Judge Melanie Plimmer
Chamber President
First-tier Tribunal, Immigration and Asylum Chamber

10 March 2023

Dear Judge Plimmer,

RE: Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal

As we have yet to correspond, we wish to congratulate you on your appointment as Chamber President of the First-tier Tribunal, Immigration and Asylum Chamber.

We also write to raise an issue of concern to our members.

On 13 May 2022, Sir Keith Lindblom, Senior President of Tribunals, issued a Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal with the agreement of the Lord Chancellor under section 23 of the Tribunals, Courts and Enforcement Act 2007.[1]

We write to you regarding the requirements relating to witness evidence, in Part 2 of that Practice Direction.

Witness Statements

In relation to Witness Statements, we are concerned with the following paragraphs:

> *5.5 The witness statement must, if practicable, be in the intended witness's own words and must in any event be drafted in a language they understand. [...]*
>
> > *(e) the process by which it has been prepared, for example, face-to-face, over the telephone, and/or through an interpreter. [...]*
>
> *5.10 A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence. It must include a statement by the intended witness in their own language that they believe the facts in it are true. [...]*

[1] Senior President of Tribunals, *Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal* (13 May 2022) <https://www.judiciary.uk/wp-content/uploads/2022/05/20220513-Practice-Direction-FtT-IAC.pdf> accessed 5 August 2022.

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5.12 Where a witness statement is in a language other than English—

(a) the party wishing to rely on it must—

(i) have it translated; and

(ii) file the translation and the foreign language witness statement with the tribunal; and

(b) the translator must sign the original statement and must certify that the translation is accurate.'

We note that paragraph 5.5 mirrors paragraph 18.1 of Practice Direction 32 - Evidence to the Civil Procedure Rules. However, we are concerned about the appropriateness of this approach in the First-tier Tribunal, which takes a different approach to admissibility of evidence and in which accessibility for appellants (whether represented or unrepresented) is crucial.

On our reading of paragraph 5.5, the 'if practicable' appears to only relate to the witness statement needing to be in the witness's own words, as the statement 'must in any event be drafted in a language they understand.' Therefore, it would appear from the face of the Practice Direction that a witness statement must be drafted in a language a witness understands, even if this is not practicable.

This is contrary to previous general best practice. The ordinary course of action by practitioners was to take instructions, through an interpreter, in a language the witness understands, and then for the practitioner to draft a witness statement in English using the interpreted words of the witness. The statement is then read back to the witness, by an interpreter, in a language the witness understands, and amended and approved in that language by the witness. This was an approach previously endorsed by the Tribunal (and its predecessors). For example, see the summary in the EIN 'Best Practice Guide to Asylum and Human Rights Appeals' (Drafting the statement | Electronic Immigration Network (ein.org.uk)):

> 12.66 The statement should be signed and dated. In *Njehia v SSHD* (16523), the IAT gave the following guidance in respect of statements taken via an interpreter:
>
> > *The proper procedure when taking a statement in a language other than English is for a competent interpreter, in the correct language and dialect, to read back the statement and for the maker of the statement then to sign it, confirming that the document has been read back in his or her own language. The interpreter should then append to the statement his own short statement that he has read back the contents of the document to the maker of the statement in his or her own language. That should then be signed and dated by the interpreter, whose name should be given.*

There is currently considerable uncertainty amongst our members as to what is now required of them.

Therefore, we are writing to seek clarification as to whether the intention in paragraph 5.5 is:

- that a witness statement, if a witness does not understand English, is drafted in a language other than English and that paragraph 5.12 would necessarily apply in such cases; or
- that the phrase 'drafted in a language they understand' should be construed to mean the instructions are properly taken in a language the individual confidently understands (such as through the interpreter mentioned in paragraph 5.5(e)), so that the witness is not asked to sign a statement they do not understand that has been prepared in English.

We would argue that the latter intention is preferable.

Although we would observe that all things being equal there is an obvious benefit in a witness being able to read the statement and confirm that it is true, rather than just having it read back to them, the advantage is lost in a not insignificant number of cases in the First-tier Tribunal (Immigration and Asylum Chambers) where the appellant or witness cannot read in their own language in any event. Our members have noted that this is not uncommon in a number of asylum cases, for example, cases brought by Iranian Kurds or, in the human rights context, for sponsors in Gurkha appeals.

We are further concerned with the practical implication of the new requirement:

1. If the legal representative does not speak the relevant foreign language, who is to draft the witness statement?

- We are concerned that it goes beyond the ordinary remit and skillset of interpreters to draft witness statements in the relevant foreign language, and it is difficult for a representative to be certain that interpreters would take statements to the same standard the representative would. Drafting witness statements is a legal skill. Further and in any event, this would require the interpreter to be skilled in writing, and not just speaking, in the relevant language, which may require a command of different registers and a nuanced understanding of differences between oral and written modes (for example, we understand that Tamil has several different registers). Indeed, a solicitor within ILPA's membership raised concern about finding interpreters who are also competent in the different skill of written translation (as opposed to oral interpretation), particularly outside of London, and the prospect of possibly first having an interpreter interpret at their office and then having to employ the services of a different individual online to produce a translation.
- Witnesses also cannot be expected to write their own witness statements, given that they cannot be expected to know what is relevant, admissible (for example, that it does not contain material covered by legal privilege), or the appropriate format, and in any case they may not be able to write the statement depending on their literacy. We are concerned that a change in practice may reduce the quality of witness statements before the Tribunal. Furthermore, once

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the statement was drafted in the native language, if alterations and amendments were required, additional interpretation and drafting would be required in the native language, before it could be translated to English.

2. We are concerned by the implications for costs to the appellant, given the significant further hours of time needed for drafting and translation.

- We wonder whether the Legal Aid Agency has been consulted on the associated increased costs, disbursements, and cash flow concerns for providers arising from having to take such comprehensive witness statements and having them translated in accordance with the Practice Direction, as well as the practicalities for retranslation. We understand from our members that in costs with multiple witnesses, the costs of translating witness statements are in the range of £5,000-£7,000 and around £2,000 where there is a single witness. This is an excessive burden on a limited pot of legal aid.
- For non-legal aid funded appellants, for whom a certified translation is unaffordable, we are concerned that it will result in witness statements not being adopted or less weight being placed on them for failure to follow the Practice Direction. We understand from our members that in some private cases, the Tribunal is being asked to waive the requirement.

3. For appeals that are pending, should practitioners replace witness statements in bundles that have already been submitted, if they do not meet the requirements of the Practice Direction?

- We understand from our members that the Practice Direction's translation requirements for witness statements have been raised as an issue in a couple of cases which has necessitated adjournments.

<u>Additional Evidence in Chief</u>

We are also concerned by the following provision:

> *5.3 Only in exceptional circumstances and with the leave of the Tribunal, will a witness be permitted to provide additional evidence in chief. [...]*

This deviates from what is set out in the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal (paragraph 7.7) which reads:

> *Although in normal circumstances a witness statement should stand as evidence in chief, there may be cases where it will be appropriate for appellants or witnesses to have the opportunity of adding to or supplementing their witness statements.*

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The test in paragraph 5.3 above appears to be unnecessarily stringent, and may particularly and adversely affect unrepresented or poorly represented appellants. Accordingly, as is accepted by paragraph 7.7 of the Practice Directions above there may be non-exceptional circumstances in which it is appropriate for advocates to elicit evidence in chief which has not been dealt with in the witness statement. We understand the intention behind restraining this evidence, but not to the point of only permitting it in exceptional circumstances. We are of the view that a test of appropriateness or reasonableness properly represents the competing interests of judicial expediency, fairness and the rights of the individuals involved.

We understand that it is relatively standard practice in the First-tier Tribunal Immigration and Asylum Chamber for there to be at least a few questions in chief following adoption of witness statements. In practice, given passage of time between filing evidence and the hearing date, particularly under the reform procedure where the evidence is front-loaded, the need to update the evidence is almost inevitable given that the date of hearing is the relevant date for the assessment of the evidence in asylum and human rights appeals. Depending on the level of involvement in preparation and the standard of preparation of the witness statement, there are not uncommonly other reasons in the interests of justice that the advocate at the final hearing would need to elicit further evidence. Given the issues often at stake in hearings in the Immigration and Asylum Chamber, we can envisage circumstances in which a strict exclusionary rule would result in unfairness.

Further, a solicitor within our membership has raised significant concern about the considerable time and cost implications of having to take a witness statement that seeks to cover everything that a person might want to say and to anticipate what counsel might wish to be addressed, and the possibility that statements may become very lengthy.

We regret that we did not have an opportunity to raise these points before the introduction of the Practice Direction and we remain at your disposal should you wish to meet to discuss these issues or if any additional details would be helpful. We thank you for your time and further consideration of this matter and we look forward to hearing from you in due course.

Yours sincerely,

Zoe Bantleman

Legal Director
Immigration Law Practitioners' Association