Upper Tribunal
(Immigration and Asylum Chamber)

)

NA (UT rule 45: Singh v Belgium Iran [2014] UKUT 00205 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

on 31 October 2013

Before

THE PRESIDENT, THE HON MR JUSTICE McCLOSKEY

UPPER TRIBUNAL JUDGE STOREY

Between

NA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

(1) Rule 45 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 confers discretionary, procedural case management powers. It does not require the First-tier Tribunal to undertake evidence-gathering. Any direction given under rule 45 to the Secretary of State to seek out or validate evidence must be exercised sparingly and in a fact-sensitive way, bearing in mind CM (Zimbabwe) v Secretary of State for the Home Department [2013] EWCA Civ 13. When considering whether to exercise its power under rule 45 to direct a party to produce evidence, the First-tier Tribunal should also be alert to its duty of impartial and independent adjudication and the essentially procedural nature of this rule.

(2) Neither Article 47 of the Charter of Fundamental Rights of the European Union nor the decision of the CJEU in MM v Minister for Justice, Equality and Law Reform, Ireland [Case – 277/11] establishes anything to the contrary. Similarly, neither of the ECtHR decisions in Singh and Others v Belgium [Application number 33210/11] and RC v Sweden [Application number 41827/07] is authority to the contrary.

(3) The decision of the Upper Tribunal in MJ (Singh v Belgium: Tanveer Ahmed unaffected) Afghanistan [2013] UKUT 254 (IAC), that in relation to assessing the reliability of documentary evidence the Tanveer Ahmed [2002] Imm AR 318* principles continue to apply, is reaffirmed.

INTRODUCTION

1. By a decision dated 22 nd August 2012, the Secretary of State for the Home Department (hereinafter "the Secretary of State"), the Respondent herein, communicated to the Appellant a refusal of his application for asylum. His case under Articles 2, 3 and 8 ECHR and his claim for humanitarian protection were also rejected. The Appellant exercised his right of appeal to the First-Tier Tribunal (hereinafter "the FtT"). The appeal was dismissed on all grounds. The Appellant's application for permission to appeal to this Tribunal was refused initially. Following a renewed application, Upper Tribunal Judge Storey granted permission to appeal on the following ground:

" …. It is arguable that the FtTJ erred in law in failing to engage with the conclusions of the ECtHR in Singh and Others v Belgium and seeking to distinguish it on the facts without more. "

We shall comment at a later stage of this judgment on the procedural course which this appeal followed thereafter.

FRAMEWORK OF THIS APPEAL

2. The Appellant is a national of Iran, of Kurdish ethnicity, aged 21 years. He entered the United Kingdom without leave in January 2012 and claimed asylum almost immediately. His case, in brief compass, is that in the event of returning to Iran he faces a real risk of death and torture or inhuman or degrading treatment or punishment on account of his race and imputed political opinion. The Secretary of State accepted his professed nationality and Kurdish ethnicity. The main elements of his account were evaluated and determined in the following way:

(a) His claim that his maternal uncle had worked for and supported the KDPI and was executed by the Iranian authorities five years before the Appellant's birth on account of his political opinion was assessed as unsubstantiated.

(b) His assertion that he had possessed a managerial role in a photocopying shop was rejected as unworthy of belief.

(c) His claim that a friend had been photocopying KDPI literature and was politically active in this organisation was treated as unsubstantiated.

(d) Ditto his claim that the authorities had visited his home on 1 st January 2012.

The decision maker further highlighted that the Appellant had lived an entirely normal life until December 2011 (the occasion when the authorities allegedly visited his home, in his absence) **and** that the Iranian authorities had granted him an exemption from national service due to the death of his father, which was considered suggestive of no adverse interest in him on account of his uncle's alleged political activities. The omnibus conclusion was that the Appellant had failed to demonstrate a well founded fear of persecution in Iran on account of his Kurdish ethnicity or professed political opinion.

3. The FtT at first instance, having considered the evidence in some detail, made the following findings in paragraph [34]:

" Looking at the evidence in the round I have found that the Appellant did not have sole charge of a photocopying shop. I have found his evidence to be vague and lacking in the detail I would expect if his claim were true. I have found that he lied about losing contact with his family. I have found that he has produced documents that are not reliable to support his claim. I do not accept that there is credible evidence to support a finding that the Appellant has been the victim of persecution at the hands of the Iranian authorities for his imputed political beliefs. I do not accept that he has been convicted in his absence or that he is of interest to the authorities and I find that the far more likely situation is that he has fabricated this story to bolster a claim for asylum. "

The Judge then reasoned, drawing on these findings, that the Appellant's profile is that of an Iranian national who left his country illegally and subsequently claimed asylum unsuccessfully in the United Kingdom. Giving effect to the country guidance decision in SB (risk on return-illegal exit) Iran CG [2009] UKAIT 00053, he concluded that the Appellant would not be exposed to a real risk of persecution or other ill treatment in the event of returning to his country. The appeal was dismissed on all grounds.

4. We have adverted above to the narrow ground on which permission to appeal to this Tribunal was granted. At the outset of the hearing, Counsel for the Appellant made an application that all of the grounds contained in the renewed application for permission to appeal be considered. This application was made without prior notice to either the Respondent or this Tribunal. Acceding to it would inevitably have resulted in an adjournment to enable the Respondent to make proper preparations, with consequential wasted costs and delay. Taking this factor into account, together with the care with which and terms in which the other grounds of appeal had been refused by two Judges of the Upper Tribunal, coupled with the inexplicable absence of advance notice, we refused this application.

5. In the hearing which followed, this Tribunal's exhortations to Counsel for the Appellant to formulate his main arguments in clear and unambiguous terms met with limited success. The absence of a skeleton argument, unacceptable in the context of this appeal, compounded this difficulty. Ultimately, following careful and repeated enquiry, it appeared to us that Counsel was advancing the following two central arguments:

(a) The FtT was under a duty to take positive steps to confirm the authenticity of certain documents on which the Appellant relied in support of his case and had erred in law in failing to perform this duty.

(b) Linked to (a), the FtT had further erred in law in failing to order the Secretary of State to take appropriate verification steps.

The documents in question consisted of a summons to attend court in Iran, an Iranian court judgment and a medical report. The Appellant's case was that these documents had been transmitted to him by his brother in Iran by email attachment. Counsel appeared to submit that it had been practically impossible for the Appellant to secure the originals of these documents and produce them in evidence.

6. In developing these two main arguments, Counsel submitted that the FtT had a duty to take steps to dispel all doubts concerning the Appellant's case. It was further submitted that the FtT should have specifically warned the Appellant that without the originals of the documents under scrutiny his appeal would be dismissed. Next, it was submitted that the FtT should have asked the Appellant to consent to the Tribunal undertaking further enquiries, directed to unspecified national Iranian authorities, in an attempt to secure the originals of the documents. When we probed this submission, Counsel suggested that the practical outworkings of this duty would entail the FtT pursuing enquiries through UK Government Agencies such as the Foreign and Commonwealth Office ("the FCO").

7. Counsel was pressed by this Tribunal to identify the source of the power for which he was contending. The submission in response, which was repeated, was that this takes the form of an implied power, to be derived from the FtT's duty of "anxious scrutiny". This Tribunal then adjourned to allow Counsel to consider this discrete issue further. Following the adjournment, Counsel revised his submission, contending that the power reposes in rule 45 of the Asylum and Immigration Tribunal (Procedure) Rules 2005. This provides, in material part:

" (1) The Tribunal may give directions to the parties relating to the conduct of any appeal or application ……..

(4) Directions of the Tribunal may, in particular –

(a) relate to any matter concerning the preparation for a hearing;

(b) specify the length of time allowed for anything to be done;

(c) vary any time limit .....

(d) provide for .....

(iii) a party to provide further details of his case, or any other information which appears to be necessary for the determination of the appeal ..... ”

At this belated stage of the hearing, the Respondent’s submissions having been completed, counsel’s submissions also invoked, for the first time, the EU Charter of Fundamental Rights, specifically Article 47.

CONSIDERATION AND CONCLUSIONS

8. As we commented at the outset of the hearing, we found it unsatisfactory that the bundle of authorities supplied by Counsel in support of his argument did not include the decision by the Upper Tribunal in MJ (Singh v Belgium: Tanveer Ahmed unaffected) Afghanistan [2013] UKUT 254 (IAC) which was reported on 01 May 2013, especially given his acknowledged awareness of this decision. We shall return to the decision in MJ below.

The Singh Decision

9. The mainstay of Counsel’s argument was the decision of the Second Section of the European Court of Human Rights in Singh and Others v Belgium [Application number 33210/11], given on 2 nd October 2012. This decision requires careful analysis. In this case, a family of Afghan nationals complained that their proposed deportation to Russia by the Belgian Government would entail a risk of repatriation to Afghanistan in breach of Article 3 ECHR. They had travelled to Belgium from Moscow. They pursued applications for asylum which were rejected by both the relevant Belgian authority and, on appeal, the Aliens Disputes Board. It was held that they had failed to prove their Afghan nationality and findings adverse to their credibility were made. Their appeal to the Conseil d’ Etat was declared inadmissible. A petition to the ECtHR ensued and the Petitioners also applied to the Court for protective provisional measures, which were swiftly granted. The written decision of the Court which followed some time later was its formal ruling on this discrete application.

10. T he Belgian Government submitted, inter alia , that it was not for the Strasbourg Court to rule afresh on the Petitioners’ asylum claims or to determine their nationality. The Court, agreeing with this submission, observed, in [55]:

“ Indeed, it is the national authorities which are responsible for asylum claims to investigate the fears of the Petitioners and the documents provided by them and to assess the risks they run in case they are sent back to their country of origin or to an intermediate country in light of Article 3 .....

This comes from the principle of subsidiarity which is at the basis of the system of the Convention .... as well as the fact that neither the Convention nor any of its Protocols guarantee the right of political asylum .... ”

In [56], the Court formulated its task in the following terms:

“ ..... The Court must investigate if the Petitioners have defendable grounds for appeal to suffer treatments contrary to Article 3 and, if they do, if they have enjoyed effective guarantees within the meaning of Article 13, which would allow them to argue these grounds of appeal and protect them from being deported arbitrarily and indirectly to the country they had fled from .... ”

The Court's approach was to determine the Petitioners' application for protective measures under a combination of Articles 3 and 13 ECHR. This reflected the Petitioners' contention that, under Belgian law, they had inadequate facilities for challenging the deportation decision.

11. The Court concluded, firstly, that the Petitioners' fear that the Russian authorities would repatriate them to Afghanistan had some merit: see [86]. Its second conclusion was that, having regard to various reports, the Petitioners' fears that their deportation from Belgium would give rise to a violation of their rights under Article 3 ECHR had some basis: see [87] and [88]. In the latter paragraph, the Court stated:

" The Court believes, in light of this evidence and the legal problems in play, that the allegations of the Petitioners of risks of violation of Article 3 of the Convention would manifestly call for a detailed investigation and that they were able to defend them before the Belgium authorities in accordance with the requirements of Article 13. "

The Court's third conclusion is expressed in [97] thus:

" The appeals in question are not suspensive **ipso jure** from the execution of the deportation measure and therefore they did not meet one of the requirements of Article 13 of the Convention combined with Article 3. "

The final question considered by the Court in [99], was whether the Petitioners had, within the Belgium legal process:

" …. at their disposal …. an appeal which met the requirements of Article 13 and which would protect them from an arbitrary, even indirect, deportation to Afghanistan. "

The Court then examined the processes of the initial investigative/deciding agency and the appellate body, the Aliens Disputes Board. The Court noted that each of these agencies had failed to investigate the authenticity of the identity documents presented by the Petitioners and, further, the Board had given no weight to certain important documentary evidence ex facie emanating from a "partner" of the UNHCR in Belgium on the ground that " … they were easily falsified and the Petitioners failed to provide originals. ": [101]. This gave rise to the following conclusion:

" [103] Thus, the Court insists on the fact that, given the importance it gives to Article 3 and the irreversible nature of the harm likely to be caused in case of the realisation of the risk of ill treatment, it is the responsibility of **the national authorities** to show that they are as rigorous as possible and carry out a careful investigation of the grounds of appeal drawn from Article 3 without which the appeals lose their efficiency ……

Such an investigation must remove all doubt, legitimate as it may be, as to the invalidity of a request for protection regardless of the competences of the authority responsible for the control. "

[Emphasis added.]

12. The Court's omnibus conclusion was couched in the following terms:

" [105] It results from what precedes that the internal authorities have not investigated the validity of the grounds of appeal, in accordance with the requirements of Article 13, that the Petitioners were arguing were defendable under Article 3. Thus there was a breach of Article 13, combined with Article 3 of the Convention. " [Emphasis added]

The net result was that the protective measures which the Court had notified to the Belgian Government at the beginning of the proceedings, upon receipt of the Petition, remained in force until the ruling of the Court became legally binding in accordance with Article 44(2).

13. The submission on behalf of the Appellant which we have identified in [5](a) above relied heavily on [103] of the ECtHR ruling in Singh , quoted above. It was argued that the effect of this passage was to oblige the FtT to proactively investigate and determine the authenticity of the documents on which the Appellant relied by making enquiries of certain unidentified Iranian authorities via the appropriate UK authorities, in particular the FCO. We reject this submission for the following reasons. Firstly, it rests on a comparison between two quite different contexts which attempts to equate apples with pears. The decision in Singh entailed a ruling by the ECtHR that certain failings in the Belgium legal processes gave rise to a breach of Article 13 ECHR, in conjunction with Article 3. In the present case, the Appellant does not – and could not – assert an infringement of Article 13 ECHR, which is not one of the "Convention rights" under the Human Rights Act 1998. The latter statute itself provides for an effective national remedy and it is one of which the Appellant has been able to avail in the context of this appeal. Secondly, the criticism of the ECtHR was directed primarily to the administrative authorities of Belgium. It is evident that neither of the agencies in question had the status of a court or tribunal: see in particular [27] of the judgment, which makes clear that the appellate body in question (the "CCE") is an administrative authority which determines appeals against decisions of the first level deciding agency (the "CGRA").

14. Our third reason for rejecting this argument is that it would effectively shift the onus of proof from the Appellant to the Respondent, thereby extending the Respondent's obligations well beyond the duty of cooperation enjoined by Article 4 of the Qualification Directive. Our fourth reason, which is linked to the third, is that it is the judicial function to determine litigious disputes on the basis of the evidence presented by the parties. Courts and tribunals do not have evidence gathering functions or duties. While there is a power to direct a party or parties to produce evidence, enshrined in rule 45 Asylum and Immigration Tribunal (Procedure) Rules 2005 ("the Rules"), this neither requires nor empowers the Tribunal itself to engage in an evidence gathering exercise. Furthermore, and in any event, we consider that this power should be exercised sparingly, bearing in mind every tribunal's duty of impartial and independent adjudication.

15. Fifthly, we reject the contention that the duty for which the Appellant contends is found in rule 45 of the Rules (see [7] supra). There are four free standing reasons for this. The first is that rule 45 has the effect of conferring discretionary powers, rather than imposing duties, on the FtT. The second is that, properly construed and viewed in its full context, it is concerned with matters of procedure . Thirdly, it only empowers the Tribunal to give directions to the parties . Fourthly, it is clear that (in common with rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008) rule 45 does not prescribe any general evidence-gathering powers or obligations. It depends rather for its true character, limits and efficacy on an appreciation of the limits on the obligation of the Secretary of State to seek out or validate evidence according to the fact-sensitive context of each case: see CM (Zimbabwe) v Secretary of State for the Home Department [2013] EWCA Civ 13 at [20] and [28]. We consider that there is a world of difference between properly exercising this discretionary, procedural case management power and proactively conducting the obligatory evidence gathering investigation canvassed in the Appellant's argument or subjecting the Secretary of State to such a duty under its guise.

The EU Fundamental Rights Charter

16. The final limb of this argument invoked, belatedly, Article 47 of the Charter of Fundamental Rights of the European Union ("the Charter"), in conjunction with Article 39 of Council Directive 2005/85/EC (the "Procedures" Directive). The most recent decision on the status of the Charter in United Kingdom domestic law is R (AB) v Secretary of State for the Home Department [2013] EWHC 3453 (Admin).

Recalling the earlier combined domestic and European litigation in NS v Secretary of State for the Home Department [2011] EUECJ C-411/10, Mostyn J observed:

“ [14] The constitutional significance of this decision can hardly be overstated. The Human Rights Act 1998 incorporated into our domestic law large parts, but by no means all, of the [ECHR]. Some parts were deliberately missed out by Parliament. The Charter of Fundamental Rights of the European Union contains, I believe, all of those missing parts and a great deal more. Notwithstanding the endeavours of our political representatives at Lisbon it would seem that the much wider Charter of Rights is now part of our domestic law …. [and] ….. would remain part of our domestic law even if the Human Rights Act were repealed. ”

We are mindful that this statement must be considered in the light of one of the cornerstone provisions of the Charter, Article 51(1), which delimits its field of application in the following terms:

“ The provisions of this Charter are addressed to the Institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law .”

[Our emphasis.]

We turn next to the provision of the Charter, Article 47, on which the Appellant’s argument was based:

“ Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a Tribunal in compliance with the conditions laid down in this Article. ”

Article 39(1) of the Procedures Directive provides:

“ Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against ….. a decision taken on their application for asylum ….. ”

17. It is clear from Article 51(1) of the Charter that this instrument is operative in United Kingdom domestic law only when EU law applies to the case or issue in hand. This has been affirmed by the CJEU in a series of decisions: see, for example, Case C- 617/10, Akerberg Fransson , 26/02/13. In the present context, it is not necessary to explore further whether AB went too far because it is uncontroversial that in the asylum appeal before us EU law does apply and that this includes both Article 47 of the Charter and Article 39 of the Procedures Directive.

18. We reject the argument that there was a proactive duty on the FtT to either (a) direct investigation and collation of evidence on the part of the Secretary of State or (b) to undertake its own enquiries and evidence gathering exercise, reposing in these provisions of EU law. We consider, firstly, that the appeal which the Appellant pursued before the FtT provided him with an effective remedy. Its efficacy was not compromised by the fact that it was theoretically possible for stronger or better evidence to have been marshalled in support of his claim for asylum. The shortcomings in the evidence produced by the Appellant, as analysed by the judge, were a feature of the Appellant’s case, to be distinguished from the efficacy of the remedy which he could potentially secure. The FtT was clearly alert to them and we consider that the ensuing balancing and weighing exercise to be undertaken in the prevailing litigation context was a matter for it. We are satisfied that, in these respects, there was nothing unlawful in the FtT’s conduct of the appeal.

19. Secondly, we are satisfied that the remedy available to the Appellant in the present case complied with the three requirements articulated by the ECtHR in Singh [90] viz he enjoyed, and exercised, recourse to a deciding authority which was available and accessible; the relevant national authority (the Secretary of State) was competent to examine the Appellant’s claim and, given the context, did so independently and rigorously; and, throughout the process, the Appellant was protected from removal from the United Kingdom: see [90] – [92]. There was no suggestion in

argument that the effective remedy requirements of EU Law (specifically Article 39 of the Procedures Directive and Article 47 of the Charter) differ in any material respect from those of European human rights law.

20. Thirdly, we are unable to derive from either Article 39 of the Procedures Directive or Article 47 of the Charter a duty on the part of the FtT to conduct the kind of proactive investigation and evidence-gathering exercise suggested on behalf of the Appellant. This is neither expressly stated nor to be reasonably implied. Furthermore, it is to be emphasised that a central requirement of both Article 39 and Article 47 is that the effective remedy be provided by an independent and impartial tribunal: we consider that each of these crucial qualities would be compromised by the kind of exercise for which the Appellant contends, as this would trespass on the universally recognised values of judicial independence and impartiality. Finally, we consider that the words " established by law " import a requirement that the court or tribunal concerned act in accordance with and within the limits of the powers and jurisdiction conferred on it by the relevant law. As we have already ruled, the case management powers conferred on the FtT and the Upper Tribunal are discretionary and essentially procedural in nature, designed to operate in a manner and for a purpose quite different from the wide-ranging duty canvassed on behalf of the Appellant. Moreover, these powers most be exercised in a manner which reflects the tribunal's fundamental duties of neutrality and impartiality. Thus the "law" in play does not provide for the judicial duty for which the Appellant contends.

The UT Decision in MJ

21. In this context we would highlight the approach of the Upper Tribunal in MJ , where there was a very similar attempt to rely on Singh as authority for a duty on the Secretary of State to verify documents. The Upper Tribunal said this:

"47. In Tanveer Ahmed [2002] Imm AR 318 , a starred decision of the Immigration Appeal Tribunal, the following principles were set out after a careful assessment of the case law.

"37. In summary the principles set out in this determination are:

1. In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on.

2. The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.

3. Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision maker still needs to apply principles 1 and 2."

…

49. At [35] the Tribunal made the point that there was no obligation on the Home Office to make detailed enquiries about documents produced by individual claimants. It was said that doubtless there were cost and logistical difficulties in the light of the number of documents submitted by many asylum claimants. The Tribunal went on to say as follows:

"In the absence of a particular reason on the facts of an individual case, a decision by the Home Office not to make enquiries, produce in-country evidence relating to a particular document or scientific evidence should not give rise to any presumption in favour of an individual claimant or against the Home Office."

50. This is a starred decision of the IAT and we are bound by it. It is relevant however to consider it in the context of what was said in Singh v Belgium . Upon consideration we do not think that what was

said in Singh is inconsistent with the quotation we have set out above from paragraph 35 of Tanveer Ahmed . Tanveer Ahmed does not entirely preclude the existence of an obligation on the Home Office to make enquiries. It envisages, as can be seen, the existence of particular cases where it may be appropriate for enquiries to be made. Clearly on its facts Singh can properly be regarded as such a particular case. The documentation in that case was clearly of a nature where verification would be easy, and the documentation came from an unimpeachable source. We do not think that Ms Laughton has entirely correctly characterised what was said in Singh in suggesting that in any case where evidence was verifiable there was an obligation on the decision maker to seek to verify. What is said at paragraph 104 is rather in terms of a case where documents are at the heart of the request for protection where it would have been easy to check their authenticity as in that case with the UNHCR. That is a very long way indeed from the difficulties that would have been involved in this case in attempted verification by the Home Office of documents emanating from Hizb-i-Islami. We do not think that what is said in Singh v Belgium in any sense justifies or requires any departure from the guidance in Tanveer Ahmed which is binding on us and which we consider to remain entirely sound.

We have reproduced the relevant passages in full. We concur with them and consider that they require no elaboration.

RC v Sweden

22. Counsel also relied on the decision of the European Court of Human Rights in RC v Sweden [Application number 41827/07], promulgated on 9 th June 2010 . In this decision, the ECtHR acknowledged, firstly – by implication – the nature of the burden imposed on asylum claimants to establish their claim. Next, in paragraph [50], it identified three general principles:

(a) It is frequently necessary to give asylum claimants the benefit of the doubt when assessing the credibility of their statements and the supporting documents submitted.

(b) When information is presented giving strong reason to question the veracity of an asylum claim, the claimant must provide a satisfactory explanation for the alleged discrepancies.

(c) Where the claimant adduces evidence capable of proving that there are substantial grounds for believing that deportation or removal would expose him to a real risk of treatment proscribed by Article 3, it is for the Government to dispel any doubts about it.

We have considered with care [53] of the judgment, where the Court stated:

“ Firstly, the Court notes that the applicant initially produced a medical certificate before the Migration Board as evidence of his having been tortured (see paragraph 11). Although the certificate was not written by an expert specialising in the assessment of torture injuries, the Court considers that it, nevertheless, gave a rather strong indication to the authorities that the applicant's scars and injuries may have been caused by ill-treatment or torture. In such circumstances, it was for the Migration Board to dispel any doubts that might have persisted as to the cause of such scarring (see the last sentence of paragraph 50). In the Court's view, the Migration Board ought to have directed that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where he had made out a prima facie case as to their origin. It did not do so and neither did the appellate courts. While the burden of proof, in principle, rests on the applicant, the Court disagrees with the Government's view that it was incumbent upon him to produce such expert opinion. In cases such as the present one, the State has a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture.”

We are satisfied that the main focus of this passage relates to the conduct of the Migration Board, which is the Swedish equivalent of the Secretary of State in this jurisdiction. In our opinion, the words

“ ……. neither did the appellate courts…… ” were not designed to suggest that there was a duty on the part of the Swedish appellate court (the Migration Court) to proactively obtain an expert medical opinion on the probable cause of the Appellant’s scars. We are of the opinion that, considering this passage as a whole, the ECtHR did not intend to suggest that an independent and impartial court should conduct the kind of proactive and detailed investigation and evidence-gathering exercise, in private and outwith the court proceedings, suggested by the Appellant or require the State to do so. We consider that this decision is to be viewed on its particular facts. We are satisfied that there is no statement of general principle in RC supporting the Appellant’s contention.

The CJEU Decision in MM

23. Finally, Counsel also mentioned (without developing) the CJEU decision in Case – 277/11, MM v Minister for Justice, Equality and Law Reform, Ireland decided on 22 nd November 2012. In its decision, the First Chamber of the CJEU considered the Irish legal system whereby applications for refugee status and subsidiary protection involve separate, successive examination and determination. It held that the claimant’s right to be heard must be observed in each of these procedures. In thus holding, the Court, having noted that Article 4 of Directive 2004/83 is concerned with “ assessment of facts and circumstances ”, stated:

“ [64] In actual fact, that ‘assessment’ takes place in two separate stages. The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions laid down by Articles 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection are met.

[65] Under Article 4(1) of Directive 2004/83, although it is generally for the Applicant to submit all elements needed to substantiate the application, the fact remains that it is the duty of the Member State to co-operate with the Applicant at the stage of determining the relevant elements of that application.

[66] This requirement that the Member State co-operate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an Applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to co-operate actively with the Applicant, **at that stage of the procedure** , so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than the Applicant to gain access to certain types of documents. ”

[Our emphasis.]

We consider that in these passages, the First Chamber was referring clearly to the first stage of the Article 4 “ assessment ” in the context of an examination by a primary decision-maker. This cannot, in our view, be equated with the function and duties of an independent and impartial appellate tribunal. Alternatively, we consider that the First Chamber was clearly not intending to promulgate prescriptive guidance on how courts or tribunals should approach the question of the collation of evidence in an asylum appeal. We conclude that the decision in MM provides no support for the Appellant’s contention.

24. We would further observe that the Appellant’s argument also suffers from a manifest incongruity. In response to a question from this Tribunal whether the Appellant would have consented to the kind of investigative steps which the FtT should, it was argued, have proactively undertaken or directed, Counsel replied in the negative. This contradicted directly the statement in Counsel’s submission to this Tribunal, dated 23 rd January 2013:

“ The Appellant consents to an attempt by the UK authorities to establish the authenticity of the documents, copies of which he produces, with the Courts or the authorities in Iran. ”

The diametrically opposite stance was adopted by Counsel at the hearing, without explanation. Furthermore, while submitting that the FtT was under the positive duty formulated above, Counsel did not challenge the correctness of the principle that in every asylum case the authorities of the investigating state have a duty to avoid any steps which might jeopardise the safety of the asylum claimant or any other person in the country concerned. This exposes yet another frailty in the argument.

CONCLUSION

25. For the reasons elaborated above, this appeal has no merit and is dismissed accordingly.

PRACTICE AND PROCEDURE

26. We are bound to draw attention to the following unsatisfactory aspects of the conduct of this appe al by the Appellant’s legal representatives:

(a) The failure to comply with the direction addressed to both parties “ to state whether they have any views as to whether this case would be suitable “ for adjudication by a senior panel of the Upper Tribunal.

(b) The response, composed and signed by Counsel for the Appellant, which consisted of a series of submissions relating to the cases mentioned above and a slightly longer formulation of the earlier “Grounds of Appeal” document, also composed and signed by Counsel. This failed to engage with this direction.

(c) The failure to provide to this Tribunal and the Respondent the bundle of authorities prior to the beginning of the hearing.

(d) Having regard to the way in which the case was argued, the failure to proactively prepare a skeleton argument and serve and file the same at least three clear days before the hearing.

(e) The application made at the beginning of the hearing, made without notice to this Tribunal or the Respondent, to re-open the previously refused grounds of appeal.

27. We have considered the letter sent to this Tribunal by the Appellant’s solicitors, in response to the direction we gave at the hearing, requiring an explanation for the failures adumbrated above. This provides no satisfactory explanation of, or justification for, any aspect of the menu of defaults. We note, in particular, the absence of advance consideration of whether a senior panel should be allocated to hear this appeal; the lateness of the application for public funding; and the unjustifiable delay in retaining Counsel.

28. We take this opportunity to emphasise that adherence to the professional standards to be expected of legal representatives by any court or tribunal is not to be measured exclusively by reference to procedural directions. The indispensable obligation on all practitioners to observe high professional standards exists independently of procedural directions. Initiative is an obligatory commodity in contemporary litigation. Both the overriding objective and the administration of justice itself become casualties in cases where the necessary standards are not properly implemented in practice.

DECISION

29. For the reasons elaborated above, we dismiss the appeal and affirm the decision of the FtT.

THE HON. MR JUSTICE MCCLOSKEY

PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER