

# **FORENSIC EVIDENCE IN THE FIGHT AGAINST TORTURE**

**INTERNATIONAL REHABILITATION COUNCIL FOR  
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# **INVESTIGATION IN THE CONTEXT OF A REFUGEE OR PROTECTION CLAIM**

## **CREDIBILITY ASSESSMENT AND MEDICAL EVIDENCE**

**[58] ... the Tribunal found a considerable amount of the appellant's evidence to be problematic, disjointed and, at times, *prima facie* inconsistent. The problematic issues with his evidence were raised with the appellant. On occasions, the situation was readily clarified; on other occasions, the Tribunal was still left with some doubts.**

*AB (Mexico)* [2011] NZIPT 800025 at [58].

**[59] The core elements of the appellant's claim however are accepted by the Tribunal, and the forensic evaluation report is substantively supportive of those core elements of the appellant's claim. It has thus been unnecessary to traverse several parts of the appellant's evidence which he was unable to present in a clear, logical and consistent manner to the Tribunal. The Tribunal is, however, satisfied as to the well-foundedness of the risk on return, despite the confusion and complexity in several parts of the appellant's evidence. The Tribunal finds that his psychiatric condition, coupled with the lack of formal education, led to considerable confusion and perversity in the presentation of his evidence.**

*AB (Mexico)* [2011] NZIPT 800025 at [59].

**[60] The appellant has been fortunate that he has had the services of two world class professors in the preparation of a forensic evaluation report. The standard of this report is excellent. It has assisted in explaining to the Tribunal many of the problems in the presentation of his evidence. As noted, the report by Wenzel and Fincanci sets out his physical and mental situation and his recollection of key events, particularly as they related to his detention and torture. The diagnostic summary found that his symptoms were highly consistent with post-traumatic stress disorder (PTSD) and recurrent depressive episodes. The discussion on his mental health reached findings that showed consistency with memory impairment and highly increased PTSD during interviews relating to torture, together with disorientation and his:**

**“... symptoms also could indicate additional neuropsychological factors such as blunt brain trauma leading to postcommotional/postconcussional syndrome which would also be consistent with the described beatings.”**

**[62] Medical forensic aspects of the report conclude:**

**“Medical examination revealed that he had several marks, and his broken elbow consistent with his history of blunt trauma, and also perineal injury highly consistent with described rape. The localisation of injuries excluded self-infliction of these injuries. His history of torture with all described methods is found to be reliable since he also indicated several of the scars to be sustained before detention, not being related with his torture which confirmed his sincerity. Some symptoms (see above) require further diagnostical procedures to be classified as to being physical or psychological/psychosomatic.”**

**[63] In conclusion, the report stated:**

**“Psychological/psychiatric symptomatology and diagnosis assessed together with physical findings based on a thorough medical examination indicate that all physical and psychological findings are highly consistent with the patient's history of torture during arrest and detention.”**

**[64] The terms of this report, coupled with a small but important point of corroboration relating to the name and prosecution of the immigration officer, led us to accept the credibility of the appellant's core claim and to extend the benefit of the doubt to him where we still had lingering doubts on core issues.**

*AB (Mexico)* [2011] NZIPT 800025 at [64].

**... where the opinion of a medical specialist is dependent upon factual assumptions provided in a patient's history, such an opinion will only be as acceptable as the history on which it is based**

*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[2003] HCA 30 per Kirby J at [88]



**In this field, as in others, tribunals and courts need to be guarded in their reliance upon their ability to assess the truthfulness of a witness from that witness' appearance alone. Yet here the Tribunal seems to have felt able to do just that. In essence, it reached a conclusion, adverse to the appellant, on the basis of its estimate of his untruthfulness and the "plausibility" of his story. Because that estimate was adverse to the appellant the Tribunal felt entitled to reject out of hand reports about his condition given by the dentist and surgeon. A moment's thought should have convinced the Tribunal that this was a highly illogical, if not an irrational and perverse, way of going about the process of decision-making. A proper approach to that process, as mandated by the Act, would have required weighing any impressions, and perceived defects, in the appellant's testimony, together with any supporting evidence before coming to a final conclusion. That is not the way this Tribunal went about reaching the decision entrusted to it.**

*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[2003] HCA 30 per Kirby J at [93]

**[In the Federal Court Finkelstein J was of the view that] [t]o suggest that because the appellant was not to be believed *therefore* the evidence of apparently independent witnesses should *also* be disbelieved or rejected involved serious illogicality of reasoning. The conclusion did not follow the premise as a matter of rational deduction. Finkelstein J went on:**

**"As with the evidence given by [the appellant], the corroborative evidence may be impeached. But unless it were impeached, it could not be ignored. Importantly, in the process of reasoning, the Tribunal was not entitled to pay no regard to the corroborative evidence in the course of deciding whether the evidence of [the appellant] was true or probable and then use its conclusion on that evidence (that it was untrue) to impeach the corroborative evidence. This is what the Tribunal did, to some extent in the case of the two medical reports, and completely in the case of [the independent witness]."**

***Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[2003] HCA 30 per Kirby J at [109]**

Finally, the Board gave no weight to a Canadian medical report indicating that the applicant had scars of injuries consistent with her PIF statement. The Board found that the doctor made his assessment based on the applicant's allegations in the PIF which the Board found to be untrustworthy and therefore the medical report was not persuasive. In *Ameir v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 876 (CanLII), 2005 FC 876, 47 Imm. L.R. (3d) 169, Mr. Justice Edmond Blanchard considered similar reasoning of the Board and held at paragraph 27 that:

It is open to the Board to afford no probative value to a medical report if that report is founded essentially on a applicant's story which is disbelieved by the Board. However, there may be instances where reports are also based on clinical observations that can be drawn independently of the applicant's credibility. In the instant case, Dr. Hirsz's medical report is based, at least in part, on independent and objective testing. In such cases, expert reports may serve as corroborative evidence in determining an applicant's credibility and should be dealt with accordingly before being rejected. The Board here, however, rejected the two reports based solely on its finding that the Applicant was generally not credible. Given my determination that the Board erred in its general credibility finding, it follows that its finding in respect to these reports is not sustainable.

While the Board relied on *Sheikh* above, for the proposition that it could reject the medical reports since it found the applicant not to be credible, it is clear from *Ameir* and *Sheikh* above, that the Board may only reject evidence emanating directly from the applicant. Since the doctor considered objective factors of scarring as well as the applicant's allegations, the Board ought not to have rejected the medical report on the basis of its credibility finding.

*Park v Canada (Minister of Citizenship & Immigration)* 2010 FC 1269; (2010) 93 Imm LR (3d) 265 (FC:TD)

**The Court also takes into consideration the applicant's allegations that he was subjected to brutality and insults by the police during his second period of detention. It observes that these allegations are not supported by any documentation such as a medical certificate and that it is not possible to establish with certainty exactly what happened to the applicant. However, the Court is once again obliged to note that the Applicant's allegations are consistent with numerous accounts collected from witnesses by international organisations....**

*Case of MSS v Belgium and Greece* (Application No. 30696/09, 21 January 2011) (ECtHR Grand Chamber) at [227].

# **TI v CANADA (Communication No. 333/2007, 15 November 2010)**

- 1. Ethnic Tartar born in Uzbekistan. In 1995 arrested and interrogated about his father's involvement with ethnic Tartars and subjected to torture such as beatings, kicks, placing of needles under his fingernails, sleep and water deprivation, solitary confinement, continuous exposure to light and administration of psychotropic drugs. He had blood in his urine and lungs. The detention lasted approximately one month. Following release he fled with his wife and daughter to the United Arab Emirates. After being approached by a member of the Uzbek Ministry of the Interior he fled to Germany under a false name. His refugee claim was rejected. He travelled to Norway and again filed a refugee claim under a false name. It was dismissed. In September 2001 he entered Canada and made a refugee claim. That claim failed on credibility grounds.**
- 2. Before the CAT Committee Canada argued (inter alia) that there was no medical evidence to corroborate any of the allegations.**

- 3. The complainant replied that he could not provide medical evidence to corroborate his mistreatment, namely the blood in his urine and lungs, as he claimed it was unrealistic for him to request his torturers for such a medical report.**
- 4. The CAT Committee at [7.5] stated:**

**The Committee notes that despite several enquiries about medical or any other documentary evidence in support of his account of events in Uzbekistan prior to his departure, namely of his alleged arrest, and ill-treatment in detention in 1995, which would corroborate his claim or possible effects of such ill-treatment, the complainant did not provide any such evidence. Neither did he provide any report of a medical examination after his arrival in Canada. In such circumstances, the Committee finds that he has failed to establish his claim that he would personally be exposed to a substantial risk of being subjected to torture if returned to Uzbekistan at the present time.**