

ILPA paper on the use of expert evidence and interpreters in asylum and human rights appeals

1. ILPA welcomes the LSC's recognition of the importance of expert evidence in asylum and human rights appeals, and its commitment to improving the quality of expert evidence, promoting best practice in the instruction of experts, and obtaining value for money in respect of expert evidence. It agrees with the LSC that measures taken to control expenditure should not compromise quality or the outcome of the claimant's case.
2. This note concentrates upon expert evidence in appeals (which is when the vast majority of expert evidence is obtained). The pros and cons of obtaining expert evidence prior to a first decision are discussed at paras xx below.
3. Expert evidence can be crucial in asylum and human rights appeals, a point which has been emphasised on several occasions by the Court of Appeal. It is because expert evidence is so important that ILPA shares with the LSC the desire for better training of representatives in how and when to instruct an expert and further steps to promote best practice in the instruction of experts and the presentation of expert evidence.
4. As a consequence, the ILPA/ RLG Best Practice Guide to Asylum and Human Rights Appeals (hereafter 'BPG') devotes a large proportion of its text to guidance on expert evidence. This guidance has been welcomed by the Medical Foundation (who part-funded the BPG in order to improve the quality of expert instruction) and by the Immigration Services Commissioner (who wrote an introductory note to the BPG). The OISC has now distributed almost 400 copies of the BPG to all Level 2 and 3 accredited advisers. ILPA has distributed the BPG free to about 3000 representatives.
5. ILPA recognises that some representatives have not been following best practice through providing inadequate or inappropriate instruction to experts, and insufficient guidance on their role in the litigation. Some have had insufficient understanding themselves of what expert evidence is for, and of the standards to be expected by the Court in the presentation of expert evidence. The result may be that expert evidence is obtained on the wrong issues, or is not obtained on issues which cry out for expert assistance, and that even where focussed on the correct issues, it is rejected by the Court through inappropriate presentation. The LSC's desire to ensure that expert evidence meets the standards laid down by the courts is welcomed. As indicated at para 19.10 of the BPG,

The unique gravity of the issues at stake in this jurisdiction render it more, not less important that wherever possible, expert evidence meets the normal standards expected by the courts.

The cause of inappropriate instruction of experts

6. In order to tackle the problem of inappropriate instruction of experts effectively, it is essential to identify the cause of the problem. In particular, it is necessary to determine whether any inappropriate instruction of experts is a result of lack of training/ knowledge of best practice or through a desire for financial gain.

7. Unlike some areas of concern in relation to ‘bad representation’, ILPA considers that the possibility that experts are being instructed inappropriately in order to obtain financial benefits for the representative can be excluded. Not only is there no financial gain to the bad representative in instructing an expert where none is required, but the opposite is the case. Experts have to be paid directly by solicitors out of a standard monthly payment from the LSC and therefore represent a drain on solicitors’ funds. The financial incentive for solicitors is to keep disbursements down, so minimising cashflow problems.
8. ILPA strongly suspects that further study will indicate no evidence that unsatisfactory and inadequate representatives are instructing more experts than quality representatives. On the contrary, ILPA would expect to find that better firms (in terms of outcome) spend the most on instruction of experts. This is because they recognise how crucial expert evidence is to a large number of asylum and human rights appeals and put the interests of their clients before their own financial interests.
9. ILPA notes that the commentary in the new Immigration Specification does not suggest that solicitors are ‘over-instructing’ experts for financial gain but does state that

There have been cases where unscrupulous interpreters *and experts* have manipulated clients for financial gain, particularly in the field of immigration law. (Para 12.2.10, emphasis added)

10. While ILPA is aware of allegations concerning the practices of a minority of interpreters in this regard, it has never been made aware of any allegation that “experts have manipulated clients for financial gain” in asylum and human rights cases. ILPA requests a full explanation of the basis for this allegation so that a properly informed response can be offered.
11. It is key to resolving this problem that it is recognised to be one of training rather than one of tackling abuse: ILPA recognises that there is a middle tier of well-meaning representatives in respect of whom it cannot be said that they are instructing experts for financial gain, but who are not properly aware of the legal issues surrounding expert evidence and best practice in instruction of expert. It would therefore welcome the further measures discussed below.

Promoting best practice in instruction of experts

12. ILPA does not take the view that expert evidence should be funded in every case, regardless of its facts. The over-riding question is whether expert evidence adds value to the presentation of the appeal.
13. It is not best practice simply to send the case-papers routinely to an expert with an invitation to write a general report. ILPA shares with the LSC the desire to eliminate this practice. It is not the role of an expert to determine whether on the evidence as a whole, the appellant is a refugee. If the representative understands and follows best practice, this practice should not continue.
14. The key question for any court in deciding whether expert evidence is appropriate is whether the expert, through training, knowledge or experience, can bring an expertise to an issue that the court itself does not possess. It is incumbent upon the representative firstly to identify issues upon which expert

evidence is appropriate, and secondly to satisfy himself that expert evidence will add value in resolving these issues.

15. ILPA agrees with the LSC that expert evidence will not add value where the answer to a particular point is plain from the publicly available country materials. Indeed, this will normally be the best rule of thumb by which to determine whether expert evidence is appropriate. If the answer is plain, and there is no realistic prospect of it being disputed either by the Home Office or the adjudicator, expert evidence is unjustified.
16. However, the vast increase in the availability of country reports and other materials on the Internet often renders the answer to a particular point less obvious, and the instruction of an expert more rather than less useful. There may well be thousands of pages of potentially relevant country report and comment available. It will usually represent a false economy to expect a non-expert representative to wade through this material to determine what is relevant to the resolution of a particular issue and assess and analyse it. It is similarly unrealistic to suppose that an adjudicator, presented with a large bundle of undigested country reports will be equipped to analyse and assess in the same way as an appropriately trained and qualified expert. An expert who has devoted years of study to a particular country, and is familiar with the full breadth of country material and accumulated knowledge, can place it in context when answering the questions posed more efficiently and more accurately than someone who lacks that expert background..
17. Best practice in the instruction of experts and presentation of expert evidence is set out at chapters 19-26 of the BPG. Chapter 19 is introductory, dealing both with the importance that the Courts have placed on expert evidence in this jurisdiction, and the dangers posed by inappropriate instruction.
18. Chapter 20 provides guidance on the types of issues upon which country expert evidence may be appropriate.
19. Chapter 21 explains how to identify an expert with the appropriate expertise to assist the adjudicator. A report by someone who does not possess the right expertise to answer the question posed obviously does not represent good value for money.
20. Chapter 22 explains the expert's role in the litigation and his duty to the court, and the guidance that the expert should receive: too often, expert reports are wasted because the expert was not given a proper understanding of what was expected of him. Of particular importance are paras 22.14 - 22.32 which deal with "The boundaries of expert opinion". An understanding of these legal issues will prevent expert opinion being sought upon inappropriate issues.
21. Chapter 23 provides detailed guidance on how to instruct an expert, aimed at addressing the problem whereby experts are routinely sent all the case-papers with a simple request to comment (see eg para 23.2). It also explains how to identify the correct documentation for the expert and how to ensure that the report meets the standards required by the Court.
22. The remaining chapters explain the rules and issues surrounding 'recycling' of expert reports (chapter 24 - see further para xx below) issues relating to oral evidence from experts (chapter 25) and medical evidence (chapter 26, see para

xx below).

23. The LSC may well wish to consider making knowledge of, and ability to follow best practice in the instruction of experts an element in any accreditation scheme. ILPA recognises that publication of best practice guides is not in itself sufficient to ensure best practice. It would therefore welcome further discussion with the LSC about the possibility of working together on special training programmes to ensure best practice in this area.
24. Further consultation would also be welcome on the potential to provide training to experts. Professional bodies such as the Academy of Experts provide extensive training for experts in other jurisdictions as well as liaising with the judiciary and others in a representative capacity. It may well be appropriate for the LSC to consider funding the provision of training (possibly distance based) in conjunction with authoritative experts such as Prof Anthony Good (who has conducted extensive research in this field). The LSC has also indicated that it is considering consulting on accreditation for experts. The availability of appropriate training would be a prerequisite to effective accreditation.

Other means of reducing the cost of expert evidence

25. The primary obstacle in the way of reducing expenditure on expert evidence is Home Office practice, specifically the failure of the Home Office to disclose its case in advance and engage in sensible discussion to agree and narrow the issues in the appeal. Not only does the Home Office fail to respond prior to the hearing to requests to indicate whether particular matters are in dispute, but it regularly raises new issues without prior notice at the hearing. The result is that expert evidence often has to cover not only those issues that the Home Office has already raised, but those that it is foreseeable that it will raise at the hearing.
26. Chapter 9 of the BPG explains this problem in more detail and discusses possible strategies by which to compel the Home Office to disclose its case in advance and define and narrow issues. Were the Home Office to agree as a matter of policy to engage in the sort of negotiation expected of litigants in every other jurisdiction, this ought to have a very substantial effect in reducing the cost of expert evidence. Alternatively, the same result could be obtained were the IAA to decide to issue standard directions requiring the Home Office to particularise issues which are and are not in dispute.
27. A related issue is the quality of Home Office evidence and submissions on country conditions. Some of the difficulties to which these give rise are discussed in chapter 17 of the BPG but more disturbing indicators of the quality of some Home Office 'Country Assessments' has now been provided by the critiques produced by the Immigration Advisory Service. Similarly, ILPA believes that further consideration should be given to the establishment of an independent documentation centre. However, a precondition for the success of such venture would be that it is entirely independent in form and practice from the Home Office.
28. The dangers, and the IAT's disapproval of 'recycling' expert reports is described at chapter 24 of the BPG. While this is not *prohibited* provided the consent of the expert is obtained, an adjudicator will nearly always prefer to see a report which demonstrates that the expert has given specific consideration to the facts of the case before him. 'Recycled' expert reports are far more likely to be criticised by

the IAT, which has led some of the most respected experts to include a standard prohibition against recycling in the body of the report.

29. One alternative means of controlling costs employed by ILPA member firms is available where an expert is instructed to produce a large number of reports in respect of a particular country where some of the issues arise repeatedly. The expert produces a general report dealing with the recurring issues which is served in each case in which they arise. He then produces a shorter supplementary report dealing with the specific circumstances of the appellant and specific issues that arise in the individual appeal.

At what stage should expert evidence be obtained?

30. There is no general rule about when expert evidence should be obtained. In particular, there are pros and cons to encouraging representatives to obtain country evidence prior to a first decision as opposed to prior to the appeal hearing.
31. While it might appear obvious that the best time to instruct an expert is prior to the Home Office decision, the formulaic manner in which its caseworkers reach decisions means that expert evidence is often ignored, even where it directly and compellingly rebuts the reasoning employed in the refusal letter. It also means that a supplementary report may be needed if the Home Office refusal letter raises allegations against the client that had not been foreseen. Similarly, where the expert report is intended to inform the adjudicator of the implications for the appellant of present country conditions, it should obviously be finalised reasonably close to the appeal hearing so that it can reflect present circumstances. This of course does not prevent the *instruction* of the expert at an early stage.
32. The report should be lodged sufficiently far in advance of the hearing to enable the Home Office to consider the expert report and respond to it (or if it declines to respond, for an appropriate direction to be sought from the adjudicator). As discussed in the BPG (para s23.45 and 25.14), this procedure can limit the need for experts to attend a hearing, and the risk of adjournment where the Home Office raises a previously undisclosed challenge to the expert evidence only once the hearing is already underway.

Medical evidence

33. The instruction of medical experts is addressed in chapter 26 of the BPG. Paras 26.2 - 26.31 give guidance on the circumstances in which medical evidence will be required. Paras 26.32 - 26.38 give guidance on how to identify and instruct a suitable expert. Paras 26.44 - 26.53 deal with the role of a medical expert. Paras 26.54 - 26.64 explain the correct format and presentation of medical evidence.
34. It will often be useful for the expert to have information available to him from the client's GP, and on occasion for the client's GP to produce a note. But as the LSC has pointed out, a cheap report from a GP is likely to be "basic and short". Such a report is highly unlikely to be accepted by any court as an appropriate substitute for a detailed medico-legal report by a properly qualified expert.
35. Medical evidence is always best obtained at the earliest possible stage, although there may then be a need for an additional report prior to an appeal hearing to

inform the adjudicator of the appellant's present state of health and present prognosis.

Interpreters

36. ILPA welcomes the LSC's recognition of the fundamental importance of interpreters to the asylum process and its commitment to improving the quality of interpreting services.
37. ILPA is ready to engage in further discussion on the issue of interpreters' fees, and specifically on the question of whether the LSC should set rates for interpreters. However, it would be fundamental to the success of any such scheme that rates are set at a realistic level, and that allowance is made for those languages for which interpreters are scarce and where the market demands higher rates.
38. If realistic rates are not paid, this will entirely undermine the LSC's stated aim of improving quality and qualifications of interpreters and introducing worthwhile accreditation. There should therefore be consultation not only with ILPA and other representative bodies but also with organisations promoting quality interpreting such as the Institute of Linguists.
39. In considering whether the attendance of an interpreter is justified at substantive interview, it is important to recall that the LSC now intend to fund representation at interviews only in "exceptional cases (unaccompanied minors; applicants going through fast-track initial decision processes; those suffering from a recognised and verifiable mental incapacity which makes it impractical to undergo an interview without support)". Moreover, it has recognised the importance of representation at interview for these most vulnerable of groups by requiring that "this will be by the advisor in the case or the immigration supervisor, not by an agent or outdoor clerk".
40. Whilst deeply regretting the restrictions upon representation at interview in other cases, ILPA agrees that these exceptional cases are amongst those where effective representation at interview is most vital. Sending a representative without an interpreter substantially reduces the value of that representation (unless the representative speaks the relevant language) as he is unable to intervene where mistakes and misunderstandings occur during the interpretation process. It would be particularly incongruous on the one hand to insist on the attendance of an adviser or supervisor (rather than clerk) but then deny that representative the tools required to maximise the value of his attendance.
41. ILPA does not see any way in which a code of conduct supported by a complaints procedure could justify only the Home Office having their interpreter present at the asylum interview. As indicated above, how is the representative supposed to identify inadequate and inappropriate interpreting when he does not have his own interpreter and does not speak the language? A complaints procedure in those circumstances would be largely ineffective.
42. Issues concerning interpreters at appeal hearings are addressed in chapter 34 of the BPG. Of particular relevance is the section on the obstacles to accurate interpreting (paras 34.4 - 34.8), the variable quality of the Court Interpreter (34.15 - 34.23) and guidance on the role of the representative's interpreter at the hearing and how to deal with concerns about the court interpreting (34.30 - 34.45).

Summary of proposals

- Expert evidence should be funded where it adds value to the preparation of the appeal.
- Representatives and experts must understand and follow best practice in the instruction of experts. If they do so, this should eliminate inappropriate instruction.
- Training should be provided to representatives to promote best practice, and consideration given to including best practice in the instruction of experts in any accreditation scheme.
- There should be further investigation into the possibility of providing training to experts as a precursor to accreditation
- Discussion should be undertaken with the Home Office and the IAA about how to narrow issues prior to the appeal hearing so as to save costs in relation to expert evidence.
- There should be further investigation into the potential of a reliable and truly independent documentation centre.
- Rates for interpreting services must be set at realistic levels that do not undermine the LSC's aim of improving quality.