THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of his family in connection with these proceedings.

Hilary Term

[2019] UKSC 10

On appeal from: [2017] EWCA Civ 119

JUDGMENT

KV (Sri Lanka) (Appellant) v Secretary of State for the Home Department (Respondent)

before

Lady Hale, President

Lord Wilson

Lady Black

Lord Briggs

Lord Kitchin

JUDGMENT GIVEN ON

6 March 2019

Heard on 10 and 11 December 2018

Appellants	Respondent	Intervene
Richard Drabble QC	Neil Sheldon	Stephanie Ha
Ronan Toal	Matthew Hill	QC
Michelle Brewer		Ali Bandeg
Charlotte Bayati		Mark Sym
(Instructed by Birnberg Peirce)	(Instructed by The Government Legal Department)	

(Instructed
Freshfiel
Bruckhaus De
LLP)

Interveners:

- Helen Bamber Foundation
- Freedom from Torture
- Medical Justice

LORD WILSON: (with whom Lady Hale, Lady Black, Lord Briggs and Lord Kitchin agree)

Introduction

1.
KV, a national of Sri Lanka and of Tamil ethnicity, comes to the UK and claims asylum. He alleges that he was tortured by government forces there in the course of detention on suspicion of association with the LTTE ("the Tamil Tigers"). He has five long scars on his back and two shorter scars on his right arm, all of which were on any view the product of branding with a hot metal rod. He contends that they are evidence of the torture. But the tribunal in effect concludes that the scars represent wounding which was Self-Inflicted By Proxy ("wounding SIBP"), in other words which was inflicted by another person at KV's own invitation in an attempt on his part to manufacture evidence in support of a false asylum claim. It dismisses his appeal against the refusal of asylum. By a majority the Court of Appeal, [2017] EWCA Civ 119, [2017] 4 WLR 88, dismisses his further appeal and, in doing so, makes controversial observations about the limit of the role of a medical expert in contributing to the evidence referable to a claim of torture. Now KV brings a third appeal to this court. This court must address the Court of Appeal's controversial observations. They raise the point of general public importance which precipitated the grant to him of permission to appeal. But the disposal of his appeal will instead depend on whether he persuades us of an error of law, in particular an error of reasoning, in the dismissal of his appeal on the part of the tribunal.

Background

2.
KV was born in 1986 and lived in Sri Lanka until his arrival in the UK in February 2011. He made his claim for asylum promptly. In March 2011 he was interviewed on behalf of the Home Office. His account was

(a) that he had worked in his father's jewellery shop;

(b) that in 2003 he had begun to assist the Tamil Tigers in valuing jewellery which its members had brought to him and, with his father, in melting their gold at their request;

(c) that, while never having been a member of the Tamil Tigers, he had continued to assist in those ways until 2008;

(d) that government forces had arrested him in May 2009 and detained him in a camp until, with outside help, he had escaped from it in February 2011; and

(e) that during his detention they had beaten him with gun butts or wooden poles every few days and, having learnt of the assistance given by him to the Tamil Tigers in respect of its gold and other valuables, had thereby sought to extract information from him about where they were kept.

3.
At the interview KV produced photographs of the scars on his back and right arm which, he said, were the product of an occasion of torture in about August 2009. It is important to note that in this initial interview his account, to which he has consistently adhered, was that his captors had first applied hot metal rods to his arm while he was conscious; that the pain had rendered him unconscious; that, while he remained unconscious, they had applied the rods to his back; that, when he regained consciousness, they had further increased the severity of the pain by pouring petrol on him and threatening to set him alight; and that some three months had elapsed before the skin had healed into scars.

4.
Later in March 2011 the Home Office refused KV's claim for asylum. It identified various perceived inconsistences in his account; and, in relation to his scars, it noted that he had produced no medical evidence in support of his account of torture, which it did not accept.

5.
In May 2011 the First-tier Tribunal dismissed KV's appeal against the refusal of his claim for asylum. But the Upper Tribunal held that an error of law had vitiated the dismissal and it directed that the appeal be reheard. It then identified the appeal as an appropriate vehicle for the issue of general guidance to medical experts invited to analyse scars allegedly caused by torture, in particular if suggested on the contrary to represent wounding SIBP; and so the appeal was directed to be heard by a panel of judges in the Upper Tribunal itself.

6.
In the event the appeal was heard over three days by three of the most experienced judges of the Upper Tribunal, namely Judge Storey, Judge Dawson and Judge Kopieczek. The tribunal (as the Upper Tribunal will hereafter be described) permitted a charity, the Helen Bamber Foundation ("the HBF"), to intervene in the appeal. The HBF is recognised by the Home Office as a responsible provider both of expert support and treatment to those who have suffered torture or other serious harm and of medical reports intended to help UK public authorities to determine whether allegations of such suffering are true.

7.
On 22 May 2014 the tribunal explained its dismissal of KV's appeal in a mammoth document, entitled "Determination and Reasons" which contains 368 paragraphs on 78 pages, [2014] UKUT 230 (IAC). Massive effort on the part of each of the three judges plainly underlies the determination. As a result of it the tribunal issued six propositions of general guidance to those preparing medico-legal reports in relation to scars borne by asylum-seekers who allege them to be the product of torture and particularly when, on the contrary, wounding SIBP is more than a fanciful possibility. The Court of Appeal, however, considered that wounding SIBP was generally so unlikely that it was inappropriate to issue the guidance. In particular the court disagreed with the apparent suggestion in the guidance that medical experts should routinely consider it even when not canvassed by the Home Office as being a reasonably possible explanation of the asylum-seeker's scarring. So the court directed that the tribunal's guidance be treated as of no effect. This court has not been invited to review whether it was right to jettison it.

8.
The tribunal subjected KV's evidence, together with that of his two brothers and his uncle, to appropriately rigorous analysis. It recognised that throughout the three years since his arrival in the UK his accounts of his experiences in Sri Lanka had been broadly consistent and that background country information, including that set out in para 32 below, had confirmed the existence of a practice on the part of state forces there of torturing detainees by burning them with soldering irons. It nevertheless concluded that various aspects of his evidence were unconvincing, including in relation to his alleged work for the Tamil Tigers, the frequency and severity of his alleged beatings during the years of his alleged detention, the circumstances of his alleged escape and the surprising immunity of his father from arrest and detention. But the tribunal's substantial reservations about KV's credibility recede into the background in the light of its helpful identification of the central issue as follows:

"337. … If the appellant's scarring was caused by torture in detention then the possibility of the appellant's account being true, notwithstanding the identified shortcomings, becomes a real one."

9.
The tribunal thereupon embarked upon a detailed analysis of the medical evidence referable to KV's scarring, to some of which it will be necessary to return. Its conclusion was as follows:

"364. … In relation to the medical evidence, we have found that whilst it assisted in eliminating some possible causes, it left us with only two that were real possibilities: that the appellant was tortured as claimed; that his scarring was SIBP. Of these two real possibilities, we have found, on analysis, that the former claim does not withstand scrutiny. Certainly we cannot say in his case that the evidence inexorably points to SIBP, but given that we have concluded it is left as the only real possibility that we have not been able to discount, taking the evidence as a whole, we are satisfied that he has not shown his account is reasonably likely to be true."

Thereupon the tribunal volunteered an emphatic rejection of almost all of KV's evidence:

"365. … We find that after 2003 he … remained in Colombo and at no stage then or thereafter did he come to the adverse attention of the army or police before coming to the UK."

10.
One should respectfully place a question-mark against the tribunal's disclaimer in para 364 of any conclusion that the evidence inexorably pointed to wounding SIBP. If your inquiry into the disputed circumstances of a past event leads you to conclude that there are only two real possibilities and if you then proceed to reject one of them (indeed in this case to reject it in terms which could not be more absolute: see para 365), you are necessarily concluding that the other real possibility represents what happened.

Evidence of Dr Zapata-Bravo

11.
KV presented several pieces of medical evidence to the tribunal but much of it proved to be of limited use. The most important was that given by Dr Zapata-Bravo. He was qualified both in internal (particularly chest) medicine and in psychiatry; had clinical experience of surgery; and had been subject to the apparently rigorous training of the HBF in the assessment of the physical and psychological effects of torture. On examination of KV in October 2013 Dr Zapata-Bravo noted five scars on his back and two scars on his right upper arm, more particularly described as follows:

(a) a flat scar on the left side of the back, just below the shoulder-blade, measuring 130 x 11 mm and in the shape of an elongated and narrow parallelogram;

(b) a flat scar on the right side of the back, at a level equivalent to that at (a), slightly shorter but in the same shape;

(c) a flat scar on the left side of the back, underneath that at (a), shorter but parallel to it and in the same shape;

(d) a flat scar on the right side of the back, underneath that at (b), shorter but parallel to it and in the same shape;

(e) a flat scar on the right side of the back, just below the waist, underneath that at (d), shorter but parallel to it and in the same shape;

(f) a slightly raised scar on the right upper arm, measuring 50 x 15 mm in the shape of a parallelogram; and

(g) a flat scar on the right upper arm, below that at (f), but longer (75mm) and in a different, oval, shape.

12.
It was the opinion of Dr Zapata-Bravo that the scars at (a) and (b) had in the past been joined together, as had the scars at (c) and (d), but that in each case they had become separated when the scarring in the small of the back, where the injury had been less severe, had disappeared. Thus, he reasoned, there had originally been five rather than seven scars, reflective of five burns caused (he had no doubt) by application of a hot metal rod. He added that the scar at (f) was the only raised scar and indicated burning even more profound than elsewhere. He could not be more precise than to say that KV had sustained the injuries prior to September 2010.

13.
For present purposes the most important part of the evidence of Dr Zapata-Bravo was the distinction which he drew between the scars at (a) to (e) on the back and those at (f) and (g) on the arm. It was a distinction confirmed by photographs placed before the tribunal. The doctor pointed out that the scars on the back were long, narrow and parallel and that in particular their edges were precise. This perfect branding, as he described it, could not have occurred while KV was conscious: even if, when conscious, he had been forcibly held down, his reflex reaction to pain would have blurred the edges of the area burnt and thus of the resulting scars. But those on the arm were different. Here the branding was not perfect. The edges were blurred. They were not parallel to each other. Their length, their width and their shape were different from each other; and they did not replicate the shape of a rod. The different presentation of the scars on the arm from those on the back indicated to him that the former represented burns caused while KV had not been unconscious and so had been reacting to the pain by reflex flinching and other movements which had blurred the branding effect. And here the doctor proceeded to note that KV had indeed consistently maintained that he had not been unconscious when his arms had been burnt but had then, as a result, fallen into unconsciousness before his back was burnt.

14.
Dr Zapata-Bravo’s conclusion was that his clinical findings were “highly consistent” with KV’s account of torture; and that the other hypothesis, namely of wounding SIBP, was unlikely.

Istanbul Protocol

15.
Dr Zapata-Bravo explained in his report that his training by the HBF in relation to the effects of suggested incidents of torture had been in accordance with the “Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, usually known as the “Istanbul Protocol”, submitted to the UN High Commissioner for Human Rights in 1999. As was said in its introduction, the manual was the result of three years of effort on the part of more than 75 experts in law, health and human rights, representing 40 organisations from 15 countries. The principles of effective investigation etc were collected into Annex 1 of the manual and were adopted by the General Assembly of the UN on 4 December 2000 (Resolution 55/89).

16.
The manual provides as follows:

“187. … For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution given by the patient. The following terms are generally used:

(a) Not consistent: the lesion could not have been caused by the trauma described;

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

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

(d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;

(e) Diagnostic of: this appearance could not have been caused in any other way than that described.

188. 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 …”

17.
It follows that, in concluding that his clinical findings were “highly consistent” with KV’s account of torture, Dr Zapata-Bravo was framing his conclusion in accordance with para 187(c) of the manual.

The Controversial Observations

18.
The tribunal did not suggest that, in concluding that his findings were “highly consistent” with KV’s account of torture, Dr Zapata-Bravo had exceeded the limit of his role. On the contrary, it cited authority to the effect that one of the functions of a medical report in relation to scars was to offer a clear statement in relation to their consistency with the history given. Nor did the Home Secretary submit to the Court of Appeal that Dr Zapata-Bravo’s conclusion had been in any way professionally inappropriate.

19.
But in the Court of Appeal Sales LJ (with whom Patten LJ agreed) made observations to the opposite effect. He said:

“33. … In making this latter statement [that his findings were highly consistent with KV’s story], Dr Zapata-Bravo seems to have moved from an assessment whether the relevant lesions (ie the burns scars) could have been caused by the trauma described (ie the application of a heated metal rod) - a matter on which he was capable of giving a view based on his medical expertise and which he had already addressed by saying that the scars were diagnostic of such trauma - into an expression of view that he was disposed to accept the claimant’s account of how heated metal rods came to be applied to his skin. Dr Zapata-Bravo seemed to use the Istanbul Protocol ‘highly consistent’ classification, but inappropriately in relation to the claimant’s story, which is something different from ‘the trauma’ to which that classification is expressly directed.

34. In my judgment, at this point he rather trespassed beyond his remit as an expert medical witness into the area where it was for the UT to make an assessment of all the evidence …

35. … [P]ara 187 of the Protocol … focuses, appropriately in my view, on the question of the likely immediate cause of a lesion or wound on the body of the complainant (in our case, application of a heated metal rod to the claimant’s skin), which is a proper subject for expert medical evidence … [I]n any event, where a medical expert is providing evidence for use in the tribunal, they should seek guidance primarily from the relevant Tribunal Rules and Practice Direction …”

In the course of a dissenting judgment in which he concluded that the reasoning of the tribunal had been unsatisfactory and that the court should have remitted KV’s appeal to it for fresh determination, Elias LJ in para 110 disagreed with the observations of the majority that Dr Zapata-Bravo had exceeded the proper limit of his role in the manner alleged.

20.
In this further appeal the Home Secretary has felt unable to defend the observations of the majority and, with the benefit of the full argument which the Court of Appeal never enjoyed, nor, to be fair to counsel, never invited, it is clear that they are erroneous. In their supremely difficult and important task, exemplified by the present case, of analysing whether scars have been established to be the result of torture, decision-makers can legitimately receive assistance, often valuable, from medical experts who feel able, within their expertise, to offer an opinion about the consistency of their findings with the asylum-seeker’s account of the circumstances in which the scarring was sustained, not limited to the mechanism by which it was sustained. Had the contribution of Dr Zapata-Bravo been limited to confirming KV’s account that the scarring was caused by application of a hot metal rod, it would have added little to what was already a likely conclusion. But, when he proceeded to correlate his findings of a difference in the presentation of the scars on the back and those on the arm with KV’s account of how the alleged torture had proceeded, he was giving assistance to the tribunal of significant potential value; and it never suggested that he lacked the expertise with which to do so.

21.
In para 33 of his judgment, set out in para 19 above, Sales LJ suggested that the references in para 187 of the Istanbul Protocol to the “trauma described” relate only to the mechanism by which the injury is said to have been caused. That is too narrow a construction of the word “trauma”. It is clear that in the protocol the word also covers the wider circumstances in which the injury is said to have been sustained. Paragraph 188 of the protocol, set out in para 16 above, which Sales LJ had himself quoted in para 31 of his judgment, guides the expert towards the type of evaluation which is important in assessing “the torture story”. Paragraph 105 of the protocol recommends that, in formulating a clinical impression for the purpose of reporting evidence of torture, experts should ask

themselves six questions, including whether their findings are consistent with the alleged report of torture and whether the clinical picture suggests a false allegation of torture. Paragraph 122 says:

"The purpose of the written or oral testimony of the physician is to provide expert opinion on the degree to which medical findings correlate with the patient's allegations of abuse …"

22.
In another case of alleged torture, namely SA (Somalia) v Secretary of State for the Home Department [2006] EWCA Civ 1302; [2007] Imm AR 1 236, the Court of Appeal, by the judgment of Sir Mark Potter, President of the Family Division, held in paras 27 and 28 that the task for which an asylum-seeker tendered a medical report was to provide "a clear statement as to the consistency of old scars found with the history given …, directed to the particular injuries said to have occurred as a result of the torture or other ill treatment relied on as evidence of persecution". In paras 29 and 30 Sir Mark quoted paras 186 and 187 of the Istanbul Protocol and commended them as particularly instructive for those requested to supply medical reports in relation to alleged torture. In RT (medical reports - causation of scarring) Sri Lanka [2008] UKAIT 00009 the Asylum and Immigration Tribunal in para 37 described the SA (Somalia) case as a landmark authority in the identification of the purpose of a medical report in relation to alleged torture and in the indorsement of the Istanbul Protocol.

23.
It is no surprise that the European Court of Human Rights should have adopted a similar construction of the role of the expert in accordance with the Istanbul Protocol: in Mehmet Eren v Turkey (2008) (Application No 32347/02), it relied in para 43 upon the conclusion of a medical report about the consistency of the clinical findings with the applicant's account of serious ill-treatment while he was in police custody. Again, no surprise that, in para 3.2 of its Guidelines on the Judicial Approach to Expert Medical Evidence dated June 2010, the International Association of Refugee Law Judges should have recognised the function of the report as being to provide expert opinion on the degree of correlation between the asylum-seeker's presentation and his allegations of torture. And indeed, no surprise that, in para 3.3 of his instruction to case-workers entitled Medico-Legal Reports from the Helen Bamber Foundation and the Medical Foundation Medico-Legal Report Service dated July 2015, the Home Secretary should have required them to give due consideration to medical opinions given on behalf of those organisations upon the degree of consistency between the clinical findings and the account of torture.

24.
The reader will have noticed that, in making the erroneous observations quoted in para 19 above, Sales LJ added in para 35 that the primary source of guidance for experts in such circumstances should be the Tribunal Rules and the Practice Direction rather than the Istanbul Protocol. This was a point to which he returned in para 94, as follows:

"Contrary to what some of the expert witnesses in this case seem to have thought, it is the Practice Direction, not the Istanbul Protocol, which provides the relevant authoritative guidance as to their duty, helpful though parts of the Istanbul Protocol might be as a reference resource."

Sales LJ was there referring to Practice Direction 10 in Part 4 of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal, dated 10 February 2010 and amended on 13 November 2014. But there is no inconsistency between that Practice Direction and the protocol. Of course the expert must comply with the Practice Direction, including in particular the requirement in paras 10.2 and 10.4 not to offer an opinion outside the area of his expertise. But the Practice Direction does not address the specific area addressed by the

protocol, namely the investigation of torture. When invited to investigate an allegation of torture, the expert should therefore recognise the protocol as equally authoritative - in accordance with the Court of Appeal's decision in the SA (Somalia) case, cited in para 22 above.

25.
But Ms Harrison QC on behalf of the HBF made a further submission to the Court of Appeal, repeated before us, that in a case of alleged torture experts are entitled to express the view that they believe that the person has suffered the torture. She cited R (AM) v Secretary of State for the Home Department [2012] EWCA Civ 521, in which Rix LJ, with whom Moses LJ and Briggs J agreed, observed in paras 29 and 30 that the expert had "believed" the appellant's account of torture and that her "belief" constituted independent evidence of torture which had disentitled the Home Secretary from continuing to detain her. It is not clear from the judgment of Rix LJ whether the expert had in terms said that she "believed" the appellant. But, as he pointed out in para 15, she had, when categorising her findings in accordance with para 187 of the Istanbul Protocol (set out in para 16 above), in effect chosen the most positive category, namely "(e) Diagnostic of … could not have been caused in any other way than that described" in relation to one of the scars. Such a diagnosis was indeed tantamount to belief in the accuracy of the description of how that scar had been caused. A corresponding placement of a conclusion within the most negative category, namely "(a) Not consistent … could not have been caused by the trauma described" would be tantamount to disbelief in the accuracy of the description. Where, however, more usually, the expert places his or her conclusion within categories (b), (c) or (d), there is no room, nor sanction in the protocol, for the expression of belief or otherwise in the account given. The conclusion about credibility always rests with the decision-maker following a critical survey of all the evidence, even when the expert has placed his conclusion within category (a) or (e). Indeed, in an asylum case in which the question is only whether there is a real possibility that the account given is true, not even the decision-maker is required to arrive at an overall belief in its truth; the inquiry is into credibility only of a partial character.

Disposal of the Appeal

26.
In his dissenting judgment Elias LJ set out in detail his concerns about the reasoning of the tribunal in rejecting KV's claim of torture. In an attempt not to overburden this present judgment with analogous factual detail, I will confine it to a review of three main points.

27.
The first relates to KV's account, confirmed by the appearance of the scars on the back, that the burns there had been inflicted while he was unconscious. He said that the burns on his arms had made him lose consciousness. But the bigger question, rightly addressed by the tribunal, was how he had remained unconscious while the burns on the back were inflicted. This in turn raised the question: how long would it have taken to inflict the burns on the back? In their written reports none of the experts had addressed this question. But, at the end of his oral evidence by telephone, Dr Zapata-Bravo, when asked, suggested that it would have taken ten minutes to inflict the burns on the back but added that his suggestion was speculative. But could KV have remained unconscious for ten minutes? The doctor's answer was hesitant: it was that he might possibly have done so if he had been in a bad state of health, with loss of weight as a result of malnutrition, and if he had not eaten nor taken fluids. Another expert, Dr Allam, who had been asked a general question about the usual speed of recovery of consciousness, had already written, in fair conformity with Dr Zapata-Bravo's later hesitant hypothesis, that an individual's state of health could affect the speed of recovery. In the end,

however, the tribunal found it to be an “unlikely hypothesis” that KV did not regain consciousness for the period of about ten minutes while the alleged torturers inflicted the burns on the back. Although the tribunal there attached central importance to an estimate of ten minutes given off the cuff and stressed to have been speculative, and although it seems altogether to have discounted Dr Zapata-Bravo’s hesitant explanation for more prolonged unconsciousness, it is in my opinion hard for an appellate court to rule that it had not been entitled to conclude that this part of KV’s account was “unlikely”. Its conclusion on this point cannot, however, mark the end of an overall inquiry into the existence of a real possibility that the scars reflected torture.

28.
The second point relates to Dr Zapata-Bravo’s pivotal opinion that the different, blurred, edges to the scars on the arm indicated the infliction of burns during consciousness, which correlated with the account which KV had always given. The problem arises from the reasons given by the tribunal for rejecting the conclusion which he based upon it. It said:

“348. … we do not consider that Dr Zapata-Bravo’s conclusion that the appellant’s scarring was ‘highly consistent’ with his account of having been tortured is justified when account is taken of the doctor’s own evidence indicating (i) it was clinically unlikely, given their precise edging, that his scarring could have been inflicted unless he was unconscious; and (ii) that it was clinically unlikely a person could remain unconscious throughout multiple applications of hot metal rods to his arms and back, unless he was anaesthetised …”

The paragraph raises big questions. Why does the summary of the doctor’s evidence at (i), in relation to precise edging, fail to limit the reference to “scarring” to “scarring on the back”? Why does the summary of his evidence at (ii) address a hypothesis, contrary to that which he (and KV himself) had advanced, that he had remained unconscious throughout the application of the rods to his arms as well as to his back? By the time it came to draft para 348, had the tribunal mislaid the pivotal point?

29.
The answer given to these questions by Sales LJ in para 21(ii) of his judgment was that in his oral evidence Dr Zapata-Bravo must have said or have appeared to say that the scars on the arm as well as on the back were precisely defined and that complete analgesia would have been required to produce all of them. Sales LJ observed that KV had failed to provide the court with a transcript of the doctor’s oral evidence and that, without a transcript, there was no basis for criticising the tribunal. But it is dangerous for us who work in appeal courts to assume that the answer to an apparent mistake at first instance must lie in oral evidence not recorded in the judgment and not transcribed for the purposes of the appeal. The court of first instance should be expected to record the oral evidence on which it places reliance. Stung by the observations of Sales LJ, KV has provided to this court for the purposes of his further appeal a transcript of all the oral evidence given to the tribunal; and with great respect, it is clear - and agreed - that in his oral evidence Dr Zapata-Bravo never wavered from his clinical findings of a difference in the scars as between the back and the arm, nor from the significance which he had attached to it.

30.
The Home Secretary correctly invites us to be realistic. We must accept that the drawing of a fine-tooth comb through any judicial survey of complex evidence written across 368 paragraphs is likely to discover a tangle in it. In para 12 of his judgment in SS (Iran) v Secretary of State for the Home Department [2008] EWCA Civ 310 Lord Neuberger of Abbotsbury observed that appeal courts should be particularly wary of interfering with evidential conclusions made in relation to claims for asylum, in

which, among other things, the paucity and fragility of the evidence are likely to be acute. On the other hand he added:

"… given the potentially severe, even catastrophic, consequences of a mistaken rejection of an appeal, where fear of ill-treatment (or worse) is alleged, it is plainly right to scrutinise any [such] decision … very carefully …"

Paragraph 348 of the tribunal's determination contains more than a minor tangle. It represents its reason for rejecting Dr Zapata-Bravo's categorisation of "high consistency" in accordance with para 187(c) of the Istanbul Protocol. The tribunal there mislaid the difference in the scars on the arm to which he had attached such significance. But it needed to address it. Elias LJ said in para 108:

"In my judgment the [tribunal] had to find an explanation for the different appearance of these scars and it could not characterise his account of being tortured as implausible without having done so."

That was his judgment. It should also, I suggest, be ours.

31.
The third point arises out of the tribunal's final conclusion that there were only two real possibilities, namely that KV had been tortured and that his wounding was SIBP. The point is that the likelihood of both possibilities had to be compared with each other before either of them could be discounted. And the contention is that, when it came to compile the final section of its determination entitled "Assessment of the Appellant's Appeal", and in particular the final subsection, entitled "Conclusion", in which it discounted the possibility of torture, the tribunal made no reference to the likelihood, or rather on any view the unlikelihood, that the wounding was SIBP.

32.
That there was extensive torture by state forces in Sri Lanka in 2009 was well established in the evidence before the tribunal. For example at para 187 of its determination it quoted an EU report dated October 2009 as follows:

"International reports indicate continual and well-documented allegations of widespread torture and ill-treatment committed by state forces (police and military) particularly in situations of detention. The UN Special Rapporteur on Torture has expressed shock at the severity of the torture employed by the army, which includes burning with soldering irons and suspension of detainees by their thumbs."

33.
By contrast, evidence of wounding SIBP on the part of asylum-seekers was almost non-existent. The tribunal referred at para 11 to just one unreported decision in 2011 in which it had concluded that the wounding had been SIBP. Dr Zapata-Bravo said that, in the field of immigration, neither he nor any colleague to whom he had spoken had experience of wounding SIBP. He contrasted it with tribal and ritual scarring, administered with social consent, which no one had suggested to account for the scars in question. His and the other medical evidence before the tribunal indicated that the wounding of a body which that person deliberately achieved by his own hand was slightly less uncommon; but that there were parts of a body which that person could not burn without assistance and that they certainly included the burnt parts of KV's back. Dr Zapata-Bravo said that in the literature he had found only one statement referable to a person's burning of himself by use of a proxy. "Very rarely", it had said, "an accomplice might be asked to cause a wound in a place the person cannot reach".

34.

There is no doubt that, particularly in the light of the serious lack of KV's credibility in several other areas of his evidence, the tribunal was correct to address the possibility of wounding SIBP. But, in assessing the strength of the possibility, it had to weigh the following:

(a) It is an extreme measure for a person to decide to cause himself to suffer deep injury and severe and protracted pain.

(b) Moreover KV needed someone to help him to do it.

(c) Wounding SIBP is, in the words of Sales LJ at para 93 of his judgment, "generally so unlikely".

(d) If KV's wounding was SIBP, the wounds on his back could have been inflicted only under anaesthetic and so he would have needed assistance from a person with medical expertise prepared to act contrary to medical ethics.

(e) If his wounding was SIBP, an explanation had to be found for the difference in both the location and in particular the presentation of the scarring as between the back and the arm.

(f) If his wounding was SIBP, an explanation had to be found for the number of the wounds, namely the three wounds on the back, albeit now represented by five scars, and the two wounds on the arm. As Elias LJ observed in para 99, "one or two strategically placed scars would equally well have supported a claim of torture".

35.
Elias LJ offered a summary in para 101:

"In my view very considerable weight should be given to the fact that injuries which are SIBP are likely to be extremely rare. An individual is highly unlikely to want to suffer the continuing pain and discomfort resulting from self-inflicted harm, even if he is anaesthetised when the harm is inflicted. Moreover, the possibility that the injuries may have been sustained in this way is even less likely in circumstances where the applicant would have needed to be anaesthetised. This would in all probability have required the clandestine co-operation of a qualified doctor who would have had to be willing to act in breach of the most fundamental and ethical standards, and who had access to the relevant medical equipment."

That was his view. It should also, I suggest, be ours.

36.
I propose that we should direct the tribunal to determine afresh KV's appeal against the refusal of asylum.