

Expert country evidence in asylum and immigration cases in the United Kingdom

BEST PRACTICE GUIDE

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1. Introduction

Expert witnesses are often called upon to provide independent country-specific information in asylum and immigration cases. Such expert evidence can play an important part in the decision making process. There are many highly experienced expert witnesses. Often though, the experts who are asked to provide evidence have relatively little experience in doing so. Writing expert witness reports falls within a very particular genre, far removed from academic and journalistic forms. Expert witnesses therefore need to ensure that their reports meet the expectations and requirements of the legal process in order to best assist the Court or Tribunal. If they do not do so, they risk undermining the value of their own evidence, and therefore its practical use in the asylum and immigration decision-making process.

This Best Practice Guide provides advice on how to write effective reports that meet the expert witness's obligations. The guide focuses on the role of the expert within the UK asylum and immigration system. The vast majority of expert reports in the UK are requested at the appeal stage and will be examined by judges at a Tribunal. This guide therefore focuses on reports written at the appeal stage, although the same principles will apply in cases where reports are commissioned at the initial application stage.

The guide includes information on the formal responsibilities of the expert, some of the common dos and don'ts, and examples of structures, stock phrases, and necessary requirements (such as sentences which set out the expert's credentials and the expert's understanding of his or her role), points to consider when giving oral evidence, and a discussion about fees.

The guide is written by people with experience of working as country experts in asylum cases, with advice from asylum and immigration lawyers. It is not designed to provide a legal analysis of the role of experts, but rather a practical hands-on tool to aid the writing of effective and useful country evidence reports. Country evidence experts vary greatly in their experience of report writing, and this guide is designed primarily for those who have written relatively few reports.

2. Legal Framework

The legal framework governing expert evidence in asylum and immigration cases is set out in the *Practice Direction: Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal*, available (as of 24 June 2013) at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Practice%20Directions/Tribunals/IAC_UT_FtT_PracticeDirection.pdf

These rules are addressed primarily to lawyers seeking to call expert evidence rather than to experts themselves, but it is important for experts to observe the requirements of paragraphs 10.1-10.13, and in particular:

- 10.2 It is the duty of an expert to help the Tribunal on matters within the expert's own expertise. This duty is paramount and overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid.
- 10.3 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
- 10.4 An expert should assist the Tribunal by providing objective, unbiased opinion on matters within his or her expertise, and should not assume the role of an advocate.
- 10.5 An expert should consider all material facts, including those which might detract from his or her opinion.
- 10.6 An expert should make it clear:-
 - (a) when a question or issue falls outside his or her expertise; and
 - (b) when the expert is not able to reach a definite opinion, for example because of insufficient information.
- 10.7 If, after producing a report, an expert changes his or her view on any material matter, that change of view should be communicated to the parties without delay, and when appropriate to the Tribunal.

3. The Process

For an expert witness, the process will normally begin with an email or phone call from an appellant's lawyer. The lawyer may have taken the expert's name from the Electronic Immigration Network's Experts Directory (Available at: <http://www.ein.org.uk/experts/?q=experts> [24 June 2013]) - which is open for anyone to register on - or have received the expert's name through a colleague's recommendation. A lawyer will normally only seek an expert report after they have done their own background research, and can not find any reports that speak to specific issues. Experts are therefore being asked to provide genuinely expert opinions on issues that could make a material difference to a case.

Initially the potential expert witness needs to discuss with the instructing lawyer whether the particular case falls within the expert's area of expertise (see dos and don't section below), the fee to be charged (see section on fees below), and the time frame for the report. It is common for an expert witness to give a preliminary opinion on the case at this stage, based on the limited facts and questions they have been provided with. The lawyer might also indicate at this stage whether there is any possibility that the expert witness maybe required to give oral evidence before the Tribunal. It is very rare for experts to be required to do so, but if the lawyer indicates this might be a possibility, the expert witness should confirm whether he or she is willing and able to do so or not.

The immigration and asylum appeal process can move very quickly, so the lawyer and the expert witness will need to be clear on the date by which the report is due. A case is usually listed at the Tribunal or Court 4-6 weeks from when the appeal is lodged. Adjournments can be difficult to get, although they are not impossible if a clear time frame for the report can be provided. The report will be part of the 'bundle' of documents that needs to be lodged with the Home Office and Tribunal at least a week before the hearing.

If the report is being funded through legal aid, the lawyer will then need, in most cases, to seek authorization from the legal aid funders. In England and Wales, legal aid is provided

by the Legal Aid Agency, in Scotland by the Scottish Legal Aid Board, and in Northern Ireland by the Northern Ireland Legal Services Commission. The process for funding is slightly different in all three jurisdictions.

The lawyer will then provide the expert witness with his or her instructions, together with all the background paperwork. As this paperwork can be quite extensive, it is usually provided electronically. Such paperwork will normally include a witness statement from the appellant, the transcript of the interview between the Home Office and the appellant, and the Home Office Reasons for Refusal letter. Other important pieces of evidence that the expert witness should be made aware of, if applicable, include the reports of the Home Office's Country of Origin Information Service (COIS) on individual countries, as well the Country Guidance (CG) determinations of the Tribunal. CG cases set out the Tribunal's current position on the factual situation in a particular country. CG cases are available at: <http://www.judiciary.gov.uk/media/tribunal-decisions/immigration-asylum-chamber> (24 June 2013). COIS reports and bulletins are produced by the Home Office and are designed to produce: 'Accurate, balanced, relevant and up-to-date information on asylum seekers' countries of origin, used by our staff when determining asylum applications'. They are available at: <http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/coi/> (24 June 2013).

A first draft of the report may be followed by clarifying discussions between the expert witness and the instructing lawyer.

Mostly, expert witnesses will not meet the lawyer's client, and often there is no need to do so. Indeed, it maybe better not to meet the appellant face to face, as the role of the expert is to comment on the account given by the appellant to immigration decision makers, and this can be taken from the case documents. Occasionally, however, it may be useful to hold a short meeting if this will help answer the questions asked by the appellant's lawyer, and the expert is qualified to do so (e.g. issues to do with accent and dialect).

Very occasionally an expert might be instructed to produce a joint report for the

Home Office and the appellant's lawyer, but this is extremely rare. Also, very occasionally, the Home Office might instruct its own expert evidence. If this is the case, the two expert witnesses might be requested to indicate any points of agreement in advance.

Occasionally an expert witness will be asked to provide oral expert evidence before the Tribunal, although this mostly happens where the decision may set some sort of legal precedent, such as in a Country Guidance Case.

As stated previously, the vast majority of reports are produced at appeal stage, after an initial refusal has been given by the Home Office. After the case is heard by the First-Tier Tribunal, there is a possible appeal to the Upper Tribunal. A case can then be appealed to the Court of Appeal (England and Wales, and Northern Ireland) or Court of Session (Scotland). Appeals to this third layer are essentially on matters of law, rather than fact, and therefore expert witness reports can play a relatively less important role, unless one of the points of appeal is the way in which previous judges have formally dealt with expert evidence.

Expert witnesses are not formally told of the outcome of the cases for which they have given reports. If they would like to know the outcome, they need to make a request to an appellant's lawyer. It can be very useful for an expert to read how his or her evidence has been dealt with by the Tribunal. Lawyers may be in touch though after a decision, as they consider the next course of action for a client. There is no formal recourse for expert witnesses who feel they have been mistreated, although an appellant's lawyer may take the case to a further appeal if they feel any criticism of the expert witness has unfairly affected his or her client's case.

4. The Expert's Role

An expert report is instructed so as to provide the Tribunal with factual information relevant to deciding an asylum or immigration claim that would not otherwise be available to the Tribunal.

The report is being written for the Court or Tribunal, not the appellant. The job of an expert witness is not to act as an advocate

for an appellant, but to give objective and independent evidence. Lawyers might provide instructions referring to the 'client', but the appellant is not the expert witness's client.

The issues that an expert might be asked to address broadly fall into two categories. One relates to plausibility and consistency; are the factual claims made by an appellant or witness consistent with the context from which they arise? The other relates to the consequences of an established fact or facts (e.g. given the appellant's particular circumstances, is he or she at real risk of being persecuted?). The first set of questions can be said to relate to past events; the second set of questions to the future. It is important to remember that an asylum claim ultimately hinges on future risk, although past events are often the best evidence the Tribunal might have about what might happen in the future.

The majority of cases do not involve reports written by country evidence experts. An expert report will only be commissioned if the instructing lawyer can persuade the legal aid funder, and sometimes the Court or Tribunal, that it is relevant to a material issue in the case and that the issue is not dealt with adequately by the generally available country information.

One of the issues dividing the parties (the appellant's representative and the Home Office) may be how much (if any) weight should be attached to that report. Ultimately, the question of weight is a matter for the Tribunal to decide. Weight will only be attached to a report if it conforms to certain requirements in its layout, style, scope, and content and demonstrates that the author is aware of the legal limitations and obligations attached to the role, and that they have discharged them. Above all, the report must state, and demonstrate, an awareness that the expert witness's role is to assess and comment upon the evidence in an unbiased way, even if it calls into question parts of the asylum applicant's case.

An expert report will be one piece of evidence amongst several, and whilst it may be important, it might not be decisive. The Judge always has to view the totality of the evidence, and is not only looking at the expert country report. However, when a Judge's decisions goes against the general thrust of an expert report, he or she is required to give reasons for discounting the report or giving it less weight.

5. Some Possible Dos and Don'ts

The following list of possible Dos and Don'ts is structured around the considerations likely to add to or diminish the appropriate weight that may be given to any report.

- Expert witnesses should seek clear and precise instructions from the instructing lawyer. Expert witnesses should ask for clarification from the lawyer if need be, or for instructions to be recast. Broad questions such as 'tell us about the situation in country X', will not be helpful for anyone.
- It is perfectly acceptable (and indeed expected) for the lawyer to ask for clarifications of any of the points made in a draft report and for an expert witness to effect any amendments. Expert witnesses need to be careful, however, that they do not step over the line and allow the instructing lawyer to dictate what they might say.
- It is important that expert witnesses express their opinions in a way that is independent and objective in relation to the outcome of the case. A report should not come across as though it is arguing the case for the appellant. The style of any report should always show 'expertise' rather than 'advocacy'. Judges are quick to criticise expert witnesses who appear to be advocating for an appellant, and such advocacy does not, in the end, assist the appellant.
- It is not for the expert to say whether the appellant's claim is 'credible'. Credibility, despite its everyday usage, is a technical legal issue reserved for judges. The role of the expert is simply to say whether the claimant's account is consistent with the background evidence (or otherwise plausible when viewed against it), not whether he or she thinks it is true or not. Again, judges will be quick to criticise expert witnesses who appear to making claims about credibility.
- Expert witnesses should not get caught up in technical academic debates and hairsplitting. They should try and write the report in as clear and straight-forward a language as possible, avoiding jargon. Judges may sometimes reject findings if they do not understand technical opinions that are not clearly or adequately explained. Reports should not assume knowledge.
- The most useful reports focus on the details of the appellant's case, as far as possible. Reports that appear too generic run the risk of being given little weight by a judge on the grounds that they do not speak to the precise circumstances of the appeal. Expert witnesses should beware of any obvious cutting and pasting from previous reports.
- An expert witness should not leave anything out of the report simply because he or she thinks it might undermine an appellant's case.
- The expert's reasons for reaching his or her conclusions on the issues in dispute should be carefully explained. Insofar as the expert's opinion differs from the Secretary of State's (or from the findings of previous Tribunal decisions), the expert should explain, as far as possible, how and why these differences have occurred.
- An expert witness should make sure that as far as possible he or she provides citations and supporting evidence for any claims that they might make. Reports that are not backed up by sources run the risk of being given relatively less weight by judges. Citations should refer to sources that are as recent as possible. Relatively uncontentious issues can be backed up by referencing public domain sources, such as the Home Office COIS reports, but as soon as case-specific assertions are made which go to the root of the case, it is essential that these are individually sourced. If the expert consults other individuals on particular matters, he or she should say so; the expert should explain who the individual is and why the expert regards that individual as a reliable source. How much evidence/underlying documentary material is necessary will vary from case to case (e.g. country guidance and single appeals may differ). Instructing lawyers should guide on this.
- It is permissible to draw inferences from factual knowledge but it should be made clear where an inference is being drawn as opposed to direct experience/evidence cited, and reasons should be given for that inference, rather than contrary ones, being selected as most likely.

- An expert witness should always show that he or she is familiar with the background documents, such as the Home Office Refusal Letter, current Home Office COIS reports, and the current Country Guidance (CG) cases from the Tribunal, where available. This is particularly important where an opinion given by an expert witness is different to that which might be drawn from those sources. Any deviation from the reasoning found in the above documents must be justified.
 - It is important that an expert witness sets out his or her own expertise and does not stray into territory where he or she lacks expertise. If an expert witness appears to the Tribunal to be stepping too far outside his or her area of expertise, the report risks being given less weight. An expert can anticipate any attempt to argue that the expert's opinion should receive little or no weight because he or she is not qualified to express the opinions in the report, by explaining as fully as possible how his or her professional background (e.g. research interests; visits to the country; methodological expertise, contacts with informants in the country; with other academics, professionals etc with an interest in the country; monitoring of literature on the country) enables the expert to address the issues raised.
 - It is important that an expert witness sticks to the timetable agreed with the instructing lawyer. Failure to deliver a report on time can have serious implications for a case.
- (b) give details of any literature or other material which the expert has relied on in making the report;
 - (c) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
 - (d) make clear which of the facts stated in the report are within the expert's own knowledge;
 - (e) say who carried out any examination, measurement or other procedure which the expert has used for the report, give the qualifications of that person, and say whether or not the procedure has been carried out under the expert's supervision;
 - (f) where there is a range of opinion on the matters dealt with in the report:
 - (i) summarise the range of opinion, so far as reasonably practicable, and
 - (ii) give reasons for the expert's own opinion;
 - (g) contain a summary of the conclusions reached;
 - (h) if the expert is not able to give an opinion without qualification, state the qualification; and
 - (j) contain a statement that the expert understands his or her duty to the Tribunal, and has complied and will continue to comply with that duty.

6. Format of a Written Report

There is advice on the form and content of expert reports in paragraphs 10.8-10.11 of *Practice Direction: Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal*:

- 10.8 An expert's report should be addressed to the Tribunal and not to the party from whom the expert has received instructions.
- 10.9 An expert's report must:-
- (a) give details of the expert's qualifications;

- 10.10 An expert's report must be verified by a Statement of Truth as well as containing the statements required in paragraph 10.9(h) and (j).
- 10.11 The form of the Statement of Truth is as follows:-
 "I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear

which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.”

Expert reports are best seen as belonging to a distinct genre with requirements quite different from those of the academic articles which most experts are more used to writing. These requirements reflect both the legal framework discussed above and, more pragmatically, the ways in which expert reports are used by lawyers in Court and Tribunals. Experts should expect lawyers to draw the Judge’s attention to particular passages, a summary or conclusions, or even single sentences in the report, and may go as far as to present the Judge with an annotated copy of the report in which those passages have been highlighted. This is partly a courtesy to the Judge, but it also reflects the positivistic legal approach to facts, which sees them as standing in their own right rather than as existing in a broader interpretive or social context. Experts should take particular care that any summarising paragraphs accurately reflect the evidence presented earlier in the report.

It is strongly recommended that reports have numbered paragraphs and, unless the report is very short, that they begin with a table of contents listing section headings and the corresponding paragraph numbers.

There is no standard pro forma for producing an expert report. One possible structure might be the following (the order is not especially significant, but an expert witness report should include all this information in one form or other):

(i) **title page**

This should give the appellant’s name (or initials) and include the table of contents, listing paragraph numbers.

(ii) **background to report**

As a minimum, who instructed the expert witness and when, and a list of the documents the expert witness has been provided with. If the expert witness has written any earlier reports on this case, say so here. Also, if relevant, list the most up-to-date COIS Country Reports and Bulletins, and the latest UKBA Operational Guidance

Note (if UKBA produces these for the country in question) and the expert witness should confirm that he or she is familiar with their contents.

Sample Wording: This report was prepared on the instructions of XX Solicitors. I have seen the following documents: Ms X’s draft statement, dated xx; UKBA refusal letter, dated xx; Asylum/ SEF interview, dated xx; Screening record, dated xx.

Sources are cited where relevant to the opinions expressed. While such citations are given to provide the court with checkable documentary corroboration of my statements, my opinions are generally based upon greater variety of sources, knowledge, and experience, accumulated over more than x years of living in and/or researching on xx.

(iii) **summary of the appellant’s account, in the expert witness’s own words**

This is useful as an aide-memoire, and as a starting point for the later discussions of particular issues; however, there are sometimes variations between the different versions of the appellant’s account, so summation needs to be done with care. In any case, a report should include a disclaimer to the effect that any discrepancies between the expert witness’s summary and these other versions are the expert witness’s responsibility, not that of the appellant.

Sample Wording: In this section I summarize Ms X’s account as outlined by Ms X’s solicitors [or, as outlined in documents listed in paragraphs x above]. I believe this summary to be an accurate summary of Ms X’s account, but any discrepancies are my responsibility. I summarise only those aspect of the account that are pertinent to the issues at hand.

(iv) **the plausibility and external consistency of the account**

If the account is fully consistent with country evidence, the report should say so; if not, the report should say what aspects seem implausible, inconsistent, or novel. Lawyers might sometimes ask an expert witness to comment on the credibility of the account, but an expert

witness should on no account do so. While ‘plausibility’ and ‘credibility’ may seem virtually synonymous in non-legal contexts, here the issue of credibility is a matter for judges, not for experts, and if an expert witness offers any opinions on this his or her report may lose weight or even be rejected altogether.

Sample wording: I am aware that Ms X’s credibility is a matter for the court, not for me. My task is to confirm whether her account is fully consistent with my knowledge of historical events in country X, and with evidence of which I am aware regarding the period in question.

(v) **instructions**

The instructions given to an expert witness by the solicitors are not privileged documents and must be revealed to the court if required. It is a good idea in any case for a report to set out the instructions verbatim, either in full at the start of the report, or one-by-one at the start of the appropriate sections. Among other things this protects the expert witness from blame for any legal errors that the expert witness may be induced to commit by instructions that make improper requests, such as asking for comment on credibility.

(vi) **issues**

This will be by far the longest section of the report. Here the report deals one-by-one, under appropriate sub-headings, with the various questions put to the expert witness in the instructions. An expert witness may often find that it is most logical and efficient to address questions in a different order from that in which they were put in the instructions, or to group together or split up those questions. After all, although many lawyers have extensive experience dealing with cases from specific countries, it does not follow that they can necessarily second-guess the expert witness’s perspective on the relationship between one issue and another.

(vii) **CV**

Again this may not take the exact form of an academic or professional CV, but

should focus on those aspects of the expert witness’s career that underwrite his or her expertise in asylum contexts, particularly, of course, his or her experience and expertise regarding the country in question. Reports should set out things like the expert’s formal qualifications, publications, and length of time and dates spent in the respective country.

(viii) **declarations**

These should certainly include the ‘statement of truth’ as discussed earlier, and may also include any statements required by the expert witness’s employer, indemnifying them against the consequences of any advice given. Advice should be sought from individual employers on the precise nature of any disclaimer. It is by no means unknown for unscrupulous lawyers (not necessarily those who actually instructed the expert witness in the first place) to ‘recycle’ reports in other, similar appeals, so it would be expedient to specify that a report relates to this specific appellant, and should not be used in any other appeal without the prior written permission of the report author.

Sample Wording: (1) I am aware that in providing this report, my over-riding duty is to the court. I believe that the facts stated in this report are true, and that the opinions I have expressed are correct. I believe that I have dealt fully with those issues which have been drawn to my attention or which seem relevant to my understanding of this case. I have not omitted any facts of which I am aware which would have had a material effect on my conclusions as stated above. The absence of an expressed opinion on any particular point should not be construed as meaning that I have no opinion on that point. I would be happy to assist the court by clarifying any matter raised herein. My fee is not dependent on the outcome of this appeal.

(2) This report is prepared in connection with the asylum appeal of Ms X and is not to be cited as evidence in connection with any other case without the express written permission of XX.

Signature and date.

7. Oral Evidence

Occasionally an expert witness maybe called to give oral evidence before a Tribunal. This is especially likely when the appeal may become a Country Guidance case, or establish an important point of law.

The Tribunal will consist of between one and three judges, depending on the particularities of the appeal. Although the Tribunal is less formal than a court, judges should be treated with respect and addressed as 'sir' or 'ma'am'. It is expected that people stand when judges enter and leave.

Oral evidence will be given following what is known as 'examination in chief' by the appellant's representative, and 'cross examination' from the Home Office representative. The Home Office might be represented by a barrister or advocate, but usually it will be by a Home Office official, who may or may not be a qualified lawyer. Judges may also ask questions.

The starting point for the oral evidence will be the written report, but an expert may also be asked further questions of clarification and detail. The Home Office, in particular, might raise questions that were not asked by the appellant's lawyer when the initial report was requested.

Evidence should be given clearly and slowly, as judges have to write down the evidence.

The principles of independence and objectivity apply just as much in oral evidence as they do in written reports.

8. Fees

Opinions vary as to how much expert witnesses should charge. In practice, report writers charge anything from £200 to over £1,000. In England and Wales, for many experts, the hourly rate they can charge (for a report paid for by legal aid) is actually set out in the Civil Legal Aid (Remuneration) Regulations 2013. While country experts are not covered, it is clear from this document that the Legal Aid Agency rarely expects to be paying more than £100 an hour. An hourly rate might be expected whether the expert witness is producing a written report, or giving oral evidence. In the case of oral evidence,

where an expert may have to travel to the Tribunal or Court, it is perfectly reasonable to charge for standard class travel. Given the tight time frames for reports, it may not always be possible for lawyers to enter into protracted negotiations with legal aid funders. Some experts will write reports pro bono, especially if the appellant does not have legal aid. Very occasionally reports will be commissioned on a private basis.

Lawyers may also seek a range of quotes from experts before commissioning a report, and are often required by legal aid funders to do so. This quote will then set the maximum that the expert can be paid for the report. Some expert witnesses object to such 'auctions', as they feel they drive down the cost of reports and their quality. On the other hand, expert reports are funded from the public purse, and there is a responsibility to seek best value for money. If an expert witness feels justified in charging a relatively higher fee, it is helpful if they set out in his or her quote why his or her expertise is particularly suited to the particular case.

Lawyers will not be paid for the case, including the money for the expert report, until the case has concluded. This can sometimes take months, or even years. Whilst it is not always necessary to wait for the lawyer to be paid, the timing of fee payments should be agreed clearly in advance, in order to avoid any misunderstanding.

Expert witness reports are increasingly susceptible to audit by the Legal Aid Agency in England and Wales. If the audit concludes that that the report does not justify the fees charged, it can refuse to pay the lawyer for the cost of the report. Cutting and pasting from one report to another can be a particular issue. It is perfectly acceptable to use general information from one report to the next, although reports should of course always be case specific. However, if a report does reproduce a great deal of previous work, it is probably reasonable for this to be reflected in the fee charged.

In terms of the overall cost of the appeal, expert witness reports are a relatively expensive part of the process. Often the total amount the lawyer will be paid for the preparation and presentation of the appeal

can be less than the amount the expert is charging for his or her report. Consequently, the quality and usefulness of the report need to be of a very high standard. It is also worth bearing in mind that some experts rely on income from writing reports, whereas others are effectively subsidized to do so by their regular employment. The balance between value for money and quality is never an easy one to strike, and expert witnesses will have to decide for themselves how they calculate their fees.

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