The second example in the guidance in part relates to this situation. It says this:

> "A report which raises a concern of torture with little reasoning or support or which mentions nothing more than common injuries or scarring for which there are other obvious causes is unlikely to constitute independent evidence of torture."

41 I confess that I find this somewhat ambiguous. It is not clear whether it is positing a case where some causal connection is made between scarring and the account of torture, but only of a most generalised nature, or whether it is suggesting that no causal link is drawn at all. I would accept that the mere description of scarring without a properly reasoned, even if brief, explanation as to how the scars appear to be consistent with the account of torture may well be insufficient to constitute independent evidence. The existence of commonly found scars coupled with a mere assertion of torture would not in general be enough. But in my view a reasoned explanation of why the scarring is consistent with the account does lend expert support to the account (and I do not read the example as suggesting otherwise.) Of course, the account may still be false; there may be other explanations for the scarring, and the account may subsequently be disbelieved. But as Rix LJ emphasised in AM , the policy requires evidence of torture, not proof. Unless the account of the detainee is inherently incredible so that there is no proper claim of torture capable of being corroborated, medical evidence consistent with the account will in my view generally satisfy the requirement.

42 Mr Dunlop, counsel for the Secretary of State, disputed that mere evidence of consistency would suffice. He referred to some observations of the IAT, on which Ouseley J was the presiding judge, in HE (DRC-Credibility and Psychiatric Reports) [2004] UKIAT 00321 when the judge said this:

> "But for these conditions e.g scarring, to be merely consistent with what has been said by the applicant, does no more than state that it is consistent with other causes also….Rather than offering significant separate support for the claim, a conclusion as to mere consistency generally only has the effect of not negating a claim."

43 This observation was cited with approval by Rix LJ in *S (Ethiopia) v Secretary of State for the Home Department [2006] EWCA Civ 1153* paras. 29-30.

44 However, in these cases the courts were considering whether an account of torture was credible. They were saying that set against other evidence, the weight to be given to a medical report which merely confirms the consistency of scarring with the account of torture is of limited weight. As the AIT put it, it is not *significant* separate support for the claim. But neither court suggests that it was not support at all, and the weight will depend on a consideration of all the evidence. I do not accept that these cases are inconsistent with the proposition that a reasoned report which establishes that scarring is consistent with the account – in other words, that there is a proper basis for believing that the scars could have been caused by the torture as alleged – will, in many cases at least, amount to independent evidence of torture.

45 Mr Dunlop went further and submitted that in order to constitute independent evidence of torture the Rule 35 report had to add something new to the evidence already available. (As we shall see, this was the view of the judge in ST). He contends that if a report merely repeats medical evidence which has already been considered by an independent tribunal which has rejected a claim of torture, that cannot tend to show that the detainee was tortured.

46 I do not agree. As Mr Dunlop concedes, this is simply adding words to the policy which are not there. In my view it is not necessary to imply them. The fact that a tribunal has found the evidence unconvincing does not alter its status as independent evidence of torture. It does not cease to be evidence because it, or evidence to the same effect, was not accepted. As Burnett J noted in EO , para. 68, the underlying credibility of the detainee is irrelevant to the question whether something amounts to independent evidence of torture. Credibility is critical when evaluating the claim but as Burnett J observed, "that does not mean that a piece of evidence which supports his central claim is any less "independent evidence" even if, in the end, the claim is rejected."

47 That is not to say that it is irrelevant that essentially the same evidence has been considered by a tribunal and rejected. Where that is the case there would be very strong grounds indeed for concluding that this fact constitutes exceptional circumstances which justify detention notwithstanding the existence of independent evidence. Indeed, the guidance gives this as an example of a situation where exceptional circumstances may be established (see para.18 above.) I agree with the observation of Burnett J when he said in EO (para.69):

> "It would be a perverse application of the policy to require the Secretary of State to release from custody someone in respect of whom there exists independent evidence of torture but also where it is clear that the claim is untrue."

48 That principle can only apply, however, where the tribunal which found the applicant to lack credibility has considered what is in substance the same medical evidence as is subsequently advanced in the Rule 35 report. The position might be otherwise if the Rule 35 report is capable of constituting fresh evidence.

49 Where the scarring is unusual and is likely only to have been resulted from torture as alleged, it will almost inevitably amount to independent evidence of torture. That is the situation envisaged in the third example which reads:

> "A report which details clear physical or mental evidence of injuries which would normally only arise as a result of torture (e.g., numerous scars with the appearance of cigarette burns to legs; marks with the appearance of whipping scars), and which records a credible account of torture, is likely to constitute independent evidence of torture."

50 Ms Harrison criticised the reference to the need for a "credible account". She says that this suggests that the doctor must be satisfied that the account is true and which would require proof rather than evidence. I do not believe that the example can fairly be read in that way. The guidance emphasises that evidence falls short of proof. In my view it is simply saying that even with unusual scarring, the account of torture must be credible in the sense of being capable of belief. If the account is inherently incredible, that will be likely fatally to undermine the conclusion that the scarring was caused by torture.

51 In my view, therefore, the examples given, properly construed, do not undermine or rewrite the concept of independent evidence of torture, although in my view the second example lacks clarity. They do not support the rigorous approach to the analysis of Rule 35 reports advanced by the Secretary of State.

The role of the court

52 A further issue which was raised in these appeals is whether the role of the court is to review the decision of the Secretary of State in relation to the application (as opposed to the

construction) of the policy, or is to make an independent assessment of the evidence. The justification for the latter approach is the importance of protecting the liberty of the individual.

53 There have been conflicting authorities on this point, some of them were considered by Burnett J in EO , paras. 14-16. However, as he pointed out, for the moment there is authority which binds this court that the court can interfere only if the decision of the Secretary of State is in breach of traditional public law principles: R(OM) v Secretary of State for the Home Department [2011] EWCA Civ. 999 , para. 24 per Richards LJ.

54 The lawfulness of that approach was challenged in the Supreme Court in *R(O) v Secretary of State for the Home Department [2016] UKSC 19* , but in the event the point did not have to be decided. Lord Wilson observed that for the present at least the nature of the review is the traditional public law approach, citing *R(ZS)(Afghanistan) v Secretary of State for the Home Department [2015] EWCA Civ. 1137* where the Court of Appeal noted that it was bound to follow the approach which had been adopted in OM .

55 However, I would agree with the observation of Burnett J in EO , para.16, that the question whether a report is evidence of torture is relatively hard-edged, and in most situations I suspect that the result will be the same whichever approach is adopted. There is, however, more room for differences of opinion when the issue of exceptional circumstances is under consideration.

56 I turn to consider the two cases in the light of this legal analysis.

The case of BA

The background

57 The claimant, BA, is an Eritrean national born on 19 July 1983. She claims she was living in Ethiopia with her father when they were deported to Eritrea during the border conflict in 1998 when she was 15 years old. She said that they were detained and her father was killed in detention. She was regularly slapped and kicked and was raped on one occasion. She was released after a month and fled via Ethiopia to Lebanon and later via Turkey to Greece. She was never fingerprinted in Greece but was fingerprinted in Italy on 6 September 2013 when she spent five days there en route to the UK.

58 She arrived in the UK in the back of a lorry on 17 October 2013. She was arrested and detained by police and claimed asylum immediately.

59 Italy accepted responsibility for the claimant's asylum claim under Dublin II on 7 November 2013. In view of this the appellant refused the claimant's asylum claim and certified it on third country grounds on 8 November 2013. She set removal direction on 15 November 2013 to take effect on 25 November 2013. These were deferred until further notice on 21 November 2013 on the grounds that the claimant was unfit to fly.

60 A Rule 35 report was prepared by Dr Hayes on 19 October 2013. In it Dr Hayes ticked the box which states:

> “I have concerns that this detainee may been the victim of torture”.

61 In the section of the form where he was required to set out the clinical reasons for his conclusion he essentially repeated the applicant's own account of her treatment in prison in 1998 but added that “she does not have any scars to document.”

62 The appellant Secretary of State responded to the Rule 35 report in a letter dated 22 October 2013 and stated that she did not accept the report as independent evidence of torture; it was no more than a record of her claim. The practitioner had not expressed his own reasoned concern that she was a torture victim.

63 The claimant filed her judicial review claim on 22 November 2013. She sought to challenge the decision to certify the claimant's asylum claim and the subsequent removal directions on the grounds that: (i) she was medically unfit to fly; (ii) if removed to Italy she would face a real risk of treatment contrary to Article 3 and (iii) her detention was unlawful.

64 On 9 December 2013 the claimant's request for temporary release was refused on the grounds that the appellant did not believe her claims of torture and that she presented a risk of absconding. The Secretary of State maintained her decision to refuse asylum and to certify BA's claim.

65 The claimant was released from detention on 17 January 2014 on being granted bail by a judge of the First Tier Tribunal.

The proceedings in the Administrative Court

66 Permission to apply for judicial review was first refused on the papers by Michael Kent QC on 29 January 2014 but was then granted by Upper Tribunal Judge Gill sitting as a Deputy High Court Judge at an oral renewal hearing on 17 June 2014. At this stage the claimant had withdrawn grounds (i) and (ii) of her judicial review claim on the Secretary of State's agreement to reconsider her decisions of 21 November and 17 December. So the only live issue was whether the claimant's detention was unlawful.

67 BA advanced a number of arguments asserting that it was. First, she said that it was unlawful as from 23 October until her release on 17 January, because she should have been released as a result of the Rule 35 report which, she asserted, amounted to independent evidence of torture. The second and third submissions focused on the reasonableness of the detention on the premise that there was no independent evidence of torture. The second was that continuing detention was in any event unlawful as from 22 November or shortly thereafter, when removal directions were deferred and the judicial review proceedings were lodged; and the third asserted that it was unlawful from 9 December when the applicant was refused temporary release without, it is alleged, being given any adequate or lawful reason. In each case it was asserted was there was no proper consideration of the relevant factors bearing upon detention or release and that had there been, the only proper conclusion would have been that BA should be temporarily released pending removal to Italy.

The judgment below

68 In a judgment handed down on the 12 December 2014 HH Judge Mckenna QC found in favour of BA on all grounds. However, the first secured the longest period of unlawful detention, and so he considered the other submissions relatively briefly.

69 As to the Rule 35 issue, he rejected the contention that the Rule 35 report in this case was not independent evidence of torture and he further concluded that there were no exceptional circumstances which justified detaining the claimant. There was no more than a generic risk of absconding and no request had even been made to request the Italian authorities to accept the claimant. So the claimant had been wrongly detained from 23 October.

70 The judge summarised his reasons for concluding that the Rule 35 report constituted independent evidence of torture as follows:

> “Whilst it is true that Dr Hayes did not explicitly specify that he believed the Claimant's account and that not every Rule 35 report amounts to independent evidence of torture, the fact of the matter is that Dr Hayes did record what he was told and he did tick the box recording his “concerns”. A doctor does not have to prepare a Rule 35 report if he does not have concerns and the doctor is also entitled to state that the report is nothing more than a repetition of an assertion made which does not give rise to a reasoned medical concern. However in this case Dr Hayes did not give any indication that the Claimant's account was doubted by him. He has therefore given some credence to what the Claimant reported to him and that is sufficient to amount to independent evidence. As it seems to me, it can be assumed that the doctor was expressing a concern of his own since that is implicit in what he in fact did in ticking the box and indeed in choosing to make a report in the first place. As Ms Gill commented when granting permission where, as here, the allegation is of rape it is difficult to see what the doctor could have added, scars being irrelevant and other discernible evidence of rape not being expected.”

71 The judge then considered and rejected the submission that there were exceptional circumstances justifying the detention.

72 The judge found in the alternative that no lawful decision to detain could have been made after 22 November 2013 when the judicial review claim had been lodged and removal directions had been deferred (paras. 27-30):

> "By 22nd November 2013 the judicial review claim had been lodged and it was plainly foreseeable that there was no prospect of the Claimant being removed in the near future.
>
> It is to be noted that the Defendant considered the question of the Claimant's release on a number of occasions prior to the ultimately successful bail hearing on 17th January 2014. Thus there were detention reviews on 5th December 2013 (page 205 and following) and on 2nd January 2014 (page 213 and following) and in between the application for temporary release which was refused as I have recorded on 9th December 2013 in the terms of the letter which appears at pages 64 and 65.
>
> To my mind the Defendant's approach to decision making on each of these occasions was flawed. There was no consideration of the likely timescale for removal having regard to the Claimant's medical condition and the existence of this claim and the fact that a decision of the Supreme Court was awaited which would or might have an impact on this claim; there was no proper assessment of the risk of absconding and, in respect of the decision to refuse temporary release, it is plain that the Defendant's reasoning was also flawed since:
>
> i) Contrary to the contents of the letter, the Claimant's allegation of torture had not been substantively considered; on the contrary it was the Defendant's case throughout that that was a matter for the Italian authorities; and
>
> ii) The decision maker appears to have misunderstood the presumption in favour of liberty and instead seems to have required the Claimant to justify her release.
>
> It follows in my judgment that a lawful decision to detain could not have been made after 22nd November 2013 because there were no factors which made it reasonable to continue to exercise the power to detain. The Claimant on any view presented a low risk of absconding and no risk of harm whilst there were barriers to her removal which were likely to persist for an unknown period."

73 Given that the primary argument succeeded, the judge granted the claimant a declaration that her detention was unlawful between 23 October 2013 and 17 January 2014. Her claim for damages for false imprisonment was transferred to the Central London County Court for the assessment.

The grounds of appeal

74 The Secretary of State submits that the judge erred in finding any unlawful detention at all. First, the judge was not entitled to find, contrary to the view of the Secretary of State, that the Rule 35 report was independent evidence of torture. Second, the judge did not give adequate reasons for the alternative conclusion that in any event detention was unreasonable once the application for judicial review had been lodged on 22 November.

75 In my judgment, the judge did err in treating the Rule 35 report as independent evidence of torture. There was no more than a recitation of the claimant's account of torture. For reasons I have given (see paras. 30-33 above), that does not amount to independent evidence. The fact that a doctor does not find the account lacking in credibility is not enough. That is what the guidance says and I believe it to be correct.

76 Accordingly, the judge was wrong to hold that the Rule 35 report was independent evidence of torture. In my view that was not a decision he could have reached even were it his task to consider the matter afresh. A fortiori he could not say that the Secretary of State had erred on public law grounds in holding that the report was not independent evidence of torture.

The alternative finding

77 The challenge to the judge's alternative finding was stated in the ground of appeal to be a reasons challenge. This was advanced before us in two ways. First, it is said that there was an ambiguity in the judge's observation in para. 27 that “it was plainly foreseeable that there was no prospect of the claimant being removed in the near future”. Mr Dunlop, counsel for the Secretary of State, says that this could mean either that there was no prospect of removal within the near future; or that it was foreseeable that removal would take a long time. I do not agree. In my view the words plainly mean that the Secretary of State ought to have appreciated that there was no prospect of removal in the near future. There is no ambiguity.

78 The other submission is that, contrary to the finding of the judge, there was evidence from which the Secretary of State could properly form the view that removal would take place in the near future. There was the possibility of expedition which, again contrary to the understanding of the judge, was in fact considered by the Secretary of State. If expedition had been granted and the claim had been rejected, removal could have taken place in a matter of weeks, thereby honouring the Hardial Singh principles. Mr Dunlop accepts that there was a Supreme Court case pending which raised the issue whether removal to Italy would be a breach of Article 3 , but he submitted that it did not follow that there could be no removal pending the determination of that appeal: see *AB (Sudan) v Secretary of State for the Home Department [2013] EWCA Civ.921* .

79 In my view, this latter challenge goes beyond a reasons challenge; it is alleging that on the material before the judge he could not have properly reached the conclusion he did. In my view, the argument is not sustainable. Even if removal could in principle be effected before the decision of the Supreme Court, an attempt to do so would almost certainly have resulted in an application to the courts with further inevitable delay.

80 Furthermore, one of the factors weighing with the judge was the fact that the claimant was unfit to fly. That was an independent reason why removal within a reasonable time could not realistically take place. The fact that there was no evidence of absconding reinforced the justification for requiring release from detention. I therefore reject this ground of appeal.

81 Accordingly, I would uphold the Secretary of State's appeal in so far as it relates to the finding that detention was unlawful from 23 October because she had received independent evidence of torture, but I would dismiss the alternative argument. Damages should therefore now be assessed on the assumption that the detention was unlawful from 22 November, as the judge found.

The case of ST

82 The appellant is a national of Sri Lanka and was born on 15 April 1991. She is of Tamil ethnicity. She arrived in the UK lawfully on 8 November 2011 on a Tier 4 (General) Student Visa valid until 3 November 2012. On 3 November 2012 she applied for an extension of stay but this was refused on 13 March 2013.

83 She then claimed asylum on 26 June 2013 on the basis that she would be at risk of torture due to her political opinion if returned to Sri Lanka. She asserted she had been arrested by the army in 2010 for a period of 15 days in connection with her brother's involvement with the Liberation Tigers of Tamil Eelam (LTTE) and had been tortured whilst in detention. She asserts that she was sexually assaulted twice and the guard who assaulted her videoed both assaults on his phone. She was slapped, punched in the breast, cut on the breast and her leg was burnt with a cigarette. [LT2/57/j]

84 Her asylum claim was refused on 14 July 2013 following an interview. [ST2/54] Essentially her story was disbelieved. It was not accepted that she was wanted by Sri Lankan authorities, that she was arrested and detained by the army and would be at risk upon return.

85 The appellant appealed to the First Tier Tribunal and relied upon two medico-legal reports. The first was a report by Dr S E Josse dated 9 August 2013. In the report he confirms that some scars are consistent with her account of cigarette burns, knife cuts and trauma from a blunt object. The second was a psychiatric report by Dr Nadir Omara dated 4 October 2013.

86 Her appeal was dismissed by Judge Bryant of the First Tier Tribunal on 23 October 2013. He considered that her account of being tortured in Sri Lanka was not credible and he rejected medical evidence supporting her claim on the basis of shortcomings in the reports: the medical evidence was not sufficiently consistent with the appellant's account (for example she asserted that she had suffered cigarette burns on her back but there was no evidence of this) and Dr Josse had not explored the causation of scarring by considering the likelihood of other causes. The judge said at [68]:

> "Whilst I fully take into account the evidence of the medical and psychiatric reports on the appellant and the evidence of the appellant's brother, I find the appellant to lack credibility to the extent that I do not believe her account of her history in Sri Lanka. I do not find that she proves, even to the low standard required, that she was ever detained, ill-treated, sexually abused or raped by the authorities or members of the security forces in Sri Lanka and that she fled Sri Lanka through fear of persecution."

87 The appellant appealed the FTT decision to the Upper Tribunal. Her appeal was dismissed by Upper Tribunal Judge Reeds on 4 February 2014. The report by Dr Josse was found not to conform with the guidance in the Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) (at [40]). The judge concluded that having considered the FTT judge's treatment of the medical evidence, he did not find that the judge's approach to that evidence was flawed.

88 The appellant was detained by immigration authorities on 6 May 2014 pending removal. She was examined by a Dr Ali who produced a Rule 35 report on 11 May 2014. He ticked the box that the appellant 'may have been a victim of torture' and also another box stating that continuing detention was likely adversely to affect her health. The doctor added the following observations:

> "Was arrested and detained by army and taken to a camp. Interrogated by army officers. Accused of helping another political group. Was beaten and raped by army officer while another officer recorded it on a mobile phone, Hands tied behind back, knife used to cut area around axilla. Cigarette burns to legs. Beaten. Raped. Very tearful and distressed while recounting events. Incidents occurred when arrested in 2010, came to the UK in 2011, On Fluoxetine and Temazepam – been under care of GP for last 4 years. Depression and anxiety symptoms since incidents in Sri Lanka. Significantly affected her mental state. Suffers with insomnia, anxiety, nightmares, flashbacks. PTSD symptoms."

89 The appellant submitted that this was independent evidence of torture but the Secretary of State rejected this submission. She summarised her reasons as follows:

> "I note that you previously raised these allegations of torture when you sought asylum in the United Kingdom on 26/06/2013. Your asylum claim was substantively considered and was refused on 14/07/2013. You appealed against the refusal of your claim for asylum and your claim was further considered by an Immigration Judge. Your appeal was dismissed on 28/10/2013 and you exhausted your appeal rights on 24/02/2014.
>
> Additionally, although the Medical Practitioner who complied the report states that they have concerns that you may have been a victim of torture. It is not considered that the report in itself amounts to independent evidence of torture and you have provided no independent corroborative evidence to support the claims.
>
> Given that your asylum claim has been considered substantively in the UK and considered by an immigration Judge, I am satisfied that your continued detention remains appropriate pending your removal from the United Kingdom."

90 In my judgment, the word "additionally" strongly indicates that the Secretary of State intended to refer to two distinct grounds: both that the report was not independent evidence of torture, and that in any event that the asylum claim had been considered already. The latter observation, whilst not spelling it out, suggests that the Secretary of State considered that the exceptional

circumstances justification was established.

91 On 12 May 2014 removal directions were set for 18 May 2014.

92 The appellant made further submissions in two letters dated 13 May 2014. The first purported to provide further information, including further evidence about her father and a further letter from the doctor. The second letter stated that she had been accepted for pre-assessment by The Helen Bamber Foundation to be carried out on 4 December 2014.

93 On 17 May 2014 the respondent refused the further submissions and decided that they did not amount to a fresh claim for asylum. On the 18 May Nicol J issued an order preventing the appellant's removal but at that point she remained in detention. On 19 May 2014 the appellant issued her claim for judicial review and on 21 May 2014 she was served with an IS.96, a notice of temporary admission, and was granted temporary release from detention.

94 Her application to apply for judicial review was first refused on the papers by HHJ Allan Gore QC on 1 August 2014 but was granted permission on oral renewal by UT Judge Grubb sitting as a Deputy High Court Judge on 30 September 2014.

95 The appellant advanced two reasons why her detention became unlawful. The first was that the respondent had wrongly refused to accept the Rule 35 report as independent evidence of torture. It should have been so characterised, and had it been, the general policy would have been applied and the appellant would have been released pending removal. The detention was therefore unlawful from the date the Secretary of State rejected this submission on the 11 May.

96 In the alternative, it was alleged that in accordance with the Secretary of State's own policy the appellant should have been released as soon as the Secretary of State had received notification that ST had been accepted for a pre-assessment by The Helen Bamber Foundation.

97 The relevant policy is entitled “Asylum Policy Instruction: Medico-Legal Reports from The Helen Bamber Foundation and The Medical Foundation Medico-Legal Report Service”. It explains how caseworkers should process and consider asylum claims involving allegations of torture where a medico-legal report from these Foundations constitutes part of the evidence. Paras.2.3 and 2.4 explain when a reference to the Foundation would lead to a suspension of the substantive decision:

> “Once the applicant has been referred to one of the Foundations, from whatever source, for an MLR, the referral is assessed by the Foundation and, on the basis of the information contained in it; a decision will be made to:
>
> • Reject the request without an appointment or;
>
> • Invite the applicant to attend a “pre-assessment” interview; or
>
> • Move directly to an appointment with a clinician.
>
> Although this varies between the Foundations, only approximately 30 per cent of applications are accepted for pre-assessment. The decision not to invite an applicant for an assessment does not necessarily reflect upon the applicant's credibility.
>
> When the caseworker is informed in writing by the applicant's legal representative that the case has been accepted for a pre-assessment appointment, they should normally suspend the substantive decision if they are not minded to grant any leave (see section 2.8 below) …
>
> However, there may be cases where the applicant's account of events, including incidents of torture, is accepted but this does not give rise to a need for international protection where, for example, the country situation has changed or there is sufficiency of protection. In such cases the caseworker may proceed to decision without waiting for the MLR but should first contact the legal representatives and give them an opportunity to provide representations as to why the decision should be suspended to wait for the MLR.”

98 The appellant submitted that in accordance with para 2.4 there should have been no decision on the merits of her case until a report from the Foundation was available. The policy itself says nothing about release from detention, but given the inevitable delay before that could be achieved, the proper application of the Hardial Singh principles required that she should be released. There was no reason to suspect that she would abscond.

99 The Secretary of State did not accept that this policy related to a consideration of further submissions; she claimed that it only applied to initial considerations of asylum. It would be impractical and lead to abuse were it otherwise. Applications would be made to the Foundations for delaying purposes. Furthermore, the policy is not automatically applied in all cases – it merely says that suspension normally follows — and this was a situation where even if the policy were applicable, it was legitimate to keep the applicant in detention.

The judge's ruling

100 The judge, Professor Elisabeth Cooke, sitting as a Deputy High Court Judge, rejected the Rule 35 argument. She held that the Secretary of State was entitled to conclude that the Rule 35 report was not independent evidence of torture. It therefore created no presumption that she ought to be released pending removal and the continuing detention was not in breach of the policy set out in Chapter 56.10. She explained her reasons for reaching this conclusion as follows:

> "I accept that independent evidence is not the same as proof; that the value of a medical report as independent evidence is not affected by the Claimant's credibility; that it does not matter that the Rule 35 Report in this case was not a detailed report written for a court. Nor does it matter that the Rule 35 Report uses the words "may have been tortured" rather than stating that the Claimant's injuries were caused by torture or could only have been caused by torture or "would normally only arise as a result of torture" (to use the words of the Defendant's policy).
>
> The difficulty that stands in the Claimant's way is, as Mr Murray put it, the context in which the Report was made. It was undoubtedly independent, and was undoubtedly evidence, but it did not constitute independent evidence of torture because it added nothing to the picture. It referred to no injury that had not been described by Dr Josse and it did not add to Dr Josse's description. It told the Defendant nothing that had not already been known and explored. The Defendant already knew that the Claimant had scars that were consistent with cigarette burns and with being cut. Alarm bells did not ring on this occasion because they had already been rung, in the asylum proceedings, and had been dismissed; the asylum claim based on this evidence, and indeed on more detailed evidence than this, had been explored very recently by the Tribunal, it had been rejected and appeal rights were exhausted."

101 Having reached this conclusion, the judge did not consider whether, if the report had been evidence of torture, there were exceptional circumstances justifying detention arising from the earlier rejection of her asylum claim. The judge might simply have thought it unnecessary to engage with that question given that on her analysis the policy did not apply. In fact it seems that the issue was not before her. We were informed that this argument was not advanced before the judge notwithstanding that, for reasons I have given (para. 79) this appears, on an objective reading of the Secretary of State's letter, to have been one of the reasons for refusing to release ST from detention. The only argument advanced on Rule 35 was that there was no independent evidence of torture.

102 However, the alternative ground relied upon by the appellant succeeded. The judge concluded that the policy on medico-legal reports from the Foundations was applicable to further submissions in the same way as to initial determinations. She recognised the possibility of abuse but was not convinced that this justified limiting the scope of the policy. She expressed her conclusions on this aspect of the case as follows (paras.28-31):

> "28. The Defendant argues first that the policy was applicable only to initial applications for asylum. Yet it does not say so and one would not understand that from its language.

> Mr Murray said that this was a matter of logic and reflects the need for finality; it would be impracticable to allow claimants to continue to have fresh applications held up by the need to await a report from either of the foundations. If the policy applied to further submissions it would provide a method of routinely frustrating removal.
>
> 29. That is not an argument from logic, but it is indeed about the wish for finality; it is an argument from convenience and practicality, motivated by the wish not to clog up the system with applicants seeking to delay removal.
>
> 30. But that is not a realistic concern, or at least not one which ought to outweigh the pursuit of the objectives behind the policy. For one thing, it will not happen in many cases; one would normally expect that an application to one of the foundations would be made along with an initial claim for asylum. For another, no case will be delayed more than once on this basis. Set against that is the objective, referred to in paragraph 24 above, that a report from one of the foundations be properly considered and given appropriate weight. Suspending a decision on further submissions in order to wait for a foundation report may enable some applicants to play the system. But it will bring expertise to bear on the case, which may reveal something that has been overlooked or wrongly discounted earlier in the process, perhaps where a claimant has been let down by expert witnesses who had not wholly understood her situation, and in some cases that may make all the difference. It is not known into which category this case falls. It makes sense that the Secretary of State's policy should encompass further submissions, even if that means that a few unmeritorious cases will be delayed.
>
> 31. Mr Jafferji pointed out that in *ZO (Somalia) [2010] UKSC 36* the Supreme Court considered the scope of the Reception Directive (Council Directive 2003/9/EC), which protects the living standards of asylum seekers in the European Union. The Supreme Court held that the term “application for asylum” applied not only to initial claims but also to further submissions, and was unimpressed by the argument that to extend the protection of the Directive to asylum seekers making further submissions would clog up the system (see in particular Lord Kerr at paragraph 31). That is of course a decision about the construction of that directive, but the reasoning is helpful here.”

103 Later in the judgment she made this further observation why the policy should not be limited to initial decisions only (para.34):

> “The objective of the policy is that the views of the Foundations should be available to the Secretary of State when she makes substantive decisions, and that objective would be frustrated by a blanket rule that the policy is irrelevant to Further Submissions.”

104 The judge also rejected the submission that because the suspension of the decision was not automatic, there was no breach of the policy. She said that the purpose of the policy would be frustrated if the caseworker could in effect pre-empt the decision of the Foundation.

105 The judge went on to consider when, on this analysis, the detention became unlawful. She held that it was from 17 May, when the decision was taken on whether or not to accept the fresh submissions which had also been sent on 13 May. The judge did not accept that it was realistic to argue that detention was unlawful from the moment that the letter from The Helen Bamber Foundation was received. So the period of unlawful detention on this analysis was between 17 May and 21 May, when the applicant was released.

Grounds of appeal

106 The appellant advances two grounds of appeal. First, the judge erred in law in holding that the Rule 35 report did not constitute independent evidence of torture. It was an error for the judge to find that it was necessary for the report to “add something to the picture”, to use her language. It does not need to reveal something new. It is enough that it adds something to the account of torture given by the applicant. The fact that there has been a tribunal finding rejecting the applicant's account of torture is not relevant when deciding whether the Rule 35 report is

independent evidence of torture, although it might constitute special circumstances which would justify continuing detention notwithstanding that evidence (as indeed the guidance states).

107 The alternative submission is that the judge erred in limiting the period of unlawful detention to four days only, from 17 May to 21 May. It was not reasonable to keep the applicant in detention once the Secretary of State had been informed on 13 May that there was to be an assessment by The Helen Bamber Foundation. She should have been released immediately.

108 The Secretary of State has put in a respondent's notice with respect to the first ground, asserting that even if the report did constitute evidence of torture, there was good reason to depart from the presumption that detention would be inappropriate, namely a finding by the First Tier Tribunal, upheld on appeal, that ST had not been tortured. She also seeks to challenge the judge's interpretation of The Helen Bamber policy, renewing the argument which the judge rejected, namely that the policy only applied to the initial asylum decision.

Discussion

109 I agree with the appellant that the Rule 35 report in this case did constitute independent evidence of torture. It confirmed that unusual scars found on the body, frequently the result of torture, were indeed consistent with the applicant's account of torture. An experienced doctor therefore confirmed that there was a causal connection between the account of torture and the visible scars. The obvious distress of the applicant when recounting her experiences further lent support to her account. For reasons I have already given (see para. 41 above) it does not affect the status of the Rule 35 report that an independent tribunal has found the appellant to lack credibility after considering similar medical evidence. In my view, this Rule 35 report was plainly independent evidence of torture. Had the report been provided before a court or tribunal, it would be impossible to contend that it was not potentially cogent evidence of torture.

110 Again, as I have explained above (para. 42), and as the appellant accepts, the fact that her account of torture had been rejected by the FTT may be highly relevant, and possibly decisive, when considering at the second stage whether there are special circumstances justifying detention notwithstanding the evidence of torture. But that does not affect the status of the Rule 35 report as evidence of torture.

Would the detention be lawful in any event under the exceptional circumstances principle?

111 The Secretary of State seeks by the respondent's notice to argue that it would, but I do not consider that she should now be permitted to advance that argument. Although objectively construing her reasons for refusing release, I think she did rely upon the exceptional circumstances to justify detention on the basis that a tribunal had rejected the appellant's claim that she had been tortured, that defence was not relied upon before the judge below. The Secretary of State relied only upon the argument that there was no independent evidence of torture. That was an error of law which was instrumental in the decision not to release the appellant, and therefore, following Lumba , it renders the detention itself unlawful.

112 However, it will be open to the Secretary of State to argue at the damages hearing that she could and would have detained the appellant because of these special circumstances and thereby seek to deny any right to anything other than nominal damages. That is the appropriate forum for this issue to be advanced. I accept that were it inevitable that the Secretary of State would succeed in this submission, it would be desirable for this court to say so now. But Mr Jafferji, counsel for ST, has marshalled certain arguments he would wish to advance as to why the FTT had not taken into account all the relevant material referred to in the Rule 35 report. He also correctly points out that it is always ultimately a matter of discretion whether to rely upon exceptional circumstances, and the court should not assume without evidence that the Secretary of State would inevitably have exercised her discretion to require the appellant to remain in detention. For these reasons, I do not think it right for this court to anticipate what the outcome of the damages claim might be.

113 The judge did not determine when, if she had found that there was independent evidence of torture, the appellant ought to have been released. There would no doubt be some period during which the Secretary of State would need to consider whether detention should be maintained, notwithstanding the evidence of torture, perhaps relying upon the exceptional circumstances

provision. I would leave this matter for the court to decide as part of the damages exercise. It would be able to hear additional evidence on the question if that were thought appropriate.

Was the Foundation policy applicable?

114 Given the finding that the detention was unlawful independently of the application of the Foundation policy, it may be thought that this is no longer a live issue. The detention was unlawful whether or not the Foundation policy applied. However, the issue could still be material if the court were to decide that damages arising from the Rule 35 error should be nominal on the grounds that the appellant would have been lawfully detained in any event.

115 However, Mr Jafferji submitted that for other reasons there is no continuing purpose in deciding this issue. First, the Secretary of State has now paid damages for the unlawful detention for the period 17-21 May on the premise that she did act unlawfully in not waiting for the result of the pre-assessment. Second, the further submissions policy has now been altered with a new section 3.7 being inserted that makes it clear that each case must be considered on its own facts. For the future, therefore, matters have been clarified. I agree that nothing of any real significance now turns of the question whether the Foundation's policy applies to new submissions or not, so I will deal with the issue relatively briefly.

116 In essence, I agree with the analysis of the judge. There are cogent policy reasons why the policy would apply to fresh submissions; the potential for abuse is limited for the reasons the judge gave; and there was at the time no express limitation of the policy to initial asylum determinations only. It is not obvious why a policy which applies to asylum claims ought not to apply to renewed claims based on fresh submissions, and as the judge pointed out, that is how the Supreme Court construed the term in an admittedly different context in *ZO (Somalia) v Secretary of State for the Home Department [2010] UKSC 36* .

117 Counsel submitted, and I accept, that it is highly relevant that these two Foundations have a special standing in the immigration and asylum field, and once someone is accepted for pre-assessment, there is a real possibility that the medico-legal report will disclose torture. (That is indeed what happened here when the full report was obtained.) This is not simply a case where a failed asylum seeker indicates an intention to obtain a fresh medical report. Very different considerations would apply in such a case. I would uphold the judge's analysis of the application of this policy.

When did the detention become unlawful?

118 The final point raised by the appellant is that the judge was wrong to allow the Secretary of State some three days grace once it had become clear that The Helen Bamber Foundation had decided to carry out a pre-assessment with respect to her claim of torture. It is submitted that it was unreasonable within Hardial Singh principles to fail to release her within 24 hours because it was obvious that she could not be removed in the near future. So the illegal detention should have been from 14 May rather than 17 May.

119 I do not accept that submission. As Sedley LJ said in *Secretary of State for the Home Department v Abdi [2011] EWCA Civ 242* , para. 62:

> “The judges of the Administrative Court frequently face a difficult task in deciding whether detention has continued for an unreasonable time, and if it has at what point in time it became unreasonable. This Court will not interfere with the judge's decision unless it can be shown that what is a difficult exercise of judgment is inconsistent with his findings of primary fact, or was based on an incorrect understanding of the law, or was one that was not sensibly open to him on the basis of those facts.”

120 Here the judge thought that the Secretary of State could reasonably take a few days. In my judgment, that was a wholly sustainable decision. There are still steps to take even once the information is provided. For example, the Secretary of State can reasonably take advice as to whether the policy does apply in the circumstances of fresh submissions. Moreover, the release is not automatic and requires an exercise of discretion. And it may be necessary to set up, or at least consider whether to set up, arrangements to ensure effective monitoring of the individual before being released. A few days for an extremely pressed department to decide how to react to

the information is not unreasonable. At any rate, I do not think it can conceivably be said that the judge erred in law in concluding that this was a reasonable period. I would therefore dismiss this ground of appeal.

Conclusions

121 For reasons I have given, I would uphold in part the appeal by the Secretary of State in the BA case. I would hold that the judge was not entitled to find that the Rule 35 report was evidence of torture. The heightened presumption of liberty did not arise. But contrary to the submissions of the Secretary of State, the judge was entitled to conclude that the detention was unlawful under Hardial Singh principles from 22 November. Damages will have to be assessed if they cannot be agreed.

122 I would also uphold in part ST's appeal. The judge was not, in my judgment, entitled to find that the Rule 35 report did not constitute independent evidence of torture. The case will have to be remitted for damages unless they can be agreed. The Secretary of State will be entitled to argue in that exercise that there were exceptional circumstances which would have led to the applicant being detained in any event, in which case no loss would have been suffered. If there was any loss on the basis that the applicant should have been released, the judge will have to consider from what point the detention became unlawful.

123 However, I find, contrary to the submissions of the Secretary of State, that the judge was entitled to conclude that the detention should have been brought to an end in accordance with her own policy once she was informed that The Helen Bamber Foundation had agreed to carry out a pre-assessment. The judge was also entitled to hold, contrary to the submissions of ST, that on that basis the detention became unlawful on 17 May.

Lord Justice Lewison:

124 I agree.

Lord Justice David Richards:

125 I also agree.