Evidentiary Value of Forensic Medical Evidence in Asylum Procedures: Where Can the CJEU Bring Light into the Darkness?

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Abstract

The evidentiary value of forensic medical reports in asylum procedures is highly contested, mainly for two reasons. First, a physician usually cannot establish when, where, why and by whom the applicant has been ill-treated. Moreover, a physician can almost never establish with complete certainty which treatment caused a scar or physical or psychological problem. Nevertheless, both the ECtHR and the Committee against Torture (CAT) have recognised the importance of forensic medical reports as evidence in asylum cases in their judgments and decisions. However, they rarely explicitly address fundamental questions relating to the duty to arrange for a medical examination and the evidentiary value of forensic medical reports. This article examines where the Court of Justice of the European Union may step in to provide more guidance regarding these issues to the Member States of the European Union, by interpreting Article 18 of the recast Procedures Directive.

Keywords

forensic medical reports – forensic medical examinations – asylum procedures – evidence

1 Introduction

Asylum applicants, who have insufficient documentary evidence in support of their asylum account, may ask a physician to write a forensic medical report on

their behalf. In such medical reports, physicians draw conclusions regarding the correlation between the signs and symptoms of torture or ill-treatment (physical or psychological)¹ and the alleged event of ill-treatment in the country of origin.² It is recognized in Article 4(4) Qualification Directive³ (henceforth: QD) and the case law of the European Court of Human Rights (ECtHR) and Committee against Torture (CAT)⁴ that the fact that an asylum applicant has been ill-treated in his country of origin in the past, is an important indication for future risk of such treatment. If the applicant has made plausible that he has been ill-treated in the country of origin, the burden of proof shifts to the state.⁵ This means that the state has to make plausible that ill-treatment will not occur again upon return.

The evidentiary value of forensic medical reports in asylum procedures is highly contested, mainly for two reasons. First, a physician usually cannot establish when, where, why and by whom the applicant has been ill-treated (the context of the ill-treatment). This context is important for both the credibility of the applicant's asylum account and the assessment of future risk.⁶ Moreover,

1 In this article I will from now on use the word 'ill-treatment' for both torture and other forms of ill-treatment.

2 Rhys-Jones, D. and Verity Smith, S. (2004). Medical Evidence in Asylum and Human Rights Appeals. *International Journal of Refugee Law* 16(3), pp. 390–391.

3 Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9, henceforth Qualification Directive or QD.

4 See e.g. *J.K. and others v Sweden* App No 59166/12 (ECtHR, 23 August 2016), paras 99–102, *R.C. v Sweden* App No 41827/07 (ECtHR, 9 March 2010), para 55, *Salah Sheekh v the Netherlands* App No 1948/04 (ECtHR, 11 January 2007), paras 146–147, Committee against Torture, General Comment No 1, Implementation of Article 3 of the Convention in the Context of Article 22, 21 November 1997, Implementation of Article 3 of the Convention in the Context of Article 22, 21 November 1997, para 8b.

5 Staffans, I. (2012). *Evidence in European Asylum Procedures*. Leiden: Brill/Nijhoff, p. 59. See also Boeles, P. and others (2014). *European Migration Law*. Antwerp/Oxford/Portland: Intersentia, p. 318, Hailbronner, K. and Thym, D. (2016). *EU Immigration and Asylum Law, A Commentary*. München: C.H. Beck/Hart/Nomos, p. 1139 and Noll, G. (2005). *Evidentiary Assessment and the EU Qualification Directive*. *New Issues in Refugee Research*, Working Paper No 117. Geneva: UNHCR. Available at: <https://www.refworld.org/docid/4ff65bf2.html> [accessed 28 October 2019], p. 11.

6 Freedom from Torture (2016). *Proving Torture, Demanding the impossible. Home Office mis-treatment of expert medical evidence*. Available at: <https://www.refworld.org/docid/58495c5f4.html> [accessed 28 October 2019, p. 22, Rhys-Jones, D. and Verity Smith, S. (2004). Medical Evidence in Asylum and Human Rights Appeals. *International Journal of Refugee Law* 16(3), p. 392. Reneman, A.M., de Lange, J. and Smeekes, J. (2016). Medische waarheidsvinding en geloofwaardigheidsbeoordeling in asielzaken. *Asiel & Migrantenrecht* 7(10), pp. 468–469.

a physician can almost never establish with complete certainty which treatment caused a scar or physical or psychological problem.⁷ Forensic medical examinations thus have important inherent limitations. For these reasons, the authorities in some countries are reluctant to arrange for a medical examination⁸ or to accept medical reports as evidence in asylum cases.⁹ They question whether forensic medical evidence can 'repair' (serious) credibility issues in an applicant's asylum account.¹⁰

This article shows that both the ECtHR and the Committee against Torture (CAT) have recognised the importance of forensic medical reports as evidence in asylum cases in their judgments and decisions. They do not accept that national authorities refrain from ordering a forensic medical report or attach no or limited weight to a forensic medical report submitted by the applicant, just because the applicant has made inconsistent, incoherent or vague statements. They also do not accept general references to the mentioned inherent limitations of forensic examinations for that purpose.

However, it is also demonstrated in this article that both the ECtHR and the CAT may accept that a forensic medical examination is not deemed relevant or a forensic medical report is granted limited weight in individual cases, because of serious credibility issues. Moreover, states have raised the context and causality argument successfully in several cases. Because of a lack of clear reasoning in the ECtHR's judgments and CAT's decisions, it is often impossible to ascertain why these arguments were successful in the particular case. Both the ECtHR and CAT rarely address more fundamental questions relating to the

7 Rhys-Jones, D. and Verity Smith, S. (2004). Medical Evidence in Asylum and Human Rights Appeals. *International Journal of Refugee Law* 16(3), p. 391.

8 IRCT (2016). *Falling through the cracks*. Available at: https://issuu.com/irct/docs/falling_through_the_cracks [accessed 28 October 2019], pp. 12–13, 16, 19, 25, 31. See with regard to Denmark *GI v Denmark* No 625/2014 (CAT, 17 September 2017), para 5.5. See with regard to the Netherlands, Reneman, A.M. (2018). *Identification of asylum seekers with special reception and procedural needs in the Dutch asylum procedure*. Available at: https://acmrl.org/wp-content/uploads/2018/09/Reneman_Migration-Law-Series-No-16-Final-version.pdf [accessed 28 October 2019], pp. 93–96. See with regard to the United Kingdom Rhys-Jones, D. and Verity Smith, S. (2004). Medical Evidence in Asylum and Human Rights Appeals. *International Journal of Refugee Law* 16(3), pp. 381, 387.

9 Reneman, A.M., de Lange, J. and Smeekes, J. (2016). Medische waarheidsvinding en geloofwaardigheidsbeoordeling in asielzaken. *Asiel & Migrantenrecht* 7(10), pp. 460, 462.

10 Freedom from Torture (2016). *Proving Torture, Demanding the impossible. Home Office mistreatment of expert medical evidence*. Available at: <https://www.refworld.org/docid/58495c5f4.html> [accessed 28 October 2019], pp. 35–38. Rhys-Jones, D. and Verity Smith, S. (2004). Medical Evidence in Asylum and Human Rights Appeals. *International Journal of Refugee Law* 16(3), pp. 381, 397.

evidentiary value of forensic medical reports explicitly. As a result, it is difficult to establish why the state had a duty to order a medical examination or why a forensic medical report was or was not granted more weight than other elements of the applicant's asylum account.

This article examines where the Court of Justice of the European Union (henceforth: CJEU) may step in to provide more guidance regarding these issues to the Member States of the European Union. The role of the CJEU is different from that of the ECtHR and CAT, because it does not examine individual complaints, but provides interpretation of EU law to the national courts through the preliminary ruling procedure. National courts may ask the CJEU to interpret Article 18 of the recast Procedures Directive (henceforth also: RAPD).¹¹ This provision contains a duty for Member States to arrange for a forensic medical examination, where the determining authority¹² 'deems it relevant for the assessment of an application for international protection'.¹³ Furthermore, it obliges the determining authority to consider a medical report in the examination of the asylum application, irrespective of whether it was requested by the authorities or submitted by the applicant.¹⁴ This article will formulate preliminary questions concerning the interpretation of Article 18 RAPD and provide some directions for answering these questions.

Section 2 of this article starts with a short explanation of the methodology. The duty to arrange for a forensic medical examination will be addressed in section 3. This section will examine when a forensic medical examination should be considered relevant for the assessment of the asylum claim. For this purpose, it distinguishes several factors, regarding the seriousness of the credibility issues and their relation to the alleged event of ill-treatment. These factors also determine how much weight should be attached to a forensic medical report. Moreover, the content of the forensic medical report is important for the evidentiary value of this report. This will be discussed in section 4. Section 5

11 Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013], OJ L 180/60. The Procedures Directive (Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.) did not contain a provision on medical reports.

12 According to Art. 2(f) RAPD, the determining authority is 'any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases'. This term will be used in the rest of the article.

13 Art. 18(1) RAPD.

14 Art. 18(3) RAPD.

will go deeper into the previously mentioned issues of context and causality. These are relevant for both the interpretation of the state's duty to arrange for a forensic medical examination and the determination of the evidentiary value of forensic medical reports. Section 6 draws conclusions and formulates preliminary questions for the CJEU.

Sections 3–5 of this article follow the same structure. They first identify the gaps in the case law of the ECtHR and CAT concerning the duty to arrange for and the evidentiary weight of forensic medical reports. Subsequently, they investigate where Article 18 RAPD may provide answers and where it leaves room for interpretation. Finally, they examine which questions may be brought before the CJEU in order to provide further guidance to the EU Member States and provide some directions for answering these questions.

2 Methodology

The ECtHR and CAT have developed an extensive body of case law concerning the use of forensic medical reports in asylum cases. The goal of this article is to identify the gaps (or unclarities) in the case law of the ECtHR and CAT and see where the CJEU can step in to provide more guidance to the EU Member States by interpreting Article 18 RAPD. The gaps the case law of the ECtHR and CAT were identified on the basis of ECtHR judgments concerning Article 3 of the European Convention of Human Rights (ECHR) and CAT decisions concerning Article 3 of the UN Convention against Torture (UNCAT), in which (the duty to request) a forensic medical report played a role. Moreover, the views of the CAT in its General Comments and Concluding Observations were taken into account.

This article examines the meaning of Article 18 RAPD by applying the interpretation methods, which are usually applied by the CJEU.¹⁵ It looks at the text of Article 18 RAPD, its place in the Common European Asylum System and its history and purpose. Moreover, it takes into account that Article 18 RAPD may not be interpreted in a way that renders this provision ineffective or that allows national rules to render the exercise of rights conferred by EU law, such as the right to asylum or the principle of *non-refoulement*,¹⁶ virtually impossible or excessively difficult.¹⁷

15 CJEU Case 283/81 *CILFIT v Ministry of Health* [1982], para 20.

16 See Art. 18 and 19 of the Charter and Art. 13, 18 and 21 of the Qualification Directive.

17 CJEU Case C-312/93 *Peterbroeck* [2005], para 12.

3 The Duty to Arrange for a Medical Examination

According to the case law of the ECHR¹⁸ and CAT¹⁹ and EU legislation,²⁰ the burden of proof lies on the asylum applicant. This means that the asylum application will be denied, if it is not substantiated that there is a well-founded fear of persecution or a real risk of serious harm upon return. Moreover, it means that it is in principle up to the applicant to provide evidence in support of his asylum claim.²¹

On the other hand, it is generally accepted that it is difficult for asylum applicants to gather relevant documentation supporting their asylum account.²² Sometimes, a forensic medical examination will be the only way for an asylum applicant to support his claim that he has been tortured or ill-treated in the past. However, asylum applicants are often not able to cover the costs of a forensic medical examination and may ask the state to arrange such examination on their behalf.

Forensic medical examinations are expensive, take a lot of time and may cause distress to the asylum applicant.²³ It may therefore be assumed that they should only be requested by the state, if they can change the outcome of the case. This is not the case in two situations: 1. the determining authority has deemed the alleged event of ill-treatment credible or 2. the determining authority has raised reasons to consider the applicant's asylum account not credible that are so serious, that it can be established beforehand that a medical examination cannot change the outcome of the credibility assessment. The

18 *J.G. v Sweden* [GC] App No 43611/11 (ECtHR, 23 March 2016), para 113. According to the ECtHR the applicant has 'to adduce evidence capable of proving' that there are such substantial grounds.

19 CAT General Comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para 38.

20 Art. 4(1) QD. See also UNHCR (2011). *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of* (hereafter also: *UNHCR Handbook*), para 196, *J.K. v Sweden* [GC] App No 59166/12 (ECtHR, 23 August 2016), paras 91–92.

21 See Art. 4(1) QD, UNHCR (1998). *Note on Burden and Standard of Proof in Refugee Claims*. Available at: <https://www.refworld.org/docid/3ae6b338.html> [accessed 28 October 2019], paras 5–6 Staffans, I. (2012). *Evidence in European Asylum Procedures*. Leiden: Brill/Nijhoff, p. 70.

22 See e.g. *UNHCR Handbook*, para 196 and *J.K. v Sweden* [GC] App No 59166/12 (ECtHR, 23 August 2016), para 92. The CJEU has also considered this with regard to refugees in the context of the Family Reunification Directive in CJEU Case C-635/17 E. [2019], para 66.

23 See *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)*, paras 149, 266. See section 6,2 for more explanation about this protocol.

question then rises when credibility issues are too serious to be 'repaired' by a forensic medical report.

In cases concerning alleged victims of ill-treatment, the credibility assessment can be considered extra complex. Research shows that an event of ill-treatment may cause psychological problems, which impede the applicant to make complete, coherent and consistent statements about this and other events.²⁴ The fact that the applicant has psychological problems may thus support his statements about past ill-treatment and explain the contradictions, inconsistencies or vaguenesses in his asylum account.²⁵ A medical examination is the only way to substantiate the applicant's claim that he suffers from such psychological problems resulting from past ill-treatment, and should therefore be requested by the state.

However, Immigration authorities may argue that the applicant's statements about alleged events of ill-treatment are not credible, because they are contradictory, inconsistent or vague. Therefore, they may not accept an applicant's argument that psychological problems caused by ill-treatment explain these contradictions, inconsistencies or vaguenesses. This may be reason to refuse a request for a medical examination.

The key question is thus under which circumstances a forensic medical report is able to change the determining authority's initial conclusions regarding the credibility of the applicant's asylum account. Is the determining authority allowed to refuse to arrange a medical examination, if it found serious inconsistencies, contradictions or vaguenesses in the applicant's asylum account? This question becomes relevant at the moment the applicant brings forward medical information in order to substantiate that he is a victim of ill-treatment and/or requests a medical examination during the administrative phase of asylum procedure. Moreover, this question may be examined during the appeal phase, if the determining authority has refused to order a medical examination. If the applicant did not arrange for a medical examination himself, the court should examine whether the determining authority has carefully considered the asylum application without ordering a medical examination. If the applicant has arranged for a medical examination himself, the court may need to rule whether the state should reimburse the costs of the medical examination.

24 See e.g. Herlihy, J., Jobson, L. and Turner, S. (2012). Just tell us what happened to you: autobiographical memory and seeking asylum. *Applied Cognitive Psychology* 26(5), pp. 661–676. Bögnér, D., Herlihy, J. and Brewin, R. (2007). Impact of sexual violence on disclosure during Home Office interviews. *British Journal of Psychiatry* 191(1), pp. 75–81. Bloemen, E. and Keunen, A. (2013). Ik heb alle bewijzen op mijn lichaam. *Asiel & Migrantenrecht* 4(9), pp. 455–456.

25 See e.g. *Istanbul Protocol*, para 99, 253.

3.1 *Gaps in the Case Law of the ECtHR and CAT*

It follows from the ECtHR's and the CAT's case law that the fact that the applicant's asylum account contains inconsistencies, contradictions or vagueness, does not automatically relieve a state from its duty to arrange for a medical examination. In *RC v Sweden*, the ECtHR considered that the Swedish authorities should have ordered a forensic medical report, even though the Swedish authorities had strong arguments to consider the applicant's account about his escape from an Iranian court not credible.²⁶ The ECtHR considered that 'the applicant's basic story was consistent throughout the proceedings' and that 'some uncertain aspects, such as his account as to how he escaped from prison [...] do not undermine the overall credibility of his story'.²⁷ In *RJ v France*, the ECtHR held that the authorities should have arranged for a medical examination, because of the serious and recent injuries on the applicant's body. Also in this case, the authorities could not refrain from arranging such examination, because they found that the applicant's asylum account was little detailed.²⁸

However, it cannot be derived from these two cases that the state is always required to arrange for a medical examination on the applicant's request. As we will see below, it has accepted in several cases that a medical report did not have to be granted important weight because of serious credibility issues. In such cases a state may not be required to arrange for a medical examination in the first place.

The CAT seems to be in favour of a broad application of the duty to arrange for a medical examination in case of credibility concerns. In its General Comment no 4 it considers that

an examination by a qualified medical doctor, including as requested by the complainant to prove the torture that he/she has suffered, *should always be ensured, regardless of the authorities' assessment on the credibility* of the allegation, so that the authorities deciding on a given case of deportation are able to complete the assessment of the risk of torture on the basis of the result of the medical and psychological examinations, without any reasonable doubt.²⁹

²⁶ *R.C. v Sweden* App No 41827/07 (ECtHR, 9 March 2010), para 53.

²⁷ *R.C. v Sweden* App No 41827/07 (ECtHR, 9 March 2010), para 52.

²⁸ *R.J. v France* App No 10466/11 (ECtHR, 19 September 2013), para 42.

²⁹ CAT, General Comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para 41, emphasis added. See also para 49(d) of this General Comment. See also *I.U.K. et al. v Denmark* No 703/2015 (CAT, 20 June 2018), para 8.8 and *S.B. v Denmark* No 602/2014 (CAT, 7 July 2017), para 8.7.

This view also emerges from its views in individual cases.³⁰ In *MB v Denmark*, the CAT held that there was a duty to arrange a medical examination, even though the national authorities had found serious inconsistencies in the applicant's statements.³¹ It was 'of the view that an impartial and independent assessment of whether the reason for the inconsistencies in his statements might be that he had been subjected to torture could have been made by the Board only after it had ordered the first complainant to be examined for signs of torture'. The applicant had substantiated his medical situation during the proceedings before the CAT with a forensic medical report and medical records and had requested the Danish authorities to arrange for a medical examination.³² The CAT found that by omitting a medical examination, the Danish authorities failed to adequately explore a fundamental aspect of the first complainant's claim.³³

However, in some cases the CAT has allowed states to reject an asylum claim on the basis of credibility issues without ordering a medical examination. This makes it difficult to derive clear standards from the CAT's case law. In the recent case of *IUK v Denmark* the CAT for example did not deem a medical examination necessary, because the complainants had 'failed to explain how or why an examination of IUK for signs of torture [...] might have led to a different assessment of their asylum application'.³⁴ The applicant had submitted a forensic medical report, which concluded that overall the applicant's physical and psychological symptoms and the objective findings made 'are fully consistent with consequences of the alleged torture'. The CAT did not 'consider the denial of an independent medical examination to have directly resulted in the state party's adverse conclusion concerning the complainants' credibility'.³⁵

30 *A.M.D. v Denmark* No 653/2015 (CAT, 22 June 2017), *F.K. v Denmark* No 580/2014 (CAT, 9 February 2016), *M.C. v the Netherlands* No 569/2013 (CAT, 30 November 2015), *K.H. v Denmark* No 464/2011 (CAT, 7 February 2013), para 2.6., *Combey Brice Magloire Gbadjavi v Switzerland* No 396/2009 (CAT, 5 July 2012), para 4.8, *A. v the Netherlands* No 91/1997 (CAT, 13 November 1998).

31 *M.B. and others v Denmark* No 634/2014 (CAT 27 January 2017), para 9.6 and *F.K. v Denmark* No 580/2014 (CAT, 9 February 2016), para 7.6.

32 *M.B. and others v Denmark* No 634/2014 (CAT 27 January 2017), para 5.1.

33 *M.B. and others v Denmark* No 634/2014 (CAT 27 January 2017), para 9.6.

34 *I.U.K. et al. v Denmark* No 703/2015 (CAT, 20 June 2018), para 8.8.

35 *I.U.K. et al. v Denmark* No 703/2015 (CAT, 20 June 2018), para 8.8. See also *Mallikathevi Sivagnanaratnam v Denmark* No 429/2010 (CAT 16 December 2013), *Z. v Denmark* No 555/2013 (CAT, 12 October 2015).

3.2 *Interpreting Article 18 RAPD*

Even though under EU law the burden of proof is on the applicant, the immigration authorities are required to cooperate with the asylum applicant under Art 4(1) QD. This 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 cooperate actively with the applicant [...], so that all the elements needed to substantiate the application may be assembled.³⁶

Article 18(1) RAPD, which contains the state's duty to arrange for a medical examination fills in the duty to cooperate.³⁷ It states:

Where the determining authority deems it relevant for the assessment of an application for international protection in accordance with Article 4 [QD], Member States shall, subject to the applicant's consent, arrange for a medical examination of the applicant concerning signs that might indicate past persecution or serious harm. Alternatively, Member States may provide that the applicant arranges for such a medical examination.

The state needs to pay the costs of the examination. If the determining authority does not deem a medical examination relevant, it shall inform the applicant that he may, on his own initiative and at his own cost, arrange for a medical examination.³⁸

Article 18 of the Directive does not explain when the determining authority should consider it 'relevant' to arrange for a medical examination. The text of the provision itself therefore does not provide an answer to the question when a forensic medical report is able to change the determining authority's initial conclusions regarding the credibility of the applicant's asylum account. Therefore Article 18 RAPD will now be examined in the light of its place in the CEAS, its history and purpose and the EU principle of effectiveness.

When interpreting Article 18(1) RAPD, two factors should be taken into account. First, the duty to arrange for a medical examination laid down in

³⁶ CJEU C-277/11 *MM* [2012], para 66.

³⁷ See also Boeles, P. and others (2014). *European Migration Law*. Intersentia, Antwerp/Oxford/Portland, pp. 315–316.

³⁸ Art. 18(2) RAPD.

Article 18(1) RAPD is regarded as a special procedural guarantee for vulnerable asylum applicants.³⁹ Article 24(3) RAPD requires Member States to provide adequate support to applicants with special procedural needs, which includes victims of torture or other forms of violence.⁴⁰ It also follows from the explanations with the revised Commission Proposal for the RAPD that 'a medical examination may be particularly relevant to the examination of the claim where the applicant is unable to fully articulate the elements needed to substantiate his/her application'.⁴¹ Article 18 RAPD is thus meant to assist applicants, who are not able to support their application with evidence or to make consistent, coherent and detailed statements during an interview. The principle of effectiveness would be violated, if Article 18(1) RAPD allows for national rules, which permit the determining authority to refuse such examination, exactly because an applicant has made inconsistent, incoherent or vague statements or does not have evidence to substantiate his asylum application.

Second, the threshold, which should be met according to Article 18(1) RAPD, namely that a medical examination is 'relevant' does not seem to be particularly high. For example, the threshold laid down in Article 40(3) RAPD, which must be met before the determining authority is required to further examine a subsequent asylum application is much higher: the new elements or findings must 'significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection'. It should also be noted that it is often impossible to predict beforehand, how much weight a medical examination and the resulting forensic report will have in the asylum procedure. This may depend for example on the degree of causality, which will be found by the physician (see section 5.2). This is also the reason why the threshold laid down in Article 18(1) should not be too high.

Both factors fit well with the CJEU's acknowledgement that the assessment of an asylum claim 'must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the

39 European Commission. *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)*. COM(2009) 554, p. 6.

40 Recital 29, Preamble RAPD.

41 European Commission. *Amended Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)*. COM(2011) 319, Annex, Detailed Explanation of the Amended Proposal, p. 7.

Union'.⁴² The CJEU has stressed that the procedure for international protection 'enables applicants for international protection to safeguard their most basic rights by the grant of such protection'.⁴³

3.3 *Where Can the CJEU Step In?*

It cannot be derived from these considerations that the determining authority is always required to ask for a medical examination. There may be situations in which credibility issues may be too serious to be 'repaired' by a forensic medical report. It will be up to the national courts to assess when this is the case. It is not the CJEU's task to decide whether the determining authority of a Member State had a duty to arrange for a medical examination in an individual situation.

It is very difficult to define in the abstract when credibility issues are so serious that they render a medical examination irrelevant. However, the CJEU could rule which factors the Member States should take into account when deciding whether a medical examination is relevant in the meaning of Article 18(1) RAPD. This will provide guidance to the determining authorities and courts of the Member States, which has so far not been given by the ECtHR and CAT.

3.3.1 Factors Determining the Relevance of a Forensic Medical Examination

This section contends that factors determining the relevance of a forensic medical examination concern the seriousness of the credibility issues and their relation to the alleged event of ill-treatment. If the determining authority deems the applicant's asylum account credible, a forensic medical examination should not be considered relevant.

First, it is relevant to know which part of the asylum account is deemed not credible by the determining authority. If the credibility issues relate to the alleged event of ill-treatment, this renders a forensic medical examination in my view, particularly relevant, because it is specifically that element of the asylum account that a forensic medical report seeks to substantiate. However, the question is whether a forensic medical report is also relevant when assessing the credibility of other parts of the asylum account than the alleged event of ill-treatment. This issue will be further discussed below.

42 CJEU Joined Cases C-175/08, C-176/08, C-178/08, C-179/08 *Salahadin Abdullah and others* [2010], para 90.

43 CJEU Case C-429/15 *Danqua* [2016], para 45.

Secondly, the seriousness of the credibility issues plays a role. It may be assumed that the more serious the credibility issues are, the less foreseeable it is that a forensic medical report can 'repair' them. In this context, it is relevant whether the credibility issues concern the core or the periphery of the asylum account.⁴⁴ The core of the asylum account relates directly to the flight motives of the applicant. The periphery relates to less essential parts of the account for the purpose of the assessment of the need for international protection, such as the travel route. Credibility issues concerning the periphery of the asylum account should be considered less serious than credibility issues concerning the core of the asylum account.⁴⁵

Credibility issues concerning the main lines of the applicant's asylum account may be considered more serious than those concerning details.⁴⁶ Main lines of the account regard for example the nature of the applicant's job or political affiliation. If the applicant cannot provide any information about these issues, this seriously undermines the applicant's asylum account.⁴⁷ Details concern for example the exact duration of detention or the names of fellow-prisoners.

Finally, it may be argued that the nature of the (lack of) information on which the doubts of the credibility are based should be taken into account. If it is established that an asylum applicant has provided false documents, this should be considered more serious than if the applicant has provided vague statements. Some information may clearly undermine the credibility of (an important part of) the asylum account. For example, if the determining authority has established on the basis of visa information that the applicant has left his country of origin months before the alleged event of ill-treatment took place, this seriously undermines the credibility of the said event. It may also concern the situation where the applicant has clearly lied about his identity and/or nationality and these could as a result not been established by the determining authority.

The table below provides an overview of the mentioned factors. Arguably, the combination of the mentioned factors in the individual case determine how relevant a forensic medical examination is. In my view, it is justifiable that a medical examination is omitted, if the determining authority has information, which clearly indicates that the applicant's statements concerning the core of the asylum account, including the alleged ill-treatment cannot be true.

44 See e.g. *R.C. v Sweden* App No 41827/07 (ECtHR, 9 March 2010), para 52.

45 *Ibid.*

46 See e.g. UNHCR (2013). *Beyond Proof, Credibility Assessment in EU Asylum Systems*. Available at: <https://www.refworld.org/docid/519b1fb54.html> [accessed 27 October 2019], p. 42.

47 *I. v Sweden* App No 61204/09 (ECtHR, 5 September 2013).

This prevents that Member States have to bear unnecessary costs and asylum procedures are prolonged for insufficient reasons.

TABLE 1

Factors determining the relevance of forensic medical report in the credibility assessment	
The part of the asylum account affected by credibility issues	
The alleged event of ill-treatment	Other parts of the asylum account
Seriousness of the credibility issues	
Core of the asylum account	Periphery of the asylum account
Main lines of the asylum account	Details of the asylum account
Documents or information, which clearly undermine the credibility of (part) of the asylum account	Inconsistent, contradictory or vague statements

However, if the applicant has made inconsistent, contradictory or vague statements about details of the alleged ill-treatment, a forensic medical examination should, in my opinion, be considered relevant. It is reasonable to ask the applicant to substantiate that he has scars or suffers from medical problems. This can be done by submitting a doctor’s statement, which confirms that the applicant has these scars or medical problems. Moreover, the applicant should claim that these are related to ill-treatment in his country of origin.⁴⁸ In such a situation, a forensic medical report can not only substantiate that the alleged event of ill-treatment has taken place, but also provide a start of an explanation of the inconsistent, contradictory or vague statements made by the applicant.

The most difficult question is whether a forensic medical examination is relevant, if the determining authority (also) raised credibility concerns with regard to other parts of the asylum account than the alleged event of ill-treatment. In this context, Article 4(5) QD should be noted. It provides that ‘where aspects of the applicant’s statements are not supported by documentary or other evidence, those aspects shall not need confirmation’ when certain conditions are

48 See also *R.C. v Sweden* App No 41827/07 (ECtHR, 9 March 2010) and *R.J. v France* App No 10466/11 (ECtHR, 19 September 2013).

met. In particular, the 'general credibility of the applicant' should have been established. If the applicant is considered generally credible, the determining authority may not require proof of every part of the asylum account.⁴⁹ This may be considered 'an alleviation of the duty to present evidence'.⁵⁰

Inconsistent, contradictory or vague statements, which concern the periphery of the asylum account, will normally not undermine the general credibility of the asylum applicant and lead to a refusal of the alleviation of the duty to present evidence as mentioned in Article 4(5) QD.⁵¹ Then, a medical examination is not relevant; the core of the account should be considered credible. However, this may be different, if the state argues that the credibility issues are so serious that they undermine the general credibility of the applicant and therefore the credibility of the core of the asylum account. The CJEU could clarify whether the state has a duty to arrange for a medical examination in order to give the applicant the opportunity to increase his general credibility.

Moreover, credibility issues often regard the context of the alleged ill-treatment, such as the reason for, or the perpetrator (state or civilians) of the alleged ill-treatment. The credibility of the applicant's alleged political or religious affiliation or activities, sexual orientation or earlier arrests may be at stake here. The determining authority may refuse to arrange for a medical examination, arguing that this cannot provide evidence concerning the alleged context of the ill-treatment. They can also be of the opinion that a forensic medical examination cannot provide explanation for inconsistent, contradictory or vague statements made by the applicant concerning this context. The assumption is then that (potential) psychological problems caused by ill-treatment only impede applicants to talk about the event of ill-treatment itself. The argument that a forensic medical examination is not relevant or a forensic medical report cannot be granted (important) weight because it cannot establish the context of the alleged ill-treatment, will be further discussed in section 5.1.

4 The Evidentiary Weight of Forensic Medical Reports

This section will address the question how much weight should be granted to a forensic medical report. This question arises when a forensic medical report

49 Boeles, P. and others (2014). *European Migration Law*. Antwerp/Oxford/Portland: Intersentia, p. 318.

50 Hailbronner, K. and Thym, D. (2016). *EU Immigration and Asylum Law, A Commentary*. München: C.H. Beck/Hart/Nomos, p. 1142.

51 See e.g. *R. C. v Sweden* App No 41827/07 (ECtHR, 9 March 2010), para 52.

has been submitted by the applicant or has been written on the request of the determining authority. The state then has to balance the forensic medical report against other elements of the applicant's asylum application.

4.1 *Gaps in the Case Law of the ECtHR and CAT*

It is impossible to derive clear standards from the case law of the ECtHR and CAT, as to the weight, which should be attached to a medical report in relation to other elements of the asylum claim. Whether a medical report is considered decisive by the ECtHR or CAT often depends on the individual circumstances of the case. In many cases the ECtHR⁵² and the CAT⁵³ have attached decisive weight to medical reports, irrespective of serious credibility concerns, including the use of a false identity or inconsistencies of the applicant's statements with country of origin information.

The CAT addressed the credibility concerns raised by the state in cases of complainants who suffered from PTSD, (amongst others) with reference to its case law according to which 'complete accuracy is seldom to be expected by victims of torture'.⁵⁴ The CAT first considered in these cases that the alleged torture was credible on the basis of medical evidence.⁵⁵ It found important in many of those cases that the applicant had provided a detailed description of the torture.⁵⁶ In some cases it pointed out that the credibility concerns did

- 52 *R. V. v France* App No 78514/14 (ECtHR, 7 July 2016), para 17, *A.F. v France* App No 80086/13 (ECtHR, 15 January 2015), para 15, *M.V. and M.T. v France* App No 17897/09 (ECtHR 4 September 2014), para 13, *Z.M. v France* App No 40042/11 (ECtHR, 14 November 2013), para 56, *K.K. v France*, App No 18913/11 (ECtHR, 10 October 2013), paras 22 and 44, *YP and LP v France* App No 32476/06 (ECtHR 2 September 2010), para 18.
- 53 See e.g. *A.M.D. v Denmark* No 653/2015 (CAT, 22 June 2017), para 4, *E.K.W. v Finland* No 490/2012 (CAT, 25 June 2015), para 4.3, *Hussein Kademi v Switzerland* No 473/2011 (CAT, 20 January 2015), paras 2.6 and 2.7, *Sathurusinghe Jagath Dewage v Australia* No 387/2009 (CAT 17 December 2013), para 4.9, *Arthur Kasombola Kalonzo v Canada* No 343/2008 (CAT, 4 July 2012), para 4.2, *Chedli Ben Ahmed Karoui v Sweden* No 185/2001 (CAT, 25 May 2002), paras 2.8–2.9.
- 54 *A.M.D. v Denmark* No 653/2015 (CAT, 22 June 2017), para 9.7. See also *R.D. v Switzerland* No 558/2013 (CAT, 13 June 2016), para 9.4, *E.K.W. v Finland* No 490/2012 (CAT 25 June 2015), para 9.6, *Ke Chun Rong v Australia* No 416/2010 (CAT, 7 February 2013), para 7.5, *Halil Haydin v Sweden* No 101/1997 (CAT, 6 December 1998), para 6.7. See also *Enrique Falcon Ríos v Canada* No 133/99 (CAT, 17 December 2004), para 8.5, where the CAT attributed the vagueness in the applicant's statements to 'the psychological vulnerability of the complainant' mentioned in the medical report.
- 55 *A.M.D. v Denmark* No 653/2015 (CAT, 22 June 2017), para 9.6, *R.D. v Switzerland* No 558/2013 (CAT, 13 June 2016), para 9.4, *M.C. v the Netherlands*, No 569/2013 (CAT, 30 November 2015), para 8.7, *E.K.W. v Finland* No 490/2012 (CAT 25 June 2015), para 9.5.
- 56 *A.M.D. v Denmark* No 653/2015 (CAT, 22 June 2017), para 9.6, *R.D. v Switzerland* No 558/2013 (CAT, 13 June 2016), para 9.4, *M.C. v the Netherlands* No 569/2013 (CAT, 30 November 2015), para 8.7, *X. and Z. v Finland* No 483/2011 and 485/2011 (CAT, 5 August 2014), para 7.7.

not 'raise doubts about the general veracity' of the applicant's claims⁵⁷ or that the applicant had submitted evidence in support of the asylum account.⁵⁸ De Weck states that the CAT is 'particularly generous in accepting inconsistencies or omissions in cases, in which it is established by medical evidence that the complainant has been a victim of torture and is still suffering as a result'.⁵⁹

However, the case law of the ECtHR and CAT also shows that a medical report supporting claims of ill-treatment does not always render the applicant's asylum account credible.⁶⁰ They have not granted decisive weight to forensic medical reports, amongst others in cases where the applicant submitted (potentially) false⁶¹ or no documents⁶² or made inconsistent, contradictory or vague statements.⁶³ Moreover, in some cases the ECtHR referred to the fact that the torture was only mentioned⁶⁴ or the forensic medical report was submitted⁶⁵ in a late stage of the proceedings. Finally, the ECtHR did not give decisive weight to a medical report, because the forensic medical report did not

57 *R.D. v Switzerland* No 558/2013 (CAT, 13 June 2016), para 9.4, *E.K. W. v Finland* No 490/2012 (CAT 25 June 2015), para 9.6, *C.T. and K.M. v Sweden*, No 279/2005 (CAT 7 December 2006), para 7.6.

58 *C.T. and K.M. v Sweden* No 279/2005 (CAT 7 December 2006), para 7.6, *Chedli Ben Ahmed Karoui v. Sweden* No 185/2001 (CAT 25 May 2002).

59 De Weck, F. (2016). *Non-refoulement under the European Convention on Human Rights and the UN Convention against Torture*. Leiden: Brill/Nijhoff, pp. 369, 465. See also Wouters, C. (2009). *International Legal Standards for the Protection from Refoulement*. Antwerp/Oxford/Portland: Intersentia, p. 479.

60 *I.S. v France* App No 54612/16 (ECtHR, 12 December 2017), *S.M. v France* App No 20669/13 (ECtHR, 28 March 2017), *A.A. and A.A. v France* App No 39707/13 (ECtHR, 13 September 2016), *R.M. and others v France* App No 33201/11 (ECtHR, 12 July 2016), *I. v Sweden* App No 61204/09 (ECtHR, 5 September 2013), *V.T. v France* App No 3551/10 (ECtHR, 27 August 2013), *D.N.W. v Sweden* App No 29946/10 (ECtHR, 6 December 2012), *Cruz Varas v Sweden* [Plenary] App No 15576/89 (ECtHR, 20 March 1991).

61 *S.M. v France* App No 20669/13 (ECtHR, 28 March 2017), paras 48–51, *R.M. and others v France* App No 33201/11 (ECtHR 12 July 2016), para 54, *D.N.W. v Sweden* App No 29946/10 (ECtHR, 6 December 2012), *A.M.D. v Denmark* No 653/2015 (CAT, 22 June 2017), para 11.2 and 13.5, *S.G. v Switzerland* No 352/2008 (CAT 8 July 2011).

62 *Cruz Varas v Sweden* [Plenary] App No 15576/89 (ECtHR, 20 March 1991), para 78.

63 *R.M. and others v France* App No 33201/11 (ECtHR 12 July 2016), para 54, *S.P.A. v Canada* No 282/2005 (CAT, 6 December 2006), *S.U.A. v Sweden* No 223/2002 (CAT, 29 November 2004), *M.O. v Denmark* No 209/2002 (CAT, 17 November 2003).

64 *Cruz Varas v Sweden* [Plenary] App No 15576/89 (ECtHR, 20 March 1991), para 78 (more than 18 months after the application).

65 *S.M. v France* App No 20669/13 (ECtHR, 28 March 2017), the medical reports were submitted in 2012 and 2013, while the applicant has arrived in France in 2010, *V.T. v France* App No 3551/10 (ECtHR, 27 August 2013), the medical report was written seven years after the alleged events.

support the applicant's statements⁶⁶ or was even inconsistent with the applicant's statements.⁶⁷

4.2 *Interpreting Article 18 RAPD*

Article 4(1) QD states that it is the Member States' duty to assess the elements of the asylum application. According to Article 4(2) QD, 'elements' consist of the applicant's statements and all the documentation regarding, amongst others, the reasons for applying for international protection. Article 4(3) QD specifies that the assessment of the asylum application should be carried out on an individual basis and that it should include amongst others 'the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm'.

Article 18(3) RAPD clearly indicates that a forensic medical report should be taken into account in the examination of the asylum application, irrespective of whether the medical examination was arranged by the determining authority or the asylum applicant.⁶⁸ The English text of Article 18 RAPD states that the result of a medical examination 'shall be assessed by the determining authority along with the *other elements* of the application'.⁶⁹ In the English text the term 'element' is thus used in both Article 18(3) RAPD and Article 4(2) QD. This indicates that a forensic medical report should be considered an 'element' in the meaning of Article 4(2) QD. Consistency between the terms used in Article 18 RAPD and Article 4 QD can also be found in several other language versions.⁷⁰ However, there are also a number of versions in which (slightly) different terms are used in Article 18 RAPD and 4 QD.⁷¹

66 *A.A. and A.A. v France* App No 39707/13 (ECtHR, 13 September 2016), paras 71–73. The ECtHR considered that the medical report was written in a precise and detailed manner by an established practitioner and described numerous lesions on the applicant's body.

67 *I.S. v France* App No 54612/16 (ECtHR, 12 December 2017), para 51. One report mentioned that the applicant had burning wounds, the other that the applicant had large scars, which were consistent with blows with a stick or whip lashes.

68 Art. 18(3) RAPD refers to both Art. 18(1), arrangement by the state and Art. 18(2) arrangement by the asylum applicant.

69 Emphasis added.

70 This is the case at least in the Danish (*elementer*), Dutch (*elementen*), French (*éléments*), Italian (*elementi*), Portuguese (*elementos*) and Spanish (*elementos*) texts. See also Migration Law Clinic (2015). *Medical Reports in Subsequent Asylum Applications Does Dutch law comply with EU law?*. Available at <https://migrationlawclinic.files.wordpress.com/2015/09/medical-reports-and-subsequent-applications-for-asylum-final.pdf> [accessed 28 October 2019], pp. 21 and 45.

71 This is the case for example in Czech, Estonian, Polish, Slovak and Swedish. See also Migration Law Clinic (2015). *Medical Reports in Subsequent Asylum Applications Does*

The language versions of the RAPD and QD thus do not all show a coherence in terms between Article 18(3) RAPD and Article 4 QD. Nevertheless, it may be assumed that medical reports should be taken into account in the assessment of the asylum application together with the other evidence available mentioned in Article 4(2) QD. Otherwise, the duty to arrange for a forensic medical report and the opportunity for the applicant to submit such report would become useless. However, it cannot be derived from these provisions how much weight should be granted to a forensic medical report in comparison to the other elements of the asylum application, in particular the statements made by the applicant. Therefore, the question remains whether a forensic medical report can 'repair' (serious) inconsistencies, contradictions or vaguenesses in the applicant's asylum account.

The European Commission has recognised that victims of torture may not be able to 'fully articulate the elements needed to substantiate his/her application' and that then a forensic medical report may be 'particularly relevant'. This means that such report must be able to 'repair' credibility issues in the applicant's account, such as inconsistent, contradictory or vague statements. Arguing that the national authorities are allowed to refuse to grant important weight to a forensic medical report, because of such credibility issues, would undermine the effectiveness of Article 18 RAPD. At the same time, it follows from the explanations with the Commission proposal for the RAPD, that forensic medical reports in itself do not constitute proof of persecution.⁷² A forensic medical report thus does not always need to be granted decisive weight in the evidentiary assessment.

Arguably, a forensic medical report, supporting that the applicant has been tortured or ill-treated adds to the general credibility of the applicant, which may trigger the application of Article 4(5) QD. Even though a forensic medical report in the meaning of Article 18 RAPD does not necessarily address the question whether the applicant's psychological problems prevent him from making consistent, coherent and complete statements, it may indicate that the applicant has psychological problems resulting from torture. This may be seen as at least a start of an explanation for inconsistent, contradictory or vague statements made by the applicant.

Dutch law comply with EU law?. Available at <https://migrationlawclinic.files.wordpress.com/2015/09/medical-reports-and-subsequent-applications-for-asylum-final.pdf> [accessed 28 October 2019], pp. 21 and 45.

72 European Commission. *Amended proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)*. COM(2011) 319, p. 6.

It has to be noted in this regard that Article 4(3) QD requires an individual examination of an asylum case. The CJEU has held in the context of the Family Reunification Directive⁷³ that this means that ‘the probative value or plausibility of the evidence, statements or explanations’ provided by applicants requires the authorities ‘to take account of all the relevant aspects, including the age, gender, education, background and social status [...] as well as specific cultural aspects’.⁷⁴ It may be argued that the individual assessment in asylum cases mentioned in Article 4(3) QD, requires a similar individual examination of the available evidence in the light of the circumstances of the asylum applicant. The fact that a forensic medical report has indicated that the applicant is (potentially) a victim of ill-treatment should be taken into account in this examination.

4.3 *Where Can the CJEU Step In?*

These are still rather general considerations concerning the weight, which should be attached to a forensic medical report. Again, it should be stressed that the assessment of the credibility of an applicant’s account in an individual case is the task of the determining authorities and national courts. However, the CJEU can address in more abstract terms which factors should be taken into account when determining the evidentiary value of a forensic medical report. For this purpose, it could use the factors for determining the relevance of a forensic medical examination identified in the previous section. As was explained there, these factors relate to the seriousness of the credibility issues and the part of the asylum account they concern. Here, the CJEU may again be confronted with the question whether a forensic medical report can contribute to the general credibility of the asylum applicant in the meaning of Article 4(5) QD.

In the determination how much weight should be attached to a forensic medical report, the content of this report also plays a role. In the next section, we will discuss two important questions concerning this content. The first is whether a forensic medical report, which establishes a potential causal link between the applicant’s scars or medical problems and the alleged event of ill-treatment can be disregarded, because it does not substantiate the context (why, where, when and by whom) of the ill-treatment. Second, it addresses the

73 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2002] OJ L 251/12.

74 CJEU Case C-635/17 *E.* [2019], para 63. The CJEU refers to para 6.1.2 of the Communication from the Commission to the Council and the European Parliament of 3 April 2014 on guidance for the application of Directive 2003/86. COM(2014) 210.

question whether a forensic medical report can be ignored, because it does not establish with certainty what treatment has caused the applicant's scars and medical problems. Moreover, it examines whether the degree of causality found in the medical report is relevant for the weight, which should be attached to it. Of course, other factors, such as the expertise of the physician who wrote the report, are also important. However, these will not be discussed in this article.

The answers to both questions are also important in the context of the duty to arrange for a forensic medical examination. May a state refuse to arrange for a forensic medical examination, because it cannot establish (with certainty) in which context an event of ill-treatment has taken place or by which treatment scars or medical problems have been caused?

5 Limitations of Forensic Medical Reports: Context and Causality

States often bring two arguments to the fore, why the evidentiary value of forensic medical reports is in general limited in asylum cases and therefore cannot change the outcome of a credibility assessment:

1. A physician cannot establish the context in which the alleged ill-treatment has taken place in a medical examination (context argument);
2. A physician cannot establish with certainty that a scar or a physical or psychological problem was caused by the alleged ill-treatment (causality argument).

These two arguments may be reason both to refuse to arrange a medical examination in the administrative phase or to ignore a medical report, which has been submitted by the applicant, in the credibility assessment. The next sections will address the legal validity of these two arguments.

5.1 *The Context of the Ill-Treatment*

Determining authorities often argue that a forensic medical report has limited evidentiary value, because it cannot establish when, where, why and by whom a person has been ill-treated (the context of the ill-treatment).⁷⁵ For the

75 Freedom from Torture (2016). *Proving Torture, Demanding the impossible. Home Office mistreatment of expert medical evidence*, available at: <https://www.refworld.org/docid/58495c5f4.html> [accessed 28 October 2019, p. 22, Rhys-Jones, D. and Verity Smith, S. (2004). Medical Evidence in Asylum and Human Rights Appeals. *International Journal of Refugee Law* 16(3), pp. 381, 392. Reneman, A.M., de Lange, J. and Smeeke, J. (2016). Medische waarheidsvinding en geloofwaardigheidsbeoordeling in asielzaken. *Asiel & Migrantenrecht* 7(10), pp. 468–469.

assessment of future risk upon return, it is crucial to know for example whether the applicant was ill-treated by state authorities or citizens or whether he was ill-treated in the country of origin or during the flight to the Member State.

The determining authority may raise the 'context argument' in every case, in which it disputes the credibility of the context of the alleged ill-treatment. This argument concerns the inherent limitations of medical examinations and not the merits of the case at issue. Indeed, medical examinations generally cannot establish the date on which, and place where the treatment has taken place, the identity of the perpetrator or the reasons for ill-treatment. Only sometimes can the report for example indicate that the specific torture method (allegedly) applied to the applicant is specific for a certain region.⁷⁶ The question is whether this significantly reduces the evidentiary value of a forensic medical report and therefore renders a medical examination or the resulting forensic medical report irrelevant for the assessment of an application for international protection.

5.1.1 Gaps in the Case Law of the ECtHR and CAT

Both the ECtHR and the CAT have never addressed the general validity of the 'context argument'. However, they have taken it into account in individual cases. In particular, in the case law of the ECtHR there are a few important examples where the Court accepted that the applicant had been ill-treated, but did not accept the context of this ill-treatment. In *DNW v Sweden*, the medical report stated that the scars 'were visibly compatible with his story and could support his claims that he had been subjected to torture in the way he had submitted the findings of the forensic evaluation'⁷⁷ and that 'none of the findings contradicted that the applicant's injuries had occurred at the time he described'.⁷⁸ Nevertheless, the ECtHR found that it could not be excluded that the applicant had obtained the injuries described in the forensic medical report during an earlier attack, which it considered irrelevant.⁷⁹ In *I v Sweden* the applicant had submitted a medical report, which stated that the applicant 'had wounds on his body which had "a good relation" with his explanation both of the timing and the extent of the torture to which he had allegedly been subjected'.⁸⁰ However, the ECtHR agreed with the Swedish authorities that the alleged context in which the ill-treatment took place could be doubted. The

⁷⁶ *Istanbul Protocol*, para 122(d), 131, 169.

⁷⁷ *D.N.W. v Sweden* App No 29946/10 (ECtHR, 6 December 2012), para 12.

⁷⁸ *D.N.W. v Sweden* App No 29946/10 (ECtHR, 6 December 2012), para 12.

⁷⁹ *D.N.W. v Sweden* App No 29946/10 (ECtHR, 6 December 2012), para 42.

⁸⁰ *I. v Sweden* App No 61204/09 (ECtHR, 5 September 2013), para 12.

applicant had not substantiated that he had worked as a journalist, which was the alleged reason that was tortured.⁸¹

The CAT's case law concerning the context argument seems to be inconsistent. In *MS v Denmark* it concluded that the Danish authorities did not have a duty to arrange for a medical examination. The authorities argued that a medical examination 'was not relevant because, whatever its outcome, it could not serve to prove that the complainant had been subjected to abuse specifically by the Taliban' (instead of a gang of robbers⁸²). The CAT took into account the overall lack of credibility of the complainant's story, in particular as regards the purpose of his kidnapping and whether it was the Taliban who had kidnapped the complainant and subjected him to abuse in connection with that purpose.⁸³ In contrast, in *GI v Denmark* the CAT held that the Danish authorities should have arranged for a medical examination.⁸⁴ The authorities had considered that 'in view of their nature, the author's injuries could also have been sustained in another context' than that pictured by the applicant.⁸⁵ They also argued that a medical examination was not relevant, because it could not serve to prove why the complainant had been subjected to abuse or to demonstrate that the risk for the complainant in Pakistan would be personal and real at the present time.⁸⁶

In most of the cases before the CAT, in which the applicant submitted a medical report⁸⁷ the CAT only 'noted' the 'context argument' or completely

81 *I. v Sweden* App No 61204/09 (ECtHR, 5 September 2013), para 16. The ECtHR did find a violation of Art. 3 ECHR in this case because the scars on the applicant's body would be an indication for the Chechnyan authorities that the applicant took active part in the second war in Chechnya and therefore cause a risk of *refoulement*. See for other cases in which the ECtHR did not accept the context: *Cruz Varas v Sweden* [Plenary] App No 15576/89 (ECtHR, 20 March 1991), para 77, *I. Q. v France* App No 30906/11 (ECtHR, 14 January 2014), paras 37, 39, *H.N. and others v Sweden* App No 50043/09 (ECtHR, 24 January 2012), *S.M. v France* App No 20669/13 (ECtHR, 28 March 2017), paras 31–36.

82 *M.S. v Denmark* No 571/2013 (CAT 14 October 2015), para 7.6.

83 *M.S. v Denmark* No 571/2013 (CAT 14 October 2015), para 7.6. See also *I.U.K. et al. v Denmark* No 703/2015 (CAT, 20 June 2018), para 8.7.

84 *G.I. v Denmark* No 625/2014 (CAT, 17 September 2017), para 8.8.

85 *G.I. v Denmark* No 625/2014 (CAT, 17 September 2017), para 2.5.

86 *G.I. v Denmark* No 625/2014 (CAT, 17 September 2017), paras 6.3 and 8.6.

87 *GE v Australia* No 725/2016 (CAT, 17 September 2017), para 7.7, *DY v Sweden* No 463/2011 (CAT, 16 July 2013), para 6.5, *Arthur Kasombola Kalonzo v Canada* No 343/2008 (CAT, 4 July 2012), para 4.9, *R-T-N v Switzerland* No 350/2008 (CAT, 4 July 2011), para 8.7, *Uttam Mondal v Sweden* No 338/2008 (CAT, 7 July 2011), paras 7.2 and 9.7–9.8, *TA v Sweden* No 303/2006 (CAT, 22 November 2007), para 4.11, *MN v Switzerland* No 259/2004 (CAT, 22 November 2006), paras 4.5, 5.4, 6.5, *SUA v Sweden* No 223/2002 (CAT, 29 November 2004), paras 2.19 and 6.4.

ignored it.⁸⁸ However, in *Chahin v Sweden* it considered ‘that even if the medical reports fail to specify when and where the complainant was tortured, they provide grounds which go beyond mere theory or suspicion for believing that he was tortured in the recent past’.⁸⁹ One case has been found, in which the CAT agreed with the state that the complainant had not ‘proved conclusively that the injuries he sustained resulted from actions by the State’.⁹⁰

5.1.2 Interpreting Article 18 RAPD

Article 18 RAPD does not address the inherent limitations of forensic medical reports. However, it may be argued that the only fact that a medical examination usually cannot establish the (full) context of the alleged ill-treatment may not be reason for the determining authority to refuse to arrange a medical examination or to ignore or attach limited weight to a forensic medical report.⁹¹ This would undermine the effectiveness of Article 18 RAPD. This provision has recognised the importance of forensic medical examinations, even though it is generally known that such examinations have limitations, including the inability to establish the (full) context of an event of ill-treatment. Moreover, it would be contrary to the obligation to carry out an individual examination of the asylum application laid down in Article 4(3) QD, if a forensic medical report would be excluded from the assessment for this reason, which is not related to the individual content of the asylum case.

5.1.3 Where Could the CJEU Step In?

On the basis of the foregoing, it seems obvious that the determining authority may not refuse to arrange for a forensic medical examination or ignore a forensic medical report, only because it cannot or does not establish the context of the ill-treatment. However, this may be different if, the determining authority has specifically disputed the credibility of the context of the alleged ill-treatment in the individual case. It would be useful if the CJEU provides more clarity as to when the context argument may be successful.

88 See e.g. *GE v Australia* No 725/2016 (CAT, 17 September 2017), para 7.7, *R-T-N v Switzerland* No 350/2008 (CAT 4 July 2011), para 8.7, *SUA v Sweden* No 223/2002 (CAT, 29 November 2004), para 6.4.

89 *Chahin v Sweden* No 310/2007 (CAT 8 July 2011), para 9.5. See also *Sathurusinghe Jagath Dewage v Australia* No 387/2009 (CAT, 17 December 2013), para 6.6 and *Uttam Mondal v Sweden* No 338/2008 (CAT, 7 July 2011), paras 9.7 and 9.8.

90 *M.N. v Switzerland* No 259/2004 (CAT, 22 November 2006), para 6.5.

91 As was mentioned before, a physician may establish that the type of torture occurs in a certain region of the country of origin on the basis of country of origin information.

Again, the factors mentioned in section 3.3 may prove helpful in this regard. Arguably, it depends on the seriousness of the reasons for deeming the context of the ill-treatment not credible whether a forensic medical examination can be omitted or a forensic medical report can be granted limited weight. In cases similar to *I v Sweden*, where serious doubts exist concerning the credibility of the main lines of the core of the applicant's asylum account, it should be considered reasonable that no forensic medical examination is arranged for, or that no decisive weight is given to a forensic medical report. However, where it concerns inconsistencies, contradictions or vaguenesses, concerning details of the core of the asylum account (such as names or dates) or less essential parts of the asylum account, this may be different.⁹² Then, the forensic medical report may contribute to the general credibility of the applicant and be reason to apply the alleviation of the duty to present evidence as mentioned in Article 4(5) QD.

5.2 Causality

The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (henceforth: Istanbul Protocol)⁹³ contains guidelines for the impartial and objective documentation of torture.⁹³ The Istanbul Protocol is not legally binding, but it has been recognised internationally, including by the ECtHR and CAT⁹⁴ and in the RAPD.⁹⁵ The guidelines of the Istanbul Protocol are applicable to asylum procedures.⁹⁶ According to the Istanbul Protocol, a forensic medical report may establish different degrees of causal relation between the alleged event

92 See also Herlihy, J., Jobson, L. and Turner, S. (2012). Just tell us what happened to you: autobiographical memory and seeking asylum. *Applied Cognitive Psychology* 26, pp. 661–676.

93 Recital 31, Preamble RAPD.

94 UN General Assembly Resolution 55/89 of 4 December 2004 and the UN High Commissioner for Human Rights Resolution 2001/43 of 25 January 2001, E/CN.4/2001/66 and *Desde v Turkey* App No 23909/03 (ECtHR, 1 February 2011), para 98, *Mehmet Eren v Turkey* App No 32347/02 (ECtHR, 14 October 2008), paras 41 and *Bati v Turkey* App No 33097/96 and 57834/00 (ECtHR, 3 June 2004), para 133, UNCAT, General Comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para 18. See also Battjes, H. (2006). Legal effects of the Istanbul Protocol, in: Bruin, R., Reneman, A.M. and Bloemen, E., *Care Full, Medical reports and the Istanbul Protocol*. Utrecht/Amsterdam: Pharos, Amnesty International, Dutch Council for Refugees, pp. 17–29.

95 Preamble RAPD, para 31.

96 The introduction to the Protocol states that documentation methods contained in the manual are applicable to amongst others 'political asylum evaluations'. See also Furtmayr, H. and Frewer, A. (2013). Documentation of torture and the Istanbul Protocol: applied medical ethics. *Medicine, Health care and Philosophy* 13(3), p. 280 and IRCT (2013).

and the applicant's scars or medical problems: not consistent, consistent, highly consistent, typical or diagnostic. 'Consistent with' is the lowest degree of causality, leaving open many other possible causes. 'Diagnostic of' is the highest degree, which means that the medical problem can 'not have been caused in any way other than that described'.⁹⁷ In practice, physicians can only rarely conclude that a scar or medical problem cannot have been caused in any other way than the alleged ill-treatment.⁹⁸

A physician can almost never establish with certainty on the basis of a medical examination that the alleged ill-treatment has caused the scars or medical problems of the applicant. This may explain why a determining authority refrains from arranging such examination. Moreover, the determining authority may grant limited or no weight to forensic medical reports, which establish a lower degree of causal relation. Such reports do not exclude the possibility that the applicant's scars, physical and/or psychological problems were caused by other events than those alleged by the applicant.⁹⁹

The first question, which is relevant here is whether the state may refuse to arrange for a forensic medical examination, because such examination cannot establish with certainty what treatment caused the applicant's scars or medical problems. Second, it is important to know whether the fact that a forensic medical report establishes a lower degree of causal relation between the applicant's scars or medical problems and the alleged event of ill-treatment may be reason to ignore or attach limited weight to such report.

5.2.1 Gaps in the Case Law of the ECtHR and CAT

It is striking that the ECtHR and the CAT do not seem to have regard to the degree of causality established by the physician between the signs and symptoms of ill-treatment and the alleged event of ill-treatment in the country of

Recognising victims of torture in national asylum procedures. Available at: https://irct.org/assets/uploads/pdf_20161120143448.pdf [accessed 28 October 2019], p. 58.

97 *Istanbul Protocol*, para 187.

98 Rhys-Jones, D. and Verity Smith, S. (2004). Medical Evidence in Asylum and Human Rights Appeals. *International Journal of Refugee Law* 16(3).

99 Freedom from Torture (2016). *Proving Torture, Demanding the impossible. Home Office mistreatment of expert medical evidence.* Available at: <https://www.refworld.org/docid/58495c5f4.html> [accessed 28 October 2019, pp. 20–23, Rhys-Jones, D. and Verity Smith, S. (2004). Medical Evidence in Asylum and Human Rights Appeals. *International Journal of Refugee Law* 16(3), pp. 391–393, Reneman, A.M., de Lange, J. and Smeekes, J. (2016). Medische waarheidsvinding en geloofwaardigheidsbeoordeling in asielzaken. *Asiel & Migrantenrecht* 7(10), pp. 466–468, Freedom from Torture (2011). *Body of Evidence.* Available at: <https://www.refworld.org/docid/52c6b7884.html> [accessed 28 October 2019], pp. 32–36.

origin in their case law. The ECtHR and the CAT only rarely address the degree of causality in their considerations.

In most cases before the ECtHR¹⁰⁰ and the CAT,¹⁰¹ in which the medical report played an important role, the physician documented the scars and/or psychological or physical problems and concluded that they were consistent with or compatible with the applicant's account. If the terminology of the Istanbul protocol was followed, they thus established a low degree of causality. Moreover, both the ECtHR and CAT have even taken into account medical reports, which only documented scars on the applicant's body, as evidence in support of the alleged ill-treatment.¹⁰² The higher degrees of causality of the Istanbul protocol have not been found in the ECtHR's case law and are rare in the CAT's case law.¹⁰³

The ECtHR generally seems to reject the state's argument that the medical report did not establish with certainty the origin of the applicant's scars, physical or psychological problems.¹⁰⁴ In *RC v Sweden*, the forensic medical report noted that 'alternative causes for the origins of the scars could not be completely excluded'. It concluded that the medical findings favoured the

100 See in cases in which the medical report had important weight and a violation was found: 'En faveur de' (*Mo. M. v France* App No 18372/10, para 8), 'compatibles avec' (*Z.M. v France* App No 40042/11, para 13, *A.F. v France* App No 80086/13, para 16, *R.D. v France* App No 34648/14, para 15, *R.V. v France* App No 78514/14, para 16), 'concordant avec' and 'directement en relation avec' (*Y.P. and L.P. v France* App No 32476/06, para 19), 'pourrait être mise en rapport avec' (*K.K. v France* App No 18913/11, para 18), 'corresponded well with' (*R.C. v Sweden* App No 41827/07, para 25).

101 In cases in which the medical report had important weight: 'compatible with' (*M.B. and others v Denmark* No 634/2014, para 5.1, *Enrique Falcon Ríos v. Canada* No 133/99, para 8.4), 'consistent with' (*A.M.D. v Denmark* No 653/2015, para 2.2, *F.K. v Denmark* No 580/2014, para 5.1, *Said Amini v Denmark*, No 339/2008, para 2.6), 'consistent and concurrent with' (*E.K.W. v Finland* No 490/2012, para 2.3), 'correspond with' (*Chedli Ben Ahmed Karoui v Sweden* No 185/2001, para 2.13), can be 'attributable to' (*X. and Z. v Finland* No 483/2011 and 485/2011, para 2.11, *Ayas v Sweden* No 97/1997, para 2.8).

102 *A.A. v France* App No 18039/11 (ECtHR 15 January 2015), para 59. See also *R.K. v France* App No 61264/11 (ECtHR, 9 July 2015), paras 68–69, which concerned a medical report of a physician in the country of origin, *R.D. v Switzerland* No 558/2013 (CAT, 13 June 2016), paras 7.6 and 9.4.

103 See for a stronger degree of causal relationship *M.C. v the Netherlands* No 569/2013 (CAT, 30 November 2015), paras 8.5. See also *I.U.K. et al. v Denmark* No 703/2015 (CAT, 20 June 2018), para 5.1, 8.7, where the findings were 'fully consistent'.

104 *R.V. v France* App No 78514/14 (ECtHR, 7 July 2016), paras 44 and 56, *R.D. v France* App No 34648/14 (ECtHR, 16 June 2016), *A.F. v France* App No 80086/13 (ECtHR, 15 January 2015), *K.K. v France* App No 18913/11 (ECtHR 10 October 2013), *R.C. v Sweden*, App No 41827/07 (ECtHR, 9 March 2010). However, see in contrast *V.J. v Finland* App No 14491/13 (ECtHR, 21 October 2014), paras 7, 46.

conclusion 'that the injuries had been inflicted on the applicant completely or to a large extent by other persons and in the manner claimed by him.'¹⁰⁵ The Swedish Government argued that the scars on the applicant's body might have been a result of the applicant's earlier activity as a football player in Iran.¹⁰⁶ The ECtHR acknowledged that some of the scars could have been caused by means other than torture. Nevertheless, it accepted the report's general conclusion that the injuries, to a large extent, were consistent with having been inflicted on the applicant by other persons and in the manner in which he described, thereby strongly indicating that he has been a victim of torture. The medical evidence thus corroborated the applicant's story.¹⁰⁷

Also before the CAT, states have argued that the scars, physical or psychological problems described in the medical report could have been inflicted in ways other than torture, for example by accidents or fights,¹⁰⁸ the applicant's separation from his family, his precarious migration status or detention in the country of asylum.¹⁰⁹ In most cases, the CAT was not convinced by this argument and attached important weight to the medical report.¹¹⁰ At the same time, the CAT has also concluded in a few cases that the conclusions of the medical report were not strong enough to support the applicant's claim of past torture.¹¹¹

¹⁰⁵ *R.C. v Sweden*, App No 41827/07 (ECtHR, 9 March 2010), para 25.

¹⁰⁶ *R.C. v Sweden*, App No 41827/07 (ECtHR, 9 March 2010), para 45. See also *R.D. v France* App No 34648/14 (ECtHR, 16 June 2016), where the ECtHR attached important weight to two medical certificates (para 42) even though the state argued that they could not establish the origin of the applicant's scars (para 33) and *R.V. v France* App No 78514/14 (ECtHR, 7 July 2016), paras 44 and 56.

¹⁰⁷ *R.C. v Sweden*, App No 41827/07 (ECtHR, 9 March 2010), para 53.

¹⁰⁸ See e.g. *G.I. v Denmark* No 625/2014 (CAT, 17 September 2017), para 8.6., *R-T-N v Switzerland* No. 350/2008 (CAT, 4 July 2011), *M.N. v Switzerland* No 259/2004 (CAT, 22 November 2006), para 6.5.

¹⁰⁹ *Sathurusinghe Jagath Dewage v Australia* No 387/2009 (CAT, 17 December 2013), para 6.5, *S.G. v Switzerland* No 352/2008 (CAT, 8 July 2011), para 6.19, *R-T-N v Switzerland* No 350/2008 (CAT, 4 July 2011), para 4.12.

¹¹⁰ See also *G.I. v Denmark* No 625/2014 (CAT, 17 September 2017), para 6.3, *A.M.D. v Denmark* No 653/2015 (CAT, 22 June 2017), paras 6.2, 9.6, *M.B. and others v Denmark* No 634/2014 (CAT, 27 January 2017), para 6.4, *E.K.W. v Finland* No 490/2012 (CAT 25 June 2015), paras 2.3 and 9.5 and *M.C. v the Netherlands*, No 569/2013 (CAT, 30 November 2015), para 4.14, *Hussein Kademi v Switzerland* No 473/2011 (CAT, 20 January 2015), paras 2.7, 4.7 and 7.5, *Sathurusinghe Jagath Dewage v Australia* No 387/2009 (CAT, 17 December 2013), *Z.K. v Sweden* No 301/2006 (CAT, 16 May 2008), para 8.4.

¹¹¹ See *R.K. v Sweden* No 309/2006 (CAT 19 May 2008), para 8.5 and *R.S. v Denmark* No 225/2003 (CAT, 24 May 2004), para 6.2. See also De Weck, F. (2016). *Non-refoulement under the European Convention on Human Rights and the UN Convention against Torture*.

5.2.2 Interpreting Article 18 RAPD

It may be argued that a refusal to arrange for a medical examination, because it can almost never establish with certainty the cause of a scar or medical problem, would be contrary to EU law. Article 18 was included in the RAPD, taking into account this inherent limitation. For this reason, the European Commission also recognised that a forensic medical report cannot prove persecution.¹¹² A medical examination should be considered relevant, if it can support (and not prove) the applicant's claim that he has been tortured or ill-treated.

5.2.3 Where Could the CJEU Step In?

On the basis of the previous section the answer to the question, whether the determining authority may refuse to arrange for a medical examination, because such examination cannot establish with certainty what treatment caused the applicant's scars or medical problems, seems to be obvious. This is not allowed. However, given the fact that determining authorities often raise the context argument in individual cases, it may be useful to refer this question to the CJEU anyway.

Secondly, the CJEU may be asked whether, and if so, how the degree of causal relation between the applicant's scars or medical problems and the alleged event of ill-treatment plays a role in the determination of the evidentiary value of such report. It seems to be logical that the determining authorities may take into account the degree of causal relationship between the applicant's scars or medical problems found during the medical examination. A forensic medical report, in which the scars on the applicant's body are found to be typical for a specific type of torture should be granted more weight, than a report in which the applicant's scars are found to be rather unspecific, but consistent with the alleged type of treatment. However, medical reports should always be included in the evidentiary assessment, irrespective of the degree of causality found. This clearly follows from the text of Article 18(3) RAPD. It should be noted that determining authorities should look at the overall conclusion of the forensic medical report and not (only) at the degree of causal relationship found for each individual scar or medical problem.¹¹³ A large number of unspecific

Leiden: Brill/Nijhoff, pp. 385–386, Wouters, C. (2009). *International Legal Standards for the Protection from Refoulement*. Antwerp/Oxford/Portland: Intersentia, p. 481.

112 European Commission. *Amended proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)*. COM(2011) 319, p. 6.

113 See *Istanbul Protocol*, para 188.

but consistent scars or a combination of scars and psychological problems, may lead to a higher overall degree of causality with the alleged event of ill-treatment and thus provide stronger support for the alleged ill-treatment.

6 Conclusions and Proposal for Preliminary Questions

Forensic medical reports have their limitations. They generally cannot establish when, where, why and by whom an applicant has been ill-treated. Moreover, they usually establish a degree of causal relationship between the alleged event of ill-treatment and the scars and/or medical problems of the applicant. A physician can only rarely establish with certainty that the alleged ill-treatment has caused the applicant's scars or medical problems. The determining authorities of some states are therefore reluctant to arrange for medical examinations or attach no or limited weight to forensic medical reports.

Both the ECtHR and the CAT have developed an extensive body of case law concerning the duty to arrange for forensic medical examinations and to take into account forensic medical reports. Both bodies have recognised the importance of forensic medical reports. However, they have not provided clear guidance to the Member States concerning some important evidentiary questions relating to such reports. They have not explained in their case law when credibility issues are so serious that a forensic medical examination may not be deemed relevant or a forensic medical report may be granted no or limited weight. The ECtHR and CAT do not generally seem to accept that the two mentioned inherent limitations of forensic medical reports (regarding context and causality) may serve as a justification for refusing a forensic medical examination or ignoring a forensic medical report. However, in some individual cases the context and causality argument have been raised successfully by the state before these bodies. Because of a lack of clear reasoning in the ECtHR's judgments and CAT's decisions, it is often impossible to ascertain why these arguments were successful in the particular case.

This article has examined where the CJEU could step in to provide further guidance on these issues by interpreting Article 18 RAPD. It first provided some directions for the interpretation of Article 18 RAPD on the basis of the text, place in the CEAS, history and purpose of Article 18 RAPD, as well as the principle of effectiveness. Most importantly, it was concluded that Article 18 RAPD does not allow Member States to refuse to arrange a medical examination or to ignore or attach limited weight to forensic medical reports on the basis of the inherent limitations of such reports regarding context and causality. Otherwise, the

Article 18 RAPD would be deprived of its effectiveness. Moreover, this would be contrary to the determining authority’s duty to carry out an individual examination of the asylum application. It follows from Article 18(3) RAPD and 4(3) QD that forensic medical reports, which find a lower degree of causality between the alleged event of ill-treatment¹¹⁴ and the applicant’s scars or medical problems, may not be excluded from the credibility assessment. However, the (overall) degree of causality found may be taken into account in the decision when determining the weight of a forensic medical report in the credibility assessment.

The determining authority should thus always take into account the individual circumstances of the case in its decision whether to arrange a medical examination or how much weight should be attached to a forensic medical report in its assessment of the credibility of the applicant’s asylum account. This article proposed that the following factors should be taken into account.

TABLE 2

The part of the asylum account affected by credibility issues	
The alleged event of ill-treatment	Other parts of the asylum account
Seriousness of the credibility issues	
Core of the asylum account	Periphery of the asylum account
Main lines of the asylum account	Details of the asylum account
Documents or information, which clearly undermine the credibility of (part) of the asylum account	Inconsistent, contradictory or vague statements
Degree of causality found between the applicant’s scars or medical problems and the applicants statements concerning the alleged ill-treatment	
High degree	Low degree

First, if the credibility issues affect the alleged event of ill-treatment, a forensic medical examination/report should in principle be considered relevant. This may be different if the credibility issues concern other parts of the asylum applicant’s asylum account. Second, the more serious the doubts about the

114 E.g. the scars are consistent with the alleged type of ill-treatment, which is the lowest degree of causality mentioned in the *Istanbul Protocol*.

credibility of the applicant's account, the less foreseeable it is that a forensic medical examination/report can change the credibility assessment. It was argued credibility issues concerning the core and/or main lines of the asylum account are more serious than those concerning its periphery and/or details. Moreover, the nature of the information on which the doubts on credibility are based should be taken into account. Documentary evidence proving that certain statements made by the applicant cannot be true, weight more than the fact that there are inconsistencies, contradictions or vaguenesses in the applicant's statements. Finally, the degree causality found in the forensic medical report determines how much weight should be attached to it.

The most difficult question for the CJEU to answer is probably whether a medical examination is relevant and how much weight should be attached to a forensic medical report, if the determining authority contested the credibility of the context of the alleged ill-treatment on the basis of the particular circumstances of the case. May a forensic medical report increase the general credibility of the applicant, triggering the alleviation of the duty to present evidence, as mentioned in Article 4(5) QD?

6.1 *Proposal for Preliminary Questions*

On the basis of these conclusions, the following preliminary questions may be referred to the CJEU by the national courts of the EU Member States:

1. Does Article 18(1) RAPD allow a Member State to refuse to *arrange for a forensic medical examination* on the basis that such examination is irrelevant, because it found the asylum applicant's account not credible? If so, may Member States justify this refusal referring to the fact that:
 - a forensic medical examination (usually) cannot establish the (full) context of the alleged ill-treatment;
 - a forensic medical examination (usually) cannot establish with certainty whether the alleged ill-treatment caused the applicant's scars or medical problems?

Which factors should be taken into account in the determination whether a forensic medical examination is relevant and the state has a duty to arrange for a forensic medical examination? Is it relevant:

- whether the credibility issues concern the alleged event of ill-treatment or the alleged context of the ill-treatment;
 - how serious the credibility issues are, taking into account the fact that they concern the core or the periphery and the main lines or details of the applicant's account and the nature of the information on which the credibility issues are based?
2. In the light of Article 18(3) RAPD may or should Member States take into account the following factors when *weighing a medical forensic report* in

the assessment of the credibility of the applicant's asylum account in relation to the other elements of the applicant's asylum application:

- The fact that the forensic medical report does not establish the context of the alleged ill-treatment;
- The degree of causality between the applicant's scars and/or medical problems and the alleged ill-treatment established in the forensic medical report?

Which factors should be taken into account in the determination whether the state has a duty to arrange for a forensic medical examination? Is it relevant:

- whether the credibility issues concern the alleged event of ill-treatment or the alleged context of the ill-treatment;
- how serious the credibility issues are, taking into account the fact that they concern the core or the periphery and the main lines or details of the applicant's account and the nature of the information on which the credibility issues are based;
- whether the forensic medical examination found a low or high degree of causality found between the applicant's scars and/or medical problems and the applicant's statements concerning the alleged event of ill-treatment?
- Does a forensic medical report, in which a degree of causal relationship was found between the applicant's scars or medical problems and the alleged event of ill-treatment, increase the general credibility of the applicant, which can result in the application of Article 4(5) QD?

This article has provided arguments, which may convince national courts to refer preliminary questions concerning the evidentiary value of forensic medical reports in the light of Article 18 RAPD to the CJEU. Moreover, it has given directions for answering these questions. A CJEU judgment on the evidentiary value of forensic medical reports may fill important gaps in the current case law of the ECtHR and CAT. It may bring more clarity concerning questions such as whether a forensic medical report can substantiate the context of the alleged ill-treatment and how the degree of causality found in a forensic medical report should be taken into account. The CJEU's interpretation of Article 18 RAPD may in its turn inspire the ECtHR and CAT to provide more guidance to states about the evidentiary value of forensic medical reports.

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