

ILPA comments on the Quality Standards for Live Appeals

ILPA is a professional association the majority of whose members are immigration, asylum and nationality law practitioners. Academics and charities are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law and is represented on numerous Government consultative and advisory groups.

ILPA is grateful for the opportunity to comment on the proposed quality standards for live appeals and for the extra time given in which to do so. We regret that due to the pressure of other consultations that we have, despite the extension of time, been able to devote very limited time to this response. In the circumstances, that we have not commented on a part of the Quality Assurance Document should not be taken as implying that we agree with it.

We understand that the Quality Assurance Document is concerned only with asylum appeals. We do not consider that the document is fit to be used in its current form. We consider that it is necessary to look more broadly at the role of Presenting Officers and that there are fundamental matters that must be addressed before any marking grid can be relied upon. Addressing such fundamental matters would appear to be in line with the UK Border Agency's current rhetoric of "transformation".

The gap at the heart of all that is written concerns the Presenting Officer's duty to the tribunal before which s/he appears, a duty which also governs his/her relationship to the other party before the tribunal and his/her relationship to other parts of the UK Border Agency.

ILPA has seen versions of training materials for Presenting Officers which make reference to their "instructions," suggesting a client/advocate relationship. In other meetings with the Agency it has been suggested that the Presenting Officer is simply a UK Border Agency member of staff like any other, and that any suggestion of a client/advocate relationship is wrong. We find it difficult to understand the circumstances in which a Presenting Officer turns to his/her line manager and the circumstances in which the Presenting Officer turns to the case owner and, if necessary, to the case owner's line manager and what are the respective responsibilities of these persons.

As an advocate, the Presenting Officer owes duties to the tribunal that inevitably affect his/her relationship with his/her employers. These duties are poorly understood and poorly managed by the Agency. For example, all too often it is not until a case reaches the High Court or Court of Appeal and Treasury Solicitors and Counsel are instructed that material is made available to the representatives of the person seeking asylum that should have been made available earlier. All too often a Presenting Officer, having identified that a point in a reasons for refusal letter cannot properly be argued, will say in submissions "I rely on the reasons for refusal letter." Until the Agency gets to grip with the role of the Presenting Officer it will not, in ILPA's view, be possible to develop quality standards that can be used to assess their performance, because there is simply not a clear idea within the Agency as to what that performance should be.

As a matter of practicality, a Presenting Officer has conduct of the hearing for the Agency. While immigration judges can and do give adjournments for a Presenting Officer to get clarification on what they should do (often referred to as “seeking instructions”) it is inevitable, if court time is to be respected, that the Presenting Officer needs to be able to act with a greater degree of autonomy, than some other Agency staff. It is more complicated to halt a court hearing than to take a break in an interview.

There have been sporadic attempts to look at the role of Presenting Officers. See for example the National Asylum “Stakeholder” Forum Action Point 27.3, appended hereto. We also append hereto, as part of this same document, “Draft Presenting Staff Professional Standards.” These were the subject of a meeting between ILPA and Mr Barry Corradine of the UK Border Agency in May/June 2011. In summary the comments raised at that meeting on the document below were as follows (other changes in UK Border Agency policy may render some of them, as they may render some parts of the original document, otiose):

- It would be helpful clearly to state that the Presenting Officer had decision-making powers in the non-Criminal Casework Directorate case; and did not in the Criminal Casework Directorate Case.
- As regards “behaviour in court”, it would be helpful to spell out something of what is meant by “professional”.
- There is a tension around paragraphs eight and nine of the draft, especially as these do not relate back to the distinction drawn between Criminal Casework and Non Criminal Casework cases. ILPA does not understand the Agency’s position that Presenting Officers are expected to consult the caseowner to withdraw or concede points, but not where they are adding to the reasons for refusal.
- While the requirement in paragraph 9 to notify changes of position in advance is welcome, ILPA was concerned that Presenting Officers might find it difficult to comply with it when they generally only get the papers the day before the hearing.
- It would be useful to make reference to the role of the duty manager with whom the presenting officer may be expected to discuss any proposed action to concede, withdraw or revise.
- Consideration should be given to the document’s setting out not only what the UK Border Agency expects Presenting Officers to do but also what Presenting Officers can expect from other parts of the Agency, for example the timeous delivery of files so that they are in a position to do what they are asked to do under their professional standards.
- The drafting should be reviewed. Phrases such as “can be defended” would be improved if rendered “should be defended”; in terms of standards setting (as opposed to describing a role), such things as “pursue all relevant and appropriate aspects” may better be expressed as “pursue only relevant and appropriate aspects” or “do not pursue irrelevant or inappropriate questioning”.
- Separating and distinguishing between the non-Criminal Casework Directorate and Criminal Casework Directorate cases where relevant would aid presentation.

The ILPA representatives at that meeting, Steve Symonds and Alasdair Mackenzie, raised the possibility of Mr Corradine’s meeting with ILPA members to discuss the work he was to lead to provide a “feedback loop” within the UK Border Agency, so that errors that presenting officers pick up are fed back to and addressed by initial decision-makers. This did not happen.

In a meeting with representatives of the Ministry of Justice, the First-tier Tribunal, the UK Border Agency and the Home Office on 28 January 2013 we were informed that the UK Border Agency is currently conducting a tender for a piece of work that will lead to the accreditation of Presenting Officers. We understood this to stem directly from Mr Corradine's work. We were also informed that it is not the case that Presenting Officers are expected to consult the caseowner to withdraw or concede points. We were informed that a Presenting Officer can withdraw or concede points, and if s/he felt that s/he needed guidance, this would be sought from his/her own manager. We suggest that, if this has not already been done, the team leading the current piece of work examine the work on standards for Presenting Officers and documents held by Mr Corradine and identify what is of relevance to the current work.

We have made general comments on the way in which the Quality Standards grid is framed and is designed to operate and we do not repeat these here. They apply, *mutatis mutandis*, to this document. We should need to review a sample of completed grids to understand whether the scheme worked and can provide only the most basic of comments faced with the template.

General

See above. The document is inadequate to assess critical errors such as failing to fulfil one's duty to the court and equally to be able to assess and evaluate the way in which the Presenting Officer deals with the rest of the Agency. The importance and the significance of this point dwarf the importance and significance of all the points that we make below.

There is no consideration of whether the appeal should have proceeded at all, and whether the Presenting Officer dealt adequately with this question, for example by discussing it with a manager in the UK Border Agency.

For it to be "correct" to follow all the Asylum Policy Instructions, these must be accurate and kept up to date. This is far from always the case and a Presenting Officer should be given credit for identifying this and taking action accordingly.

PRELIMINARY ISSUES

1a. Addressing preliminary issues

A failure to identify relevant documentary evidence to support any submissions made on any preliminary points may be a critical rather than a serious error where the Presenting Officer or Case Owner should have recognised that s/he could not discharge the evidential burden and that the case should have been allowed, resulting in the appeal not proceeding at all.

1b. Adjournments

To suggest that it is a critical error not to oppose an ill-founded adjournment request is arguably ill-judged. In comparison with other errors identified as critical in the document it is of less gravity in that it does not produce long-term irreparable consequences for the Agency's conduct of the case. A better example of a critical error would be a failure to apply for an adjournment where one was required.

A Presenting Officer who has not had sight of key documents or who had had insufficient time properly to prepare the case may be forced to ask for an adjournment if s/he is to give effect to his/her duty to the court. But that the documents are not available may be the result of a critical error elsewhere in the Agency and the grid should provide the opportunity to identify this.

CROSS EXAMINATION

2a Cross Examination

A serious error is to pursue lines of cross-examination without any good reason for so doing, or to go on fishing expeditions. This error may be critical in circumstances where it causes confusion or distress. What is the Presenting Officer to do when a part of a reason's for refusal letter is ill-judged and/or poorly reasoned, where this is only picked up after the hearing has started.

It is surely not necessary to use such jargon in the scoring grid as "positively impacted." Moreover, we are unable to comment on whether it is appropriate because we do not know what it means.

Cross-examination involves considerable exercise of judgment. For example if the witness is doing well on cross-examination and a good explanation of inconsistencies and omissions has been given, then it may alienate the immigration judge, not to mention unnecessarily to distress the witness, to pursue others. An experienced Presenting Officer may make a judgment that s/he is unlikely to succeed by attacking credibility and should concentrate instead on, for example, risk on return. The marking grid must make allowance for Presenting Officer's being good at their job and not serve to prevent their becoming so.

There is no reference, in this section or in any of the sections on cross-examination, or indeed on conduct, to whether the cross-examination was carried out in a way appropriate to the appellant/witness, e.g. if the witness is a child, a person with learning disabilities, etc.

2b Cross Examination - straying beyond what is permitted

If the immigration judge insists that a Presenting Officer does not pursue a particular line of questioning then the Presenting Officer must comply. In these circumstances the remedy lies in an appeal or formal complaint. It is a critical error to stray into impermissible areas of cross-examination and may involve a dereliction of the duties every advocate owes to the tribunal or court before which s/he appears. Where to pursue a line of argument in a reasons for refusal letter would involve such cross-examination the Presenting Officer must be allowed not to pursue that line of argument.

2c Credibility

Some of the critical errors we see with respect to credibility, which should be scored as such, are:

- In cases where credibility was accepted in the reasons for refusal letter and no new material/evidence casts doubt on this, the Presenting officer takes issue with credibility;

- In some cases the Presenting Officer fails to cross-examine and then in submissions seeks to take issues with parts of the appellant’s account that are unchallenged;
- Attempts to confuse and bewilder the witness and then to rely on errors that are the results of this as indices;
- Failure to respect the standard of proof in submissions on what should and should not be accepted;
- The Presenting Officer making a case against credibility which depends on expert knowledge that s/he does not possess (such as suggesting that a scar could have been caused in a particular way).

2g New evidence emerging during cross-examination

We defy anyone to “test the credibility” of the document and this should be rewritten, using a word such as “authenticity”.

There are circumstances in which the appropriate response to new evidence is to seek an adjournment and circumstances in which, because of the way in which the new evidence is introduced, this is not felt to be necessary. This can be a difficult judgement to make in the course of a hearing and if the decision is left to the Presenting Officer we suggest that those marking should be hesitant to criticise the Presenting Officer for asking for an adjournment in these circumstances.

It is a critical error not to put before the court exculpatory evidence. For example, if a matter on the UK Border Agency file shows that an assertion in the reasons for refusal letter is false and this has not been drawn to the attention of the tribunal, then the Presenting Officer must do so.

2h Examination of witnesses

See comments on 2c above.

SUBMISSIONS

3a. Submissions

It is a critical error to defend the indefensible and, whatever the reasons for refusal letter says, the Presenting Officer should not be criticised for not doing so.

It is a critical error to make submissions which the advocate knows to be false. If material on the UK Border Agency file or otherwise known to the Presenting Officer shows that the inaccurate assertions have been made in the reasons for refusal letter then the Presenting Officer must not seek to support those assertions.

3b Credibility – submissions

The category of “serious” contains a confused description. Not to highlight significant matters might be serious, regardless of whether or not minor matters were raised. But equally it might be serious to pick up on minor matters when these were irrelevant to the question of whether the appellant is or is not a refugee. As indicated above, a good advocate

will avoid picking nits where this is likely to alienate an immigration judge and the scoring grid should reinforce, rather than militate against, high standards of advocacy.

3c. Sufficiency of protection

The “serious” category is confused. If an advocate argues a point but fails to provide the evidence to support the argument, then all things being equal s/he will lose on the point and quite possibly lose the case. This would appear to be a critical error.

3e Submissions on the law

We should argue that the making of generic submissions not tailored to the case is always a critical error.

CONDUCT

4a, 4b and 4c Conduct

This criterion exposes the hole at the heart of this marking grid. It appears to treat matters of conduct and professionalism as matters of courtesy and etiquette. The Civil Service Code of Conduct demands more than this. But over and above those standards, there is the question of the advocate’s duty to the court or tribunal before which s/he appears which in turn goes to how s/he can be expected to deal fairly with the other side. A Presenting Officer has a duty to the tribunal, a duty which may at times put him/her at odds with other parts of the UK Border Agency. It should not be only when a case reaches the higher courts that documents that should have been produced at a much earlier stage are made available, with secret policies emerging.

The lack of current guidance/policy in the Agency is thrown into sharp relief by the “Correct” category under this heading. Reference is made to documents such as the Asylum Policy Instructions that do not deal in any detail with these issues of conduct. There is no document to which those designing the grid can point that tells the Presenting Officers about the standards to which they should adhere because no clear statement exists.

EFFICIENCY AND FLOW

5. a Irrelevant cross-examination

There is a risk of overlap with the section on cross examination. To try to sever aspects of cross-examination and treat those under the heading of efficiency and flow risks failing to assess cross examination in the round. Thus, for example, as a matter of efficiency and flow it may be serious error where “...the majority of the PO / CO cross examination focused on irrelevant issues / matters” From the point of view of the conduct of cross examination as a whole, the matter may be critical.

5b Submissions

See comments on cross examination. Exactly the same points apply to trying to hive off a part of the submissions. That “...the PO/CO made lengthy submissions on issues: the majority of which had no relevance to the issues under appeal” was a matter we should regard as a critical error.

5c Preparation

The same comments as under irrelevant cross-examination and submissions above. The mere evidence of written preparation on file, without regard to the content and quality of that preparation, cannot be enough to distinguish between a critical and a serious error.

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Chair
ILPA
29 January 2012

For the attention of John Ainscough john.ainscough@homeoffice.gsi.gov.uk

(Given to ILPA June 2011).

Draft Presenting Staff Professional Standards

General

1. You should establish a good level of knowledge of immigration law, case law, rules, policies, country information and effective advocacy skills and keep them up to date. You should regularly take part in training or other professional development activities to maintain and further develop your knowledge and skills.

Preparation for court

2. You should establish an excellent level of knowledge of the case, by fully preparing for the appeal in advance of the hearing. You should also research relevant immigration law, case law, rules, policies and country information in advance of the hearing.
3. When preparing for the appeal you should review the decision, taking into consideration new evidence (if any) and decide whether the decision can be defended in court. This check will help to improve the Agency's success rate for those cases that go on to a substantive appeal. Ensure that decisions to concede or to withdraw a decision are, wherever possible, made in advance of the hearing and a senior officer consulted. It may also be appropriate to consult the original decision maker. In the case of criminal deportations, approval must also be sought from a Criminal Casework Directorate Senior Caseworker (SCW).

Behaviour in court

4. You represent the Secretary of State and the Home Office when in Court. Therefore you must act with a high degree of professionalism and behave consistently in line with the Home Office values.
5. You should always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings.
6. You should attend court on time.

Presenting the case in court

7. Represent the decision-maker in court in line with the law, the applicable Immigration Rules, the EEA Regulations and UK Border Agency policies where appropriate, including the best interests of the child.
8. Having previously established that the decision can be defended, ensure each case is fully argued in court, responding to new evidence and issues raised by the Immigration Judge and the appellant or their representative. Deliver a persuasive and cohesive argument, structuring cross-examination and submissions accordingly. Where appropriate, introduce additional arguments to those raised in the original decision.

9. Pursue all relevant and appropriate aspects of the appellant's case or claim. Where it is intended to introduce new or additional grounds in support of the original decision, notification should be given to the appellant and their representative at the earliest opportunity and preferably in good time before the hearing. The new issues should be in line with the law, the Immigration Rules, the EEA Regulations and UK Border Agency policy.
10. In court, robustly defend the decision under appeal but be mindful that you must disclose evidence and material that is relevant to the facts in issue, irrespective of which party to the appeal this assists, in order to achieve a just determination of the case. You must not knowingly mislead the Immigration Judge or permit the Immigration Judge to be misled.
11. Test the evidence that has been given by the appellant (and any other witnesses) at earlier stages and at the hearing. Be sensitive to the circumstances of the appellant or witness who may (for example) be a child, a rape victim or a torture victim.
12. You should ensure cases are dealt with as efficiently and quickly as possible. Oppose unmeritorious adjournment requests and only apply for adjournments where it is absolutely necessary with, wherever possible, the approval of a senior officer.

Follow up

13. To help speed up appeals and reduce costs, where directions have been set by an Immigration Judge, ensure that they are complied with.
14. To help improve the quality of decisions, provide appropriate feedback to the decision maker.
15. To help improve the quality of management information - ensure that CID fields are updated and management returns are completed, in a timely way.
16. Ensure that post hearing minutes are accurate and completed in a timely way.