A note on the text

Abbreviations used in the text

Col	Column [of Hansard]
HC	House of Commons
HL	House of Lords
HOPO	Home Office Presenting Officer
IAA	Immigration Appellate Authority
IAT	Immigration Appeal Tribunal
SSHD	Secretary of State for the Home Department
TA	Temporary Admission
UNHCR	United Nations High Commissioner for Refugees

References to rules are to the Asylum Appeals (Procedure) Rules 1996 unless otherwise stated.

The text uses *she* to refer to asylum seekers and refugees, in recognition that women make up the majority of the world's refugee population. Otherwise *he* is used, but each should be read as *she or he* unless the context demands otherwise.

Foreword

Of all the structures for reviewing administrative decisions in the United Kingdom the asylum appeals system is perhaps the most important, for its purpose is to ensure that effect is given to our international obligation, entered into at the end of one of the most terrible periods of human history, to give a haven to people fleeing from persecution.

But what in 1951 seemed a diminishing of displaced persons in a world recovering its sanity has in the 1990s become a human flood. The collapse of civil order and the entrenchment of tyranny in country after country, combined with the ubiquity and relative facility of air travel, has permitted people in their thousands to flee from dangerous to safe countries. with them, inevitably, is mingled a stream - nobody knows how large - of individuals for whom the way round immigration controls is a bogus asylum claim, often engineered by corrupt agents and advisers. They, as well as honest claimants who simply do not come within the Convention, have to be weeded out

No system of decision-making and adjudication can be infallible. The best a system can do is seek to be scrupulously fair, in the belief that fairness is the best way we know to establish the truth. But fairness is costly: it means time and resources which would be hard to provide at any time and which a system such as ours, crammed to bursting and backlogged almost to the point of seizure, is hard-pressed to vouchsafe. It is in this situation that a colossal burden falls not only on those legal practitioners who represent and advise asylum claimants but also on the Home Office, which in the appellate system is cast in the constant role of their antagonist, and upon members of the IAA itself.

The problems are exacerbated by the fact that of all fields of legal and para-legal activity, this is probably the one most dogged by incompetence and malpractice - and not only among non-lawyers. It also suffers a peculiar blight, to which this guide draws attention: a dearth of trained and competent interpreters, and in their place a body of (usually) well-meaning helpers whose endeavours can readily mislead as clarify. There is in my view an urgent case for the introduction of the Nuffield system of training and accreditation of interpreters in immigration and asylum work.

Just how specialised asylum work is, and just how hard good practice is to achieve on what is usually a financial shoestring, this guide amply shows. But good practice pays. It pays in terms of practitioners' reputation and standing; it pays in terms of the respect in which they are held by opponents and tribunals; and above all in terms of the satisfaction of doing an important and difficult job well. This guide deserves not only a warm welcome but - that greatest of all accolades - constant use.

Because it is directed to practitioners who advise and represent asylum seekers within an adversarial appeal system, this guide is inevitably partisan in tone and approach. But I hope it will also be read by those who handle and present asylum cases for the Home Office and by those who adjudicate, not with a view to defensive or opaque decision-making or to catching claimants out by leaning their strategies, but in order to see what careful and conscientious representation entails and to encourage good practice - if necessary by meeting halfway - as the best means to the shared end of ensuring that no genuine refugee Is ever turned away, unless to a third country which is truly safe.

Stephen Sedley
Royal Courts of Justice
April 1997

ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

THE LAW SOCIETY

REFUGEE LEGAL GROUP

BEST PRACTICE GUIDE TO

ASYLUM APPEALS

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1. Introduction

1.1 96% of asylum claims are currently rejected at first instance by the Home Office. Since 1993, asylum seekers have been entitled to an automatic in-country appeal against that rejection. The Special Adjudicator reaches his own decision on appeal as to whether the appellant is entitled to refugee status on the date of the hearing. The High Court will normally review only the operation of the appellate process. The Home Office decision-maker is seldom called on to defend his decision, and the fairness of the Home Office's decision-making procedure and the rationality of its reasons for refusal are therefore no longer subject to any direct review by the courts. 96% of asylum seekers therefore rely on the appellate system, and on their representatives' presentation of their appeals.

1.2 The common law holds asylum appeals to be of such moment that only the highest standards of fairness will suffice. There are two pervasive financial obstacles to the fair and effective presentation of asylum appeals, firstly the unavailability of legal aid for representation at hearings, and secondly the withdrawal of Income Support and other benefits from appellants. If you are not representing *pro bono,* you should try to give your client an estimate of the costs for the whole process including hearing. Check your client's legal aid eligibility. Explain clearly what legal aid will pay for and what it will not pay for, particularly representation at the hearing. Explain the risk of adjournments and how this may add to costs. Give details of the availability of free representation.

1.3 As of April 1997, the Home Office is following a policy of rejecting adjudicators' recommendations that appellants should not be removed (see Chapter 24). It renders even greater what the Immigration Appeal Tribunal described in *Gashi* (13695) as:

> *'the dangers in failing to treat the Convention as a practical and living tool which the signatories co-operate to provide that substitute protection of the more basic fundamental rights (and which is encapsulated by UNHCR's view that) "The term persecution cannot be seen in isolation from the increasingly sophisticated body of international law on human rights generally. In recognition of the adaptable nature of the refugee definition to meet the ever changing needs of protection, UNHCR recognises an important link between persecution and the violation of fundamental human rights."'*

1.4 It is also the consequences of removal together with the drastic mismatch of resources between appellant and respondent which highlight the rationale and necessity for the Immigration Appeals Tribunal's jurisprudence on establishing fact in status determination, the rejection of balance of probabilities as a standard of proof and the danger of adverse credibility findings being founded on the norms of the country of asylum and the characteristics of the examiner, superimposed onto country of origin and asylum seeker (see also Chapters 11 and 25). The Convention is a far more powerful human rights instrument than is often recognised. When representing appellants with difficult, doubtful or novel cases which may not fit within the traditional stereotype of Convention refugee, but whose removal may nevertheless be dangerous, cruel or unjust, you will want to consider whether the Convention has

evolved in the face of such injustice rather than standing still. You cannot do so without a knowledge of constantly developing refugee law.

1.5 This guide is not a substitute for a sound knowledge refugee law. Refugee law moves very quickly. Some of the more important sources are listed in the appendix, but many of the most useful decisions are never reported. As an absolute minimum. you should obtain and read the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status.* This is available at £5.00 from UNHCR (see the appendix). The High Court has stated that the *Handbook,* though not binding, is persuasive, adjudicators virtually always accept its guidance, and the Home Office maintains that all *'caseworkers work closely to the United Nations High Commissioner for Refugees ' handbook '* (Minister of State, Home Office, HL, 20.6.96 Col. 493).

1.6 The Guide follows a roughly chronological order from receipt of the refusal letter, through preparation for and conduct of the hearing, to analysing the determination and if necessary making an application for leave to the Immigration Appeal Tribunal. The final two chapters deal with representing children and with detention and applications for bail.

1.7 I would like to thank the following for their generous help and in some cases extreme patience: Kate Bell, Jackie Bond, Ruth B. Jane Coker, Buster Conic, Simon Cox, Sandia Drew, Richard Dunstan, Valerie Easty, Rebecca Fleming, Jim Gillespie, Larry Grant, Vicky Guedella, Richard McKee, Natalia B. Andrew Nicol QC, Kieran O'Rourke, Martin Penrose, Margaret Phelan, Susan Rowlands, Simon Russell, David Rhys-Jones, Rick Scannel, Hugh Southey, Alison Stanley, John Walsh, Fran Webber, and Debbie Winterboume. Thanks to Mike Young at the Refugee Council for help in the design and production of this report, and to Cameron McKenna for the printing and binding. I have also been greatly assisted by Alison Harvey's *The Risks of Getting it Wrong,* Katie Ghose's *Ministerial Statements on the Asylum and Immigration Act 1996,* and Asylum Aid's *No Reason at AII.* Details of these reports are set out in the appendix. I am, of course, responsible for those errors and omissions which remain.

Mark Henderson
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3rd April 1997

2. A Guide to the Refusal Letter

Refusing by Numbers

~~1.1~~2.1 Subsequent chapters cover countering Home Office allegations through witness statements (chapters 9 and 10), oral evidence (chapter 20), documents from the country of origin (14), and expert evidence (11-13). However, it is important for your preparation that you become familiar with the sometimes bizarre conventions which produce the Home Office's reasons for refusal.

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~~1.2~~2.2 Once you have read a few Home Office refusal letters you will generally be able to write your client's refusal letter before you see it - in some cases word for word. However, your first refusal letter may appear strange and confusing. Much of the refusal letter might consist of either standard paragraphs pasted onto all refusal letters for that country of origin which have little relevance to your client's case, or unsourced assertions about how the 'genuine refugee' behaves. The behaviour of the 'genuine refugee', you will find, often varies from case to case so as to create a "damned if you do, damned if you don't" effect.

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~~1.3~~2.3 You need to be able to identify standard paragraphs and standard allegations; those which may be damaging and those which are legal or factual nonsense. Get your client in immediately and obtain her instructions and comments on the reasons. The allegations and assertions may also appear bizarre to your client, and you should explain to her that most letters are written that way. The initial application to the Home Office is outside the scope of this guide, but your client's representative should have had the Home Office interview notes translated immediately after the interview, gone through them line by line with the client, and made any appropriate representations to the Home Office on accuracy and omissions. If the interview notes have not been checked, this needs to be done immediately and a dated statement taken. You should always check the summary of your client's claim in the refusal letter (which is sometimes inaccurate and/or misleading) against her statements and interview records, and take her instructions.

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~~1.4~~2.4 While this section deals with the initial analysis of the refusal letter, and tactics for dealing with some of the standard allegations, as stated before, it is no substitute for a sound knowledge of asylum law and practice.

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Credibility

Discrepancies and failure to give details upon arrival

~~1.5~~2.5 If your client fails to mention all details of her claim upon arrival you are likely to be faced with an assertion that the details were therefore fabricated and that *"A genuine refugee could be expected to give a consistent account of her persecution "*

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No evidence or research will ever be offered to support this assertion as to how the genuine refugee acts, but it will be made automatically, including, for example, where your client mentions rape or sexual abuse at a later date. The assertion becomes even stranger when one takes into account the fact that in the standard pro forma interview conducted on arrival, there is only one question on the basis of the asylum claim and

asylum seekers are explicitly restricted to "Basic details only" in their response. Asylum seekers often say that they are interrupted when they try to give details of their clans, and told they will be given a full interview at a later date when they will have an opportunity to give those details. In a letter to Howe & Co of 17 October 1994, the Immigration Service Complaints Section rejected a complaint that the immigration officer had acted improperly in failing to record on the pro-forma notes most of the information that the asylum seeker had given about his detentions and political involvement on the grounds that:

> *"the sole purpose of a pro-forma interview is to glean sufficient information to enable a considered decision to be made as to how best to proceed with the application. The form therefore only records information which The immigration officer] knew to be essential to the case at that stage... (G)iven the purpose of the pro-forma interview, [the immigration officer's] actions were reasonable and correct.*

~~1.6~~2.6 However, HOPOs will often allege that pro-forma interview notes are verbatim records which are read back to the asylum seeker, despite there being no evidence that this is the case. And having told the asylum seeker that she is not supposed to give details until a later interview, the Home Office will then maintain that she has damaged her credibility by not giving details until the later interview.

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~~1.7~~2.7 The practice flies in the face of Ministers' representations to Parliament indications during the passage of the Asylum and Denigration Act 1996:

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> *"(Hon. members) suggested that someone arriving in this country seeking asylum is required to give details at the port of the suffering that they have undergone or their reasons for seeking asylum. All we ask is that, when such people are asked why they have come to this country, they should say that it is to seek asylum, not something totally different. There is no question of their being required to give details there and then"* (Secretary of State for Social Security, HC 15.1.96, Cal 881)

> *"...those who apply for asylum when they arrive here do not have to go into detail; they do not have to tell their story; they just need to say, 'I am applying for asylum'... Their story will come at a later stage."* (Lord MacKay, Minister of State for Social Security, HL, 2.7.96, Col 1351)

~~1.8~~2.8 If the asylum seeker were to be cautioned upon arrival - something to the effect of "You are required to disclose all details of your asylum claim immediately upon arrival and you will damage your credibility if you fail to mention now details of your claim which you later rely upon" - then while a fairly outrageous practice in itself, at least it would be open, honest and consistent. However, assuming that the Home Office acts in good faith, it is very difficult to understand a procedure whereby the asylum seeker is told to save details for later and then refused on the basis that she did just that. You should object to any such allegation both prior to and at the start of the hearing. Point out the hypocrisy, both in terms of what your client was told and what Parliament was told. In *Kasolo (13190*), the Home Office admitted that the full asylum interview was an opportunity to provide further information, not an opportunity to catch the asylum seeker out, and the IAT overturned an adjudicator

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who had relied on failure to give the information earlier. Explain this to your client who may otherwise assume that the allegation must somehow be fair and reasonable and become confused and anxious wondering how to deal with it.

~~1.9~~2.9 In an increasing number of cases, a "short procedure" is being implemented by the Home Office, whereby asylum seekers are being given only one asylum interview which is conducted at port upon arrival in the United Kingdom. The risk of injustice is obvious. The interview may be conducted almost immediately upon arrival, or the asylum seeker may have to wait for hours for her interview in conditions in which she cannot recover properly from her journey. Very often, the interviews are conducted without allowing the asylum seeker legal advice or representation. (Indeed, the Immigration Service has in the past insisted on conducting the interview before a legal representative arrives, even having been informed that he is on his way.) The interview is often much less comprehensive even than the standard asylum interview. The standard of interpreters may well be worse. There are frequent accounts by asylum seekers of impropriety by the Immigration Service, both before and during such interviews, the risk of which can only be exacerbated in cases where the Immigration Service insists on conducting the interview without legal representation.

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~~1.10~~2.10 The Chief Adjudicator has indicated to the Thanet House Users' Group his concern at the adequacy of short procedure interviews, and that he previously had felt compelled to exclude the interview record and hear evidence de nova. Conducting a full asylum interview upon arrival utterly contradicts the Government's justification, as stated above, for expecting asylum seekers to claim on arrival. If your client has had a full interview at port on arrival without advice, representation or even a proper chance to recover after her journey, you may well want to dispute the notes as a whole on the grounds of fairness rather than simply after explanations of particular discrepancies.

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~~1.11~~2.11 Concerns have been raised in Parliament that asylum seekers would not be able to give the necessary information at an initial interview, and would not afterwards be allowed sufficient time to produce evidence. Parliament was told that:

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> *"We envisage that applications from nationals of designated countries will be considered under the short procedure, and in relation to those who apply on arrival, they will be interviewed on the day of arrival if the applicant is fit and well enough to be interviewed. The applicants then have a month - not a matter of days, but a month - in which to submit additional information before the case is considered."* (Minister of State, Baroness Thatch, HL Committee, 23.4.96, Col 1043)

If your client has been criticised for doing just that, you will again want to point out the hypocrisy.

~~1.12~~2.12 Along with giving details which were not given on arrival, the letter will often allege other discrepancies, particularly regarding:

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- the dates or durations of her detentions
- the number of times she had been detained

- the dates she became involved in an organisation and the activities she carried out the nature of the ill treatment she suffered an omission to mention all ill-treatment suffered during a detention every time she mentioned that detention.

~~1.13~~2.13 Allegations of discrepancies are often the result of misunderstanding or misrepresentation of your client's statements. For example what was expressed as a rough guess by your client may be transformed into a concrete assurance in the refusal letter. Leading questions may be used to lead inconsistent answers. Very often, the alleged discrepancy will not have been put to your client. A common situation is where an asylum seeker appears to given an answer which is inconsistent with a previous answer. Rather than refer back to the earlier answer and explain and query the apparent inconsistency, the answers will simply be stored up for presentation in the refusal letter as unexplained discrepancies demonstrating that your client is a liar. Such practices are pursued, despite assurances that the Home Office follows the *Guidelines for the examination of survivors of torture* by the Medical Foundation for the Care of Victims of Torture, and the UNHCR handbook. The Handbook states that:

> *"While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts."* (paragraph 199)

~~1.14~~2.14 It is in any event a basic principle of fairness that allegations of discrepancies should be put to a person before being relied upon against her. The unfairness is not cured by being put months or years later at the appeal when it is both obviously far more difficult to explain (if it is even remembered), and the lapse of time may be used by the Home Office as showing opportunity to fabricate an answer. In *Salun* (13202), the Immigration Appeal Tribunal stated that

> *"It seems to us that in the second interview if there are discrepancies with the first, the appellant should then be given the chance to explain why. That opportunity would be more teeing whichever way the responses went when the matter came on appeal "* [emphasis as in transcript]

You should attack any reliance by the Home Office on discrepancies which were not put at the time.

Lack of detail

~~1.15~~2.15 A common allegation is that a detention did not happen because if it had, the claimant would have given more details. Bizarrely, allegation is made even if the Home Office interviewer did not ask for any details. For example, your client may have been asked if she had been detained. She has answered yes for a month. The interviewer, rather than asking for details goes onto his next question. It is then alleged in the refusal letter that if your client had really been detained for a month, she would have given more details when asked about it.

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Political sophistication

~~1.16~~2.16 The asylum interview will often include a series of sometimes ludicrously simplistic questions about the ideology of the organisation with which your client was associated. Your client will answer the simplistic questions. The refusal letter will then allege that your client's understanding of the aims and objectives of the organisation is simplistic. Alternatively, the Home Office will criticise an uneducated person who attended demonstrations and distributed campaigning materials because she cannot give a blow by blow account of past splits in the organisation, or the derivation of its ideas.

Implausibility

~~1.17~~2.17 On a vast array of subjects, the refusal letter will claim that the Secretary of State does not consider that people would have done the things your client says they did, and on that basis, reject the claim. The Secretary of State may consider that the local police would not have released your client if they were still suspicious of her, that the prison guards would not have accepted bribes to release her, that she would not have been arrested just because her family were active or just because she attended demonstrations, that the guerillas would not have anything against her just because she refused to help them, or that drug barons would not pursue her to a particular town.

~~1.18~~2.18 Since no evidence is ever provided to support such allegations of implausibility, it can only be assumed that they are purported to be based either on what the Secretary of State would do if he was a prison guard, a guerilla or a drugs baron, or on how a reasonable prison guard, guerilla, or drugs baron would behave. How the Secretary of State can guess how they would behave is never revealed. Refuting these allegations with expert evidence is discussed in chapter 11.

~~1.19~~2.19 Equally, the refusal letter will claim that the Secretary of State knows how your client would and would not have acted in her country of origin, for example how much torture she would take without confessing, or whether she would risk returning to her village to see her mother if she was really frightened of the authorities.

Lack of corroboration

~~1.20~~2.20 Despite your client having made a detailed statement for the Home Office regarding, for example, her detention, the refusal letter will often state:

> *"The Secretary of State notes that you have provided no evidence that you were detained "*

~~1.21~~2.21 As pointed out by the Immigration Appeal Tribunal in *Kasolo (13190)*, this assertion is simply wrong. What the Home Office appears to mean is that the asylum seeker has provided no evidence which corroborates the evidence of her own testimony. However, it is established both in national and international law that an asylum seeker's claim should not be dismissed simply because she fails to provide corroboration. The UNHCR Handbook states that:

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"Often, however, an applicant may not be able to support his statements by documentary or other proof and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution win have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof " (paragraph 196)

~~1.22~~2.22 On occasion, the Home Office has made completely unreasonable or impractical demands that asylum seekers obtain proof from the country of origin. On the other hand, its obligation to seek evidence in support of asylum seekers' claims (though not through investigations which might prejudice confidentiality) appears to have largely escaped it. What evidence the claimant is able to produce will often be dismissed as self-serving.

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Timing of departure

~~1.23~~2.23 If the client remained in the country for any period after first suffering persecution, then it will be alleged that the reasonable refugee could be expected to leave at the earliest opportunity. On the other hand, if your client left immediately, it will be said that there is no proof that she would have suffered any further persecution if she had stayed.

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Choice of country of asylum

~~1.24~~2.24 If your client passed through any other country on her way to Britain, then it will be alleged that a genuine refugee could reasonably be expected to claim asylum at the first safe country she reached. Often the Home Office's idea of what constitutes a safe country in which to pursue an asylum clang is rather surprising. In particular, the allegation will be made even where the Secretary of State has not felt able to designate the country as a safe. third country with proven asylum procedures (to which removal does not carry a suspensory appeal right). In any event, this statement has no basis in law. There is nothing in the Convention requiring a refugee to seek asylum in any particular country. The Home Office appears to be mistaking the agreements that exist between some states for sharing out asylum claims putting some sort of duty on refugees to claim in a particular county. Equally, the Home Office may attack credibility on the basis seemingly that an asylum seeker did not claim in the country which would have responsibility for her claim under the Dublin Convention. Since the asylum seeker is not returning to her country of origin from the country in which she did not claim but instead going to the United Kingdom, such allegations make no sense in fact as well as in law.

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Escape route/access to travel documents

~~1.25~~2.25 If your client obtained a passport or travel document, whether or not by bribery, or passed through immigration control, again whether or not by bribery, the refusal letter will allege that this shows that she was not of interest to the authorities. Bribery will either not be acknowledged or dismissed as not possible. There will never be any explanation of why the Home Office considers the relevant officials to be incorruptible. If your client tried and failed to obtain a passport through normal channels, the fact that she tried will be used to discredit her fear. If she did not apply for a passport, it will be claimed that there is no proof that she would have been refused a passport because she never applied for one.

Timing of asylum claim

~~1.26~~2.26 Claiming asylum after arrival, even days after arrival is, according to the Secretary of State, *"contrary to the behaviour which could reasonably be expected of a genuine refugee."* In fact, in 1995, in country applicants were over 50% more likely than port applicants to be recognised as refugees by the Home Office - 5.7% of in country applications as opposed to 3.7% of port applications *(The Risks of Getting it Wrong*, pare 6.1.2).

~~1.27~~2.27 You may also want to refer to the LAT's view in *Latif Mohammed* (7592) that

> *"It seems to us entirely understandable that a potential refugee would think it far preferable to obtain admission before applying for asylum than applying at the airport."*

~~1.28~~2.28 The Government's Social Security Advisory Committee accepted when considering the benefit regulations that refugees, almost by definition, may see no point in going through the asylum process for as long as they are not going to be returned to their country of origin. Some adjudicators also see no merit in the argument, such as this one quoted in *The Risks of Getting it Wrong:*

> *"She had leave to enter for two years. This was two years safety. The explanation* [for delay in claiming of 1 year and 8 months] *seems wholly reasonable"* (paragraph 6.2.2)

Activities in Britain

~~1.29~~2.29 This is another "damned if you do, damned if you don't" category. If your client has taken part in political activities in the United Kingdom, these may be dismissed as self-serving. If she has not, it will be said that this is inconsistent with her claimed political commitment.

Motive

~~1.30~~2.30 The refusal letter may well allege that your client had an erratic employment record and/or a low standard of living and that she is therefore an economic migrant. Often your client will have had a very reasonable quality of life as opposed to financial remuneration (particularly compared to her quality of life in the United

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Kingdom), or else her economic difficulties may be a result of persecution, in which case, you would welcome the Home Office's apparent acceptance of the account of her difficulties. If your client is liable to military service, it may allege that she has come to the United Kingdom to avoid it (true by definition, if it is part of your client's claim).

Legal and political assertions

Country of origin

~~1.31~~2.31 The Home Office produces standard paragraphs about conditions in particular countries of origin which it inserts into refusal letters, often regardless of the facts of the individual's case. They are almost never sourced. They will range from asserting that democratic elections are planned to more picturesque assertions about farmers feeling safe enough to return to their fields. It will often be alleged that government ministers have condemned human rights abuses by their security forces or that such abuses have been investigated. In *Jcyakumaran (1994)* Imm *A R 45*, Taylor J (as he then was) said

> *"I ask what solace it is to the victim to hear that he is being persecuted by soldiers out of control rather than the government if this be the case."*

~~1.32~~2.32 Often there will not be a clear divide between "the government" and "soldiers out of control". Particular organs of state may be willing to condemn human rights abuses while other organs of state perpetrate them. One part of the security forces may torture while another does not. Different state organisations may be bitterly opposed to each other. The question is whether there is persecution emanating from the state apparatus, not whether there are elements of the state apparatus which are opposed to it. The refusal letter will often simply ignore the clear evidence that abuses continue, despite the condemnation.

Agents of persecution

~~1.33~~2.33 Persecution by non-state agents of persecution can found a claim under the Convention on the same basis as persecution by the state, unless the state is willing and able to offer such protection from the agents of persecution as will prove effective (UNHCR Handbook, paragraph 65). The question is whether, despite the protection on offer, there remains a serious possibility that the agents of persecution will be able to persecute your client. Unfortunately, refusal letters often appear to proceed on the basis that the test is whether the Government is doing its best. The refusal letter may well rely on statements from government ministers disapproving of the persecution, on constitutional protections, and assertions that there have been arrests of people responsible for such persecution in the past and that the police would be willing to investigate. Even if true, the fact that persecution may be investigated is not the issue. The issue is whether your client may be persecuted, not whether some of the persecutors are being caught. There will quite likely be an allegation that your client did not do enough to seek the protection of the authorities, even if your client has reasonable grounds for believing that the authorities would not protect her from future persecution.

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~~1.34~~2.34 Do not be surprised if half the refusal letter is aimed at showing that your client is not at any risk from the government, even though that was never your client's case.

Internal flight

~~1.35~~2.35 The refusal letter will often allege the availability of internal flight for no other reason but that your client has not been persecuted in the geographical area of her country of origin to which the Home Office suggests she flees. This is as sensible as suggesting that someone who escaped from police in London will not be of interest to police in Newcastle. It will usually be perfectly reasonable for your client to assume that once she is wanted by the security forces or cements of them, she is not safe in any part of the country. Sometimes the refusal letter will allege that if your client was really in fear she would have left the country immediately rather than move to a different area. The Home Office may then argue internal flight at the appeal.

No Convention reason

~~1.36~~2.36 As well as the Legitimate interest/prosecution not persecution argument considered below, it will often be alleged that persecution related for example to failure to perform military service or suffered in the context of a civil war cannot be for a Convention reason. Such assertions will often be quite misleading and made seemingly in ignorance of the guidance set out in the UNHCR Handbook. You may consider seeking directions against the Home Office, for a skeleton argument and/or particulars (chapters 6 and 7). In respect of civil war, you must also refer to *Lazarevic and others v. SSND, 13* February 1997, CA (reported in *Legal Action,* March 1997, 27).

Exclusion/ legitimate interest

~~1.37~~2.37 It is fairly unusual for the refusal letter to contain an explicit allegation that the claimant is excluded from the Convention by reason of Article IF. more usual allegation is that:

> *"While the Secretary of State does not condone any ill-treatment you claim to have suffered, he is of the opinion that the security forces would have a legitimate interest in investigating you, in view of your claimed support for a terrorist organisation.*

~~1.38~~2.38 What the Home Office apparently want to say is that she is not being persecuted because the security forces are conducting a legitimate investigation into terrorism. (Indeed the Secretary of State has sought international support for his view that those who support "terrorist" organisations should not benefit from the protection of the Convention.) Yet torture can never be for a legitimate purpose under the 1951 Convention (*Ravicharzdran v SSHD (1996) Imm AR 97).*

~~1.39~~2.39 Since the Home Office will not normally allege in the refusal letter that your client is excluded from the 1951 Convention, it cannot allege that her support for a "terrorist organisation" means that she should not be protected from torture. You should demonstrate (possibly through requests for particulars) that it makes no sense.

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~~1.40~~2.40 The "legitimate interest" argument may be used not merely in respect of support for "terrorists" but even where an organisation or demonstration has merely been declared illegal under the laws of the country of origin. Sometimes the Home Office will allege that security forces were only doing their duty in arresting your client due to the illegal nature of her activities. It might state that this is "prosecution not persecution", or even that arrest for illegal activities does not come within the Convention. These allegations are often legal nonsense, and particularly bizarre in that the illegality of the activities may well found the asylum claim.

Minimising persecution

~~1.41~~2.41 The Home Office may appear to rely on your client having been released without charge, despite the fact that detention without any due process is a feature of the tyranny from which she flees. If your client thinks she was eventually released because despite torturing her, the security forces could not get evidence to try her, it will be said that this shows that legal safeguards are working. Other assertions are considerably more bizarre. The following is taken from *No reason at all:*

> *"The Secretary of State noted that you claimed that (Zaiman) soldiers ... came to your house ... arrested your father and shot your brother who later died although you managed to escape through a window. The Secretary of State noted your claim that the soldiers were firing wildly within the house, and he considered that the shooting of your brother was therefore not necessarily a deliberate act. He further noted that they did not shoot your father who was the most politically active member of your family."* (page 27)

Is that it?

~~1.42~~2.42 In a letter to Alasdair MacKenzie, then Co-Chair of the Asylum Rights Campaign, Mr D A L Cooke, Head of Asylum and Special Cases Division at the Home Office gave the following undertaking on behalf of the Home Office:

> *"You expressed concern about Presenting Officers raising fresh reasons for refusal. Presenting Of dicers are instructed to confine themselves to the reasons for refusal and the factual information which supports them, for example records of interview."*

~~1.43~~2.43 There is nothing to stop HOPOs dealing with new issues which arise at the appeal. However, HOPOs regularly rely on different reasons from those disclosed in the refusal letter and representatives have been confronted with the extraordinary sight of Presenting Officers denying that they have ever been given instructions not to raise their own reasons of their own motion.

~~1.44~~2.44 It is established law that fairness requires that an asylum seeker is entitled to notice of the reasons for which the Secretary of State maintains that she is not entitled to asylum, and she is entitled to the full reasons not just some of them. The refusal letter is supposed to discharge that duty but if the Home Office can turn up to the appeal hearing and rely on reasons which it has not disclosed to the asylum seeker, then the Home Office has clearly not discharged this duty. Any assertion by HOPOs

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that this is exactly what they are entitled to do should be opposed. Fairness is likely to require the offer of an adjournment if the Home Office raises a new issue at the hearing.

3. **Certification - the Special Appeals Procedure**

~~1.1~~3.1 Section 1 of the Asylum and Immigration Act 1996 introduced a new special appeals procedure, and new criteria by which the Secretary of State could certify the asylum claim as one to which the special appeals procedure should apply. The effects of certification are as follows:

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1. The time limit for lodging Notice of Appeal is reduced from seven to two working days BUT ONLY if your client is in detention and the notice of refusal is served on her personally. Otherwise the seven day time limit will apply.

2. The time allowed for a special adjudicator to determine the appeal is reduced from 42 days to 10 days (though the adjudicator retains the power to extend time under rule 41).

3. If the adjudicator accepts that the statutory criteria for certification are met, then he must give his decision at the end of the hearing, and your client will be denied the right to apply for leave to appeal to the Immigration Appeal Tribunal (leaving judicial review as her only remedy).

Procedure

3.2 Rule 41 allows the IAA to extend time if necessary to enable it to determine the appeal fairly. The IAA uses the power to extend the 42 day time limit on non-certified appeals as a matter of course because of pressure on court time. However, the intention appears to be to prioritise certified appeals to enable them to be determined within the 10 day time limit.

3.3 In non-certified appeals, directions are usually issued requiring full disclosure from each side 28 days before the hearing. This would obviously be impossible in certified appeals if the 10 day time limit was adhered to. Yet there is no reason whatsoever why an appellant should be better able to deal with documents which are not served by the Home Office in advance, simply because the appeal is certified

3.4 The High Court established, before the introduction of a universal right of appeal that natural justice required that asylum seekers be given a reasonable opportunity to dispute the reasons offered by the Home Office for rejecting their claims. If appeals had to be completed in some cases little more than 10 days after those reasons were disclosed to the asylum seeker, it is quite clear that there would often be insufficient time to gather the evidence to properly dispute the Home Office's case.

3.5 It is vital to emphasise in such situations that the criteria for granting adjournments are exactly the same for certified as for non-certified appeals under rule 10 (see chapter 17). So are the principles laid down by the High Court whereby fairness requires that adjournments are granted where necessary to give a party a reasonable opportunity to prepare and present ha case to the fullest. You should not be refused an adjournment in a certified appeal, in circumstances where it would have been accepted in a non-certified appeal, whether because you need time to obtain evidence or because the Home Office has submitted new evidence at the hearing. If necessary,

you should refund the HOPO that Home Office ministers answered Parliament's concerns that the reduced time limit would cause injustice by referring to the adjudicator's power to adjourn to enable evidence to be gathered (eg HL Committee stage, 30.4.96, Col 1562).

3.6 It may be possible to avoid the reduced time table altogether by asking for certification to be dealt with as a preliminary issue. If the adjudicator rejects certification, the ten day time limit will no longer apply to the determination of the substantive appeal, and it should be relisted for substantive hearing in the normal way. The disadvantage is that some of the statutory conditions for certification will be difficult to determine in isolation from the merits of the substantive appeal, and your client may be prejudiced by the adjudicator making a finding, for example, on credibility, without hearing the totality of your evidence. The feasibility of disputing each of the statutory conditions as preliminary issues will be discussed below.

Disputing Certification

3.7 3.7 You should first ensure that the form of the certificate is correct. For example, if it has not certified that paragraph 5(5) (on torture) does not apply, it is invalid. Some adjudicators are cogently allowing HOPOs to amend invalid certificates at the appeal, though this may well be unlawful.

3.8 3.8 There is a power to certify a claim if the conditions set out in the Act are met. There is no duty to certify if the conditions are met, and indeed Parliament was told that

> *"I have also made clear that certification will not be automatic. We will not, for example, certify a claim if, despite meeting the certification criteria, it raises particularly novel and complex legal arguments on which there is no clear case* law."(Home Office Minister of State, HL Report Stage, 20.6.96, Col 524-525)

3.9 The decision to certify a claim will be unlawful if it is unfair or irrational, and may well be unfair if it is inconsistent with the Home Office's stated policy on certification as set out above. The exercise of the discretion to certify a claim can be challenged on judicial review. However, it is not yet clear whether adjudicators will feel able to consider whether the Secretary of State has lawfully exercised his discretion to certify where the adjudicator accepts that the statutory conditions are met (though it is clear that section 19 -of the Immigration Act 1971 applies to the special appeals procedure - see also 3.32 below).

3.10 Whether or not an adjudicator feels able to rule on the lawfulness of the Secretary of State's discretion to certify, he may form a view as to whether the decision to certify was unfair, unreasonable, or inconsistent with Home Office undertakings and consider consequently that the appeal has been wrongfully subjected to the truncated time limits. If so, such a finding may well be relevant to the adjudicator's consideration of whether adjournment is necessary in order to achieve the just disposal of the appeal.

The statutory conditions

3.11 Certification will always be unlawful if the statutory conditions are not made out. The burden of proof is on the Home Office. The IAT has confirmed that the Home Office cannot rely upon the lower standard of proof applicable to appellants. Therefore, the Home Office must prove on the balance of probabilities that the conditions are made out.

3.12 The House of Lords has held on issues relating to illegal entry that where the Home Office alleges fraud, it must prove its case to a high standard of probability (*Khawaja* (1984) AC 74), and there is no reason why the same standard should not apply where the Home Office seeks to prove fraud for the purposes of certification.

3.13 The statutory criteria for certification will now be discussed in turn.

> *(2) ...if the country or territory to which the appellant is to be sent is designated in an order made by the Secretary of State by statutory instrument as a country or territory in which it appears to him that there is in general no serious risk of persecution.*

3.14 It would appear from the wording of the sub-paragraph that an adjudicator must agree that the statutory condition has been met if the country has been designated by the Secretary of State, even if he concludes that the designation was wrong and even irrational. Regardless of the lawfulness of the designation, or the adjudicator's power to reject certification on the basis that the country was designated unlawfully, the adjudicator does not have to agree with certification for the purposes of the substantive appeal. He is perfectly entitled to find that a general and serious risk of persecution exists in a white listed country, when allowing - or for that matter dismissing - the appeal.

3.15 You may well wish to dispute that the country is generally safe (though it may not necessarily be part of your case, if your client relies upon particular and unusual facts). Any submission by the HOPO that the Secretary of State's designation should in itself be given significant evidential weight in relation to the determination of the appeal, even if no evidence is submitted in support of designation, should, of course. be vigorously resisted.

3.16 The fact that the country of origin has been white listed will make little difference to the way you conduct the appeal, as prior to the white list taking effect, the refusal letter would normally in any event have included unsupported assertions to the effect that the country was generally safe.

> *(3) ... on his arrival in the United Kingdom, the appellant was required by an immigration officer to produce a valid passport and either - (a) he failed to produce a passport without giving a reasonable explanation for his failure to do so;*

3.17 Many asylum seekers destroy their travel documents en route to the United Kingdom. One might have thought that the passport no longer being in existence would be a reasonable explanation for not showing it to the immigration officer. Furthermore, if

the passport was false, it might not be obvious to the asylum seeker that she would be expected to present it to the United Kingdom immigration authorities at all, particularly if she has alternative documentation. You should, however, note the definition of 'passport' in sub-paragraph 10:

> *'passport' in relation to an appellant, means a passport with photograph or some other document satisfactorily establishing his identity, nationality or citizenship.*

3.18 A 'passport' in the context of the Act is not limited to a travel document. Often, an asylum seeker will destroy an invalid passport en route, but retain a valid national identity card. Such a document, providing it establishes her identity, nationality or citizenship, satisfies the definition of 'passport' in sub-paragraph 10. Having satisfied the requirement to provide a 'passport', it will be irrelevant that she destroyed any other travel document, whatever the reason. If the Home Office in such circumstances, you can dispute this as a preliminary issue.

3.19 Where the asylum seeker cannot produce any document which satisfies the definition of passport, the issue will be whether the explanation provided by your client was reasonable. The issue is whether the explanation which is offered is a reasonable explanation, not whether it was the real explanation. The credibility of your client as a witness should therefore not be an issue in determining reasonableness.

3.20 The burden of proof is on the Home Office to show that the asylum seeker has failed to give a reasonable explanation. Upon what criteria will reasonableness be judged? And reasonable to whom? The claimant? The "reasonable asylum seeker" in the position of the claimant? The reasonable man on the Clapham omnibus?

3.21 The purpose of section 1 is supposedly to allow the certification of claims which are less likely to give rise to successful appeals. The conditions are supposed to be indicators that an asylum seeker is less likely to be a refugee within the terms of the 1951 Convention. The only test of reasonableness consistent with such a purpose would be that which might appear reasonable to a refugee in the position of the claimant. An unreasonable explanation would be an explanation which a genuine refugee in the position of the claimant would not offer.

3.22 Where asylum seekers have destroyed travel documents, the refusal letter sometimes includes an unsupported allegation that this is "not the conduct of a genuine refugee". Given that the burden of proof is on the Home Office, it is for the Home Office to show why the explanation should be categorised as unreasonable. If it relies on unsupported assertions, then you should ask for the evidence - presumably in the form of research into the behaviour of genuine refugees - and in the absence of evidence, you should submit that the Home Office has not proved its case.

(b) he produced a passport which was not in fact valid and failed to inform the officer of that fact.

3.23 This ground for certification is discussed fully under Chapter 14. The sub-paragraph curiously refers to a passport which was "not valid" rather than "False". This might be thought to include a passport which had expired. However, this would be obvious

on the face of the document and presentation of a document which indicated that it was invalid could therefore be taken to be informing the immigration officer of the invalidity. During the passage of the Bill' there was no suggestion that the criteria would include passports other than false passports. Any attempt by the Home Office to apply the sub-paragraph to passports other than those which are false should be resisted.

3.24 Where the Home Office that a passport is false, it should prove its allegation to a high degree of probability. Where your case is that the Home Office have produced insufficient evidence to do so, you may well want to have the question determined as a preliminary issue.

> *(4)(a) it does not show a fear of persecution by reason of the appellant's race, religion, nationality, membership of a particular social group, or political opinion*

3.25 It is clear that to show a fear of persecution for a Convention reason does not require the asylum seeker to show any evidence to support the claimed fear, because sub-paragraph (b) provides the power to certify where an asylum seeker shows a fear of persecution for a Convention reason which is manifestly unfounded.

3.26 It will be relatively rare that an asylum seeker does not allege that she fears return for a Convention reason. The Home Office indicated during the passage of the Bill that certification on this ground would be *"comparatively few and far between"* (HC committee 11.1.96, Cols 92-93) and Minister of State, Ann Widdecombe MP, stated that the category:

> *"has a narrow scope... Sub-paragraph (a) has been introduced to allow us to certify claims where the grounds cited manifestly do not amount to persecution - claims based, for example on a fear of prosecution for a non-political crime or on solely economic considerations."* (HC Committee 11.1.96, Col 99)

3.27 However, it is not inconceivable that the Home Office may attempt to use the sub-paragraph where it disputes the Convention reason, for example, because it rejects the claimed social group or even, on the "prosecution not persecution" argument which it often relies upon in refusal letters in respect of offences which are obviously political. This would, of course, be a wholly contrary to the above indications. Equally, however, if the above reference to "solely economic considerations" was taken to refer to claims where the persecution consisted of "economic considerations" - for example, depriving a person of work - that too would be contrary to the Convention. Also, cases in which the Convention reason or the nature of the persecution are genuinely not straightforward are often those which raise the most difficult issues of law, and therefore the very cases where the Home Office has accepted that certification would be inappropriate.

3.28 You may want to have a preliminary hearing to determine on the basis of legal argument, whether the alleged fear is capable of coming within the Convention categories. The issue cannot be higher than whether a Convention reason is arguable.

(b) it shows such a fear of such persecution, but the fear is manifestly unfounded or the circumstances which gave rise to the fear no longer subsist;

3.29 The majority of refusal letters allege that the fear is unfounded, but it is clearly inappropriate to apply this subparagraph to such claims as a matter of course, and the Home Office has indicated that it will not do so.

3.30 The Home Office alleges that an asylum seeker would no longer be of interest to the authorities having been out of the country for some years, but it would be absurd to seek to apply the sub-paragraph to such claims. During passage of the bill, it was indicated that certification would be appropriate if:

> *"You come to this country and said 'I am being persecuted because 'x' party is in power and they don't like my party' and 'x' party loses power and your party wins"* (HL, 2.7.96, Cols 1324-1325)

3.31 It is not difficult to think of cases in which the situation would be far less simple, and certification would be inappropriate. However, you should certainly dispute certification if based on any less significant change of circumstances, and it should be possible to deal with this on a preliminary issue.

(c) it is made at any time after the appellant

(i) has been refused leave to enter under the 1971 Act,

(ii) has been recommended for deportation by a court empowered by that Act to do so,

(iii) has been notified of the Secretary of State's decision to melee a deportation order against him by virtue of section 3(5) of that act, or

(iv) has been notified of his liability to removal under paragraph 9 of Schedule 2 to that Act

3.32 Note that there is no 'reasonable explanation' proviso, and the subparagraph will therefore apply even if there is a perfectly good explanation as to why the asylum seeker did not apply until she had been refused leave to enter etc. However, note the following comments to Parliament

> *"Let me take the example that I have of the student who completes a course. He is due to return to another country. He refuses to go at the point of deportation and seeks asylum. The proposition in the Bill is that he should be put through the accelerated procedure. The adjudicator hears the case. If in the case put to the adjudicator there is good reason why he should not have received a certificate in the first place, the adjudicator could set the certificate aside."* (Home Office Minister of State, HL Committee, 30.4.96, Col 1499)

3.33 Given the lack of a 'reasonable explanation' proviso, the above statement must seemingly be taken to refer to the adjudicator reviewing the exercise of the discretion to certify. The absence of such a proviso might also mean that asylum seekers who

fear return because of circumstances which only arose after one of the events listed in subparagraph (c) *(refugees sur place)* may be certified. However, the Home Office Minister of State told Parliament that claims would not be certified where the Secretary of State was satisfied that the claim been made as a result of a genuine change of circumstances, though she thought that such a coincidence would be rare. (HL Report Stage, 20.6.96, Col 527)

3.34 It was also confused during the passage of the Bill that the provision

> *"is not designed to cover the chap who enters the country and who does not apply for asylum immediately at the port of entry, but who then makes a full and proper claim."* (HC Committee, 16.1.96, Col 172)

3.35 If it appears that a claim has been certified in such a case, then this assurance should be relied upon.

(d) it is manifestly fraudulent, or any of the evidence adduced in its support is manifestly fraudulent

3.36 The Home Office disputes the asylum seeker's credibility in the majority of refusal letters but this is not sufficient to justify certification, particularly given the burden and high standard of proof required to prove "manifest" fraud. Note also the case-law regarding the relevance of a credibility finding to whether a claim is frivolous and vexatious under the old paragraph 5.

3.37 With respect to allegations that documents from the country of origin submitted in support of a claim are manifestly fraudulent, see the discussion in Chapter 14.

(e) it is frivolous and vexatious

3.38 Parliament was given the following indications:

> *"The term 'frivolous' would apply to a claim that was based on facts that differ from and are wholly incompatible with those cited by the applicant, whether in a previous claim, in contact with the authorities, or, indeed, in the same application. It would apply to claims from manifestly safe countries such as other European Union states.*
>
> *"The term 'vexatious t would apply when a failed asylum seeker mace a repeat claim which did not differ significantly from one which had already been rejected and to multiple claims in several identities."* (HC Committee 16.1.96, Col 139)

3.39 Certifying as frivolous because the Home Office alleged that the appellant had made inconsistent statements in support of her claim would contradict the assurance that cleans would not be certified simply because the Home Office found them not credible. The use of the term "manifestly safe countries" appears to create an unwritten ultra white list. Any asylum seeker from a western country would normally be relying upon exceptional circumstances, and it could probably be argued in such a case that the general safety of the country was irrelevant.

3.40 If an asylum seeker made a fresh asylum claim, having failed in a previous claim, without leaving the country, and the Home Office alleged that there had been no change of circumstances such as to justify the fresh claim, then it would refuse to recognise that a fresh claim had been made. In that case, the asylum seeker's remedy would be judicial review. If the High Court found the Office position to be unreasonable, it is difficult to see how the Home Office could then certify the claim as vexatious on that basis.

3.41 It seems likely that the Home Office may certify as "vexatious" where a person goes to her country of origin after claiming asylum, and then returns to make a fresh claim. However, she may have returned because she thought (perhaps for the same reasons offered by the Home Office) that she was no longer in danger but was proved wrong, or compelling personal reasons may have necessitated her return. In such circumstances, certification on this ground should be disputed.

Victims of torture

3.42 Regardless of whether the Home Office can prove any of the criteria set out above, sub-paragraph 5 provides that it may not certify the claim if:

> *'the evidence adduced in its support establishes a reasonable likelihood that the appellant has been tortured in the country or territory to which he is to be sent.'*

3.43 Note that if there are substantial grounds for believing that there is a serious risk that the asylum seeker will be tortured for a non-Convention reason, the Home Office have undertaken that she will be granted Exceptional Leave to Remain (though ensuring compliance with that undertaking is often far from straightforward).

> *"Let me give a clear undertaking ... that we will not send people back when there is a reasonable belief that they will face torture."*(HC 21.2.96, col 420)

3.44 It is quite conceivable that there will be few cases where the Home Office accepts that this paragraph applies when refusing the asylum claim. Where it certifies despite the claims of torture, the matter must be determined by the adjudicator. In some appeals, it will be difficult to separate the issue of whether this paragraph applies from the substantive merits of the appeal, as both may depend on the appellant's credibility. You may not wish to request a preliminary hearing on this issue, as it may well rest upon a general finding as to the appellant's credibility. However, if you obtain a medical report which supports torture, you may wish to dispute certification as a preliminary issue solely in reliance on the report

3.45 The Home Office gave assurances during passage of the Bill that:

> *"the very greatest importance and weight ... is attached to any evidence of torture, especially when supported by a medical certificate."* (HL, 23.4.96, Col 1058)

3.46 It also stated that:

> *"Medical evidence submitted after an initial refusal win be fully considered If the refusal is maintained, reasons for doing so would normally be given in writing."* (Home Office Minister of State, HL 30.4.96, Col 1563)

You may want to require the Home Office to comply with this undertaking, if submission of medical evidence does not result in withdrawal of certification. Refer also to the discussion on applying for an adjournment to enable medical evidence to be produced, in Chapter 12.

4. **Time Limits for Lodging Notice of Appeal**

4.1 If the Home Office certifies your client's claim as one to which the special appeals procedure should apply AND your client is detained when the refusal is served AND it is served on her in person, then your client has only two working days in which to lodge a notice of appeal.

4.2 In all other cases (except out of country appeals) the time limit for lodging notice of appeal against a refusal of asylum is seven working days.

4.3 There is no meat in submitting detailed grounds of appeal before the time limit. You can submit detailed, grounds, representations or a skeleton argument at a later stage. The important thing is to ensure that the time limits are met. The following is sufficient:

> *"The Secretary of State's decision is in breach of the United Kingdom's obligations under the 1951 Convention relating to the Status of Refugees."*

Appealing out of time

4.4 If you do find yourself in a position where the time limit has expired, you should lodge a Notice of Appeal immediately. Rule 5(6) states that:

> *"Where any notice of appeal is not given within the appropriate time limit, it shall nevertheless be treated for an purposes as having been given within that time limit if the person to whom it was given in accordance with this rule [an immigration officer or the Secretary of State] is of the opinion that, by reason of special circumstances, it is just and right for the notice to be so treated."*

4.5 When you are appealing out of time and you consider the above criteria are met, you should submit representations to that effect. However, do not delay lodging the Notice of Appeal while you are preparing such representations, as this may prejudice your client if you have to ask an adjudicator to extend time. Instead, submit the Notice of Appeal, and indicate that representations in respect of the day are being prepared. If the Home Office does not treat the appeal as in time, the adjudicator may extend the time limit. However, the test which he must apply is worded differently. Rule 41(2) states that:

> *"A special adjudicator shall not extend the time limit for giving notice of appeal except where it is in the interests of justice and he is satisfied that the party in default was prevented from complying with the time limit by circumstances beyond his control."*

4.6 The adjudicator cannot therefore directly review the refusal of the Home Office to accept that the appeal should be treated as lodged within time because of special circumstances. This could only be done by way of judicial review. It is not clear, however, whether the different wording is supposed to provide for a significantly different test.

4.7 The most common cause of late appeals will be mistakes by representatives. This will normally be beyond the appellant's control. Ignorance of the time limit or ignorance that time has started no run should also render compliance with the time limit beyond the appellant's control.

4.8 It will virtually always be in the interests of justice to extend time. While crimes against humanity can disentitle your client to the Convention's protection, it is hardly just that failure to submit a form within seven days should have the same effect.

4.9 The question of whether the adjudicator should extend time will often be decided by way of preliminary issue. If you are asked to submit written representations, then you must do so in time, and they must explicitly address both limbs of the test (i.e. why it is in the interests of justice, and why the failure to lodge in time was beyond the appellant's control).

5. **The Respondent's Bundle**

5.1 Rule 5(8) states that:

> *"Within 42 days of receipt of the notice of appeal (whether or not the notice was given within the time limit, the immigration officer or (as the case may be) the Secretary of State shall send to a special adjudicator and the appellant -*
>
> *(a) the documents specified in paragraph (3)* [being the notice of appeal]
>
> *(b) the original or copies of any notes of interview;*
>
> *(c) the original or copies of any other document (except statutory material) referred to in the decision being appealed.*
>
> *and, in a case where the time limit specified above has not been complied with, the Secretary of State shall notify the appellant and the special adjudicator why it has not been complied with."*

5.2 Scrutinise the Respondent's bundle to determine whether it contains all these things.

5.3 The Home Office's standard practice has been to remove the pages of the asylum interview record which list the appellant's family members. This, it is claimed, is done to protect confidentiality. In fact, if the details relating to family members reveal anything prejudicial to the appellant's case, then the HOPO will usually supply them at the hearing and proceed to cross-examine on them. You should therefore always request the pages relating to family members prior to the hearing if they have been omitted, pointing out that the practice is contrary to the rule 5(8) which require that the appellant be supplied with any *notes of interview*.

5.4 See also under Chapter 7 as to documents referred to in the refusal letter but not included in the bundle.

5.5 Check that pages of interview notes have not been omitted accidentally. This sometimes happens when an immigration officer has continued a note on the reverse side of the page, but only one side has been copied.

5.6 All documentation submitted to the Home Office by the asylum seeker in support of her claim, such as statements, and documentation from the country of origin, should have been included in the bundle. It is important to check that the Home Office has complied with its obligations in this respect. Such documentation can be voluminous and the current charge imposed by the IAA for producing photocopies on the day of the hearing is £1 per page.

5.7 There is no sanction if the Home Office fails to comply with the time limit set out in the rule, except that it must provide an explanation. However, failure to so comply might obviously be relevant to a request for an adjournment.

6. **Directions**

6.1 The Rules give the adjudicator new and wide-ranging powers to make directions to all parties regarding the conduct of the appeal. Rule 23(4) states that:

> *"Directions given under this rule may - (a) relate to any matter concerning the preparation for a hearing and, in particular, may specify the length of time allowed for anything to be done."*

6.2 You must answer requests for directions within the time given by the IAA. If you are unable to provide the relevant particulars within the time limit, then you should write to the IAA explaining why. If you can give partial particulars then do so, and indicate that further particulars will be provided when available. The consequences of failure to comply with directions are discussed below.

Hearing centre

6.3 Rule 23(4)(b) gives the IAA the power to specify the place where the appeal shall be heard. This is unsurprising. However, in some cases, appeals are listed at hearing centres far away from where the appellant lives. Particularly given that Income Support has been withdrawn from appellants, the increased cost of reaching such hearing centres may impose an unreasonable and sometimes insurmountable burden on appellants. If that is the case, then you should write to the IAA pointing out that your client has no means of over-coming those obstacles and asking for a closer hearing centre.

Preliminary issues and pre-hearing reviews

6.4 Rule 23(4)(c) states that directions may:

> *"in particular, provide for -*
>
> *(i) a particular matter to be dealt with as a preliminary issue;*
>
> *(ii) a pre-hearing review to be held;"*

6.5 Whether to use the preliminary issue procedure to dispute certification is dealt with under that chapter 3. The Home Of flee may often apply for issues about out of time appeals to be dealt with as preliminary issues.

6.6 Rule 35(1)(c) states that an appeal may be determined without a hearing where

> *"a preliminary issue has arisen, and, the appellant having been afforded a reasonable opportunity to submit a written statement rebutting the respondent's allegation -*
>
> *(i) the appellant has not submitted such a statement, or*
>
> *(ii) the special adjudicator is of the opinion that matters put forward by the appellant in such a statement do not warrant a hearing;"*

6.7 It is therefore extremely important that any written statement requested is submitted on time and sets out all facts and evidence relied upon to dispute the Respondent's allegation. If it is your view that the preliminary issue should be determined by a hearing, then you should say so, and give your reasons, for example, where the issue may turn upon the appellant's credibility.

6.8 A pre-hearing review may be listed to determine the preliminary issue, to review preparations for the substantive hearing, to hear a dispute regarding directions, or for any other reason. The major difficulty with pre-hearing reviews is of course the absence of legal aid for representation. The alternative of a MacKenzie friend is particularly unsatisfactory, since the pre-hearing review will normally consist of submissions to the adjudicator, and a MacKenzie friend is not supposed to address the adjudicator directly.

6.9 If a pre-hearing review is listed and it is not possible to arrange representation, then you should write to the IAA explaining the absence of legal aid and requesting that the matte be dealt with in writing. Note that there is no power provided in rule 35 to dispense with a hearing because an appellant or her representative have failed to attend a pre-hearing review. The IAT held under the previous rules that it is not open to an adjudicator to proceed to determine an appeal because the appellant has failed to attend to a hearing which has been listed as a pre-hearing review.

Particulars

6.10 Under rule 23(3)(c)(iii), adjudicators may direct

> *"the furnishing of any particulars which appear to be requisite for the determination of the appeal;"*

6.11 Obtaining an order for particulars against the Home Office is dealt with in chapter 7.

6.12 Rule 23(4)(d) lists further directions which the adjudicator may *"in particular"* make. Those are dealt with in turn below.

Witness statements

> *(i) statements of the evidence which will be called at the hearing specifying in what respect the services of an interpreter will be required*

6.13 Preparing witness statements is dealt with separately in chapter 9, as is the use of interpreters, and in particular the importance of ensuring that the right interpreter is requested (see Chapter 19).

Bundle of documents

> *(ii) a paginated and indexed bundle of all the documents which will be relied on at the hearing*

6.14 This should be done whether or not a direction is issued. To fail to do so will only annoy the adjudicator and hinder your submissions. Ensure that the pagination is legible on the copied bundle which is submitted to the adjudicator.

6.15 Some representatives submit evidence to the IAA piecemeal as and when they receive it. This wastes the time of both the IAA and the representative. None of it will be read by the Adjudicator who will hear the case until he is given the file shortly before the hearing. The material will have to be resubmitted in a paginated indexed bundle prior to the hearing. Therefore there is little point in submitting the material twice as long as proper records are kept of when you received it.

6.16 If you are representing in a number of appeals where the same documents are relevant, you may wish to submit a single bundle to the IAA and the HOPO Unit, and state in which appeals you will be relying upon it. This would save the cost to your client or the Legal Aid Board, of repeatedly photocopying the same bundle, and the IAA from repeatedly filing the same bundle. However, you must ensure that the bundle is genuinely relevant to each appeal and also get the IAA's written agreement in advance, and give notice by recorded delivery to both the IAA and the HOPO Unit of those appeals in which you will rely upon the bundle. Experience suggests that the bundle often does not reach the right appeal, and unless you have obtained such agreement and given such notice, the adjudicator may blame you.

Skeleton arguments

> *(iii) a skeleton argument which summarises succinctly the submissions which will be made at the hearing and cites all the authorities which will be relied on identifying any particular passages to be relied on*

6.17 The Legal Aid Board has confirmed that it will consider applications for Green Form legal aid for the production of skeleton arguments, and will consider disbursements in order to enable the advocate presenting the case to draft the skeleton argument.

6.18 Given that you will probably also have been directed to produce written witness statements which will set out your client's evidence, it should be neither necessary nor appropriate for the skeleton to reproduce the evidential basis for the claim. Unless there are complicated legal arguments involved, a short skeleton should be sufficient, listing the Convention grounds upon which the appellant relies, a brief reference to the factors contributing to a present well-founded fear, an indication of the basis on which the refusal letter is contested, a reference to any expert evidence and country of origin reports, and the authorities, including any particular passages, which will be relied upon (the last being mandatory under the rule). You may wish to deal in greater depth with the authorities and country of origin materials, depending on the case.

6.19 If your client simply cannot afford to pay for the production of a skeleton argument legal aid is refused,, and it is not possible to arrange for this to be done on a pro bono basis, then it would be appropriate to write to the IAA, explaining this. Given that the rules provide that directions should not be made in respect of an unrepresented appellant, unless the adjudicator is satisfied that he will be able to comply with them, it would appear absurd that an appellant who was able to afford some representation

should be penalised because she is not able to afford to have the representative produce a skeleton argument. You can also argue that your client is not represented in respect of preparation of a skeleton argument, as she cannot afford such representation.

6.20 An alternative to a skeleton argument and chronology may be to draft a written statement or affidavit from the appellant which deals with the points suggested under "skeleton argument" (see Chapter 9). Legal aid should also cover such a statement by the appellant.

6.21 If you do so, you should write to the IAA pointing out that no separate skeleton argument and chronology is being submitted as the appellant has made a statement which includes the relevant information.

Time estimate

(iv) an estimate of the time which will be needed for the hearing of the appeal

6.22 This is obviously dependent upon the HOPO as well as upon you. You should allow for a reasonable but not excessive period for cross examination in your time estimate, and might want to expressly indicate how much time you have allowed. You may wish to state that the time estimate is based on the assumption that the Home Office will not seek to raise new issues at the hearing. If witnesses will be giving evidence through interpreters, you should take into account the extra time this will require.

6.23 The IAA's current practice is to request a time estimate when the notice of hearing is issued. For obvious reasons, you will often not be able to give an accurate time estimate at that stage. This is recognised by the IAA. You must respond to such directions, but you may state that your estimate is subject to change.

List of witnesses

(v) a list of the witnesses who will be called to give evidence

6.24 Again, current practice is to direct that such a list be provided within 28 days of the Notice of Hearing. If you are asked to provide those details before you know who you will be calling, then state any that you presently intend to call, and state that the list is subject to change but that any change will be communicated to the IAA You should certainly not be prevented from deciding to call an additional witness after you have given this list to the IAA, but you should inform the IAA as soon as possible of any change to the number of witnesses.

Chronology

(vi) a chronology of events

6.25 The chronology should include only key, and preferably uncontentious dates, and avoid those dates which may have to be established by evidence at the hearing. If you have submitted a written witness statement, then your chronology should be expressed as a summary the most important dates from the witness statement. By incorporating

the chronology into the witness statement, you avoid any difficulty in obtaining legal aid for a separate chronology. Obviously, as with witness statements, your chronology must be checked against all other statements and evidence to ensure that there is no inconsistency between your chronology and any other material.

Limiting issues, evidence, and submissions

6.26 Rule 23(4)(e) has caused a great deal of concern, as it gives an adjudicator the power to limit issues, evidence and submissions, without setting out the circumstances in which the adjudicator would be justified in using such powers. Fetch item which the adjudicator may limit is dealt with below in turn.

> *(i) the number or length of documents produced by, for example, requiring the appellant to specify to the respondent the passage or part of any document on which he will rely, especially if the document has to be translated into English for the hearing*

6.27 It is in any event good practice to indicate the passages from a document upon which you will rely. However, it cannot be right to set an arbitrary limit on the number of the number of documents submitted, regardless of whether they are relevant or not. If any such limit were imposed, then it should be made clear in writing that the appellant objects to such limitation and all relevant documents should be submitted in any event.

> *(ii) the length of oral submissions*

6.28 This provision may be used to seek to pressurise representatives into relying for the most part on a skeleton argument. If so, it should be resisted. Consideration of the evidence is a vital part of the determination of the appeal, and where the appellant or other witnesses will give oral evidence, you obviously cannot comment on the evidence by way of skeleton argument before the hearing. Nor, in the absence of a skeleton argument from the Home Office, can you deal properly with its legal submissions (or any new issues it may be allowed to raise at the hearing).

6.29 There have been instances of directions being issued well prior to the hearing setting a time limit for submissions. If you receive such a direction, you should make clear immediately that you object to it, and if, in your view, you have relevant points still to make, should object in the strongest terms to any attempt to cut off your submissions because you have passed a particular time limit Such arbitrary directions are a very different matter from an adjudicator indicating to a representative during submissions that he does not regard your submissions as relevant for whatever reason. Your purpose is to persuade the adjudicator, and if he is willing to assist you by indicating his view during your submissions, you should take advantage of this, though at the same time, ensuring that you put the points which you feel must be put.

> *(iii) the time allowed for the examination and cross examination of witnesses by, for example, allowing a witness statement to stand as evidence in chief*

6.30 An adjudicator can direct that a written witness statement is submitted under rule 23(4)(d)(i). It would, however, be quite objectionable for an adjudicator to refuse to

allow the witness to supplement her written statement by giving oral evidence in chief. An asylum seeker has a right to an oral hearing of her appeal, which must include putting her own case to the adjudicator as well as fending the HOPO's questions. Any attempt to limit evidence in chief in this way should be vigorously opposed. This is discussed further in Chapter 20.

(iv) the issues which will be addressed at the hearing

6.31 In determining the appeal, the adjudicator cannot exclude any issue which the appellant raises which might place her within the Convention. However, such directions could be used to encourage the Home Office to narrow the issues in advance (see Chapter 7).

Other directions

6.32 As mentioned above, current practice is to issue directions with the Notice of Hearing to which you must respond within 28 days, requiring not only details of witnesses, and time estimate, but also the name of representative, and whether you will submit medical evidence. It will obviously be impossible to answer those questions accurately months or years before the hearing date and this is recognised by the IAA, which has indicated that the purpose is merely to filter out those appeals which are not being pursued. You must reply but details can be changed later, or you can reply "to be advised".

Directions to the Home Office

6.33 It is part of your duty to seek to ensure that directions are applied fairly and equally as between appellant and respondent. The initial draft of the nobles provided for many directions to be made only against the appellant. This was obviously unjust and after representations was recognised to be inappropriate so that the final version of the Rules was amended so as to allow for all directions to be issued to each party.

6.34 However, some automatic directions appear to have failed to reflect this vital amendment, for example, by directing only the appellant to provide a skeleton argument. You should always object if it appears that directions are not being fairly applied to each party, particularly in relation to items such as skeleton arguments which may be extremely useful in determining how the Home Office will put its case. It is blatantly unfair that you should have to provide legal submissions and authorities in advance while the Home Office does not.

Procedure upon non-compliance

6.35 Specific provisions are made in relation to preliminary issues and are discussed above. Rule 24 states that:

"(1) Subject to paragraph (2), where a party fails to comply with a direction given under rule 23 the appellate authority may -

(a) treat that party as having abandoned the appeal or, as the case may be, treat the decision appealed against as having been withdrawn;

(b) proceed with the appeal; or

(c) determine the appeal without a hearing under rule 35."

6.36 An adjudicator is not entitled to treat an appellant as having abandoned her appeal because she failed to attend a hearing, where there was a positive indication from the appellant, for example by way of letter from her representative, that she had not in fact abandoned it. It will obviously be wrong to treat an appeal as abandoned by reason of failure to comply with directions where that is obviously not the appellant's intention. Where, for whatever reason, a direction is not going to be complied with, it is vital that you write to the IAA, giving the reason for non-compliance, and confirming that the appellant continues to prosecute her appeal.

6.37 Rule 35 states that an appeal may be determined without a hearing where, inter alia,

"the special adjudicator is satisfied, having regard to -

(i) the material before him;

(ii) the nature of the issues raised; and

(iii) the extent to which any directions given under rule 23 have been complied with,

that the appeal could be so disposed of justly."

6.38 It will be seen that non-compliance with directions is not a pre-condition for determining an appeal without a hearing under this provision. It is difficult to see how failure to comply with directions, such as a direction to produce a written witness statement or skeleton argument could make an appeal more amenable to determination without an oral hearing rather than less. And given that adjudicators have until the 1996 Rules been able to determine appeals without any of the directions set out in Rule 23(4)(d), it is difficult to see how non-compliance could prevent an appeal being disposed of justly by way of an oral hearing.

6.39 There is no indication that determination under rule 35 can be used as a punishment for failure to comply with directions, and every indication that it should not be so used, given the criteria set out in rule 35, and in particular that the improbability that Parliament would have intended to introduce such a draconian punishment without express wording.

6.40 The rules do not give an adjudicator the power to draw adverse inferences from failure to comply with directions. While it may be that an adjudicator might be entitled to draw an inference where it was appropriate to do so, it would be quite inappropriate to draw adverse inferences as a matter of course from non-compliance with directions.

6.41 Adjudicators may well draw adverse inferences from failure to provide particulars. However, what adverse inference can be drawn from a failure to produce a skeleton

argument setting out the submissions which the representative will make? Rule 24 (2) states that:

> *"Where the appellate authority is satisfied that the party in default was prevented by circumstances beyond his control from complying with the direction given under rule 23, additional directions may be given under that rule."*

6.42 The point of this paragraph is unclear. The somewhat unlikely implication would appear to be that where the non-compliance was not a result of circumstances beyond the party's control, no further directions may be given, even assuming the adjudicator goes on to hear the appeal.

6.43 Note that the paragraph does not state that where non-compliance was caused by circumstances beyond the party's control, the adjudicator should proceed to hear the appeal. However, this would appear to be the clear indication, and in any event, it would be inconceivable that an appeal would be treated as abandoned, where non-compliance was not the appellant's fault.

6.44 If you fail to comply with directions, a standard letter may be sent requiring you to indicate within a specified period of time why the directions have not been complied with, and indicating that the adjudicator may take any of the steps outlined in rule 24. You MUST respond to such a letter, making clear that the appeal is being pursued, that the appellant intends to attend the oral hearing, and giving reasons for not having complied with previous directions.

7. Obtaining Disclosure from the Home Office

7.1 Much of the purpose of discovery and requests for particulars in civil litigation is to find out as early as possible exactly what case the other side will present at trial. In asylum appeals, the situation is rather different because the Home Office often do not produce any further particulars or evidence at the hearing to support the allegations made in the refusal letter. It is not a case of flushing out now how the Home Office will substantiate their allegations at trial, because in the majority of cases they make no attempt to do so. The following passage from an adjudicator's determination is quoted in *The Risks of Getting it Wrong:*

> *"In this case the Secretary of State "understands" that if an individual is not politically active and is only involved in trade unions, he has no reason to fear persecution. I find some difficulty in following that argument and I do not know where he "understands" it from."* (paragraph 8.10.1.5.1)

7.2 However, you cannot discount the risk that an adjudicator may suppose that the Home Office would not make assertions which it was not able to support, and that such a view might influence his determination even if not expressed therein. Such assumptions may exist despite the fact that in practice, the Home Office proves incapable of producing evidence to support very many of its allegations. It is not your duty to persuade the Home Of flee to present a proper case. Just because the refusal letter makes a bald assertion which is neither sourced nor substantiated, you need not automatically request such substantiation by way of particulars. The proper course will often be to forcefully point out the impropriety of presenting a case against your client without any attempt to lead evidence to support it, and contrasting this with your evidence, including that of your client, refuting the allegation. If, as usually happens, the HOPO still refuses to offer evidence to support his case, even in the face of such a challenge, then you should argue that the allegation should be either withdrawn, or discounted.

7.3 However, the failure of the Home Office to offer any evidence to support its case may be even more powerful if it has been ordered to do so by the adjudicator, but has refused, and you should consider this option. It may persuade the Home Office to abandon its stranger allegations. The following appeared in a refusal letter quoted in "*No Reason at All"*

> *"The Secretary of State ... considered your account of crossing the Zaire River by canoe at night to be totally implausible. The Secretary of State is aware of the size, strength and considerable dangers posed by the river such as shifting sandbanks and crocodiles."* (page 8)

7.4 Confronted with a request for particulars of the alleged crocodile population, the Home Office was unable to comply. It withdrew the allegation, but then - illustrating the potential drawbacks in such requests for particulars - produced a wholly new set of allegations to justify refusal of the claim.

7.5 Like asking questions of witnesses, you should have a good idea both of any answer you are going to get and of answers which you will not get to a request for particulars. If the Home Office assertions as to country of origin are completely at odds with the

reports of organisations like the US State Department, Amnesty etc which the Home Office is unlikely to dispute (and indeed claim to have regard to when composing refusal letters), then a request for disclosure may well demonstrate that it is unable to support its allegations. If you have an expert report which comprehensively refutes allegations in the refusal letter, you might want to expose the evidence (or lack of evidence) on which the allegations were based. You may often wish to request particulars of an allegation that an arrest warrant or similar document is a forgery, particularly if you have an expert report which says it is genuine (see chapter 14).

7.6 If the refusal letter claims that the Secretary of State has "caused enquires to be made" then you may want to ask what enquiries he caused to be made, of whom, and how they knew. Allegations about how particular opposition groups operate are often misreadings of publicly available books, which can be exposed as such if the source of the information is known. Your expert report refuting such allegations may be even more powerful if the expert can discredit the source of the allegation.

7.7 You might request particulars in respect of mixed legal and political arguments such as the "legitimate interest" argument discussed in chapter 2, or pseudo-legal allegations such as it being reasonable to expect a reasonable refugee to claim in the first country she comes to, or for the basis on which it is asserted that a genuine refugee would want her claim processed in, for example, Thailand rather than in the United Kingdom. As long as such standard reasons are not attacked, they will continue to be relied upon to refuse refugees.

7.8 Disclosure may also provide a means of pinning the Home Office to the case it will advance at the hearing, by requesting particulars of any arguments relied upon which are not in the refusal letter. As stated above, you should always object if you are directed to submit a skeleton argument and the Home Office is not. Alternatively ask for particulars of all legal sources, and the passages thereof, upon which the Home Office will rely. The Rules give an adjudicator an explicit power to limit the issues in an appeal. HOPOs often refuse at the hearing to define which issues are in dispute. The Chief Adjudicator has indicated to the Thanet House Users Group that requests for a such a direction will be welcomed.

Discovery

7.9 There is no general right to discovery in asylum appeals, beyond those documents which the Rules require the Home Office to serve (see Chapter 5). You may use rule 5 (8) (c) which requires all documents referred to in the refusal letter to be included in the bundle in order to obtain disclosure of documents which the Home Office has not voluntarily included in the bundle. For example, where the refusal letter states that *"The Secretary of State has seen reports wash show..."* these reports are unlikely to be included in the bundle, despite being referred to in the refusal letter. However, as discussed above, it is not your job to present the Home Office case properly, so think first about what your purpose is in requiring .

7.10 The Rules also provide that:

> *"when the appellate authority into consideration documentary evidence, every party to the appeal shall be given an opportunity of inspecting that evidence and taking copies if copies have not been provided pursuant to rule 23."*

7.11 The only exception is in relation to documents which would reveal methods used to detect forgery, in respect of which, see chapter 14.

Particulars

7.12 The rules applicable to requests for further and better particulars in civil cases do not apply to asylum appeals. The Rules give the adjudicator a very wide power to direct

> *"The furnishing of any particulars which appear to be requisite for the determination of the appeal"* (rule 23(4)(c)(iii))

7.13 This can therefore include particulars which would be refused in civil litigation as being requests for particulars of evidence, or which would be sought by means of interrogatories or notices to admit, for which there is no separate provision under the Rules. For example in *Al-Mass'ari* (HX/75955t94), the Chief Adjudicator ordered that particulars be given of the substance of communications between the governments of the United Kingdom and Dominica The submission by the Home Office that this was a request for particulars of evidence and therefore should not granted was rejected. You can, of course, only request particulars of the contents of such communications, not copies of the communications themselves as you have no right to discovery. The only way to procure the communications themselves would be by way of witness summons (see below).

7.14 You should always write to the Home Office requesting the particulars and giving a reasonable period for it to respond, before applying to the adjudicator for a direction.

7.15 If the particulars relate to an allegation which is central to the reasons for refusal, and the Home Office refuses to comply with the direction, then it would be quite appropriate to urge the adjudicator to use his power under rule 24 to decide the appeal in the appellant's favour without a hearing, to treat the decision as withdrawn, or, under Rule 23 (4) (e) (iv), to prevent the Home Office raising the issue at the hearing.

Witness summonses

7.16 Witness summonses have been sought in respect of Home Office interpreters and occasionally interviewing officers, where the appellant alleges either that the interpreting was inadequate or that the interview has not been properly recorded in the notes. However, before requesting such a summons, you should think carefully about what you will gain by examining the person. If you summon a witness then he will normally be regarded as your witness, which means that the restrictions on examination in chief will apply and you will not be allowed to ask leading questions on contentious issues. It also means that the HOPO's examination will be regarded as cross examination, and he will be allowed to put leading questions, even though the witness may be far more sympathetic to the HOPO's position than to yours.

7.17 In ordinary litigation, a representative will only be allowed to cross examine his own witness if the witness is declared hostile. This requires not only that the witness is giving unfavourable answers, but that he has no desire to tell the truth. It may be difficult to persuade an adjudicator to make such a declaration in respect of a Home Office employee. Adjudicators are not bound by any rules of evidence, and there is no reason why the rules in other jurisdictions should be applied inflexibly to asylum appeals. However, because of the rarity of witness summonses, the circumstances have not yet been explored in which a representative will be allowed to lead a witness whom he has summonsed.

7.18 There might be occasions when you wish to summons the author of the refusal letter. This is quite legitimate in that the refusal letter is treated as a written statement of evidence. Where the allegations in the refusal letter appear to be particularly absurd or disconnected to reality, it may be more persuasive if you demonstrate this to the adjudicator through your examination of the author. However, again you must think very carefully about the restrictions which may be imposed on your examination, and on whether you would be better off simply pointing out that the refusal letter is a wholly unsatisfactory piece of evidence which should be give little weight.

7.19 Home Office employees may often disobey a witness summons, and unlike refusal to produce particulars, the adjudicator has no express sanction under the Rules. However, in circumstances where a party is defying an order of the court, it will be appropriate to draw the strongest adverse inference against that party, and the adjudicator should be urged to do so.

7.20 If the witness will have to travel more than 16 kilometres from his home to the hearing centre, then your client will be responsible for the witness' costs.

Witness summonses to obtain discovery

7.21 The majority of witnesses summonses have so far been used, because of the absence of a power to order discovery, to obtain an order for production of documents which the Home Office is refusing to disclose voluntarily (normally one which you think might support your case). In *R v An adjudicator (Mr Care), ex parte SSHD* (1989) ImmAR 423, the use of summonses for this purpose was expressly approved by the High Court, and again by the House of Lords in *Abdi* (1996) ImmAR 288.

Legal aid

7.22 Legal aid ought to be extended to requesting particulars from the Home Office and to making a written request to the adjudicator for a direction. You will not, however, get legal aid to attend a pre-hearing review to decide whether the particulars should be directed or the consequences of failure by the Home Office to comply, unless you attend as a MacKenzie Friend. However, there is nothing to stop you making such representations in writing.

8. Home Office Evidence on Country of Origin

8.1 As discussed previously, assertions about country of origin information in the refusal letter will generally be unsourced and unsupported. Chapter 7 deals with whether and when to seek disclosure. Only in some cases does the Home Office subsequently submit evidence on country of origin.

8.2 The most common evidence submitted by HOPOs is the US State Department report for the relevant country of origin. They will generally do so where the report contains any indication that the human rights situation is improving or that the government has taken action to curb human rights abuses, promised to do so, or even criticised the human rights abuses of its security forces.

8.3 For this reason, you should always obtain and read the latest US State Department report (and preferably those for the last two or three years). It is quite common for the HOPO to quote very selectively from the report. Indeed, it is quite common for a US State Department report submitted by the HOPO to support your case, and even rebut some of the assertions in the refusal letter. For example, the HOPO might refer to the report having stated that the Government has set up a commission of enquiry into human rights abuses or to government ministers having condemned human rights abuses as unacceptable. However, the same report might state that torture of detainees remains common.

8.4 The HOPO might also produce press reports from British newspapers, for example stating that fighting has died down in a civil war. Occasionally, the HOPO will produce excerpts from Home Office briefings or reports or letters from the British Embassy or High Commission. If it is inconsistent with the evidence of independent organisations, you should ask the adjudicator to prefer the independent expert evidence over the evidence of one of the parties to the appeal. You should also ask for details of who produced the report, when it was produced, methodology, and sources, particularly what account was taken of the findings of organisations such as Amnesty.

8.5 If documentary evidence of this nature is submitted on the day of the hearing, you should always request an opportunity to take instructions on it from your client. You may wish to request an adjournment to consider the evidence or seek an expert opinion on it; If you have submitted your documentary evidence in good time rather than on the day of the hearing, your position will be strengthened in requesting an adjournment. If a direction has been issued requiring documents to be submitted in advance, and the Home Office has failed to comply, then, in the absence of a good reason for not doing so, you may consider asking the adjudicator to refuse to admit the documents.

9. **Written witness Statements**

9.1 Under rule 23, an adjudicator can direct you to submit *"statements of the evidence which will be called at the hearing"* and can limit *"the time allowed for the examination and cross examination of witnesses by, for example, allowing a witness statement to stand as evidence in chief"*.

9.2 Even if not directed to do so, there are advantages to submitting written witness statements:

- Your client can tell her story in a relaxed atmosphere, in her own time. This is particularly important if your client is inarticulate or unusually nervous and you are concerned that she will not be capable of doing her account justice in oral evidence.

- It reduces the risk of disputes arising over the recording of your client's evidence.

- The HOPO will sometimes effectively examine in chief whether you do so or not, the rationale seemingly being that an inconsistency is bound to slip in somewhere. By using written witness statements, you avoid your client having to give the same oral evidence twice, and you will often have considerable scope to add to that evidence in re-examination, as the HOPO will have opened the issues in cross examination (see chapter 22).

- If you do not submit a written statement, the adjudicator may urge you on the day to adopt in whole or in part the Home Office notes of the asylum interview as your evidence in chief (see below).

9.3 The maw disadvantages are seen to be that the witness does not get to put across her full case orally in front of the adjudicator and may not be able to do herself justice answering narrow negative questions in cross examination. Your client will also have less opportunity to become accustomed to giving evidence before cross examination. This is dealt with in greater detail in Chapter 20.

Drafting witness statements

9.4 The point of the witness statement is to put the necessary factual basis of your client's claim before the adjudicator in a manner which is credible.

Structure

9.5 Often the best structure will be chronological, starting off with the witness' upbringing and background, before moving on to the onset of her problems, the acts of persecution, her decision to leave, and her escape from the country. Even if the appellant is claiming persecution on multiple grounds, for example race, political opinion and social group, these fears will often relate to a single story which is best told as a single story. If the appellant fears persecution on more than one basis, and each relates to a distinct set of facts, the statement may be easier to follow if you deal with each ground of persecution in turn. For example, the appellant may have

suffered racial persecution over a number of years, but also fear persecution as a result of a relative's political activities. If they are effectively two separate stories, then it is better to tell two separate stories, rather than switch between the two in chronological sequence. If your client wants to describe how the general political situation deteriorated over a particular period, and then tell her own personal story of that period, again it may be easier to deal with the two in turn. The important thing is that whatever structure you choose is simple to follow, both for your client who may be cross examined on it and for the adjudicator.

Areas

9.6 The witness statement should normally deal with the points raised in the refusal letter. However, as discussed in chapter 2, if the allegations are wholly misconceived, then you should not be further misleading your client by putting the Home Office allegations to your client as if they were proven discrepancies. It is unfair, and your confused client, in the face of your assertion that she has contradicted herself when she has not, may feel forced to produce an artificial explanation for a non-existent discrepancy which subsequently falls apart

9.7 Sometimes, for example if the refusal letter is alleging implausibility, it may be appropriate for the statement to refer to other evidence, such as expert reports which you are submitting. Your client should not be pressurised into giving explanations for the actions of others, eg the security forces, because the refusal letter alleges (without evidence) that they would have acted differently. If all she can say is that it happened, then that is all she should say. However, she should deal with her own opinions to the extent that they are relevant. For example, if the refusal letter alleges that if she was of any interest to the authorities then she would have been caught leaving through immigration control, then you may want to submit expert evidence to confirm that it would be possible to leave the way she did. However, your client will have to deal with whether she thought at the tune that she might be caught, and if not why not, and if so, why she nevertheless decided to run the risk.

9.8 There are some areas which you will often want the statement to cover, whether or not any issue is raised in the refusal letter. These include:

- why she was released after any periods of detention (if she does not know, simply stating that she does not know);
- when she decided to leave the country, what made her decide to leave at that point, and why she did not decide to leave sooner,
- the explanation of any delay between her deciding to leave and actually leaving;
- how she avoided being caught during any period which she was in danger and why she would not be confident of avoiding being caught in the future;
- how she chose her escape route and what asks she thought were involved;

- why she chose to claim in the United Kingdom, or why she did not know she was being brought to the UK;
- if she has left her immediate family in the country of origin, whether she thinks they are at any risk, and if so, why she has left them;
- whether she has had any contact with anyone in her country of origin since she left the country;
- what would happen to her when she reached whichever port the Home Office would return her to, and whether there is any part of the country to which she could go and live without danger;
- why she whim win still be in danger, despite the time which has elapsed since she left the country.

Dealing with potential allegations not relied upon in the refusal letter

9.9 You will have to decide to what extent you will try to pre-empt the HOPO's cross examination, by dealing in the statement with the answers to questions you expect the HOPO to ask.

9.10 The advantages in doing so are generally thought to be that you promote an impression of openness and candour by voluntarily disclosing and dealing with weaknesses, that you rob the cross examination of force by leaving the HOPO to ask questions which have already been answered, and that you ensure that the witness is able to explain potential weaknesses in response to fair straightforward questions in a more relaxed and sympathetic environment. You are also in a stronger position objecting to the HOPO repeatedly putting the same question if it is a question which was also answered in evidence in chief.

9.11 The disadvantages may be that you signpost to the HOPO and the adjudicator your apparent concern about potential weaknesses which they had either not considered to be weaknesses or had failed to notice altogether. By appearing to go out of your way to limit the damage, you may convey the impression that the discrepancy carries an importance which it does not deserve. If you are confident that your client will be able to deal with the HOPO's question, then it may be better to let your client to do so, which might appear more effective by being more spontaneous, catch the HOPO off guard, and avoid any appearance that you are concerned about the issue.

9.12 It is essential, however, to be aware when making these judgements that even if the HOPO does not put a potential inconsistency in cross examination, adjudicators have been known to rely upon the inconsistency and dismiss the claim on the basis that no satisfactory explanation has been offered, sometimes without even indicating that they were concerned by the issue at the hearing. There is clear High Court and EAT authority that this is not a fair practice and that an adjudicator should not be allowed to dismiss an appeal on a point which he gave no indication he might consider adverse to the appellant *(Mayisokele* CO/3117/95, High Court and 13039, EAT, plus *Taiwo* 11953). However, there are also cases in which this principle does not appear to have been upheld. If you do not deal with a point in evidence in chief, and neither the

HOPO nor the adjudicator raise it, you win not be able to deal with it in re-examination.

9.13 The fact that you have sought explanations for potential discrepancies in evidence in chief in no way should inhibit you from attacking the discrepancy culture in submissions, and dismissing the discrepancies, even if they are discrepancies, as irrelevant to the substance of your client's claim.

9.14 It is your duty to put the positive case which entitles your client to the protection of the Convention. This should include explaining points, which absent an explanation, might reasonably appear inconsistent with your client's positive case. To what extent you cover points which are unreasonable but which you think the HOPO may take anyway must be decided in the context of the individual case and what will best reassure your client. But you should not give the impression that you are allowing the Home Office to dictate the ground upon which the case is fought by adopting its discrepancy culture and centring your evidence on a negative and nitpicking dissection of past statements rather than upon the central themes of the appellant's claim.

Detail

9.15 There is a general belief that the credibility of an account with the Home Office increases with the amount of detail that is provided. Some Home Office caseworkers appear to believe that genuine refugees will give a blow by blow account of their persecution, as if from the pages of a thriller, e.g.:

> *"I was grabbed from behind and pushed onto the ground. They were shouting something but I could not make it out. There were at least three of them standing around me. One put his boot on my head, and my nose felt it was going to break as it was pressed into the ground .."*

9.16 If your client is going to be comfortable both giving this kind of detail to you and repeating it in cross examination, then that is good and she should give it. However, for fairly obvious reasons (to all except the Home Office) many victims of persecution are largely incapable of offering this kind of blow by blow account of their suffering. You must differentiate between clients who are perfectly capable of giving details but just do not realise how much the Home Office (and some adjudicators) like that sort of thing, and those clients who are incapable of it. It is not a good idea to attempt to force detail out of your client of which she is uncertain or unhappy for inclusion in the statement. But spend time talking around different subjects and understanding your client's capabilities. There is nothing wrong with going into details on subjects on which she is happy, but not doing so where she is unsure, and there is nothing wrong with admitting in the statement that she is unsure, as long as she explains why.

9.17 Detail is, in any event, a two-edged sword. A detailed and articulate account has on occasion been attacked as well-rehearsed and contrived, just as a hesitant, reluctant or vague account may be alleged to be fabricated.

Language

9.18 You should also ensure that the statement reflects as far as possible the way your client speaks and the language in which she will give oral evidence. Do not present the statement in emotional or passionate language when your client's language is actuary matter of fact or under-stated. Do not use expansive, sophisticated or complicated language when your client is actually of very little education.

9.19 You should never embellish a witness' statement with standard passages which you think sound convincing and powerful, regardless of whether you get your client's agreement to the wording. Firstly, the adjudicator will have heard them before and is likely to recognise them, and they will influence his opinion of the whole statement, even though the remainder may be perfectly genuine. Secondly, if your client is able to explain your standard paragraphs at all in cross examinations the explanation will likely sound equally artificial. Do not include a paragraph thanking the British authorities for their kindness.

9.20 It is not only the Home Office which has stereotyped ideas about genuine refugees. Perfectly credible clients who give perfectly straightforward instructions have their statements ruined by their representatives dressing them up in what they apparently consider to be the language of a genuine refugee.

Consistency

9.21 The HOPO is likely to compare a written statement against any other documents for potential discrepancies or inconsistencies. **It is vital that any statement you submit is checked rigorously against**:

- **all Home Office interview notes;**
- **all statements and written representations previously submitted to the Home Of rice, whether by you or a previous representative;**
- **all documentary evidence submitted from the country of origin, for example dates of arrest warrants, and letters from family members;**
- **any medical reports, other expert reports or character references which have been or may be submitted.**

9.22 If you find apparent inconsistencies, then you must discuss them with your client. If the client wishes to correct a previous statement, an explanation must be given.

9.23 The Home Office will often claim that providing new information after the initial decision amounts to a "discrepancy". This is unjustified (see chapter 2). However, if your client does wish to rely on information to which she has not referred in her previous statements or interviews, then you should take a dated statement, but explain the allegations which may be made against your clients and give her time to consider before it is submitted. Genuine refugees may exaggerate their claims. A genuine fear of return is quite consistent with a willingness to embellish in order to stay, particularly if the Home Office has refused the claim with what appears to the refugee

to be an ridiculous belittling of her fears and experiences. Equally, however, you should not be overly frightened of unfair allegations of inconsistency from the Home Office. If your client has relevant evidence to give which has not yet been submitted then it will often be wrong to advise that it should not be submitted purely to avoid Home Office allegations of inconsistency. The Immigration Appeal Tribunal has been critical in cases such as *Kasolo* (13190) of such allegations based purely on an asylum seeker expanding on the reasons for which she seeks asylum You should, however, indicate why the information was not relied upon earlier, and be prepared to deal with such allegations at the hearing.

Legal and political submissions

9.24 As discussed in Chapter 6 on skeleton arguments, you may have your client deal in her statement with the legal and political issues which arise in her case. These may include reference to country of origin material, expert reports, and submissions on whether her experiences amount to persecution, and whether there is a Convention reason.

9.25 Any such submissions which are not based on your client's personal knowledge or opinions should commence with "I am *advised that ...", so* as to avoid the HOPO attempting to cross-examine your client on those issues.

Allowing interview notes to stand as evidence in chief

9.26 The adjudicator's directions may give you a choice between submitting written statements and relying on Home Office interview notes. As stated above, if you do not submit a written statement, you may be faced with pressure from the adjudicator to allow the Home Office notes of the asylum interview (or those parts of it which your client accepts as accurate) to stand as evidence in chief.

9.27 The main advantage in so doing is that relying only on the interview notes avoids any risk of inconsistencies slipping into the statement. It is preferable to allow accurate interview notes to stand, rather than submit an unchecked statement. But there are disadvantages to allowing the interview notes to stand. The standard structure of the asylum interview may not facilitate a logical and coherent presentation of your client's account, the interviewer may have been unsympathetic and uninterested, and your client may have felt intimidated. Even if the interview notes are accurate and comprehensive, consider whether it might be preferable carefully and accurately to transfer the information given at the interview into statement form. Apart from anything else, it will avoid the adjudicator having to decipher the immigration officer's hand-writing.

9.28 Remember that the HOPO will put Home Office interview notes to your client as inconsistent statements, whether or not they have been adopted as evidence in chief. However, if you have mistakenly agreed to the adoption of inaccurate interview notes you may have unfairly prejudiced your client's explanation for the inaccuracy.

9.29 Before deciding whether the interview notes can stand as evidence in chief, you should take full instructions from your client from scratch on all possible grounds for her claim. It is necessary but not sufficient to go through the interview notes line by

line with your client. The asylum interview is a standard set of questions which may not be appropriate to your client's claim It is wholly unacceptable simply to have the interview notes translated to the client and ask her if there is anything she wants to add or change, but it is essential, whether or not they are to be adopted, that your client is provided with a full written translation of the Home Office notes of interview.

'Short interview procedure'

9.30 The above discussion applies primarily to cases in which a client is given a full asylum interview after she has had the opportunity to obtain legal advice and representation. If your client has been dealt with under the short procedure (see chapter 2) and given one interview at port on arrival, and particularly where interviewed without representation, you should be exceptionally wary of allowing the notes of such an interview to stand as evidence in chief.

Statements of witnesses of fact other than the appellant

9.31 You should refer to Chapter 15 as to the use of witnesses of fact other than the appellant. It is particularly important to keep to the forefront of your mind what the witness is adding to the appellant's evidence, and to ensure that the witness' statement is directed towards those points. If the statement wanders into less relevant matters, you will be in a less strong position objecting if the HOPO embarks upon a more general fishing expedition for discrepancies.

10. **Taking Instructions on the Statement**

10.1 It is absolutely vital that you use an experienced professional interpreter. Often your client will bring someone from her refugee community to interpret for her. That person may well be more knowledgeable about the country of origin, and able to explain apparently surprising aspects of your client's story far more convincingly than your client can. This person's expert knowledge may be invaluable to the preparation of your client's claim. But an inexperienced representative may get into serious difficulties by using him as an interpreter. At worst, encouraged by the fact that the interpreter has all the answers, he will start directing his questions to the interpreter, eg "How was she able to escape" and the interpreter will start providing an answer without even translating the question. The representative will merely accept the answer, presumably because he assumes that his client will give the same answer. You should always address questions directly to your client, and insist that these are translated directly to your client. But this is not enough. For example:

> ***Rep****: "The Home Ounce is saying that the authorities would not have arrested you repeatedly just because you attend one demonstration. Were you surprised that they kept on arresting you just because you had attended one demonstration?" Interpreter:[Translates into client's language] Client: It did happen. I was arrested three times and tortured on every occasion. Interpreter: fin English] You see... Land continues to provide an explanation of why this might have happened]*

10.2 Your client has not answered the question. The interpreter has realised this, and is giving you the answer you are looking for. However, you assume that he is merely translating the client's answer. An even more dangerous position is where your client understands the question but gives an answer that the interpreter thinks is misconceived or will not please an adjudicator, and the interpreter therefore alters the answer when he translates it to you. The interpreter's answer will go in the statement You will not realise that your client does not properly understand - or even perhaps agree with - what her statement says, until your client departs from the statement in oral evidence, and the HOPO claims she is lying.

10.3 If you are using an interpreter who your client has provided then you must impress on the interpreter how crucial it is that he interpreters accurately. The interpreter may be able to add to your understanding - and perhaps your client's understanding - of the conditions in her country of origin. You should encourage any such information. After discussion, your client might quite legitimately change her views and her answer to a previous question. If there is a misunderstanding between you and your client which the interpreter is able to explain then he should explain it to both you and your client.

10.4 However, you must insist that any information volunteered by the interpreter is clearly differentiated from the translation of your client's answer, and that the interpreter translates directly and accurately everything both you and your client says. Your client is going to be cross-examined on her statement. The interpreter will not be able to answer these questions for your client.

10.5 It is also important that the interpreter's English reflects the manner in which your client speaks as accurately as possible, and for example if the way your client speaks is very simplistic, that the interpreter does not interpret into sophisticated English. You want the statement to be as faithful as possible to the way your client speaks. You also need to be able to judge whether she is worried about particular topics, so that you can plan how to phrase your questions in examination in chief to get the best response, and to be alert to any psychological difficulties your client may have (see Chapter 12).

11. **Expert Evidence**

11.1 The proposition that asylum should be refused to those whose persecutors behaved illogically, surprisingly or bizarrely might itself appear bizarre to us. In fact we might expect to be surprised by their behaviour. Neither might we wish to refuse asylum to victims of persecution, simply because we think we would have behaved differently. However, the Home Office will refuse asylum simply on the basis of unsupported allegations of implausibility. No evidence is led before the adjudicator to support those allegations. Adjudicators will simply be offered reasons why the sensible persecutor or sensible victim would have done things differently and asked to dismiss the appeal on the grounds of implausibility. In *Kasolo* (13190), the EAT the dismissal of appeals in such a manner, quoting gingham MR as follows:

> *"An English judge may have, or think he has, a shrewd idea of how a Lloyds Broker or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ships' engineer, or a Yugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibly assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he would have done or even - which may be quite different - in accordance with his concept of what a reasonable man would have done."*

11.2 However, the Home Office claim more than a shrewd idea of the behaviour of the reasonable sadistic Iraqi secret policeman, the reasonable corrupt Zairean prison guard, or the reasonable terrified torture victim, and the HOPO, as if competing in a strange parlour game, will often eschew evidence in favour of producing clever reasons suggesting what each would do next. However bizarre it may appear, such allegations are often the basis of the Home Office case, and you ignore such allegations at your (and your client's) peril. You must be prepared to refute allegations of implausibility in the refusal letter, and to support any other event which might appear strange or surprising (given that the adjudicator is not restricted to the refusal letter).

11.3 Your client is the obvious person to rebut allegations of implausibility. She was there after all and can give first hand evidence. The Secretary of State was not there and usually offers no evidence whatsoever. But the Home Office will seek to denigrate your client's evidence as self serving and partial and will urge the adjudicator to discount it for that reason. The HOPO will invite the adjudicator to make an adverse credibility finding purely on the basis that the account seems unlikely and it can therefore be inferred that she is lying. If the adjudicator accepts this argument, then relying upon your client's credibility to rebut allegations of implausibility becomes a vicious circle.

11.4 Normally, courts hold "expert evidence" appropriate where the issue upon which it is given is outside the knowledge or experience of the fact finding tribunal, and where the expert, through experience, training or qualifications, has acquired that knowledge and experience. Almost by definition, the events upon which an asylum seeker will rely will be outside the ordinary experience of the fact finding tribunal. Any

suggestion that your client needs corroboration to succeed is contrary to law and should be resisted. But if the adjudicator finds that your client is not a credible witness (as is often the case when evidence is given in a cross-cultural situation of experiences which do not appear to make logical sense), then you may lose your appeal if you cannot corroborate your client's account. In the absence of documentary proof or witnesses of fact, expert is all you have and all important.

Seeking expert evidence

Country of origin material

11.5 You may have to show for example that the Government's statements on human rights are contradicted by its deeds, that its investigations into human rights abuses by its security forces are ineffective, that it persecutes low-level activists as well as prominent officials, that persecution is common even against peaceful opponents, and that any investigation involves risk of torture.

11.6 The first place to look for country of origin material is in the publicly available sources. The adjudicator has access to the latest reports from the US State Department, Amnesty, Human Rights Watch, and UNHCR's Ref World database, and may well be familiar with such reports. However, you must always explain how such material supports your client's case. You need explicitly to set out why your client will be in danger from the human rights abuses, otherwise you will get the standard argument from the HOPO that you have not linked the human rights abuses to your client. Often you will be able to do this by reference to the general material. However, specific expert evidence that your client would be at risk will put you in an even stronger position.

11.7 You should also rely on LIT determinations in which appellants in a similar position to your client have been held to have a well-founded fear. Though not binding on adjudicators, they are of persuasive value, particularly where they have commented on country of origin reports which are before the adjudicator, and it may be an error of law to depart from an IAT determination where the material facts are equivalent without giving reasons for doing so.

11.8 If your client is claiming persecution on the basis of persecution of a party, tribe, ethnic group, or religious order, of which little or no information appears in the general country of origin material then you will need to obtain an expert report.

11.9 The examples below where expert evidence is appropriate are illustrated by common allegations from refusal letters, but they may equally be adopted by an adjudicator where the point has not been taken in the refusal letter.

The behaviour of the security forces

> *"The Secretary of State did not believe that you would still be of any interest to the Authorities five years after your last arrest, and three years after you left the country."*

11.10 This is a very common refusal reason and often adopted by adjudicators. You should consider whether you need to look for evidence that your client will still be in danger, even if the point has not been taken in the refusal letter. Often it is not explicitly dealt with in the publicly available material. You should be looking for a report from someone who has knowledge of the methods of the security forces, and who will confab once opened, files are not generally closed and that people are regularly detained on the basis of suspicions relating to events which took place several years before.

> *"The Secretary of State notes that you claim to have been arrested four times and ill-treated However, he also notes that on your own account you were released each time without charge because the authorities had no evidence against you and therefore the Secretary of State does not believe you would be of any continuing interest to the authorities."*

11.11 This is another common refusal reason. Clients often say that they must have been released because the authorities did not have any evidence with which to charge them. This may be correct. However, the Home Office will portray it as acceptance that the authorities have no further interest in, suspicion of, or desire to obtain evidence against the client, which is not usually what the client meant at all. You might be looking for a report confirming that it is common practice for the security forces to repeatedly arrest and ill-treat people without charging them whether for information gathering, informal punishment, or simply general intimidation, and that those who have been detained in the past are at risk of being targeted in the future. The fact that your client has been detained more than once in itself demonstrates the risks of repetition.

Agents of persecution

> *"The Secretary of State understands that the Government have condemned such attacks and that there have been prosecutions of those responsible, and therefore considered that you could have turned to the authorities for protection."*

11.12 As stated in Chapter 2, it is vital to be clear on what you are seeking evidence, and not to allow the Home Office to obscure the issue. You need an expert to comment on whether your client will be able to find sufficient protection to prevent her being persecuted, not merely whether the authorities are willing to provide what protection they can (though obviously tolerance of such attacks by the authorities will further strengthen your case). It should be quite satisfactory for you to obtain evidence that despite the huge numbers of arrests the Government is making, and the resources it has put into preventing the persecution, the persecution continues, and shows no sign of stopping. Indeed, your expert evidence may be strengthened by recognising that the Government has done its best to stop the persecution, because, assuming it has not succeeded, then it can be inferred that it is not likely to succeed.

Assertions about the behaviour of opposition groups

> *"The Secretary of State did not find plausible your assertion that the organisation to which you previously belonged would have pursued you to the capital city, simply because you left the organisation without permission."*

11.13 You may be lucky and find publicly available material from amnesty or Human Rights Watch which specifically addresses the question of whether this organisation are likely pursue someone just because she had left it. However, it is more likely that you will have to seek specific expert evidence on the point. You should always point out, however, that the Home Office has produced no evidence to support its assertion in the face of your client's first hand evidence to the contrary.

> *"The Secretary of State is aware that supporters of this group are quickly given military training and thrust into violent activities and that therefore your claim to have been involved for six years only as a sympathiser lacked credibility."*

11.14 Such comments are often based on misreadings of publicly available books and articles which are never submitted by the Home Office. Again you should ask that the argument be rejected on the basis that the Home Office has failed to submit any evidence to support it, but you can also obtain the comment of an expert. His report may be more powerful if you seek particulars of the source of the assertions.

Internal flight

11.15 Remember that your client can only be refused on the basis that she could move to other parts of her country if it would be reasonable for her to move there. Therefore, you may want expert evidence to show that your client would be unlikely to find work or accommodation in the areas to which it might be suggested that she flee.

Escape routes

11.16 Allegations in the refusal letter relating to the improbability of escape routes are common. For example, your client escaped from Iran by using a passport in her own name and bribing an immigration officer. The refusal letter states that

> *"The Secretary of State understands that the Iranian authorities mace checks on all persons leaving Iran, and therefore, if you were wanted by the authorities, you would not have been able to leave on a passport in your own name."*

11.17 Your client can obviously give evidence that this is exactly what she did. However, the HOPO, while submitting no evidence, will ask the adjudicator to guess that the escape route would not have been feasible, and dismiss the appeal accordingly. You should seek expert evidence on such assertions, for example from someone who can give an opinion on whether Iranian authorities are as incorruptible as the Home Office claims. You may also want to request particulars (see Chapter 7).

11.18 Amnesty will often have information on the feasibility of escape routes and methods from different countries. Interpreters, particularly if they have lived in the county of origin m recent years, may also be a useful source of information on this topic. The Home Office is likely to have a range of standard allegations about the improbability of particular methods of escape from particular countries. It is quite likely that you will be able to use the same expert evidence on escape routes for different clients.

The Appellant's views and experiences

11.19 One example is referred to above, whereby the appellant's accounts of her torture are rejected on the basis that anyone so tortured would have confessed. Strange though such allegations may seem, they happen, and therefore you have to seriously consider seeking evidence that it is not unusual for detainees to suffer such torture without confessing.

11.20 An extremely common allegation is that the appellant would have left the country sooner, if she had suffered the persecution which she claimed. There are a range of possible reasons. The appellant may have been reluctant to give up her family, dedicated to her cause, or unable to organise and fund her escape. Obviously, obtaining expert evidence on such matters is difficult, though you might consider seeking evidence on the cost and difficulty of organising escape, or on the strength and nature of family ties.

> *"The Secretary of State was of the opinion that your understanding of the aims of the organisation was extremely basic and therefore did not believe that you had the involvement which you claimed "*

11.21 Such opinion will often be based on the answers to the most basic and facile questions by an immigration officer. However, you may consider seeking expert opinion on the depth of your client's political knowledge (and possibly on the adequacy of the immigration officer's questioning).

> *"The Secretary of State notes that you did not seek or receive any medical treatment for your alleged injuries, which he considered cast considerable doubt upon whether you suffered the injuries which you claimed."*

11.22 You may want to obtain evidence to the effect that either there were no medical facilities available in the area, or that those which did exist would have been beyond the financial means of the Appellant, or that doctors were likely to refuse to assist her.

General assertions about the behaviour of refugees

11.23 Other reasons for refusal may relate to assertions about the normal behaviour of a genuine refugee. Some of those are discussed in chapter 2. No evidence will be presented to support these assertions Other prior to or at the hewing. Expert evidence to rebut these assertions will be more difficult to obtain from the usual sources. The Home Office should be attacked for making allegations without evidence, but evidence is also obtainable by being imaginative, see for example the statistics on the success rates of in-country applicants quoted in paragraph 2.27 above.

Finding experts

11.24 The first source of experts is the ILPA *Directory of Experts on Conditions in Countries of Origin and Transit.* This lists experts according to country. But you should not limit your search to the PUPA Directory of Experts. The range of useful experts is limited only by the range of experiences of asylum seekers and the range of allegations and assumptions which may be made by the Home Office and the courts.

11.25 University departments are often good places to look. For social group cases, geographers or anthropologists may be particularly helpful. They might also be helpful where your client says that she did not try to escape sooner because of family pressure which exerts an unusual pull in her country of origin. If your client's claim to be the person in a particular photograph is rejected by the Home Office, you may want to consider facial mapping. If an identity document is alleged to be forged, it may require forensic examination. Criminal lawyers may be a good source of experts in these areas. In the example quoted in paragraph 7.3 concerning crocodiles in the River Zaire, you might want to instruct a zoologist.

11.26 Expert directories such as *The Law Society Directory of Experts* and the *UK Register of Expert Witnesses* list vast numbers of experts, but the relevance of many to asylum appeals will be limited. For example, the listing for "Turkey" in the *UK Register will* produce only an expert vet. They may be a useful source, however, on issues such as document verification. The Law Society, the Academy of Experts, and other organisations also run help lines, though these tend to be expensive

11.27 You should also contact voluntary agencies and campaigning groups, both particular to the country of origin, and in relation to the category of persecution, for example gender or sexual orientation. However, you should ensure that any reports are objective (see below). Talk to other practitioners who have experience of the particular country or the particular type of persecution. Organisations such as Amnesty and Human Rights Watch may be able to point you to relevant experts as well as providing their publicly available material. Look at any relevant publicly available books, journalism, or research. Ask your client about possible sources from within her community.

11.28 People who have been granted refugee status may make very valuable expert witnesses, particularly if, for example, the refugee used the same escape method which is now being disputed by the Home Office.

11.29 Expertise is not a guarantee of objectivity. Those motivated by a particular agenda are likely to acquire expertise. An expert may, for example, be sympathetic to the current regime in the country of origin. Inclusion in, for example, the *ILPA Directory of Experts is* not a guarantee that the expert will not be unsympathetic to your client's case or even unsympathetic to asylum seekers in general.

11.30 Always talk the case over with the expert on a no-names basis before instructing him. The following are pointers as to what to look for in an expert:

- Publications, particularly recent and relevant ones

- Journalism, particularly for media with a reputation for objectivity
- Advising national or international bodies - obviously if an expert has at any stage advised the Foreign Office, or if HOPOs have produced excerpts from their work to back up their allegations, this is of particular relevance
- Academic research
- Participation in human rights
- Time spent in the country (preferably recent) - though note that some experts may have been refused entry to the country in recent years because of their activities, and this would not necessarily detract from the expert's value
- Experience of writing reports for litigation (if so, ask for details, and follow these up with the relevant representatives)
- Any comments by the courts on his reports, for example, if his evidence has been accepted by the IAT in a previous case
- Fees
- How long he will require to produce the report

Instructions and report

11.31 The expert must be clear as to what his report is for. You should set out fully what question you want answered. The question may or may not be specific to your client. A general question might be whether those arrested at illegal demonstrations are likely to be recorded and of continuing interest to the authorities. A specific question might be whether the client's knowledge of the aims or structure of an organisation was consistent with her claimed involvement. Remember the standard of proof. Often it will be sufficient if your expert can say that there is a serious possibility that something might happen, rather than whether something did or will happen. If so, that should be made clear to the expert (though he should not be discouraged from being more emphatic if the evidence warrants it). If the expert has been asked to comment on particular allegations in the refusal letter, then these allegations should be set out in the report, and you should ask that each allegation be explicitly accepted or rejected, whether in whole or in part.

11.32 Ensure that you have given the expert all the information he requires to form his opinion. If it appears to the adjudicator that the expert was unaware of a matter which might be material to his opinion, he may give the report less weight. Equally, however, it should be Sac clear that it is not necessary for the expert to reproduce the appellant's history except in so far as it is relevant to the opinion for which he has been asked

11.33 The report should contain the following:

- the particular question(s) which the report is to address
- a general account of the expert's qualifications, training and experience, aimed at showing both his ability to answer the question asked, and that he is a credible witness who can be relied upon to give impartial and objective evidence
- the answer to the question
- a detailed explanation of how the expert arrived at the answer, including particular aspects of his qualifications, training, experience or research which led him to the answer, and all sources upon which he relies
- a declaration that the expert has referred to everything which he considers to be relevant to his opinion

11.34 The most important part of the report (assuming that the answer supports your case) is how the expert knows. The report must demonstrate why the adjudicator should defer to the expert's opinion over that of the Home Office and over any contrary opinion which the adjudicator might hold or form. It must deal with any material which will be before the adjudicator which might support a contrary view. The expert should avoid commenting on areas of the claim are not within his particular expertise, as set out in his report. This will only damage his objectivity and the credibility of those opinions which he is qualified to hold. He may comment on an area which is outside his primary expertise but where he may be able to add to the adjudicator's understanding. However, the report should make clear that he is aware that it is outside his primary expertise, and why he can nevertheless assist the adjudicator on the topic.

11.35 Particularly where the expert has a history of campaigning or is connected to a campaigning organisation, it is important that he demonstrates that his report is impartial. He should avoid emotive comments, even in these areas which are within his stated expertise, and the sections setting out his qualifications should as far as possible demonstrate his reliability and objectivity.

11.36 When you receive the draft of the report, you will probably want to discuss it with the expert. It is your job, as representative, to ensure that the report properly addresses the issues, in a manner which will be of assistance to the adjudicator. The Law Society's Directory of Experts provides guidance as to the representatives role in the production of experts' reports, and extracts are set out below:

> ***"B10.8 Honing the report***
> *"A report produced by even the best briefed, best informed expert will usually need further refinement before it is ready for disclosure to the other side.*
>
> *"It is emphasised that, by further refinement, it is not suggested that you ask him to modify or distort his views in any way. It should be taken as read*

throughout that this section is solely about changes it is wholly legitimate to ask him to make for the sake of completeness and accuracy.

"Once you have received the initial report, you will need to go through the document in fine detail, and refer it back to the expert as often as necessary until you have it in its optimum form. Too often, it seems, lawyers fed awkward about asking their experts to make legitimate changes. Any reasonable expert should be happy to make reasonable changes to his report... Any expert who is particularly difficult and unco-operative during this process is probably one to avoid in the future.

"Do not accept the report at face value. Ask yourself whether your expert's views are supported by the facts. Are there factors he hasn't considered ? Are you convinced by his argument? If not, ask him to expand on it and if you are still not convinced, get a second opinion.

"If it is favourable, you should assess it critically. Where are the openings for the opposition? Is he painting too rosy a picture of your case? What has he left out? Has he addressed all the issues? Where is the evidence to support what he says?

"If there are inherent weaknesses in your case, you should make sure your expert addresses these in his report...(N)ever be tempted to allow your expert to mislead the court.

"You also need to check the report for clarity. Is it understandable to someone with no expertise in this particular field and no prior knowledge of the cased...

"Check it for consistency, even the most apparently minor details, such as dates and times...

"Although you can and should ask your expert to make necessary changes to his report, you must be careful not to overstep the mark into writing it for him. Unlike affidavits and other witness statements, expert reports must not be 'settled 'by the lawyers."

11.37 **There is nothing wrong with asking an expert to address a particular issue, as long as you do not ask him to misrepresent his own opinion**. You may ask him if he agrees or disagrees with a particular proposition and to include his comments on that proposition in the report. You may ask him to take out irrelevant material. You may ask him to take out emotive comments. You should not, however, write passages of the report. It must be the expert's own words.

11.38 Financial considerations often prevent an expert giving oral evidence (as legal aid is not available for attendance at the hearing) If the expert will not be giving oral evidence, then he will be unable to defend the report in cross-examination. It is particularly important therefore to put yourself in the position of the HOPO, and consider whether any aspect of the report is open to attack or any ambiguity might be exploited, and to ensure that the expert deals with those areas in the final report.

11.39 Though the presentation of a report should be irrelevant to the assessment of its contents, it is better to err on the safe side. Make sure you are provided with a well presented copy of the report and that copies you make for the court are of good condition on good quality paper. Check punctuation, grammar, and spelling. Check that information which the expert has taken from the appeal papers is correct, even if it is not material to the expert's opinion. Remember that unless you are calling your expert to give oral evidence, the report will be all upon which the adjudicator bases his assessment of the expert

11.40 You may occasionally have to decide whether to submit a report which has both favourable and unfavourable aspects. **However, there is no obligation upon you whatsoever to disclose an unfavourable report to the court or the other side and it would be contrary to professional ethics to do so**. If the report was so Hymning that you felt you could no longer present your client's appeal, then the appropriate course would be to advise your client to either withdraw her appeal or seek alternative representation.

Expert oral evidence

11.41 The immediate difficulty in calling an expert to give oral evidence is that it will not be covered by legal aid. If cost does not rule out oral evidence, you should form an opinion of how good a witness an expert will be. An expert who can produce superb reports may come over very unconvincingly as a witness, but be no worse of an expert for that. As a general rule, if you can overcome the problem of cost, and if you think the expert will be a convincing witness, including under cross examination, then it is better to call him as well as submitting a report. However, it is unusual to do so and often unnecessary if you have ensured that the report is comprehensive.

11.42 It would, of course, be possible to seek a witness summons in respect of your expert, if you considered that necessary or appropriate, though you would hesitate long before summonsing an expert against his will. Summonses may be useful where it is the expert's employers that are obstructing his attendance, and the expert himself is happy to appear.

12. **Medical Reports**

Whether to obtain medical evidence

12.1 Adjudicators will sometimes draw adverse inferences in their determinations from failure to submit a medical report, whether or not absence of medical evidence has been relied upon in the refusal letter. In many cases, this will be quite inappropriate. Torture is often inflicted in a manner designed to avoid leaving evidence. Also, there are simply insufficient suitably qualified medical experts to enable every asylum appellant to be medically examined. However, if such evidence may exist, then in some cases, particularly where you might otherwise lose on credibility, a medical report can make the difference between winning and losing. The following discussion uses the terms "medical report" and "medical expert" to refer to all reports on physical or mental condition, regardless of whether they are prepared by someone who is medically qualified.

Reports on physical conditions

12.2 Do not assume that because there are no physical marks, there is no point in having your client medically examined. For example, shrapnel from a bomb blast may have lodged inside a person completely unknown to her. Equally, however, do not make assumptions about the marks you can see. Ask your client about thorn. It is not unknown for a representative to instruct an expert to look at marks which appear to suggest torture only to find that the marks have a perfectly innocent explanation which the client would have explained if asked

Reports on psychological conditions

12.3 Be sensitive to the possibility that your client may have psychological difficulties. Listen to your client when you take instructions. Ask her how she is feeling. Clients will often say that they feel or have fat depressed or stressed They will often say that they cannot remember things very well because of depression or stress. Sometimes a client will have blanked out particular incidents. She may give what seem to be completely different accounts of an incident each time you speak to her. She may appear disturbed, unable to concentrate, unusually slow, unwilling to answer the questions you ask or incoherent.

12.4 It is very important in this respect that you are using an experienced interpreter so that you have the best possible idea of how your client is expressing herself. Some interpreters seem to consider it their job not only to interpret but to render the language coherent and logical. This means that you will be unaware that the client is using patterns of speech which may indicate psychological problems.

12.5 You should not only get a psychological report. Urge her to seek psychological treatment. Write a letter to her GP explaining the problems you are having with her, and asking that she be referred. This has the obvious benefit that your client will receive treatment that may benefit her health. However, it will also mean that she receives a prolonged period of treatment on the National Health Service by a doctor who will have a proper opportunity to understand your client, her symptoms and come to an accurate diagnosis. When a medical report is required, this doctor may be able

to produce a much more valuable report (and possibly at lower cost) than would a doctor who had not treated your client but saw her only for the purposes of producing the report. It will also avoid the HOPO attempting to discredit your client's psychological condition on the grounds that she is not undergoing treatment.

Further medical reports

12.6 Obviously, if a medical report was submitted on a physical injury, but the refusal letter for example makes allegations about discrepancies which you think might be explained by the client's psychological condition, then it will be necessary to seek a further report. You may also need a further report on the same subject where for example the original medical report confirmed scarring consistent with the wound having been inflicted by torture but the refusal letter alleges that it could have been caused by some accident. You would want to seek the expert's comments on the allegation. Equally, your medical report might have detailed psychological problems. However, the refusal letter might nevertheless rely on discrepancies which could be explained by your client's condition. If so, you should get the expert to directly address the relevance of the alleged discrepancies.

Finding and choosing a medical expert

12.7 Many medical reports on asylum seekers are produced by the Medical Foundation for the Care of the Victims of Torture and there are long waiting lists for reports from the Foundation. There is a tendency for some representatives in asylum appeals not to look beyond the Foundation and similar organisations for medical reports. You should cast your net as widely as possible. There is a huge range of experts available in the United Kingdom (and, if necessary, abroad), including many who are experienced in preparing medical reports for the purposes of litigation.

12.8 The most important thing is to consider exactly what you want and why you want it. What is important is the expert's forensic expertise in diagnosing the injuries which your client has suffer If you need information on a skin disorder, then a dermatologist may be the best person to go to. Plastic surgeons will often provide excellent reports on injuries inflicted by torture.

12.9 You may require a psychologist's report on whether your client can remember things and a neurological report on why she cannot remember them. You may want to consider psychometric testing. The range of issues on which psychological evidence is accepted in the criminal courts is constantly expanding, for example in relation to battered wife syndrome, and you should be alert to new openings. However, there are still adjudicators, as there are judges, who are suspicious of psychologists because they are not medically qualified. There have been dicta to the effect that psychologists/reports are not medical reports as referred to in the UNHCR Handbook. It is therefore particularly important that a psychologist's qualifications are explained in detail in the report.

12.10 Often, it will pay to talk to personal injury solicitors, as they are dealing on a regular basis with medical experts and will know not only where the expertise lies, but which experts are better able to produce that knowledge in a form which is useful and persuasive to a court. *The Law Society's Directory of Experts* and other expert

directories list vast numbers of medical experts. The Law Society also runs an experts help line, though this is expensive. APIL (the Association of Personal Injury Lawyers) has a directory based on recommendations by members. Increasingly, information is available to the general public on medical experts which may be of use (for example, the London Evening Standard publishes a review of what it claims to be London's top 100 specialists). As you build up relationships with medical experts which you use, then use them as sources of information on other experts. Even more importantly, talk to other representatives practising refugee law. You need to know how previous reports by your expert have been viewed by the courts. The Home Office has also on occasion taken to presenting its own expert reports aimed at rubbishing a psychological expert used by asylum representatives.

12.11 As with other expert reports, you should be alert to the risk, particularly when using experts not already widely used by asylum representatives, that they will be politically unsympathetic to your client, either because of the nature of her claim, or simply because she is an asylum seeker.

The report

12.12 As with other expert reports, the medical expert should be willing to discuss his draft with you, and make reasonable alterations, as long as it does lead to his opinion being distorted or misrepresented. If he is not willing to do so, you should consider using a different expert in future. If you have concerns in relation to a Medical Foundation report which for whatever reason cannot be dealt with by the writer, then it may be worth discussing them with one of the Foundation's full time staff.

12.13 The report should always start with a detailed explanation of the writer's qualifications. Many medical reports in asylum appeals leave out this essential element. Particularly if the report is written by someone who is not medically qualified, for example a psychologist, then the report must explain how he is qualified to make the diagnosis. It cannot be assumed that adjudicators will be familiar with which disciplines are appropriate to different issues, and a HOPO may otherwise allege that your expert does not have the correct qualifications.

12.14 A medical expert is just that. He is not a expert on asylum law. It is your job to ensure that the report addresses the correct issues. Doctors used to dealing with personal injury litigation, where the standard of proof is balance of probabilities, may be used to determining whether something is more likely than not. If you want to know whether there is a serious possibility that an injury was caused in a particular way, then you should ensure that this is what the report addresses (though of course you should welcome greater certainty where available).

12.15 A medical report on a physical injury should not regurgitate your client's entire account of her experiences in her country of origin. It should deal only with the nature of the injury and the likelihood that it was inflicted in the manner claimed. Of the report does reproduce your client's account, other than in respect of the injuries which the report is addressing, you would normally ask the expert to omit it from the final report It is irrelevant whether your client has given the expert a general account which is in some way inconsistent with other accounts she has given. A physical medical report should not be used as yet another test of the client's general credibility.

12.16 A psychological report may involve taking a full history from the patient and reproducing it in the report. However, it should not merely consist of a long statement taken from the client, followed by a short comment at the end. The history which is reproduced should still be limited to that which is relevant to the diagnosis, and should be closely tied to the diagnosis. It may obviously be inappropriate in such a report to omit aspects of the history which are inconsistent, and will obviously be so if inconsistency is part of what the expert is diagnosing.

12.17 ALWAYS CHECK ANY DETAILS IN THE REPORT AGAINST YOUR CLIENT'S STATEMENT. Whether or not inconsistencies stay in the report, you need to be aware of them.

Treatment of the report

12.18 The Home Office assured Parliament that:

> *"Very great weight is attached to any medical evidence"*
> (HLCommittee, 30.4.96, Col 1562)

12.19 However, contrary to the Home Office's undertakings, HOPOs have been known to urge adjudicator's to dismiss medical evidence with the most extraordinary allegations. For example, where the medical report clearly shows injuries consistent with the appellant's account and known torture methods in the country of origin, HOPOs have resorted to allegations that the injuries were self-inflicted for the purposes of the medical report. Obviously, if the Home Office were to seriously pursue this argument, it would render virtually any medical evidence of torture worthless. If it is raised, then objection should be taken in the strongest terms, and the matter raised with the Home Office after the hearing.

12.20 One of the most common justifications offered by adjudicators for dismissing positive psychological reports is that the expert has to rely on the account given by the subject of the report. If the adjudicator finds that the appellant has fabricated her account, then the expert's analysis, based on that fabricated account, is said to be of no value. Where the purpose of a psychological report is to assist in showing persecution in relation to an appellant who may otherwise not be found credible by an adjudicator, it is therefore essential that the writer is made aware of this possibility, and ensures that the report deals with it. If the expert actually cannot say more than if the client's account is true, then she is probably still suffering from the after-effects then it is probably not worth submitting the report.

12.21 It is fairly common for adjudicators to say simply that they reject the explanation offered in the medical report for discrepancies. Therefore, as in non-medical expert reports, it is vital that a medical report explains why the writer is qualified to make a judgement on the significance of inconsistencies or discrepancies which the adjudicator is not qualified to make. It is vital that he demonstrates what differentiates his analysis from that of a lay person.

12.22 Try to look at the report from the point of view of someone who has formed the opinion that your client is lying. This process is particularly important because,

contrary to the practice in other civil litigation, it will be unusual for the expert to give oral evidence, and he will therefore not have the opportunity to address criticisms of his report from the court or the other side. It is your job to make sure that the report deals with what might be said against it. This is also important in relation to reports on physical injuries. The report may say that an injury is consistent with the account of torture. However, it may well be necessary to discuss how else the injury could have been caused. The other possible explanations for the injury may be highly unlikely, and could therefore be discounted on that basis.

12.23 As with other expert reports, presentation is important. Check spelling, punctuation and grammar.

12.24 Also, as with other expert reports, you do not have to disclose unfavourable medical reports and should not do so.

Procedure

12.25 Some initial directions issued with the Notice of Hearing ask representatives to indicate whether medical evidence will be submitted, even where the hearing is months or years ahead. This is often unrealistic, and is generally accepted as being so. The point (as discussed under chapter 6) of such directions is apparently to ensure that the appeal is being pursued and it is quite acceptable to reply "Not yet known".

12.26 However, medical reports must always be served on both the Home Office the IAA in good time prior to the hearing.

12.27 As mentioned in Chapter 3, the Home Office has undertaken that:

> *"Medical evidence submitted after an initial refusal will be fully considered If the refusal is maintained, reasons for doing so would normally be given in writing."* (Home Office Minister of State, HL 30.4.96, Col 1563)

12.28 Obtaining disclosure in advance of the reasons for which the Home Office disputes medical evidence will be particularly helpful if you can then ask the author of the report to address those reasons prior to the hearing.

Adjournments for medical reports

12.29 In response to concerns that the appeals time-table was too tight to allow time for medical evidence to be obtained, it was stated in Parliament that

> *"If somebody needs to find medical evidence to support his claim, then time for that evidence to be found is given... The same explanation applies to establishing a likelihood. The point at which an applicant needs to establish the likelihood of having been tortured will be at the adjudication point. Where the adjudicator has given time for the applicant to amass his evidence, he will consider it..."*
> (Home Office Minister of State, HL 1.7.96, Cols 1277-1278)

12.30 It was also confirmed that, regardless of whether an appeal is being considered under the Special Procedure:

> *"It is open to an adjudicator to grant an adjournment to enable the applicant to provide further evidence..."*
> (HL Committee, 30.4.96, Col 1563)

12.31 In requesting an adjournment, you should ensure that you explain the reasons for the delay in providing expert evidence, for example the inability of the Medical Foundation to cope with demand. The Home Office sometimes implies that such reports are available upon demand.

12.32 You might also like to refer to the UNHCR Handbook's provision in relation to mentally disturbed asylum seekers that:

> *"The examiner should, in such cases, whenever possible, obtain a medical report."* (paragraph 208)

12.33 At the appeal stage, the examiner is the adjudicator.

Further reading

Guidelines for the examination of survivors of torture
Medical Foundation for the Care of Victims of Torture

Medical evidence: Guidance for Doctors and Lawyers
Produced jointly by the Law Society and the British Medical Association.

13. **Legal Aid for Experts**

13.1 There is no arbitrary limit on the number of experts that can be instructed on legal aid (medical or any other subject). What is necessary is that each expert is individually justified to the Legal Aid Board according to the requirements of the individual case. The general rule is that you should have legal aid for an expert report on an issue material to the appeal which the court cannot be expected to properly determine without such expertise. As stated in chapter 11 on Expert Evidence, this will apply to a far larger proportion of issues than in average domestic civil litigation.

13.2 You should explain to the Legal Aid Board the issue on which expert evidence is required, any relevant allegations made by the Home Office on implausibility and credibility, how the issue is outside the normal experience of the courts, that it could be determinative of the appeal, and what is at stake in terms of the life and freedom of your client.

13.3 You should obtain a written quote from the expert, and if possible from more than one expert. Include, if appropriate, quotes from experts who are more expensive than the one which you wish to use. If the expert is unusually expensive, or if you only provide a quote for one expert, then it is particularly necessary to explain why only that expert meets your requirements.

13.4 Because the Home Office have the same standard reasons which they cut and paste word for word into the refusal letter of numerous categories of asylum seeker, you may find that you can use the same non-medical expert report on a number of appeals. It can be pointed out to the Legal Aid Board that the report will be relevant to many other appeals.

13.5 In relation to medical reports, if you require a report on mental condition which will be more expensive than, for instance a Medical Foundation report, then you must explain why you need to use your expert, for example by reference to his techniques or experience of particular conditions, or because you require psychometric testing. Obviously, you may need to instruct different experts in relation to different conditions, for example gun shot wounds and stress.

14. **Documents from the Country of Origin**

> *"The Secretary of State noted that you have no evidence to support your claimed detentions or your claimed membership of the organisation"*

14.1 This assertion crops up repeatedly in refusal letters. It is an error of law to reject an appellant's account on the grounds that he has produced no corroborating evidence. However, if an adjudicator will otherwise find on the basis of the appellant's evidence that there is no serious possibility that it is true, the production of documentary evidence from the country of origin might prevent your client being wrongly returned to a country where she faces persecution.

14.2 The difficulties in obtaining documents such as arrest warrants from the country of origin are obvious. Even when they are obtained, the Home Office will often allege that they are false (though seldom producing any evidence to support the allegation). Nor can you assume that because the Home Office has offered no grounds to dispute the document, it will necessarily be accepted as genuine by the adjudicator. Even if there is no evidence - or even allegation - that the document is false, there is a risk that an adjudicator will attempt to infer from his rejection of the oral evidence that the documentary evidence is a forgery. The following passage from an adjudicator's determination is quoted in *"The Risks of Getting it Wrong":*

> *"in this case the documents look more authentic than is often the case but there are enough doubts surrounding the story they purport to support to case doubts on their genuineness."* (paragraph 7.2.2)

14.3 Equally, adjudicators have previously dismissed documentary evidence on the basis of findings supposedly made in other cases, for example:

> *"From my experience gained in hearing appeals of this nature over several years I attribute very little evidential value to documentary evidence emanating from the Indian sub-continent which has frequently been found to be untrue and frequently utterly fraudulent. I have attributed such evidential value as I see fit to it in this claim." (Risks of Getting it Wrong,* paragraph 7.1.1)

14.4 Unsurprisingly, the Immigration Appeal Tribunal has hod that it is an error of law for an adjudicator to rely upon such assertions about evidence which is not before the adjudicator in the particular appeal *(Singh (9298)).* However, you should, despite the difficulties in finding it, at least try to obtain expert verification of documents as a matter of course, regardless of whether the Home Office has taken issue with its authenticity.

14.5 The 1996 Act has introduced a new danger to the production of evidence from the country of origin. It states that a claim may be certified if:

> *"... any of the evidence adduced in its* support *is manifestly false "*
> (section 1(4)(d), and see Chapter 3)

14.6 There is no reason why a forged document should necessarily damage your client's credibility. It may be, for example, that she paid an agent to obtain the document, and the agent, unable to obtain the real thing, simply passed off a forgery to your client as the real thing in order to claim his fee. You may wish to submit a document to explain your client's state of mind or her actions at a particular point of time. In such a situation, the material question may not be whether the document is genuine but simply whether your client thought it was genuine.

14.7 However, the Home Office may argue that even if the appellant makes no claim that the document is genuine, or even points out that it is a forgery, the mere fact that the document is a forgery entitles it to certify the appeal. This would be absurd. A better view would be that evidence is false if it is claimed to be something which it is not. However, there is as yet no authority on the question, and you and your client should be aware of the very real risks. If the document is submitted to prove state of mind, rather than the state of affairs which the document purports to indicate, it should be explicitly stated that it is submitted for that limited purpose, and that no claims are made as to its authenticity. If a third party wishes to provide evidence in support of your client's claim, that third party should be advised to submit it directly. Parliament was assured during passage of the 1996 Act that the provision to certify by reason of manifestly false evidence:

> *"would only apply to evidence adduced by the applicant and not by a third party."*
> (Home Office Minister of State, HL Report 20.6.96)

14.8 If a claim is certified by the Home Office on the basis of an allegation that a document is manifestly false, then the adjudicator will have to deal with this issue, even if he dismisses the asylum appeal (see Chapter 3).

14.9 The burden of proof is on the Home Office and the use of the term "manifestly false" rather than simply "false" appears to require a standard of proof higher than balance of probabilities and closer to beyond reasonable doubt. In any event, there is established authority that a high standard of probability will be required to prove fraud *(Khawaja* (1984) AC 74).

14.10 You should always seek to have documents verified before submitting them. Interpreters from the country of origin are often able to help with verification. You may be able to find a suitable expert through the *ILPA Directory of Experts, the Law Society Directory of Experts,* and other such directories. Lawyers in other fields may also know of experts in general document verification. If practical, you could seek a report from a lawyer in the country of origin.

14.11 If you verify a document but the Home Office nevertheless alleges that it is false, you should request particulars of the allegation, and preferably have an expert comment on those particulars.

14.12 If you produce the document on the day of the hearing, the HOPO may request and be granted an adjournment to have it examined by the Home Office (and you may also be in breach of directions requiring the filing of all documentation in advance). While you must resist any refusal to admit material documents on such grounds, particularly

if late submission was not your client's fault, you may not be able to resist an adjournment. You should make every effort to submit such documents in advance, and in compliance with any directions. Equally, however, if you do submit the document in advance and the Home Office disputes its veracity on the day without warning, then in the absence of a good reason why advance notice was not given, you should ask the adjudicator to discount the allegation.

14.13 It is quite unusual for the Home Office to provide any evidence at the bearing than letters containing the allegation of forgery and any particulars of the allegation. It is of course open to you to apply for a witness summons in respect of the person who has made the allegation of forgery. This could require that he produce all documentation upon which he has relied. However, as stated in Chapter 7, if the Home Office is not going to present its case properly, you should not necessarily step in to do it for it. It will often be sufficient and preferable to point out that the Home Office has provided no evidence whatsoever to support its allegations. This will particularly be the case in relation to certification when the burden of proof is on the Home Office.

Non-disclosure

14.14 Rule 30 states that where, on appeal:

> *"a passport or other travel document, certificate of entitlement, entry clearance or work permit (or any part thereof or entry therein) on which a party relies is a forgery, and*
>
> *"the disclosure to that party of any matters relating to the method of detection would be contrary to the public interest,*
>
> *"then, if supply of a document to that party would involve such disclosure, that document shall not be supplied to, or made available for inspection by, that party."*

14.15 While this rule appears to be aimed at documents allegedly issued by the United Kingdom authorities, the Home Office does use it to seek to prevent disclosure of reports alleging that foreign passports, entry stamps, and travel documents are false. Note that the rule does not automatically prevent disclosure of any documents which would disclose the method of forgery. The Home Office has to prove in addition that disclosure would be contrary to the public interest. Note also that the rule applies only to the limited categories of documents listed and therefore cannot be used to prevent disclosure of the method of detecting forgery of arrest warrants etc.

Introducing documentary evidence

14.16 If you are wishing to rely upon documentary evidence such as arrest warrants or letters from family members in the appellant's country of origin, then the documents should be identified by the appellant at the appropriate point in her evidence in chief or exhibited to her statement. For example, when you get to the point in the witness' evidence when the arrest warrant was issued, show her the arrest warrant and ask her what it is.

14.17 The HOPO may cross-examine your client on where the document came from and will ask the adjudicator to draw adverse inferences from the answer. This is one of the Home Office's "damned if you do, damned if you don't" allegations. If it was obtained through normal channels, then the HOPO will say that such channels could not be used if your client was wanted by the authorities. If it was obtained by bribery, the HOPO will say that you cannot trust it because it was not obtained through normal channels. You should point this out to the adjudicator.

15. **Whether to Call Oral Evidence**

Whether to call the appellant

15.1 It is your client's case and assuming she is capable of giving instructions, then she may instruct you to call her whatever you think of the idea and you will obviously respect this. However, part of your job is to draw on your experience to offer guidance on the best way of pursuing the appeal.

15.2 By the time the appeal hearing comes round, years may have passed since your client left her country of origin. She may have given a full account of the persecution she faced in her asylum interview, and often in a further statement submitted by her representatives. The refusal letter may not have attacked the client's credibility, but instead alleged that her experiences were not such as to create a present well-founded fear because the situation in her country of origin had improved, the persecution she suffered was a one-off, or the authorities would probably have forgotten about her, given the time that had elapsed since she left the country.

15.3 If your client's credibility has not been put in issue, and she has nothing material to add to the interview notes and any written statements, then there may be little point in calling her when there is already an account of her persecution fully set out for the adjudicator in the papers, and made much closer to the events. To call your client in such circumstances may simply lead to a fishing expedition by the HOPO in which he will require your client to regurgitate all the evidence she has ever given, in the hope that with the passing of time, the evidence will not come out exactly the same. It could also result in an adverse credibility finding by the adjudicator, based on an assessment of demeanour or mannerisms which are in fact explained by cultural differences or simply personality. If credibility is not in issue, then there is nowhere to go on credibility except downhill.

15.4 If credibility has not been put in issue and you are not calling your client to give oral evidence, then you should get the HOPO to expressly confirm in advance that it has not been put in issue. You should always at the start of the hearing explain to the adjudicator that credibility is not disputed by the Home Office. In *Bavani* (12829), the IAT held that where facts are agreed between the parties, it was not open to an adjudicator to reject those facts in his determination without giving notice at the hearing that he was minded to do so, and allowing an opportunity for further evidence to be called on the issue.

15.5 HOPOs have occasionally tried to put credibility in issue at the start of the hearing, even though it has not been put in issue in the refusal letter. Such a practice is quite improper, given the Home Office's undertaking that HOPOs are instructed not to raise new issues on their own motion unless they arise from evidence post dating the refusal letter (see chapter 2), and you should object on that basis. You should also seek an indication of which parts of the evidence the HOPO now disputes, but the HOPO may refuse to give even this indication. You then have to decide whether to tender your client for cross examination merely so that the HOPO can embark on a fishing expedition of indeterminate length in the hope of finding something he can offer as a reason for disputing credibility.

15.6 Despite the inappropriateness of such practices, you should however be wary of not calling your client in such a situation. You may not be protected from the adjudicator making an adverse credibility finding, as you are if the HOPO does not dispute credibility. The best course may be to tender your client for cross examination and explain to the adjudicator that you are doing so because the HOPO disputes credibility without instructions to do so, and without any basis for doing so. The adjudicator may agree that tendering your client for cross-examination on such grounds is really an abuse of court time.

Not calling the appellant when credibility is disputed

15.7 If credibility is put in issue in the refusal letter, many representatives will choose at least to tender their client for cross examination, however flimsy the basis upon which credibility has been disputed. If, however, your client is disturbed, incoherent, repeatedly inconsistent or unable to remember either her experiences or what she has said on different occasions, then she may have a psychological problems which would render it inappropriate for you even to tender her for cross examination. In such a situation, you should obviously arrange for a medical report and treatment without delay (see chapter 12).

15.8 If the medical report indicates that your client has psychological problems such that she cannot be expected to give accurate and consistent evidence, and the necessary factual basis of the claim is already before the adjudicator, then you are fully justified in not calling your client.

15.9 If a medical report does not disclose any medically recognised condition but you nevertheless think that there is no prospect that your client will come up to proof or deal in any meaningful way with the allegations in the refusal letter, then the decision as to whether or not to call her is far more difficult. You have to ask yourself how you think you are helping your client's case by calling her. The risks of not calling your client are that the adjudicator is denied the opportunity of getting a feel for the appellant, and may, whether explicitly or not, hold her failure to give evidence against her. The adjudicator is entitled to make an adverse credibility finding, including a finding that he does not believe any of the appellant's account, regardless of whether or not the appellant gives oral evidence before him, though he is not entitled to base an adverse credibility finding on failure to give oral evidence *(Kaleem Ahmed* (12774)).

15.10 If your client is a minor, chapter 26 discusses the decision whether or not to call her.

Whether to call witnesses of fact other than the appellant

15.11 The Rules give an adjudicator the power to limit oral evidence (rule 23). However, it was previously established law that you have a right to call any witness that you choose, as long as he will give evidence that is admissible and relevant (*R v IAT, ex p. Hussain* (1982) hum A R 23). It is Likely that rule 23 was intended to alter the fundamental principle that you can call any witness whose evidence is admissible and relevant.

15.12 Some representatives, however, appear to call as witnesses family members and friends of the appellant simply because they arc there. It is often unhelpful and sometimes dangerous. The fact that an act of persecution was witnessed by your client's spouse does not mean that you have to call the spouse to give evidence of the fact. The HOPO will inevitably allege that corroborating evidence from family members is self-serving and as such should be discounted. If the otherwise disbelieves the appellant to the extent that he finds there is no serious possibility she is telling the truth, then it is unlikely that having the appellant's spouse back her up will change matters. The HOPO will also use cross-examination to embark on another fishing expedition to see if he can get the witness to describe any incident any differently from how the appellant described it. The fact that both witnesses are humans probably discussing distressing events from some time ago through interpreters means that there is a reasonable possibility that he will succeed.

15.13 However, you should be aware that there is a risk of being dawned if you do, damned if you don't, in that while oral evidence from family members will be attacked as self-serving, failing to call a family member may equally be attacked by the HOPO . If you do not intend to call a family member, it is probably better that they do not attend the hearing.

Reasons to call other witnesses of fact

15.14 Where you are not calling the appellant because of medical or psychological problems (see above) and there is someone else available with first hand knowledge of the persecution suffered by the appellant who can give credible evidence, then you may considering calling that person. The same might apply if the appellant is a minor (see chapter 26). You may call a witness because he can give first hand evidence of something of which the appellant cannot give first hand evidence, for example if the witness was questioned by the security forces about the appellant.

15.15 It may well be worth calling a witness to fact, even if only corroborating the appellant's evidence, if that person has been granted asylum or ELR, as having accepted been found credible to the extent that she has been granted leave to remain, the Home Office will find it difficult now to attack the credibility of her evidence in relation to the present appeal. If the witness has been granted ELR rather than asylum, the HOPO may argue that the basis upon which she was granted ELR is not known. You should always take instructions on any friends or relatives who have been granted asylum or ELR and, if possible, obtain the relevant Home Office reference numbers, files relating to the asylum application and if applicable appeal, and if they can offer relevant evidence, obtain a statement.

15.16 You should always be extremely wary of calling anyone who has an outstanding asylum claim or appeal, without having had full access to all the relevant papers, and satisfying yourself that she will give consistent evidence.

15.17 Very occasionally, you might to decide to call a family member after the appellant has given evidence. This might happen when an appellant who you thought could give satisfactory evidence has actually given incoherent and inconsistent evidence or has failed to establish a vital fact. If you have a family member who you think could give credible first hand evidence in the areas where the appellant has failed, you might

now consider calling her. However, such a course is fraught with obvious danger, and should only really be considered when after the appellant's evidence you think you have little to lose. By far the better situation would be if you realised beforehand that your client would not give useful evidence and acted accordingly.

15.18 You should also never consider calling a witness without seeing her, forming an opinion of her, and proofing her. As well as taking a proof of her evidence in chief, you should determine by questioning what her answers will be to likely lines of cross examination. You should prepare before the hearing any witness who you think there is any possibility that you might want to call, not just those you have decided to call. If you get yourself into the situation where you have not prepared a witness but decide due to unforeseen events during the hearing that you may have to call her, you should request an adjournment, rather than simply calling her and hoping for the best. You should ensure that anyone who might be called to give evidence is kept outside the hearing room (the only exception being where you have no interpreter, and require a potential witness to remain with you to monitor the court interpreter). In such a case, you should normally explain the position to the adjudicator.

16. **Discussing the Hearing with your Client**

16.1 Try to explain in as much detail as possible what the hearing will be like, who will be there, and in what order things will happen. There is no excuse for your client not having a good idea of how examination in chief will go because whether you are going to conduct a full examination in chief or ask supplemental questions, she should always be provided with a written proof in her own language of her evidence.

16.2 Your client must be given a translation of any Home Office interview notes and any statement or representations submitted by her or on her behalf. The HOPO will often base any attack on your client's credibility in cross-examination on a dissection of these documents. Your client will be expected to answer questions about the precise wording she is alleged to have used months or year before. It is absolutely essential that you ensure that your client reads the translation of all such documents immediately prior to the hearing, and that she has a further opportunity to discuss these with you.

16.3 You should discuss in detail possible lines of cross examination. Common questions in cross examination are discussed in chapter 21, but you should be especially careful to deal with the most misleading questions, such as those which criticise the appellant for not giving details of her claim on arrival. This also means tackling your client (and any other witness) about the weaknesses in their evidence. The first time she is asked a difficult question should not be by the HOPO in front of the adjudicator.

16.4 Your client will be concerned about giving her evidence in a manner which convinces the adjudicator. The Immigration Appeal Tribunal and the High Court have both emphasised the dangers of making adverse credibility findings in respect of a witness who speaks in a foreign language and is of a wholly different culture and background from the adjudicator. Given the difficulties in conceiving of any safe method by which an adjudicator could dismiss oral evidence in such a situation on the basis of demeanour, mannerisms, pattern of speech, or tone of voice, it is not possible or appropriate to give guidelines on how to give evidence in a way which will enable the witness to demonstrate that her evidence should not be dismissed on such a basis. Rather than attempt to second guess the basis upon which an adjudicator may dismiss oral evidence, and seek to tailor the evidence accordingly, it is better to concentrate on helping your client to give her evidence as confidently as possible, preparing her to establish the necessary factual basis, and putting and explaining the allegations which will be made against her.

16.5 Your client is telling her story TO the adjudicator. It may be weeks before the adjudicator comes to consider that story in writing his determination. It is vital to your client's case that the adjudicator is able to take a proper note of his evidence. If your client is giving evidence in English, you should explain to her that you may interrupt her if she starts speaking too fast, and that she should not be put off by that.

16.6 Your client will also be desperately anxious to ensure that she makes particular points in her evidence. She will not know exactly what questions you will ask (though she should know roughly as she will have been given a written proof). She may well think should take the first chance she is given to get her point out, just in case she does not get another. The adjudicator may become irritated and intervene himself if

he feels that the witness is straying from the question which she has been asked. You may warn the witness of this possibility beforehand and that you may ask her to confine a particular answer to a particular issue, and if necessary interrupt her to do so. However, you should recognise that asylum seekers will often express themselves best and most effectively if allowed some leeway to express themselves rather than restricting them to rigid question and answer sessions. If you feel that criticism from the adjudicator for not sticking to the question is preventing your client from putting across her case as best she can, or that it is rendering her so nervous and unsure that the quality of her evidence is affected, then you may wish to submit that the interests of justice (and efficient use of court time) would be better served by allowing the witness that leeway.

16.7 If you do have to rein in your witness during your examination, it is a good idea to indicate that while you are dealing with one particular issue at present, you will then come on to the issue which she has started to talk about. Controlling evidence is far more difficult through an interpreter. When a witness is giving evidence in English, you can interrupt the witness if her answer starts to go off the point. When using an interpreter, you will not know that the witness is not answering the question until the interpreter translates it. You cannot interrupt the interpreter when it is clear that the answer is going completely off the point, because the interpreter is under a duty to translate everything that is said. Because you are not able to interrupt irrelevant answers and keep the witness to the question asked, it is more likely that, upon translation, the adjudicator will criticise the witness for failing to answer the question, a practice which may well damage the witness' confidence. As far as possible, you should prepare your client for this, so as to lessen the impact on her self-confidence.

16.8 Regardless of whether full instructions have been taken, a full statement taken, and the procedure explained, you should always have a further meeting with your client on the day of the hearing and the client should always be asked to read her proof, in her own language, just before going into the hearing.

16.9 Most adjudicators do not ask witnesses to give evidence on oath. However, if the witness wishes to do so, the IAT have held that an adjudicator should allow it *(Nakhuda* (9269)). Discuss beforehand whether she wishes to do so, and if so, ensure that the IAA will have any necessary book available in the hewing room.

16.10 Rule 32 gives adjudicators a power to exclude members of the public from the hearing at the request of a party. You should inform your client of this provision in advance and ask if she wishes the hearing to be -in camera Adjudicators are sensitive to the particular fears that asylum seekers may have and seldom refuse such requests.

17. **Adjournments, Abandonment, and Determination Without a Hearing**

17.1 Rule 10 states that:

> *"(1) ... a special adjudicator not adjourn a hearing unless he is satisfied that an adjournment is necessary for the just disposal of the appeal.*
>
> *(2)When considering whether an adjournment is necessary, a special adjudicator shall have particular regard to the need to secure the just, timely and effective conduct of the proceedings."*

17.2 The Regional Adjudicator, Mr Latter in a letter of 13th December 1996 to the Immigration Law Practitioners' Association indicated that in applying Rule 10:

> *"I agree entirely that administrative convenience can never outweigh the interests of justice. The primary consideration is whether an adjournment is necessary for the just disposal of the appeal in the particular circumstances of each application."*

17.3 The leading case reported in the Immigration Appeal Reports on the determination of applications for adjournment is *R v Kingston-Upon-Thames Justices, ex parte Peter Martin* (1994) Imm AR 172. The issue was whether a magistrates' court acted unfairly in refusing a request for an adjournment made at the hearing on behalf of one of the parties (a barrister) on the grounds that work commitments prevented him being present and he had been unable as yet to obtain potentially relevant evidence. The Divisional Court declined to find that the refusal to adjourn was unreasonable, Simon Brown LJ stating that the proceedings were "at the lower end of the scale of importance", compared with the importance and possible adverse consequences of, say, a criminal trial, and that the court was entitled to have regard to its own convenience (the court had no alternative business which it could take). Buckley J relied on the interests of the opposing party in bringing a "relatively trivial piece of litigation" to a close, the fact that the applicant had in fact had months to prepare his case, and that he was a person "well-versed in the ways of the law". He said:

> *"The principles of natural justice that are prayed in aid in support of this application demand no more than that a party to litigation should be given every reasonable opportunity to prepare and present his case."*

17.4 The common law requires that because the issues at stake are of such weight, only the highest standards of fairness will suffice in asylum appeals. Because the Divisional Court accepted that the importance (or in that case the lack of importance) of the litigation was a primary factor in determining whether fairness demanded an adjournment, it is clear that any significant risk that an appellant may be prejudiced in presenting her appeal, in view of the potentially horrendous consequences of such prejudice, may require an adjournment be granted in order to achieve the just disposal of the appeal. The Immigration Appeal Tribunal in *Stolintchena* (12173) held that anxious scrutiny of asylum claims required that the appellant was able to present her case to the full, and that adjudicators must follow the guidance laid down in *Martin.*

17.5 Rule 10 does not restrict the power of adjudicators to adjourn hearings where necessary to ensure the fairness of the proceedings, and, in practice, the Deputy Chief Adjudicator has indicated that he does not consider that administrative convenience can ever outweigh the interests of justice (see above). In fact, rule 10, taken with rule 41, confirms that adjournments must be granted wherever necessary to achieve the just disposal of the appeal whatever time limits might otherwise apply to the determination of the appeal. This corresponds with the assurances given to Parliament about maintaining the adjudicator's power of adjournment to guard against any injustice which might result from adherence to truncated time limits (*HL Committee, 30.4.96, Col 1563).*

Making an application

17.6 If your client is unable to attend through illness or injury and an adjudicator is concerned about a lack of medical evidence, then usual practice is for the adjudicator to formally adjourn the appeal for a period to allow the submission of written evidence, and then reconsider the matter. However, if the appellant has attended through his representative, an adjudicator cannot dismiss the appeal without a hearing (see below). It is certainly arguable that if medical evidence is submitted within the time allowed by the adjudicator and he is minded to reject the medical evidence for some reason, then he should give the appellant an opportunity to make submissions before doing so. The same approach may be adopted when faced with the unexplained non-appearance of an appellant who has previously prosecuted her appeal. Sudden illness of a representative should almost always result in adjournment. Note that adjournments have been granted to the Home Office, despite having known for days that the HOPO was ill, simply because of administrative difficulties in finding another HOPO to replace him.

17.7 If there has been an opportunity to obtain material evidence but it has not been obtained as a result of the failings of an appellant's representatives, then, in the clear absence of an effective remedy against the representative and the potential adverse consequences to the appellant of her representative's conduct, it will seldom be just to refuse an adjournment in order to remedy the representative's mistake. You should refer to *R v SSHD, ex parte Packeer v. SSHD* (1997) Imm A R 110, where the Court of Appeal held that

> *"Of course, the appellate structure in asylum cases must be astute at every stage to detect, of its own motion if need be, any instance where the applicant may have been put at obvious risk of injustice in the presentation of his case through inadvertence or ignorance on the part of the applicant or his advisers."* (transcript, page 6)

17.8 You may again refer to *Martin* where the Divisional Court found that a significant factor in determining the fairness of the refusal to adjourn was that the party was himself an experienced teamster. The contrast with the vulnerability of the asylum seeker and her dependence on her representatives could hardly be greater.

17.9 Where you believe an adjournment to be necessary in the interests of justice, you should pursue the request forcefully and with determination. Point out if necessary the likelihood that the decision will be subject to challenge in the IAT or the High

Court if the adjudicator refuses to adjourn, and that any perceived saving in court time or expense is therefore illusory.

17.10 If the adjudicator absolutely refuses to adjourn, then your options are either to present the hearing as best you can, withdraw your representation, or offer no evidence. It will seldom be helpful or appropriate to withdraw your representation or to offer no evidence if you have any instructions upon which you can present the appeal. The most difficult situations often arise where an advocate is instructed to meet his client on the day and no interpreter attends with the result that the advocate is unable to take instructions. Many adjudicators will allow the court interpreter to be used in such circumstances, particularly as the Legal Aid Board now often refuses to pay for the attendance of an interpreter at a hearing. If the adjudicator refuses to allow the court interpreter to be used, there may be difficulties in relation to your professional duty as well as fairness to the client in continuing in the absence of proper written instructions.

17.11 However, even in such extreme situations, you should never consider withdrawing or offering no evidence (assuming you can obtain instructions to do so) except as a very last resort. Continuing the hearing should not prejudice you in challenging on appeal or judicial review the adjudicator's refusal to adjourn. You will have asked the adjudicator to note that you are continuing under protest and will have renewed your request for an adjournment at every appropriate point in the hearing. You will have drafted a statement and/or note immediately after the hearing detailing each way in which your client was prejudiced, and may also have put your complaint in writing to the Chief Adjudicator.

17.12 Whatever you do, ask the adjudicator to note that your position is that you are not in a position to proceed as you cannot properly present your client's appeal.

17.13 The Regional Adjudicator made clear in the letter quoted above that the consent of the Home Office was not a precondition to the consideration of an adjournment application by an adjudicator, though the Home Office's comments on the application will be obtained if possible.

Requests for adjournments by the Home Office

17.14 The OAA has in the past agreed to requests for adjournments by the Home Office without giving appellants the opportunity to comment. However, the Thanet House Users' Group has been told that this practice has stopped, and that efforts will be made to obtain each party's comments before considering an application for adjournment. If you oppose the adjournment on grounds of your client's financial position, then it may be worth referring to the fact that the Chief Adjudicator has indicated that the IAA will be prepared to take into account difficulties caused by the removal of benefits to appellants when considering the listing of appeals.

Adjournments by the IAA

17.15 Sometimes, the IAA will adjourn a case on its own motion due to lack of court time, lack of adjudicators, or the court files having been mislaid. This may be unforeseeable and unavoidable. However, if your client has paid for representation at

the hearing only to have it adjourned in circumstances which should have been foreseeable and avoidable, then you may wish to ask the Lord Chancellor's Department to pay your client's costs thrown away.

Determination without a hearing

17.16 Rule 33 states that

> *"(2) ...subject to paragraph (3J, the appellate authority may proceed with the hearing of an appeal in the absence of a party (including the appellant) if satisfied that, in the case of that party, such notice of the time and place of the hearing, or of the adjourned hearing, as is required by rules 14(2) and 18(3) or, in the case of a hearing before a special adjudicator, by rule 6 and rule 10(3), has been given.*
>
> *"(3) The appellate authority shall proceed with the hearing in pursuance of paragraph (2) if the absent party has not furnished the authority with a satisfactory explanation of his absence.*
>
> *"(4) Where in pursuance of this rule the appellate authority hears an appeal or proceeds with a hearing in the absence of the appellant or some other party, it may determine the appeal on such evidence as has been received*
>
> *(5) For the purposes of this rule a reference to a party (including an appellant) includes a reference to his representative.*

17.17 Because sub-paragraph (5) defines a party as including the party's representative, then if the representative has attended but requested an adjournment, the adjudicator may not rely on sub-paragraph 3 so as to proceed with the hearing against the wishes of the appellant's representative because there is no satisfactory explanation for the non-attendance of the appellant in person.

Abandonment

17.18 Rule 35 makes the following provision regarding abandonment of an appeal:

> *"(4) This paragraph applies where... (b) the special adjudicator is satisfied, having regard to the material before him or to the conduct of the appellant or his failure to appear or otherwise to prosecute the appeal, that the appeal has been abandoned;*
>
> *(5) Where the appellate authority is satisfied that -*
> *(a) the appellant was notified of the hearing date, and*
> *(b) the provisions of paragraph (4) apply to the appeal,*
> *it shall send to the parties written notice that paragraph (4) applies (specifying the sub-paragraph which is appropriate) and it shall not be necessary to hold a hearing in order to determine the appeal or to issue a written notice of determination."*

17.19 Before an adjudicator can treat an appeal has abandoned, he must therefore satisfy himself from the material before him or from the appellant's non-appearance or failure to prosecute the appeal, that the appellant has in fact abandoned the appeal. The rule clearly does not allow an adjudicator to treat an appeal as abandoned when it has not in fact been abandoned in order to punish a party for failure to comply with directions or to complete preparations within a particular period. In particular if there is positive evidence from the appellant, for example in the form of a letter from her representative, that though unable to attend a particular hearing or comply with a particular direction, she has not abandoned her appeal, then it will normally be perverse for the adjudicator to find that the non-attendance is evidence upon which he can satisfy himself that the appellant has decided to abandon the appeal.

18. **Opening the Hearing**

18.1 If your client wants members of the public excluded, then make this application at the start of the hearing.

18.2 See the HOPO beforehand and ensure that you have everything he has submitted or plans to submit. Ensure that the HOPO and the adjudicator have copies of the documentary evidence which you have submitted. The HOPO will normally be asked whether he has anything to add to the refusal letter. Normally he will not, in which case you should confirm with him, in front of the adjudicator, that the Home Office is not relying upon any issue which it did not disclose in the refusal letter. You should object strongly to any attempt to rely on reasons which could have been but were not relied upon in the refusal letter (see chapter 2).

18.3 If you have submitted evidence such as medical reports or documents from the country of origin after the refusal letter but well in advance of the hearing and the Home Office has given no indication that it disputes them, then you should object if the HOPO raises issues about the evidence on the day, for example that an arrest warrant is forged, or that a medical expert's methodology is deficient. In respect of the medical evidence see Chapter 12, and the Home Office's undertaking that written reasons will normally be provided if medical evidence is disputed.

18.4 The HOPO may openly justify the lack of notice to the adjudicator on the grounds that he was only beefed days before the hearing. Your client will be nervous enough about facing cross-examination without you starting off by needlessly antagonising the HOPO who may privately be equally critical of the Home Office's conduct of the appeal, but powerless to do anything about it. Your argument is with the Home Office, and the HOPO's admission that the reason the Home Office has not given proper notice of its case is not unforeseen circumstances, but sheer negligence in only instructing its representative at the last minute, despite having months (sometimes years) notice of the hearing date, is a powerful argument in favour of not admitting new reasons or evidence. There is no need for you to accept an adjournment caused by such negligence without an undertaking from the Home Office to pay your costs.

18.5 If the refusal letter has made baseless or unsupported allegations - such as failure to mention details upon arrival, or other failure to act as a reasonable refugee - then you may wish to raise these at the start of the hearing, and object for the reasons discussed in chapter 2. You can assume that the HOPO intends to cross-examine on the case set out in the refusal letter unless he indicates otherwise, and there is no need to wait until he asks the question in cross-examination. You also have a right to know the case you have to confront when you conduct your examination in chief, and there is no reason why your client should have to deal with unjustified and unsupported allegations. It is quite inappropriate for the respondent to use cross examination as a way of introducing allegations for which he is unable to offer the court any evidence. If the refusal letter relies on bare allegations about the reasonable behaviour of refugees, ask the HOPO if he will be calling evidence to support them. If you have submitted evidence which refutes an unsupported assertion in the refusal letter, ask the HOPO if he will now withdraw it, and if not, what evidence he intends to call. If you have not already done so, you should also ask the adjudicator to direct that the HOPO defines which issues are admitted and which are in dispute (see Chapter 7).

18.6 The 1996 Rules give adjudicators a power to limit issues to be addressed at the hearing (see Chapter 6).

18.7 Tactics on opening where you do not intend to call live evidence are dealt with in Chapter 15.

19. **The Court Interpreter**

19.1 The Royal Commission on Criminal Justice stated in its report in 1993 that:

> *"Clearly, in the court setting, the highest standards of interpretation are called for."*

19.2 The Royal Commission recommended that only trained and qualified interpreters be used in court, and this recommendation was accepted by the Government. In response to the Royal Commission's recommendations, a National Register of Public Service Interpreters was established in 1994, administered by the Institute of Linguists with the support of the Home Office and the Lord Chancellor's Department.

19.3 It is often assumed, not unnaturally, by appellants and representatives - and perhaps by some adjudicators - that only such properly trained and qualified professional interpreters are used for court work by the IAA. In fact, it appears that sometimes interpreters are used who have no qualifications whatsoever. While some court interpreters are committed people of a high standard who carry out their role with considerable sensitivity, there have also been numerous concerns expressed about the quality of some of the interpreters used by the IAA. These have included inability to speak the witness' language properly, inability to speak English properly, inability to interpret properly (which is not the same as speaking both languages), and bias.

19.4 You should ask through the adjudicator that the court interpreter state his professional qualifications and training. To test whether the interpreting is going to be adequate, the adjudicator will normally ask the interpreter to talk with the witness before she gives evidence. The ensuing conversation, however, is likely to be of a sophistication which could be handled in French by your average English first farmers. Having established that they are able to exchange basic greetings, the interpreter is then deemed to be capable of translating the witness' explanation of Marxist theology. Not surprisingly, it does not always follow.

19.5 Common problems arise where the correct translation of words and phrases varies according to context. Interpreters, upon being challenged on their translation of a witness' answer into nonsensical English, have been known to reply that they have been told to translate exactly what the witness has said. What they are actually doing is, as the English first former learning French would do, translating words only according to their most common translation, without any regard to context. A related and potentially far more serious problem arises where there is no equivalent word or phrase in the language. For example, there may be no equivalent word to "detention" but instead different words describing arrest for questioning and release on the same day, detention over night in a police station, or detention for a longer period in a prison. There may be no equivalent in the country of origin to the British procedure by which the police charge a suspect. When a HOPO asks a witness whether he admits that he was always released without charge, the interpreter may, instead of indicating that there is no such procedure and therefore no means of accurately interpreting the question, simply substitute what he considers a similar procedure commonly, whether the witness was ever brought before a court. The witness will answer no, and this answer will be interpreted and recorded as "no, I was never charged with any offence". Being charged and being brought before a court may in

fact have quite different connotations and implications. However, if you are not aware of the problem, and do not have your own interpreter, and the court interpreter does not indicate that he has altered the question and answer, the court will be misled. It is for this reason that court interpreters require a basic understanding both of the British legal system and that of the country of origin.

19.6 Court interpreters may appear to hold a conversation with the witness before translating an answer. While it is acceptable for an interpreter to ask a witness to repeat a word or phrase to ensure that he has heard properly before translating the answer, this should not develop into a conversation. You must insist that everything your witness says is translated. There have been cases in the past where for example the appellant repeatedly complained that she was unwell but the interpreter ignored this and translated only the substantive answers to the representatives' questions.

19.7 Always address the witness in the first person. If clarification is required, ask the witness through the interpreter, do not ask the interpreter. You should only normally address the interpreter to ask him to repeat a translated answer which you did not hear properly. Very occasionally it will be right for you to request the interpreter to offer an explanation of why a phrase cannot be properly translated, for example because there is no satisfactory translation, or because differences in background and culture prevent the meaning being adequately translated.

19.8 Major refugee producing countries are, for obvious reasons, more likely than average to be deeply divided on grounds of ethnicity, tribe, religion, class or politics. There have been complaints by witnesses of bias in court interpreters on those grounds. It is alarmingly common for court interpreters, when questioned about their interpreting, to seek to persuade the adjudicator that the witness is at fault, though this is may be more often due to lack of professional training or assessment. It is not unknown for interpreters to allege to adjudicators, in court, that the witness is lying and pretending not to understand the interpreter.

19.9 Such behaviour should lead to the immediate halting of the hearing, and it beginning de nova with a new interpreter. In such circumstances, you should always complain to the Chief Adjudicator in writing, and should state that the interpreter will not be acceptable in any future appeal in which you are involved.

19.10 If an adjudicator refuses all applications by you to at least adjourn in such circumstances to replace the interpreter (though it may be more just to abandon the hearing and start again), your client is left in the desperately unfair position of having to communicate to the court through an interpreter who is making allegations to the court about her evidence, or even her credibility. Even so, you should be exceptionally wary of offering no further evidence in such circumstances. If you have an your own interpreter monitoring the court interpreter, then the better course will almost always be to continue the evidence, objecting on each occasion on which the interpreting is inadequate or inappropriate, and asking the adjudicator to note each objection. (You must politely continue to object where necessary, regardless of whether the adjudicator has indicated that he does not wish to hear any further objections relating to the standard of interpreting.) If you do not have your own interpreter at the hearing, then you and your client are obviously in a considerably worse position. However, even so, offering no further oral evidence should be an

absolute last resort. Provided you are alert to difficulties (see below) and continue to object where necessary, you are unlikely to have prejudiced your client in subsequent appeals or judicial review by continuing with oral evidence in the face of repeated refusal to accept your request for an adjournment.

19.11 If there is a major problem with the court interpreter and the adjudicator refuses to adjourn, you may wish to confirm your objection in writing to the Chief Adjudicator immediately after the hearing.

19.12 You should, at an early stage, have established in what language and dialect your client and any other witness who you intend to call are most fluent. This will not necessarily be the language which your client used for Home Office interviews or that which has appeared adequate for taking instructions. Check that both language and dialect are right. The fact that the language spoken in different areas has the same label is not necessarily any indication that speakers from those areas will be able to understand each other. In relation to some dialects, it may be effectively impossible for someone to properly understand and convey meaning unless they have lived in the area and amongst the people who speak it. Usually, it is necessary that the interpreter is familiar with cultural differences, as well as the language. Explain in writing and in detail to the LAA what is required.

19.13 You should always aim to have your own independent interpreter at the hearing. However, as legal aid is not available (unless you are appearing as a MacKenzie Friend), this may be dependent on the client having the necessary funds. If you do have an independent interpreter, he should sit beside you in the hearing, and should indicate to you when any problem arises, but should not address either witness, interpreter or adjudicator directly without the adjudicator's permission. If you are concerned about the interpretation of an answer, ask the adjudicator for a moment to consult your interpreter. The interpreter should take detailed notes of any problems that are arising as these may be vital in future proceedings before the LAT or the High Court.

19.14 If you do not have an independent interpreter - which is an extremely unsatisfactory position - then you have to be alert to any signs of difficulties. You should be alerted if the interpreter is using inarticulate or bad English when the witness was coherent and articulate in conference, or if the witness has previously been consistent but the answers translated differ from those given before, or if the translated answers are not consistent with the knowledge and understanding which you are aware that the witness possesses. In this, as in general, it is of huge benefit if you are familiar with the country of origin.

19.15 If there appears to be a problem with the interpreting then you should raise it immediately. Even if the mistake is tolerable in isolation, if it later becomes necessary to replace the interpreter because of accumulating difficulties, then it will be vital that the adjudicator has been kept aware of the developing situation from the outset.

19.16 If you are concerned, you may wish to seek an adjournment to take instructions from your client as to whether there is any problem with either comprehension or bias. The Immigration Appeal Tribunal has indicated that the court interpreter is unlikely to be

the best judge of the degree of comprehension between himself and the appellant, and that where there is a dispute, it would be advisable for an adjudicator to adjourn to either replace the interpreter or to seek expert evidence as to the degree of comprehension *(Diarrassouba* (11688)).

19.17 Always keep a note of the court interpreter's name. If a case is adjourned and the Interpreting is satisfactory, then the hearing should resume with the same interpreter, as some interpreters will interpret the same word or phrase with a different word or phrase, and a change of interpreter may lead to changes in interpreting which will wrongly suggest Inconsistency on the part of the witness.

20. **Examination in Chief**

Whether to conduct oral examination in chief

20.1 If a statement or interview notes are standing as evidence in chief, you may be asked whether you wish to conduct oral examination in chief at all. You obviously need to do so if relevant evidence is not covered by the statement. Also, if the HOPO indicates that he will pursue different issues at the hearing from those raised in the refusal letter, and your objections are over-ruled, then you should have the right to lead evidence on the issue (see also Chapter 18). If the written witness statement does not deal with the reasons for refusal, or if the interview notes have been allowed to stand as evidence in chief, you will probably want to deal with the refusal letter in examination in chief.

20.2 Examination in chief is not simply an opportunity to lead evidence. A vital purpose of examination in chief is to accustom your client to the court room and to addressing the adjudicator before she is subjected to cross-examination. Unless you have a very confident client, you should always give your client this opportunity and you should be careful not to turn your examination in chief into a mini cross examination. This can be a particular risk if you have allowed a written statement to stand as evidence in chief, and are using examination in chief to clear up potential discrepancies. You should always ensure that any defensive questions on discrepancies are balanced by positive questions enabling the witness to argue her own case to the adjudicator and gain her confidence, and that even when putting discrepancies, your tone and the manner in which you phrase the question are appropriate to the fact that the witness is your client, and, if appropriate, to the fact that the alleged discrepancy you are putting is, on your case, of little weight.

20.3 You should not be prevented from conducting an oral examination in chief simply because you have complied with a direction to submit written evidence in chief. In *Petre* (12998), which was decided prior to the 1996 Procedure Rules, the Immigration Appeal Tribunal dealt with a challenge to an adjudicator's determination, *inter alia* on the basis that

> *"the adjudicator declined to hear two witnesses who had given written statements but whom the appellant wished to call, the adjudicator stating that she would hear oral evidence only if the Home Office wished to cross-examine the witnesses."*

20.4 The IAT held that:

> *"As to the duty of the adjudicator in hearing witnesses, ... this was established by the High Court in R v L41; en parse Tazzamil Hussain (1982) Imm AR 74 [so that] an adjudicator has no power to exclude a witness from giving evidence unless the adjudicator holds that the evidence is inadmissible. An adjudicator's power to exclude such evidence would include exclusion of irrelevant evidence, but such evidence having been excluded it would be open to the party seeking to call that evidence to seek leave to appeal on the grounds that it was admissibly In this case, however, the adjudicator seems to have tried to take a short cut [by] in effect putting it within the power of the*

Home Office Presenting Of Dicer to decide whether the witness should be called or not. The Home Ounce does not seek nor sought such a veto but the adjudicator's approach remains fundamentally flawed. This is particularly so as the adjudicator clearly decided the case in part at least on the grounds that she did not believe the appellants."

20.5 Though the 1996 Rules give the adjudicator an express power to limit the time allowed for oral evidence, they do not give an express power to refuse to hear oral evidence, and there is nothing in the Rules which requires a departure from the principles set out by the High Court and the Immigration Appeal Tribunal for an adjudicator to apply in determining whether to exclude evidence.

Purpose

20.6 Examination in chief should enable your client to tell the story of how she comes to fear persecution, whether that be the full story, or aspects which are not covered in the written witness statement or interview notes. The ideal examination in chief represents a natural flow of question and answer between the curious listener and the storyteller. However, it is not easy to recreate in a court-room under the rules of evidence. It is much more difficult to create when using an interpreter - even a fully qualified professional interpreter. Particular vocabulary or phrases which you might use in an examination in chief to put an English speaker at ease, to encourage spontaneity or a particular tone or mood, will often not survive translation. The difficulties increase dramatically when, as is too often the case, the IAA is using an unqualified interpreter (see chapter 19).

20.7 The role of detail in demonstrating credibility is discussed in chapter 9. You should ask as detailed questions as your client is able to answer, but you should apply the same caution as in a witness statement, and not seek to force out details of which your client is unsure or unclear. As also discussed in chapter 9, your client may be better talking about some things rather than others. It may be that your client is nervous and uncertain about dates but confident in describing details of particular detentions. If so, you may wish to take her to a particular detention in a way which will clearly identify it to her (not by the date) and then let her recount events in detail. Then deal very shortly with dates, if necessary simply getting her to admit that she is confused about them. This is much better than launching into a detailed analysis of dates which will merely increase her nervousness and quite possibly her confusion. Having been given an opportunity to tell the adjudicator about something she remembers well, she may be more relaxed about admitting confusion about something she does not remember. You will also be in a stronger position objecting to detailed questioning on dates by the HOPO if the witness has accepted she does not remember properly, than if you have tried to force out a detailed account through your own questioning.

20.8 Those questions which allow your client to put her case effectively to the adjudicator are likely also to be those questions which put her at ease, but you might want to start by dealing with uncontentious background details. Even asking her name and address can help.

20.9 There are no formal rules of evidence before an adjudicator as there are in other courts. The adjudicator is responsible for his own procedure, as long as he acts fairly

but he will usually prevent you from leading your own witness on contentious issues. Though you will be allowed to lead on non-contentious issues, you may choose not to lead in order to give your witness an initial opportunity to say something to the adjudicator which is undemanding.

20.10 Leading questions are those which lead the witness towards a particular answer or which assume facts which are in dispute or which the witness has not yet established in evidence. They can often be answered by "yes" or "no". Non-leading questions are those which do not suggest a particular answer and cannot usually be answered yes or no. Non-leading questions will usually start "Who...", "What...", "Where...", "Why..." or "When...". If your question begins with "Did...", then it is likely to be a leading question.

20.11 Leading is a relative term. The degree to which a question leads depends upon the extent to which it suggests an answer and the extent to which any facts which it assumes are disputed. "*Did you escape by bribing the security guard?"* obviously suggests how the witness escaped. "*How were you able to escape?"* does not suggest the method. But you are still leading (suggesting) the fact that she escaped unless the witness has already established that. Even *"How did your detention end? "* leads the fact that the witness' detention ended. However, this fact is pretty obvious, as the witness is now sitting in front of you. Whether a question is "too leading" is a matter of common sense and fairness. Ideally, the more contentious a fact is (or the more uncertain it appears that the client will give that fact), the more you should ensure that your question does not assume or suggest that fact. Adjudicators vary in how much leading they accept, but it is not only to prevent the HOPO or the adjudicator interrupting that you avoid leading. It may also give your client the best opportunity to put her case to the adjudicator. The more the question leads a contentious answer the less convincing the answer may appear. But be flexible. If your witness is nervous and inarticulate, some leading (as long as the adjudicator allows it) may ease her into her evidence and enable her to get a grip of her story to the ultimate benefit of the court.

20.12 You do not lead when you repeat a fact which the witness has already given (or 'piggy-back' on her answers). This can help keep control of the evidence, where you are pursuing a particular narrative but the witness is not sticking to the question. You repeat back that the part of the witness' answer which you want to develop as a prelude to your next question, for example:

> *"Q: What did the soldiers do when they got to your house? A: They broke the door down because you see we have no rights and have had none since 1963 and will have none until they are deposed.*
> *Q: After they broke down the door to your house, what did they do next?"*

20.13 This brings the witness back to the particular part of the story which you are seeking, without criticising the witness for straying from the question, or provoking the adjudicator into criticising the witness.

20.14 Fixed choice questions, where you ask which of two alternatives are correct, are not leading as long as they do not suggest which alternative the witness should choose, eg

"Did you obey or disobey the order?". These can also be useful where you are wanting to control the witness and avoid expansive answers.

20.15 You are normally allowed to lead against your case. You lead against your case by asking a leading question which suggest an answer which is prejudicial to you, for example *"Did you mace these detentions up?"* This can be effective in robbing the HOPO's cross examination of force, and can produce an engaging exchange with your witness. However, you must ensure beforehand that your witness is aware of and comfortable with the tactic.

20.16 Never allow yourself to appear impatient because you are not getting the answer you are looking for. This will only damage your client's confidence, and will give the adjudicator a bad impression of you and possibly (and if so, more importantly) encourage a bad impression of your client chapter 16 on the undesirability of overly restricting your client's answers).

20.17 If you are not getting the answers you are looking for, think about how your phrasing of the question might have led your witness to misunderstand the information she was being asked to give. Explain the topic you are dealing with as far as you are able without too much leading. If you have asked a non-leading open question, consider a fixed choice question or a question which leads against your case. If you are not getting the answer you were expecting and cannot think of a way of rephrasing it which will explain the misunderstanding, then it is unlikely that simply repeating the question will solve rather than exacerbate the problem. If the answer is not essential then leave it. If the answer is essential then it may be that you can come back to the point once you have elicited further evidence which can then be used to explain the answer you are seeking without leading. As a last resort, you can try again in re-examination if the subject has been tackled in cross extermination.

20.18 The difficulties in controlling the witness in asylum cases is greater because of the use of interpreters. A question which may be adequately clear in English may not be adequately clear by the time it has been translated. Be particularly careful to avoid long questions, compound questions, and those involving double negatives. For example instead of *"Why did you not flee until Easter even though you were arrested at Christmas?"* try *"You were arrested at Christmas. But you waited until Easter before you fled Why did you wait until Easter?"* Let the interpreter translate the burst two statements before asking the question. As well as making the question clearer, this will give the witness more time to think about the issue before having to answer.

20.19 Both control of the witness and comprehension by the adjudicator will be hugely aided if you explicitly set out the structure of your examination in chief and signpost each group of questions as you come to them, so that both your client and the adjudicator (and yourself) know where you are going and what you are trying to do If you have a written witness statement or interview notes standing as evidence in chief, then you can use it as a framework, and refer to it in guiding the witness to the issues with which you wish to deal. You can assume the facts set out in the written statement for the purposes of your oral examination, even if they are in fact disputed by the Home Office, just as disputed facts can be assumed in your questioning once the witness has established them in her oral evidence, for example, *"You describe in*

your statement how you were arrested at the demonstration. How many people were arrested with you?"

20.20 When the examination in chief is designed to supplement a written statement or interview notes, there is a particular danger that the evidence may appear disjointed and difficult to follow - both to the adjudicator and your witness - if you jump about between different parts of the case. This may also make it less memorable. You must ensure that your oral examination in chief is fitted sensibly into the framework of the written statement. It is not usual for a statement to be read out in asylum appeals, but you should paraphrase or read enough of the statement to put your questions into context, and explain what you are intending to add to the statement by each group of supplemental questions.

Conducting a full oral examination in chief

20.21 It is far more difficult conduct a full examination in chief of an appellant in an asylum appeal than it is to examine witnesses in other courts, and it is particularly difficult to get the examination in chief underway without leading. If you are examining the defendant in a criminal trial, all the relevant facts may have occurred on the one day, and you can start simply by asking the witness if she remembers any particular incident on that day. The material facts in an asylum appeal may however be spread over many years or the appellant's lifetime, and may involve not just her own experiences over those years but those of her family and her community.

20.22 You should plan very carefully the structure of your examination in chief, referring to the discussion on structure of witness statements in Chapter 9. Even though you will not submit it, a written proof must be prepared for your client. Controlling the structure of the examination in chief will be greatly assisted by signposting your questions. It will also help relax the witness, by making sure she always knows what is coming up, for example *"I want to start with your upbringing and background... Now I'm going to ask some questions about your political activities... Now, I'd like to ask some questions about the experiences of your family... Now I want to ask you some questions about how you came to leave your country... Now I want to deal with events since you arrived in Britain..."* Signposting in this way should not be criticised as leading. It is obvious that she was born and brought up, it is presumably accepted that she had a family, it must be accepted that she left the country and that she is now in Britain. It might not be accepted that she had any political involvement, but if her claim is based on political involvement, then it is so obvious that she will give evidence of political involvement, that you are unlikely to be criticised for leading into your questions on it. It might be different if you were to introduce your questions with *"I am now going to deal with your various responsibilities as the organiser for three branches of the IPK "*

20.23 Open questions may enable the witness to develop her own story without further interruption, but to what extent this is practical and desirable depends on the witness. Will she keep to the point or digress? Will she give the right amount of detail or too little or too much? Will she go at a reasonable speed for the adjudicator? Does she have the presence to keep the adjudicator's attention during a long monologue without the interjection of question? Is she articulate and confident? If she is nervous, inarticulate, has a poor memory, or the evidence is complicated, then it is probably a

good idea to limit open questions and keep a tight control on the evidence. Short questions and answers can also be easier to follow and more engaging than a monologue.

Examination of chief of witnesses of fact other than the' appellant

20.24 Much of the above discussion will apply both to examination in chief of appellants and of other witnesses of fact. In getting the evidence in chief underway and in controlling it thereafter, you should always make clear by signposting and by the way you phrase the questions how the evidence that is being given adds to the appellant's evidence. If you allow the witness to stray from the matters on which she will give additional evidence, it will again make it more difficult to object if the HOPO pursues irrelevant matters in cross-examination.

21. **Cross-examination**

21.1 If you call your client, the HOPO has a right to cross examine her. The HOPO usually has three aims when conducting cross examination:

- firstly, to emphasise what he alleges to be weaknesses in the case put forward by your client;
- secondly, to put and to your client alleged discrepancies or inconsistent statements; and
- thirdly to ask questions which have already been asked in the hope that the client will give inconsistent answers.

Alleged weaknesses

21.2 In relation to the first aim, the HOPO may simply ask leading questions to confirm aspects of your client's evidence which were relied upon in the refusal letter (regardless of whether the facts are not disputed). For example, the refusal letter may have stated that:

> *"On your own account you have never been charged with any offence."*

21.3 In cross examination, the HOPO will say:

> *"Can you confirm that you were never charged with any of offence?"*

21.4 Your client will obviously answer no, as she has never alleged that she was charged. You may wish to enquire whether this is an efficient use of court time, but your client should be warned that the HOPO will put such questions. The HOPO may misunderstand your client's case, and, for example, put the above question when your client has in fact said that she has been charged, in which case, you should object.

21.5 If it is alleged that any part of the appellant's evidence is implausible or unlikely, the "question" is likely to be along the lines set out below:

> *"I put it to you that it is wholly implausible that you would have been able to leave on your own passport if you were of as much interest to the authorities as you say you were. Would you like to continent?"*

Alleged discrepancies

21.6 In relation to the second am the HOPO will repeat allegations in the refusal letter that there are discrepancies between different answers at the asylum interview, or between asylum interview, other interviews, and additional statement, and ask your client to comment. He may also put what he alleges to be discrepancies between various material submitted to the Home Office in support of the initial claim, even though such an allegation was not made in the refusal letter.

21.7 He may also put alleged discrepancies which are between you client's evidence in chief and previously submitted evidence. When your client gives her explanation, the HOPO will often "put it" to her that her explanation is not credible.

Seeking new discrepancies

21.8 In relation to the third aim, the HOPO will ask questions which were asked during Home Office interviews, or during examination in chief, or which your client has answered in previously submitted statements. The rationale appears to be that if the appellant is repeatedly asked the same question, there is a chance that inconsistencies will appear in her answers which can then be presented as discrepancies damaging her credibility. Sometimes the HOPO will even ask the same question more than once in cross-examination, apparently for the same purpose.

Objecting to cross-examination

21.9 With increasing use of witness statements, cross-examination will increasingly be the main opportunity your client has to give oral evidence to the adjudicator. It therefore becomes vitally important that you ensure that cross-examination provides a fair opportunity for your client to put her case.

21.10 You may object to a question in cross examination if you feel that the question is improper, unfair, irrelevant, confusing, misleading, or the questioner's tone and manner inappropriate. Some representatives consider that a confident, articulate, sophisticated client can be left to deal with improper or confusing questions, and effectively make her own objections. Others consider that regardless of the client's ability to deal with improper questions, fairness requires that such questions should not be put, and that it is part of the representative's duty to do his best to ensure that the proceedings are fair. You should only decide not to object to an improper question if you are very sure of your reasons. The fact that an adjudicator has over-ruled previous objections should not lead you to stop objecting to similar questions. It may be more difficult to challenge before the IAT or in the High Court the fairness of questions asked in cross-examination if you did not object to the question when it was originally asked. Also, even if the objection is over-ruled, the HOPO will sometimes rephrase the question in a less objectionable way, and it will at least mace the HOPO aware that you are ready to object, so that he may think twice about other questions he was planning to ask.

Examples of potentially objectionable questions in cross examination

21.11 Some of the examples below apply particularly to cross examination of the appellant, but the same principles apply to cross-examination of other witnesses of fact.

21.12 *The discrepancy which is not a discrepancy*

HOPOs will often put a "discrepancy" to a witness without first establishing that it is a discrepancy:

> *"Today you said that your father had written to you saying that your brother had been arrested, but in fact, according to your asylum interview, you have*

had no contact with your family since leaving Ghana. How do you explain this discrepancy?"

Objection: the interview was two years before the hearing. It may be that the appellant had not heard from her family at the date of the interview but has heard from them since. The HOPO has assumed a discrepancy which has not been established.

"You now say you joined this organisation in 1993, but in your asylum interview you said you supported the organisation in 1989. Why are you telling a different story now from that which you told in your interview?"

Objection: The two are not inconsistent. She need not be a member to support the organisation.

21.13 *Putting interview notes to the client which she does not accept are accurate*

Object where your client has explained that she does not accept the interview notes yet the HOPO puts them as inconsistent statements without qualification.

21.14 *Alleging a discrepancy based on failure to mention something, even though she was never asked about it*

"You've told us today that you were ill when you passed through Russia on your way to claim asylum in the United Kingdom, but you did not mention this during your asylum interview. Why have you just remembered now that you were ill in Russia?"

Objection: She was never asked during her asylum interview whether she was ill in Russia. The asylum interview is an interview, not a complete record of her life.

"You have said today that you were tortured while you were detained, but you did not say you were tortured when asked about your detention during the asylum interview."

Objection: The appellant was asked when she was detained and she answered. She was not asked how she was treated during her detention.

21.15 The HOPO will often allege that failure to mention a particular aspect of the asylum claim during a short pro forma interview on arrival represents a discrepancy. For example, the Home Office notes of the pro forma interview may state that:

"PAX says she was detained a month ago for two weeks."

The HOPO is quite likely to seek to mace the following use of this:

"You said in your asylum interview that you had been detained five times. However; when interviewed on arrival you mentioned only one detention."

You should object to questions along these lines on principle, for the reasons set out in chapter 2, and should have made your objection clear at the start of the hearing. If your objections are over-ruled, then, at the very least, the HOPO should be asked to read in full the question to which he is referring. If the question is allowed to be put as an omission for which an explanation is required, then, not surprisingly, your client may become confused as to why she would have omitted the incident if asked about it, and offer that perhaps she forgot. This answer is then held against.

21.16 When you object to the appellant being criticised for failing to answer a question which she was not asked, the HOPO will sometimes claim that the opportunity given to the asylum seeker at the end of both an interview to add anything she wishes demonstrates that she could and should have mentioned the information at the interview, whether she was asked about it or not. It is an absurd argument in relation to both interviews.

21.17 At a short pro forma interview, the asylum seeker can hardly be expected, having been told that details should not be given, to understand the offer to add anything as meaning that the interviewer has changed his mind and does want the details which he has just told the asylum seeker not to give.

21.18 The full asylum interview may consist of a long and comprehensive list of questions usually over many hours. The asylum seeker will normally have been advised to answer the questions she was asked. The mere fact that the interview is a detailed interview implies that the opportunity to add anything refers to the questions which have been asked in the interview. Again, it might be different if, at the end of the interview, the interviewer was to say:

> *"I have finished my questions and now you are to make a statement describing any details relevant to your claim which you rely upon or may rely upon in the future but upon which I have not questioned you at the interview, and this statement must be made before you leave the interview room, as any such details provided at a later date will be regarded as fabrication."*

But that is not what the asylum seeker is told, and you should object accordingly.

21.19 *Not putting the alleged inconsistent statements to the witness or putting them out of context*

If the HOPO is going to put any alleged discrepancy arising in statements or interview notes, then the witness should be read all the relevant passages and enough of the surrounding material to put the passages in context. If you feel that the extract read out by the HOPO is insufficient to put the statement in context, then object and ask that the extra passages which you feel are necessary are read. You must object if the HOPO appears to misrepresent your client's statements. For example the asylum interview may read:

> *Q: "What was the date of the detention you have just told me about?"*
>
> *A: "I cannot remember, it was during the summer of 1988."*

Q: "Please can you be more specific? I want to know the date."

A: "I think it may have been June 1988."

The cross examination may be conducted as follows:

Q: "During which month were you detained in 1988? "

A: "I think it might have been July."

Q: "July?"

A: "Yes"

Q: "At your asylum interview you said your detention was in June but now you are saying it was in July. How do you explain this discrepancy?"

Objection: Point out that your client said no such thing, and at least ask the HOPO to read out the full passage before putting it.

21.20 The HOPO may also fail to explain to the witness when or in what circumstances the witness is alleged to have made the inconsistent statement. There may be notes of two or more Home Office interviews before the court, plus additional written statements submitted to the Home Office, but the HOPO may simply ask the witness

"So why did you say to the Home Office 'I was not detained before I990'?"

Objection: The HOPO should explain to the witness the date and nature of the interview, or the date of the statement in which she is alleged to have said it.

21.21 Given the length of time it has taken the Home Office to reach decision in some cases, and the delays in the appellate process, the HOPO may be putting statements to the appellant which she is alleged to have made some years before. Before asking *"Why did you say that?"* it may well be appropriate to ask the witness if she remembers saying it.

21.22 *Irrelevant questioning*

Your client may have mentioned as background the fact that she was detained in 1981, but made clear that it is not the basis of her present asylum claim. The HOPO may fail to understand this and start asking detailed questions about the detention in 1981 such as what time of day it was, how many officers arrested hey how long she was held, was she charged with anything, and how she was released. Apart from irrelevant questions being inappropriate on principle, it will save valuable court time if you point out to the HOPO that the detention does not form part of the basis of the claim so the questions are irrelevant to the issues the court has to decide.

21.23 *Questions to which the witness cannot be expected to know the answer*

"Why did the guard let you go?"

This or a variation is a question which HOPOs seemingly invariably ask. Your client is not the guard. If the HOPO wants to "know" why the guard released your client then the appropriate person to ask is the guard. Your client should be asked questions which imply that she should have knowledge which she cannot possibly have.

21.24 If your client has an opinion on why she was released, and is happy to give that opinion in evidence, then you may allow this question to be asked. But it is obviously inappropriate as phrased, and normally this should be pointed out. Problems may otherwise arise because the appellant, assuming that she is expected to know the answer to any question she is asked, will offer what is effectively a guess such as "They did not have any evidence". The HOPO will then allege that the appellant has stated conclusively that the security forces have no evidence against hey and ask the adjudicator to infer from that answer that the appellant is at no continuing risk.

21.25 *HOPO giving evidence under the guise of cross examination*

As we have seen, the refusal letter will often make assertions about anything from the general human rights situation in the country of origin to the identity of a branch secretly of an opposition party, without providing any evidence in support. But the HOPO may use cross-examination to assert facts which are not even referred to in the refusal letter, never mind supported.

21.26 If the HOPO wishes to lead evidence of the facts which he is alleging, then he may do so, whether documentary or oral, and, if oral, you will have the right to cross examine whoever he calls. On at least one occasion, when the HOPO was stopped from giving evidence during cross-examination, the HOPO responded by calling himself as a witness. The adjudicator accepted the HOPO as a credible witness and dismissed the appeal. However the IAT *(Aitsaid* (11391)) remitted the matter on the basis that the adjudicator erred in allowing a representative to give evidence.

> *"You say you were stopped by the Special Branch but that's not true because the Special Branch only operate in the capital. Do you have any comment?"*

or

> *"l suggest that there is no way that you would have been able to bribe your way through an airport with the security that Istanbul has."*

Objection: Ask the HOPO if he is going to lead evidence about the areas in which Special Branch operates or on whether there are corrupt immigration officials at Istanbul Airport. If he is not going to lead evidence on the matter, then he should not be asserting the 'fact' to your witnesses.

21.27 *Commenting on evidence instead of asking questions*

> *"I find that quite implausible"* or *"That's not very likely really, is it"*
> [in response to an answer from the witness]

Objection: If the HOPO has any comment to make on the evidence, then he should make it in his closing submissions. He is not entitled to comment on the evidence during his cross-examination. By commenting, he may also be straying into giving evidence. If he alleges that something is likely, what basis does he do so - his knowledge or experience of the country of origin? If so, you should be allowed to cross-examine him on that knowledge or experience.

21.28 *Raising new issue without notice*

You should object immediately, particularly if you have gained assurances through requests for particular and again at the hearing, that no further issues are to be raised. At the very least, an adjournment should be granted.

21.29 *Mistakes*

The simplest objection is to a mistake on the part of the HOPO. Mistakes as to dates and the sequence of events are quite common, and should be pointed out before the witness has the opportunity to respond to the question.

21.30 You should also check that the HOPO is reading from the interview notes correctly. The Home Office never provides a typed transcript of interview records and expects the court to rely on a handwritten note, which is quite often virtually illegible. Mistakes in deciphering the handwriting may completely change the meaning of the note from which the HOPO is reading.

21.31 *Breaching another asylum seeker's confidentiality*

HOPOs have been known to claim that a witness' evidence regarding a particular event is inconsistent with that given by another asylum seeker, whether relative, friend, or acquaintance who is not party to the appeal or represented at the appeal, and to attempt to disclose information allegedly from that asylum seeker's file to demonstrate this inconsistency.

21.32 If the HOPO attempts to do so, then you have a duty to the court immediately to enquire whether the asylum seeker concerned has waived confidentiality on her claim. For the HOPO to divulge information given in confidence by an asylum seeker in support of her claim at the hearing of a separate appeal without that asylum seeker's permission would be grossly improper, and given that asylum seeker will not be represented, you should assist the court by pointing this out. The HOPO will sometimes submit that he is entitled to breach an asylum seeker's confidentiality where the asylum seekers are related. Apart from pointing out the novelty of such an argument, you may also refer to the Home Office's confirmation that:

> *"confidentiality prevents material supplied in respect of one application being applied to another application regardless of whether or not applicants are related"*
> (letter to Deighton Guedella from Ms Sue Brown of the Asylum Directorate)

21.33 You should ask that the HOPO produce evidence of the waiver of confidentiality by the asylum seeker before he divulges any otherwise confidential information from that asylum seeker's file.

21.34 *Privilege*

The advice which you or any other representative has given to your client concerning the conduct of her asylum claim is privileged and the appellant should not be expected to reveal such information, in answer to questions either from the HOPO or the adjudicator.

22. **Re-examination**

22.1 At the end of the cross-examination, you will be asked whether you want to re-examine. It is an offer not an order, and one you should regard with suspicion. Representatives often re-examine far too much for their clients' good. You do not demonstrate the strength of your case by the number of questions you ask in re-examination - often, the reverse is true. By indicating that you have no need to re-examine, you demonstrate how little damage the HOPO's cross-examination has inflicted. You should explain to witnesses before the hearing that although you will be offered an opportunity to ask further questions after cross-examination, it may well not be necessary to do so.

22.2 You can only ask questions in re-examination arising out of evidence given in cross-examination. If, however, the witness for whatever reason has wholly contradicted herself in cross-examination, then it is more than likely that further questions will increase rather than limit the damage. Ask yourself whether you are digging yourself a deeper hole. Equally, if the cross-examination has inflicted at most minor damage, then the risks may well outweigh the possible gains in re-examining, as well as signposting what damage there has been.

22.3 If your witness has given new information in cross-examination upon which you have no instructions, and you fear that it appears prejudicial, then you may be tempted to ask questions which give the witness the opportunity to explain and to put her previous answers in a better light. Re-examination should not be used to take fresh instructions from your client in front of the adjudicator. If you have thought of an obvious explanation for an apparently damaging answer, then you can and should offer that explanation in your closing speech to counter any adverse inference which the HOPO urged the adjudicator to draw. You are prohibited from leading in re-examination as you are in examination in chief. You should avoid embarking on a tortuous series of non-leading questions which you hope will lead the witness to offer your chosen explanation. Unless you have taken full instructions on the explanation before the hearing and you are confident that the client will give that explanation, the most likely result is an increasingly confused, warned, and exhausted witness, who cannot understand what you are getting at.

22.4 You may have objected to cross-examination on the grounds that it is unfair or misleading, perhaps the putting of a previous statement to the witness out of context, and the adjudicator has over-ruled your objection, telling you that you will have an opportunity to deal with it in re-examination. Consider carefully whether or not you should do so. It may be better to point out in closing why the question was misleading and why the answer should consequently be disregarded. The witness may have been confused by the misleading question and anxious about having felt compelled to give an answer which appeared wrong. She may now be even more anxious about contradicting the earlier answer, and therefore feel forced to confirm her earlier answer rather than give the answer you expect. If she does so, you may have undermined the submission which you could otherwise have made.

Circumstances in which you might want to re-examine

22.5 When cross-examination is taught, it is taught as an opportunity to force the witness to admit things which are damaging to her case and which can provide ammunition for closing speeches. The cross-examiner achieves this aim through tightly controlled leading questions which one by one compel the witness towards accepting the facts which The cross-examiner needs to build his argument, and avoids open questions which might elicit an explanation which destroys the basis of chat argument.

22.6 If the HOPO has elicited a series of answers which support his case, but you know that if the witness was asked the right follow up question, would give a perfectly reasonable explanation of her previous answers, then re-examination provides the opportunity to ask it. However, it is obvious that whether you can effectively use this opportunity is wholly dependent upon the extent to which you have thought of possible lines of cross-examination before the hearing and taken full and comprehensive instructions on every angle. If you have not done so, then the opportunity is usually best left.

22.7 Slightly different considerations may apply if you have only conducted a very limited oral examination in chief and relied for the most part on written statements (or simply tendered your witness, though this is not often advisable for the reasons set out at chapter 20). The HOPO may for whatever reason embark upon what amounts to a wide ranging examination in chief. In such circumstances, it is quite acceptable for you to use re-examination to add any relevant information to the answers which the HOPO has elicited. However, you should still only ask such questions upon which you have taken full instructions and on which you know the answer you will get, and you should be extremely cautious about moving into questions on which the witness has not been provided with a written proof.

22.8 Before you finish, or before you decline the opportunity to re-examine, ask the adjudicator if there is anything upon which he wishes to hear further evidence.

23. **Closing Submissions**

HOPO's submissions

23.1 The HOPO makes his submissions first. He will normally start by reminding the adjudicator under which sections of which acts the appeal falls to be determined. He will usually refer to *Sivakumaran* and *Kaja* on the burden of proof, and ask the adjudicator to decide the case accordingly. He will almost always rely upon the arguments set out in the refusal letter. He will then make additional points.

23.2 You should take a full note of the HOPO's submissions. Occasionally they say things which will be useful at a later stage. You will also want to respond in your closing submissions to each of the HOPO's arguments, and it may help if you note the HOPO's submissions down one page, and pointers to yourself on counter arguments on the facing page. You will not normally be offered any time after the HOPO finishes his speech to consider his submissions before making your own.

23.3 It is only occasionally appropriate to interrupt the HOPO's submissions to object, rather than waiting until your own submissions. However, it may be helpful to the adjudicator if you interrupt where the HOPO:

- makes a mistake about basic facts, for example dates of interviews or the date the appellant entered the country;
- misquotes either the interview notes or the evidence given at the hearing;
- misrepresents your case, for example by purporting to deal with an argument which is not part of your case, or claiming you accept something which you do not accept;
- appears to be altering his case, for example by attacking credibility when he had agreed at the start of the hearing that it was not in issue;
- if he is relying on something which he did not put to the witness in cross-examination;
- (Sometimes) if he starts making factual assertions for which no evidence has been led.

Your own submissions

23.4 It's usually best to write only notes beforehand rather than a full speech (though you might want to write out your first couple of sentences in long-hand if you think you are going to be nervous). That way your delivery will be much more natural and you will be able to make more eye contact with the adjudicator. More importantly, you will be better able to adapt your speech to deal with issues which have arisen at the hearing and with the HOPO's closing submissions. You might however consider preparing standard submissions on common issues such as conditions in a particular country of origin, or where the Home Office has made allegations concerning lack of detail in a pro forma interview conducted upon arrival.

23.5 Go at a speed which allows the adjudicator to make a proper note. Problems sometimes arise because the adjudicator does not adequately set out your submissions in the determination. If you have not given him a chance to make a proper note of your submissions, then you have yourself to blame. Remember that it may be weeks before the adjudicator comes to write his determination. If the adjudicator does not appear to have made a note of a submission which is central to your case, there is nothing wrong with asking the adjudicator politely whether he has a note or whether he would like you to pause while he notes the submission.

23.6 It is difficult take a note when you are writing, but you should try to note your submissions in case you later want to argue that a submission has not been recorded or addressed in the determination. If you are dealing with arguments which you have prepared earlier, then you need only tick off each submission in your notes as you make it.

23.7 The best structure for your closing submissions may change from case to case but they should always have a structure of some sort. A common structure is:

a. Summary of the appellant's evidence in chief

b. Summary and discussion of supporting evidence, including its relevance to the appellant's credibility

c. How the client's case is made out in law

d. Rebuttal of refusal letter and HOPO's additional points

e. Concluding with a summary of factors establishing present risk

23.8 You do not need to go into detail on the authorities on the standard of proof. However, you should ensure that your submissions on the facts reflect the correct standard of proof (ie whether there is a serious possibility that something occurred, not whether it did occur) and you should show how the HOPO's inferences from the evidence are inconsistent with the application of the lower standard of proof You should attempt to deal with each point in the refusal letter and each point in the HOPO's submissions, and show how they are either wrong or not material to the appeal. For example, if the HOPO relies on minor discrepancies, you should rely on *Chiver* (10758) which states that discrepancies which do not go to the centrepiece of an appellant's case should not invalidate that centrepiece.

23.9 Remember that adjudicators hear cases day after day, and see the same allegations put forward day after day by the Home Office, often without serious challenge. You need to engage the adjudicator's attention and explain forcefully why a case built on allegations without evidence, source or even explanation should be rejected by any court. Also attack the Home Of dice presumptions about the reasonable refugee individually, discrediting where appropriate by demonstrating the "Damned if you do, damned if you don't" approach which lies behind them. Point out the alternative standard Home Office allegation which would have been deployed if your client had

acted differently. Point out the absence of any legal justification for the Home Office's claims of how she could reasonably have been expected to act.

23.10 Always conclude by asking the adjudicator whether there is any matter of concern upon which you have not addressed him.

24. **Recommendations**

24.1 Home Office told Parliament in 1988 that recommendations by adjudicators were "invariably" accepted by the Home Office unless they were perverse or otherwise unlawful, and representatives consequently put much effort into pursuing such recommendations where it was clear that an appellant's removal would be harsh or unjust, but the application of the 1951 Convention was unclear.

24.2 However, despite the above indication, the Home Office increasingly rejected such recommendations, and in 1996, the Home Office formally adopted a new policy whereby adjudicators' recommendations would be rejected unless:

> *"the written determination discloses clear exceptional circumstances which have not previously been considered and which would merit the exercise of ... discretion outside the immigration rules."*

24.3 In a letter dated 21$' October 1996 from the Immigration Policy Directorate to the Immigration Advisory Service, it was further indicated that:

> *"It is of course entirely possible for an adjudicator to take a different view of compassionate circumstances which have been considered by the Home Office. This would not avail an appellant since they would not be exceptional circumstances which had not been previously considered by the Secretary and which would merit the exercise of discretion outside the Immigration Rules.*
>
> *"Each recommendation will be considered on its merits but the clear exceptional compassionate circumstances will also need to merit an exercise of discretion outside the Immigration Rules before we would be prepared to accept an adjudicator's recommendation."*

24.4 That remains the Home Office's policy at time of going to press in April 1997, though it is possible that it may change after the General Election in May 1997. The policy has been circulated to adjudicators, and many have expressed their concern during hearings that the new policy of rejecting recommendations is unwarranted and will result in injustice. As long as the policy remains in place, it is important to be aware and to remind adjudicators that the Home Office is likely to ignore recommendations, and that they no longer provide (if they ever did) an alternative means by which an adjudicator can prevent an appellant's removal in difficult, doubtful, unusual or novel cases. Instead, as suggested in Chapter 1, you may want the adjudicator to consider more closely whether the Convention, properly applied as a living instrument, has evolved to cover the predicament of your client.

24.5 In the light of the statements set out above, you should, if you are going to ask for a recommendation under the present policy, at least indicate to the adjudicator, if possible, factors in favour which have not been considered by the Home Office.

24.6 However, there are other ways you can pursue issues outside the 1951 Convention. If your statutory right of appeal is not limited to compliance with the 1951 Convention and you consider that the Secretary of State's decision is unlawful on public law grounds (for example, through an unexplained failure to follow Home Office policy

on removal or a misdirection as to the UK's obligations under the European Convention), then you should be asking the adjudicator to allow the appeal rather than make a recommendation.

24.7 Whether or not your appeal is limited to the 1951 Convention, you should seek findings of fact from the adjudicator which will be relevant to your client's entitlement to remain in the UK pursuant to other international Home Office policy, or other compassionate circumstances. Such findings are of great importance in the light of *R v. SSHD, ex parte Danaei* (Tms, 28th March 1997). Danaei's asylum appeal had been dismissed by the adjudicator on the grounds that his persecution was not for a Convention reason. However, the adjudicator resolved the issues of fact between appellant and Home Office wholly in favour of Danaei and against the Home Office.. Danaei then submitted to the Home Office that, on the basis of the adjudicator's findings of fact, his removal would be contrary to Article 3 of the European Convention. The Home Office rejected this claim on the grounds that it did not accept the adjudicator's finding of fact. The High Court held that the Home Office, when considering an application for exceptional leave to remain, was not entitled to reject an adjudicator's findings of fact relating to the appellants individual circumstances (as opposed to the general situation in the country of origin), without having additional material or being able to show that the adjudicator had been deceived.

24.8 An adjudicator, by explicitly finding a breach of the European Convention, may at least compel the Home Office to offer reasons why it disputes the breach, and those reasons might disclose any misdirection by the Home Office as to the proper construction of its obligations. However, by making explicit his findings of fact from which the breach flows, the adjudicator may well force the Home Of rice, if it still declines to accept the breach, to either disregard the adjudicator's findings of fact or else offer untenable reasons as to why such facts do not render removal in breach of its obligations. Your client will then have a remedy in judicial review.

25. **Challenging the Adjudicator's Determination**

If you have lost before the adjudicator

25.1 If the appeal was not certified by the Secretary of State, then you have a right to apply for leave to appeal to the Immigration Appeal Tribunal. If the appeal was certified, but the adjudicator disagreed with the certification, you also have that right. However, if the adjudicator has dismissed the appeal and agreed with certification, you have no right to apply to the IAT and your only remedy is judicial review. You can judicially review either the correctness of certification or the substantive dismissal of the appeal or both. You do not have to be able to dispute certification in order to judicially review the adjudicator for dismissing the asylum appeal. Equally, you could judicially review the correctness of certification without alleging an error of law in the adjudicator's determination, on the basis that you have a viable appeal on the facts (see below) which you have been wrongfully prevented from pursuing to the Immigration Appeal Tribunal.

25.2 Note that whereas the Home Of lice is prevented by statute from removing your client as long as her application to the IAT is outstanding, there is no similar provision relating to applications to the High Court. If the adjudicator dismisses the appeal and upholds certification and you wish to pursue judicial review, you need to immediately inform the Home Office of your intentions and seek an undertaking that your client will not be removed until the application is determined. If the Home Office does indicate that it will attempt to remove your client before the leave application is heard, your only remedy is an emergency application to the High Court for an order preventing it.

Time limits

25.3 You have five days from receipt of the adjudicator's determination in which to apply for leave to appeal. The five day time limit does not include weekends or bank holidays, but it is absolute. The IAT has no power whatsoever to extend time under the rules. Furthermore, determinations are deemed under the Rules to be received two days after they are sent regardless of whether they are actually received much later or are never received at all.

25.4 Rule 13(5) states that:

> *"Where the Tribunal fails to decide any application for leave under this rule within the time prescribed, the application shall be deemed to have been granted"*

25.5 You should therefore be aware of the period between application for leave and decision.

25.6 If you have missed the five day time limit, then you have two options. The first is judicial review. Detailed discussion of judicial review in such circumstances is outside the scope of this "rude, but you will normally at least have to say that you did not miss the time limit for appealing in order to go straight to judicial review, as that would open you to allegations of abuse.

25.7 The second option is to persuade the IAA to re-promulgate the determination. This means that the time limit will start to run again from re-promulgation. The IAA will usually be prepared to re-promulgate if there has been some defect or administrative mistake in the serving of the determination which has prevented an appeal being submitted in time.

Submitting additional grounds and evidence

25.8 Under the pre-1996 rules, it was established (after previous confusion) in *R v SSHD, ex parte Toprak* (1996) Imm AR 332 that the IAT had no jurisdiction to consider grounds submitted after the time limit. However, the court considered that additional grounds could be submitted after the application but within the five day time limit. The 1996 Rules (rule 13(3)) state that:

> *"an application for leave ... shall be ... (ii) accompanied by ... all the grounds relied on."*

25.9 This could be understood as meaning that once you have made an application for leave, no further grounds may be submitted, even within the time limit. Such a construction would make little sense, and the better construction is that the reference to all grounds relied upon means all grounds relied upon at the date of the application rather than all grounds which may in the future be relied upon. It is reasonable to suppose that if the IAT was to be prevented from considering grounds submitted within the time limit, then there would be express wording preventing it from doing so.

25.10 However, the true construction has not yet been established, and until it has been, you should delay making your application until you can attach all grounds which can be submitted within the time limit.

25.11 The rules contain no provision preventing you submitting evidence after the application for leave or indeed after the five day time limit, and if such evidence is submitted before the IAT determine the leave application and it is relevant, there is no justification for refusing to take account of it.

The application for leave

Legal aid

25.12 Your client is entitled to legal aid on the green form scheme for drafting the application for leave to appeal to the IAT, though not for representation at the full hearing.

Criteria for granting leave to appeal

25.13 The IAT has a duty to gnat leave if it is arguable that the adjudicator has made an error of law in dismissing the appeal. The Court of Appeal in *Borissov v SSHD* (1996) Imm A R 524 confirmed that:

"...the jurisdiction of the Immigration Appeal Tribunal is not limited to questions of law, and it is within the scope of their jurisdiction for them to review, if they see fit to do so, the Special Adjudicator's conclusions offact, though no doubt this power will be sparingly exercised, and in any event, in accordance with general principles, the Immigration Appeal Tribunal will naturally be most reluctant to interfere with a finding of primary fact by the Special Adjudicator which is dependent on his assessment of the reliability or credibility of a witness who has appeared before him."

25.14 The IAT has a duty to grant leave where it is arguable that a finding of fact is irrational or *Wednesbury* unreasonable, as that is classified as an error of law. The Court of Appeal made clear in *Borrisov* that the IAT could grant leave and then allow appeals against adjudicator's findings of fact which were not classified as or claimed to be *Wednesbury* unreasonable. However, to what extent it can or should extend its jurisdiction on appeals on the facts beyond the confines of *Wednesbury* unreasonableness has not been established. While the LET will be slow to accept a challenge to an assessment of live evidence, it has in the past adopted a considerably more rigorous review of findings of fact based on documentary evidence. You should normally classify errors of fact as irrational if that is indeed arguable so as to trigger a duty to grant leave.

Analysing the determination

25.15 The following section is written with reference to applying for leave to appeal to the IAT, but will also apply to a large extent to judicial review of the dismissal of the asylum appeal. Chapter 3 should be referred to for guidance on challenging certification through judicial review. Set out below are some of the principle points you should be checking in the determination. As with the rest of this Guide, this section is not a substitute for a knowledge of asylum law and principles of procedural fairness, and in particular recent case law.

25.16 In recent years, errors in the application of the standard of proof have constituted the most common reason for the IAT remitting appeals, partly because of initial resistance by adjudicators and the Home Of lice to the case of *Kaja* which established that the same lower standard of proof - reasonable degree of likelihood or serious possibility - should apply not only to assessment of future risk but to proof of past facts. It has subsequently been determined that the same standard applies to subjective fear. The adjudicator must explicitly state that he applied the correct standard of proof to all three areas.

25.17 However, where the adjudicator justifiably finds that the appellant is a complete liar, the Court of Appeal held in *Kingori* (1994) Tmm A R 539 that his determination should not be overturned because he has made a mistake setting out the standard of proof, the reasoning being that the appellant would have lost whatever standard of proof was used. However, the IAT has in a number of cases (eg *Petre (12998))* warned adjudicators against relying on this case outside the special circumstances for which it was intended, and in particular where the adjudicator had not in fact rejected all the appellant's evidence, or where his analysis of the facts did not justify such an extreme and blanket adverse credibility finding.

25.18 You should check that the lower standard of proof has been applied only to the benefit of the appellant. It has been known for adjudicators to find for example that *"I think there is a serious possibility that she is actually wanted as a common criminal rather than a political agitator as she claims."* In fact if there is only a serious possibility or reasonable degree of likelihood that the appellant is wanted for a non-Convention reason, then one can infer that there is at least a serious possibility that she is wanted for a Convention reason.

Credibility

25.19 Both the High Court and the IAT have indicated that the tendency for adjudicators to dismiss asylum appeals solely on credibility means that those credibility findings must be the subject of careful scrutiny, and have warned of the dangers in making adverse credibility findings in cross cultural situations and on evidence given through interpreters. The Chief Adjudicator has also indicated that he considers adjudicators are putting too much emphasis on credibility findings as opposed to assessing the risk the appellant will face if her account is true. Such concerns are part of the rationale for the rejection of the balance of probabilities as the standard of proof, and the requirement that adjudicators should treat as proved that which there is a serious possibility has happened. You should always be looking at whether the correct standard has actually been applied to the fact finding process as opposed to whether it has been correctly quoted at some point in the determination.

25.20 In *R v IAT, ex parte Hussain* (CO/1990/95), Turner J stated that:

> *"Credibility is not in itself a valid end to the function of an adjudicator. There is a risk ... that over emphasis on the issue of credibility may distort the findings of an adjudicator."* (transcript, page 7)

25.21 The Chief Adjudicator has also told the Thanet House Users' Group that he considers that too much emphasis is placed on credibility, as opposed to assessing future risk should the appellant's account be true. In *Guine (13868),* the Immigration Appeal Tribunal colt mended the above passage in *Hussain* to adjudicators and stated that:

> *"...a decision which concentrates primarily on findings of credibility for its outcome is in general more likely to be found to be flawed .. In our view it is safer for Adjudicators first to look at the story and see whether if it were true the appeal would succeed and then to proceed to examine it against the background of the country in question."* (transcript, page 5)

25.22 The Tribunal, both in the above case, *Kasolo* (see chapter 11), and in other cases (see for example *Mendes* (12183) and *Sokoto* (12898)), has warned against adverse findings on credibility pursuant to findings of implausibility which are made from the standpoint of the assumptions of an examiner in the country of asylum

25.23 It will be rare that an adjudicator is justified in rejecting every part of an appellant's evidence. Often significant parts of the appellant's account must be accepted despite adverse credibility findings. But the adjudicator may fall into the trap of determining the appeal as a trial of the appellant's credibility without considering whether on the basis of the evidence which he has not rejected, the appellant has anything to fear.

You must also not fall into the trap of rushing to dispute adverse credibility, without considering what you can do with the evidence which is left.

25.24 Sometimes, when an adjudicator accepts incidents of persecution but finds that the appeal must be dismissed for lack of credibility, what he seemingly means is that in the absence of credibility, the appellant cannot show the required subjective fear. In Gashi, the IAT said it would h hard to contemplate a situation where it would h right to dismiss an appeal on a finding of no subjective fear when there is the required objective risk. If this is what the adjudicator appears to have done, challenge it.

25.25 See under chapters 2 and 21 for general points about discrepancies and the analysis of interview notes. These will also apply to analysis of the determination. If discrepancies do not impinge on the centrepiece of your client's case, rely on *Chiver* (10758). Attack discrepancies based on failure to disclose all details upon application, referring to cases such as *Kasolo* (13190), or *Salim* (13202) in the case of failure to disclose details at the pro forma If the adjudicator relies on discrepancies which were not in the refusal letter, check whether he indicated his concerns at the hearing (see Chapter 9). If the adjudicator has determined that documentary evidence such as arrest warrants or letters from family members have been fabricated, without such an allegation having been put to the appellant, that is an error of law.

25.26 If you are able to produce evidence which disproves a finding of fact by the adjudicator then this should be submitted, and you should argue that any adverse credibility finding cannot stand as it was based at least in part on this mistake of fact, regardless of whether the mistake was the adjudicator's fault or not.

Treatment of country of origin material and expert and medical reports

25.27 A court is not obliged to accept expert evidence (which for current purposes include publicly available country of origin reports). But if it rejects it, it should give reasons for doing so. The more you have spelt out what the reports say in respect of your particular client's case and the Home Office allegations made against her, the stronger your position if the adjudicator dismisses the reports without giving reasons or simply ignores them. If the adjudicator rejects country of origin reports from a reputable source submitted by the appellant in favour of conflicting reports from another reputable source submitted by the Home Office, this is likely to show a failure to properly apply the lower standard of proof *(R v. IAT; ex parte Demisa*, 17 July 1996, reported in *Legal Action,* March 1997).

25.28 If you have found evidence or reports or judicial determinations or decisions since the hearing which support your client's case, and particularly if they answer an adverse finding made by the adjudicator, those should be relied upon and submitted with your application for leave. While you should give the explanation for those not being produced before the adjudicator, the failure to do so, whatever the reason, should not result in the IAT refusing to admit them and you should rely on the Court of Appeal's direction in *Packeer v SSHD* (1997) Imm A R 110 that:

> *"Of course, the appellate structure in asylum cases must be astute at every stage to detect, of its own motion if need be, any instance where the applicant may have been put at obvious risk of injustice in the presentation of his case*

through inadvertence or ignorance on the part of the applicant or his advisers." (transcript, page 6)

25.29 An adjudicator is therefore entitled, and in some circumstances may be required to take the initiative in obtaining evidence on the country of origin. However, any such evidence must be brought to the attention of both parties who must have the opportunity to comment, and a challenge may be founded on any reference in the determination to reports on which the parties were not given that opportunity. Equally, any finding of fact which could not be justified on the reports which were considered at the hearing may be challenged, as may an acceptance of unsupported and unsourced Home Office assertions in the face of the first hand evidence of your client and/or independent expert evidence.

25.30 You should look at how medical evidence has been treated. The IAT hod in *Mohamed* (12412) that:

> *"it is incumbent upon an adjudicator to indicate in the determination that careful attention has been given to each and every aspect of medical reports, particularly given that these are matters of expert evidence which cannot be dismissed out of hand."* (transcript, page 2)

Fairness

25.31 If you were refused an adjournment by the adjudicator to enable you to submit evidence on a point on which he subsequently made an adverse finding, this will normally be challengeable. If the delay in producing the evidence is due to representative fault, then you should rely on *Packeer* (above). You will also want to appeal if the appellant was forced to proceed with the appeal when unfit to do so, or where the interpreting was inadequate.

25.32 As discussed elsewhere, the raising of new issues by the Home Office at the hearing on which you are not given the opportunity to take instructions or obtain evidence may also found an appeal, as could any refusal to issue directions against the Home Office which could have assisted you or any direction preventing you relying on evidence or submissions which you considered relevant.

25.33 You should check the recording of your witnesses' evidence. If that recording is unsatisfactory, then you may wish to attach your notes of hearing to the application for leave. You should equally check that your central submissions were recorded and have been addressed in the reasons.

If the adjudicator allows the appeal

25.34 The Home Office can appeal to the IAT if the adjudicator allows the substantive appeal, whether or not the appeal is certified.

25.35 The IAT indicated in *Sivanesan* (14113) that though it had no power to set aside leave on application by the respondent, there was nothing to prevent the party who has won before the adjudicator making representations to the IAT opposing the grant of leave to the other party.

25.36 This is obviously difficult in practice. However, there has been much concern about the weakness of the grounds upon which the Home Office is being granted leave, and this could represent a valuable opportunity to tackle the problem. Clearly, you cannot sensibly make representations without having sight of the grounds and it is implicit in the IAT's indication that you should be allowed this on application either to the IAT or the Home Office.

25.37 Legal aid should be granted, as it would be for defog an application for leave to appeal.

26. **Representing children**

26.1 UNHCR states that:

> *"The problem of "proof' is great in every refugee status determination. It is compounded in the case of children. For this reason, the decision on a child 's refugee status calls for a liberal application of the principle of the benefit of the doubt. This means that should there be some hesitation regarding the credibility of the child's story, the burden is not on the child to provide proof but the child should be given the benefit of the doubt." (Refugee Children, Guidelines for Protection and Care, page 101)*

26.2 The UNHCR Handbook repeats that determination of the claims of children requires liberal application of the benefit of the doubt (paragraph 219), and the Immigration Rules also lay down special procedures for determining children's claims.

26.3 The UN Convention on the Rights of a Child defines 'child' as any person under the age of 18, and the Immigration Rules provide accordingly that a child is:

> *"a person who is under 18 years of age, or who, in the absence of documentary evidence, appears to be under that age."*
> (paragraph 349, HC 395)

26.4 If you represented your client during her asylum application to the Home Office then you should already have dealt with any failure by the Home Office to recognise your client as a child. If this has not been done prior to refusal of the asylum application, you may, in the absence of documentary evidence, need to obtain a medical opinion as to her age. Also, you should not necessarily accept at face value documentation suggesting your client is an adult. If you have reason to believe that she is a child, and it is possible that the documentation is inaccurate, you may still wish to obtain a medical opinion. UNHCR states that:

> *"When the exact age is uncertain, the child should be given the benefit of the doubt." (Refugee Children*, page 103)

Ethics

26.5 Membership of the Children's Panel of the Law Society requires the following personal undertaking:

> *"I undertake when representing children in proceedings covered by the Children Act 1989:*
> *1. Subject to paragraph 2, I will not normally delegate the preparation, supervision, conduct or presentation of the case, but will deal with it personally;*
> *2. In each case I will consider whether it is in the best interests of the child to instruct another advocate in relation to the presentation or preparation of the case;*
> *3. If it is in the best interests of the client, or necessary to instruct another advocate:*

3.1 I will consider and advise the guardian ad litem (and the child if of appropriate age and understanding) who should be instructed in the best interests of the child;

3.2 I will obtain an undertaking from that advocate to:

(a) attend and conduct the matter personally unless an unavoidable professional engagement arises;

(b) take all reasonable steps to ensure that so far as reasonably practicable a conflicting professional engagement does not arise.

26.6 You should apply the same standards to the representation of children in asylum appeals. It is not acceptable for a child to be switched between representatives, whether or not they are from the same film You should endeavour to be present at every hearing or interview with your client. If it is impossible for you to be present, you must ensure that your client is accompanied by someone she knows and trusts. It is not acceptable to send a clerk who does not know your client or her case. If you wish to use another advocate at any hearing, you must ensure that the advocate is introduced to your client well before the date of the hearing.

26.7 Ideally, you should have a working knowledge of the rapidly developing child care law and practice, but you must as a minimum ensure that specialist advice is obtained as to whether it may assist your client. For example, a local authority is under a duty pursuant to the Children Act 1989 to pay for the representation at any asylum appeal hearing of a child who is under its care, and may have a similar duty in respect of children living in their families, but whom the authority supports pursuant to the Children Act. Ideally, you should also have a basic knowledge of child development. Membership of the Law Society's Children's Panel requires this.

26.8 It your responsibility to ensure that both the Home Office and the courts recognise their duties to your client as a child. But while always being aware that your client is a child, you must equally recognise that the child is your client. She is as entitled as an adult client to independent representation, to realistic advice to enable her to make informed choices, and to have her instructions respected and effected to the fullest extent to which you are able. It is because a child is entitled to the same standard of representation that you must adapt to her age, mental development, and experience so as to provide it.

Taking instructions

26.9 UNHCR advise that a child should be assessed by:

> *"An expert with sufficient knowledge of the psychological, emotional, and physical development and behaviour of children... When possible, such an expert should have the same cultural background and mother tongue as the child " (Refugee Children,* page 100)

26.10 If this has not already been done, then you should consider obtaining such an assessment. Apart from its potential evidential value in your client's appeal, it will assist you in determining how you can best take your client's instructions. Whatever the expert's conclusions, however, it cannot absolve you of your ultimate duty to

assess your client's ability to give instructions, and to follow them to the fullest extent which your assessment allows.

26.11 You should also assess the degree of support available to your client from responsible adults, and whether, for example, you should apply for the appointment of an advisor from the Refugee Council's Panel of Advisors. If the age or development of your client does not allow you to take detailed direct instructions, you will have to make an assessment of the extent to which you can accept instructions from any responsible adult on your client's behalf You may wish to consider seeking the appointment of a guardian ad [item.

26.12 Before taking instructions, you should conduct the fullest possible independent research on conditions in the country of origin. Children will be less likely than adults to be able to make an accurate assessment of those aspects of their experiences which will require explanation *to* someone not familiar with their country. Many children will have only the vaguest idea of why they have been sent to the United Kingdom. Paragraph 351 of the Immigration Rules (HC 395) states that

> *"A person of any age may qualify for refugee status under the Convention and the criteria in paragraph 180B apply to an cases. However, account should be taken of the applicant's maturity and in assessing the claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of his situation. An asylum application made on behalf of a child should not be refused solely because the child is too young to understand his situation or to have formed a well-founded fear of persecution."*

26.13 You should consider practical steps which you can take to make it easier for your client to give you instructions. Your client may prefer to meet you at a venue other than your office. She may prefer to be accompanied at meetings by someone Use whom she trusts. She may equally want to consult her representative privately and you must ensure that such opportunities are made readily and tactfully available.

26.14 The extent to which you can take instructions will depend on the maturity and experience of your client. Children will manifest fear in different ways. As recognised by paragraph 351 (above), there is no need to seek instructions on subjective fear in the way in which you would from an adult client. As is recognised by paragraph 352 (below), children even more than adult asylum seekers are likely to express themselves best if given freedom to do so in their own way in their own time, rather than in response to structured interview questions. You should also refer to UNHCR's *Guidelines for Interviewing Unaccompanied Refugee Children and Adolescents and Preparing Social Histories.*

Legal basis of a child's asylum claim

26.15 Just as children's manifestation of subjective fear may not be related to that of an adult, different criteria will often apply to the objective element. For example, the conscription of children into military service is very likely to constitute persecution in circumstances where it would not amount to persecution in respect of an adult. You should have regard to the rights protected by the UN Convention on the Rights of the

Child in considering what amounts to persecution. You should be familiar with the developing law relating to children as a social group.

Home Office interviews

26.16 The Immigration Rules provide that

> *"A child will not be interviewed about the substance of his claim to refugee status if it is possible to obtain by written enquiries or from other sources sufficient information properly to determine the claim. When an interview is necessary it should be conducted in the presence of a parent, guardian, representative or another adult who for the time being takes responsibility for the child and is not an immigration officer, an officer of the Secretary of State or a police of Dicer. interviewer should have particular regard to the possibility that a child will feel inhibited or alarmed The child should be allowed to express himself in his own way and at his own speed. If he appears tired or distressed, the interview should be stopped."* (Paragraph 352, HC 395)

26.17 If you represented your client in his application to the Home Office, and he was called to interview, you will have formed a judgement upon whether such an interview was appropriate, and if of the opinion that it was not, will have objected, referring to paragraph 352, and, if necessary, may have threatened judicial review.

26.18 However, you may be faced with the position that your client has already been interviewed, and her answers used against her in the refusal letter. In *Mathanakamar* (12817), the Immigration Appeal Tribunal, in a judgement of considerable importance to child asylum seekers, found as follows:

> *"It is not for this Tribunal to decide whether the appellant might if he had been properly dealt with in accordance with the Rules have said something different from that which he did say and whether, if he had done so the outcome may have been different.*
>
> *In our view it is not generally a sufficient answer to say simply that the appellant had reached the age of 18 by the time he gave evidence before the Adjudicator, nor to base a decision on the fact that he was in any event nearly 18.*
>
> *Given the way in which asylum appeals are processed and decisions reached what is said at each stage is a crucial and integral part of the fact-gathering and decision-making process. In this appeal it is simply not correct to say, as Miss Pond [the HOPO] did, that the appellant was only interviewed briefly to find out what his identity and intentions were. Likewise he was not asked to give his evidence in his own way, he was given set questions to which he was expected to answer. The presence of a solicitor may or may not be a sufficient safeguard. Much depends upon the extent to which the solicitor is himself able to protect a child either because he knows how to do so, or because he is allowed to do so. At these interviews the solicitor is not permitted to answer for the person interviewed he is only allowed a very limited role. Also it is not*

a helpful response to ask rhetorically, as Miss Pond did, "how else except by questions, could the Home Office find out the position". There are many ways they could find out the position and Rule 180R [of HC 251] proposes one of them.

We do not propose to deal with the other issues which may ... arise because we think that the breach of the Rules is a sufficient reason for setting aside the Adjudicator's decision ..."

26.19 If you find that your client has been interviewed in contravention of the Immigration Rules and has been prejudiced as a result, you should consider whether to ask the Home Office to reconsider the case without regard to the interview, or to submit to the adjudicator that the interview should be excluded. Older children are at greater risk of being interviewed in breach of the Immigration Rules. It may be necessary to point out that the IAT has held that procedural irregularities are not cured by the fact that a child has reached adulthood by the date of the appeal hearing, nor by the fact that the child was almost 18 when the interview was conducted.

Disclosure

26.20 If the refusal letter makes assertions about the results of investigations in the country of origin, you may want to ask for particulars of these investigations or a witness summons to produce the relevant documentation. However, if the refusal letter refers to any document in the refusal letter, then the Home Office is obliged under the rules to include the original or a copy of that document in the Respondent's bundle (rule 5(8)(c)). If interviews have been conducted by the Home Office in the country of origin, and the notes have not been produced, then you may also want to require this pursuant to rule 5(8)(b).

Whether to call your client at the hearing

26.21 In keeping with the rules preventing routine interviewing of children, it will often be unnecessary and inappropriate to advise a child to give oral evidence at a hearing, and preferable instead to deal by way of a written statement with any matters arising out of the refusal letter upon which your client can comment. The statement should be taken through means and in an environment which best suit your client. You may wish to indicate to the Home Office that your client, as a minor, will not be giving oral evidence, and invite the Home Office to put in writing any questions which it wishes to address to your client. You can then discuss these with your client, and, if they are appropriate questions for your client to answer, answer them by way of supplementary written statement. You may also consider calling adult relatives to explain the dangers your client faces.

26.22 However, just as with adult clients, if your client, despite your advice, wishes to give evidence and is competent to make a decision on the matter, then you must respect the decision.

The hearing

26.23 Much work has been done by the family courts to make the court-room as unintimidating as possible for children involved in litigation. As yet, the IAA does not make special arrangements for child appellants as a matter of course. Adjudicators have, however, indicated that if the IAA is given advanced notice, then basic steps can be taken such as having the hearing in a smaller room and not putting the adjudicator on a podium. However, it is important that you indicate in advance that such arrangements are required. Such steps should be requested whether or not the child intends to give oral evidence.

26.24 As discussed above; it is generally recognised that it is inappropriate and potentially unfair to Limit children's evidence to questions and answers. You should indicate at the start of the hearing that the appellant is a minor, and ask that if called to give evidence, she should be given the opportunity to express herself in her own way at her own pace, and should not be criticised if her evidence goes beyond the confines of the question to which she is responding. If the adjudicator indicates that this is not acceptable, then you and your client may wish to reconsider whether she should give evidence. If the appeal is dismissed in such circumstances, then you may wish to raise the issue before the Immigration Appeal Tribunal or the High Court.

26.25 During cross-examination, you must be particularly alert to object to inappropriate questioning. The same problems may arise as with adult asylum seekers (discusses in Chapter 21). However, a style of questioning that might be acceptable to an adult might well be inappropriately aggressive to a child. There may also be an increased danger of the HOPO straying into irrelevancy. For example, if your client fears persecution on the basis of membership of her family, adults in which are politically active, the HOPO may launch into questions about political ideology, even though your client has never claimed any knowledge of those politics. You should point out that the claim is based on social group rather than political opinion.

26.26 If the HOPO criticises your client for not having answered his question, then you should of course object strongly and refer the HOPO to paragraph 352 of the Immigration Rules.

Detention of children

26.27 While the Home Office has undertaken to detain adults only as a last resort (see chapter 27), its policy in respect of the detention of children is even more restrictive:

> *"Unaccompanied children are only ever detained by the immigration service if they arrive out of working hours and it is impossible to contact immediately the local social services until the following morning. In such cases they are given accommodation and looked after for that time. The protection of children is paramount in such arrangements."*
> (HC Standing Committee A, col 545, 3.12.92)

26.28 Problems sometimes arise because an Immigration Officer claims that a child is or appears to be over 18. In such circumstances, you should present either documentary

evidence or a medical opinion, and, if detention is still maintained, apply for bail, and, if necessary, judicial review.

Non-asylum issues relating to removal

26.29 Home Office policy (DP 4/96) states that:

> *"There is no bar to taking deportation/illegal entry action against children of any age who are liable to such action... In all cases removal must not be enforced unless we are satisfied that the child will be met on arrival in his/her home country and that care arrangements are in place thereafter. To this end, caseworkers should contact the Welfare Section of the appropriate Embassy or High Commission as well as the local Social Services Department.*
>
> *If them is any evidence, not just a suspicion, that the care arrangements are seriously below the standard normally provided or that they am so inadequate that the child would face a serious risk of harm if returned, consideration should be given to abandoning enforcement action."*

26.30 Where the decision against which you are appealing is inconsistent with the policy set out above (for example, where there is evidence that care arrangements will be unacceptable), you may wish in appropriate cases to request the adjudicator to allow the appeal under section 19 of the Migration Act 1971 because the Secretary of State has acted inconsistently and therefore unfairly. You can also ask for a recommendation on this issue, though see chapter 24 as to the Home Office's policy on recommendations.

26.31 You will also want to consider whether removal of a child in the circumstances of your client might breach Article 3 of the European Convention on Human Rights, the Convention on the Rights of the Child or the United Kingdom's other international obligations.

Further information and assistance

Panel of Advisers for Unaccompanied Refugee Children
Co-ordinator, Refugee Council, 3-9 Bondway, London SW8 1SJ
Telephone: 0171 582 4947

International Social Service
Crammer House, 39 Brixton Road, London SW9 ODD
Telephone: 0171 735 8941

Defence for Children International
PO Box 88, CH-1211 Geneva 20, Switzerland

Refugee Legal Centre
Sussex House, 39 45 Bermondsey Street, London SE1 3XF
Telephone: 0171 827 9090

The Children's Legal Centre
University of Essex, Wivenhoe Park, Colchester, C04 3SQ
The CLC has produced a number of useful briefings, including "International law and children in armed conflict" by Jenny Super, and "Representing unaccompanied refugee children in the asylum process" by Vicky Guedella, to which this chapter fir *indebted*

27. **Detention and Bail**

What to do if your client is detained

27.1 Your client may already be in detention under the Immigration Act 1971 when her claim is refused by the Home Office. may be destined when her asylum claim is rejected by the Home Office or at any time while she is pursuing her appeal.

27.2 If your client was detained before the initial Home Office decision on her asylum claim, steps should already have been taken to challenge the detention. This chapter deals with how to challenge your client's detention while she has an outstanding appeal against the asylum refusal. Any detained asylum seeker with an outstanding asylum appeal has a right to apply to a Special Adjudicator for bail.

27.3 Immediately your client is detained or you receive instructions from a detained appellant, you should write to the Immigration Service requesting your client's release and requiring that they disclose all reasons relied upon to detain your client.

The right to reasons

27.4 It is essential that you know the reasons for detention. The Immigration Service have undertaken (and in any event have a duty) to consider your representations in favour of release, even if a bail hearing is pending. It is a basic principle of natural justice that your client has the right to know the case against her. In *R v SSHD and a Special Adjudicator, ex parte Zola-Ndonga* (C01475/97), the High Court granted leave and bail where the Immigration Service had failed to disclose the full reasons for detention and therefore denied the applicant the opportunity to counter them. Without knowing the reasons for the decision, you cannot properly put your case against the decision. You also need to know in advance the reasons which the HOPO will rely upon at the bail hearing. Of new reasons are sprung on you at the hearing, you may not have the opportunity to obtain the information you need to dispute them.

27.5 However, immigration officers have been known to give only partial reasons, or even deny that they have any duty to give reasons, and simply assert that they can detain any appellant whenever they like! Amnesty International, in its report *"Prisoners Without a Voice: Asylum-Seekers Detained in the United Kingdom "*, stated that

> *"The vacuity of the 'explanation' of the decision to detain in so many of the cases in this study heightens Amnesty International's longstanding concern that, in many cases, the decision to detain appears to be an arbitrary one, dependent less upon a subjective and considered assessment of whether detention is actually necessary, than on the availability of detention places on any given day and more nebulous factors such as the individual Immigration pacer's demeanour and disposition towards asylum seekers."*

In its formal response to the first edition of the above report by Amnesty

27.6 International, Home Office minister Nicholas Baker MP stated by letter of 15 November 1994 that:

> *"detainees should be fully informed of the reasons for detention "*

27.7 At the same time, the Home Office new "Instructions to Staff on Detention". These stated that:

> *"It is essential that all staff ensure that when a person is to be detained the reasons for detention are explained to the individual fully, in a language he or she understands. It is not sufficient to state merely that the Immigration Service is not satisfied that the person will comply with the terms of temporary admission. The reasons for making the decision to detain must relate to the individual factors of the case and be explained as fully as possible.*
>
> *"Once the individual has been notified of the reasons for detention this should be recorded on the detention record (Form IS93). When the review of detention is carried out by an Inspector, within 24 hours of the original decision, he/she should ensure that the reasons have indeed been fully recorded, and adequately justify the decision."*

27.8 On 27th January 1997, the Minister of State, Ann Widdecombe MP, in a statement to the House of Commons, stated that:

> *"We give detainees full reasons for their detention. Initially, that is done orally, and, at regular intervals subsequently, it is done in writing..."*

27.9 If immigration officers fail to give proper reasons, they should be reminded both of those instructions and their public law duty to give reasons. In *Zola-Ndonga* (above), Hidden J commented, in granting leave, that the sole reason initially offered for refusing temporary admission, that the Chief Immigration Officer was "not satisfied (that the applicant would) comply with terms of Temporary Admission", was the very wording which the Secretary of State had instructed immigration officers could not be satisfactory as a statement of reasons for refusing temporary admission (see above).

27.10 You should ensure that the undertaking to provide reasons regularly in writing is being complied with. Sometimes immigration officers have offered only oral reasons. If the Immigration Service refuse to give written reasons but offer oral reasons, then you should record the telephone call in which you obtain the reasons for detention. The immigration officer should be told that the call is being taped for your records. If you cannot do this, the next best option is for someone to listen in on the call and take a short hand note. Otherwise, get the immigration officer to stop while you write down the reasons, and then read them back to him. In any event, confirm the reasons in writing to the Immigration Service, and that those represent ALL the Immigration Service's reasons for detaining the client. Problems have repeatedly arisen where the Immigration Service has refused to give written reasons, and subsequently disputes in court that the oral reasons recorded on behalf of the applicant are accurate. Also ask for reasons for a refusal to give written reasons..

Is the detention lawful?

27.11 As stated above, immigration officers will sometimes assert that they can detain any asylum seeker whenever they like. That is quite untrue. The Home Office have given numerous and emphatic undertakings about the restrictions it places on the detention of asylum seekers and its policy has been considered by the High Court on a number of occasions. It has been accepted by the Home Office in all these cases that (except perhaps in exceptional cases which have not been considered), asylum seekers should only be detained in accordance with the policy which the Home Office have undertaken to follow. It is absolutely vital that you are familiar with the Home Office undertakings and policy, that where appropriate, you rely upon them to obtain your client's release. In R v *Secretary of State for the Home Departments ex parte Brzezinski and Glowacka* (CO/4251/95, CO/4237/95, 19th July 1996), Kay J noted that:

> *"... it has been made clear that the policy is to use detention only as a last resort and that it is in fact employed in a very small proportion of cases put at about 1.5%."* (transcript, page 5)

27.12 In a letter dated 15th November 1994, Home Office minister, Nicholas Baker MP told Amnesty International that:

> *"I cannot accept that the use of detention in a tiny minority of cases deters individuals generally from seeking asylum...(The number of asylum seekers detained) represents less than 1.5% of the number of people whose claims for asylum in the United Kingdom are currently under consideration and in my view supports the argument that detention is used only as a last resort."*

27.13 In a letter, dated 27th June 1995, Nicholas Baker MP told Amnesty International that:

> *"I cannot agree that the initial decision to detain is an arbitrary one. The fact that so few asylum seekers are detained does, I think illustrate that detention is used only as a last resort."*

27.14 Though those restrictions have been voluntarily adopted by the Home Office, the High Court, in *Brzezinski* held that any reasonable person would be drawn to the same conclusion. In *R v SSHD and a Special Adjudicator, en parte Stefanowicz* (CO/ 2451/96), Simon Brown LJ commented during argument in the Court of Appeal that:

> *"Any policy that locks up those not immediately going to ground would be ridiculous and irrational."*

27.15 The Home Office issued further guidance on detention under the Immigration Act 1971, contained in 'the Immigration Service Instructions to Station Detention, Annex A". Those were quoted by Kay J in *Brzezinski:*

> *"Decisions to detain are to be made on the basis of the criteria set out below. These are not in any order of priority and neither detention nor temporary admission/release will necessarily be warranted on the grounds of only one of the criteria in isolation - all factors must be taken into consideration:*

(a) Is there any evidence of previous absconding from detention?

(b) Is there any evidence of previous failure to comply with conditions of temporary admission/release or bail?

(c) Has the subject shown a blatant disregard for the immigration laws?

(d) Has the subject attempted to gain entry by presenting falsified documents?

(e) What are the person 'sties with the United Kingdom? Does he/she have a settled address/employment? Are there close relatives (including dependents) here?

(f) What is the likelihood of the person being removed (especially in asylum cases) and if so after what timescale?

(g) What are the individual's expectations about the outcome of the case? Are there factors, eg an outstanding application for judicial review, representations or an appeal, which afford an incentive for him/her to keep in touch with the Department."

27.16 It was pointed out in *Brzezinski* that those criteria relate to everyone detained under the Immigration Act 1971, not just asylum seekers, and therefore, some will have little relevance to a decision to detain an asylum seeker. For example, detaining asylum seekers because of lack of settled employment or family ties would lead to the majority rather than a tiny minority of asylum seekers being detained.

Disputing reasons

27.17 To justify detention, the Home Of ice need to show what is so exceptional about your client as opposed to other asylum seekers, so as to put her within the small minority who must be detained. Many of the reasons commonly offered clearly do no such thing. Some of them are discussed below.

27.18 "She did not claim asylum on arrival / entered the country using false documentation."

A very large proportion of asylum seekers do not claim asylum on arrival Provided a person presents herself voluntarily to claim asylum, the fact that she initially used false documents to enter the country should be irrelevant. Refer to the discussion of timing of the asylum claim under chapter 2.

27.19 *"The majority of asylum seekers of her nationality have been refused"*

The High Court in *Brzezinski* found, not surprisingly, that this could not be a reason justifying detention. The Immigration Service has already tried to justify detention on the basis that she is claiming asylum from a white list country. This represents an astonishing departure from the way in which the white list was portrayed to Parliament, and is almost certainly unlawful.

27.20 "He has no ties with the United Kingdom"

As referred to above, most asylum seekers will not have ties with the United Kingdom, and again this cannot be a reason to detain an asylum seeker.

27.21 "The asylum claim has been refused by the Secretary of State and has been found to be bogus. She will therefore know that her appeal has little chance of success."

96% of asylum claims are refused by the Home Office at first instance. Equally, Home Office ministers often allege that the majority, if not all claims which are refused by the Home Office arc bogus. In *Stefanowicz,* the Court of Appeal rejected objections to bail on similar grounds.

27.22 *Unable to prove her identity, and possessed/presented false documents*

It is for obvious reasons unreasonable to expect an asylum to provide documents proving her identity. Indeed, if an asylum seeker does travel with documents proving her identity, it is often alleged by the Home Office that this proves that she cannot have been genuinely in fear of the authorities. You may also wish to refer to *R v Secretary of State for the Home Department, ex parte A. K/ B.* (27th June 1996) in which McCullough J stated that:

> *"I am also unhappy about some of the individual reasons advanced (by the Secretary of State):*
>
> > *"The pax presented a forged document in a false identity on arrival."*
>
> *"Well, he did; that is true. It may be that this was stated by way of introduction to the next sentence:*
>
> > *"He admitted having used other forged documents to travel between countries, showing his complete disregard for rules and regulations and adherence to law."*
>
> *"One is, however, left wondering whether the Secretary of State was attaching some extra significance, over and above what had happened in other countries, to the presentation of the forged document in a false identity on arrival in the United Kingdom. In the case of a genuine asylum seeker such falsity is of no weight at all. It is something to which many genuine asylum seekers have to resort."* (transcript, page 1-2)

27.23 *Had previously applied for asylum then returned to her country of origin before returning to the UK and making a repeat claim.*

This was relied upon by the Home Office in *Stefanowicz,* the rationale being that it demonstrated that the applicant's asylum claim was baseless. This is misconceived. Refugee status does not require that the refugee will automatically be killed or imprisoned if she steps foot in her country of origin. Refugees may have legitimate reasons for having to return or they may have wrongly thought that the situation had improved sufficiently to return.

27.24 Because she is in detention, her appeal will be expedited and therefore we expect a quick decision. The likelihood of a quick decision on her appeal makes it more likely that she will abscond if given Temporary Admission.

This is obviously circular. Expedition may be achieved as a consequence of detention but this fact cannot be relied upon to detain the person in the first pace.

27.25 She has been convicted of a criminal offence in the United Kingdom while on Temporary Admission.

The Immigration Service may rely on this reason, even though the count imposed a non-custodial sentence. It was held in *Brzezinski* that a conviction for a minor offence of dishonesty could not be sufficient to justify a belief that an asylum seeker will abscond, and while not irrelevant to an assessment of her trustworthiness, could only be a minor consideration. If the court which tried the matter felt that imprisonment was appropriate then it would impose a custodial sentence (and could, if necessary recommend deportation). Such reasons may be accompanied by assertions that *"She has abused her Temporary Admission"*. If the court has not imposed a custodial sentence, it is not for immigration officers to take the law into their own hands. If there is no other reason which could reasonably justify detention, then it is clearly unlawful for immigration officers to rely on a minor conviction.

27.26 *He has been charged with/is suspected of a criminal offence*

Immigration officers have also been known to detain asylum seekers who have been charged with a criminal offence, but released on police bail, or even because they are alleged to have committed a criminal offence for which they have not been charged. Again, this represents an obvious abuse. If there are reasonable grounds to suspect that someone has committed criminal offences, and it is felt necessary to detain her because of this, then she can and should be detained under the criminal law, and, if bail is opposed by the authorities, then she should be entitled to her rights under the ordinary criminal law. Criminal suspects are entitled to-the same basic rights, regardless of immigration status. The High Court has indicated in *Stefanowicz* that this is an obvious point in such cases, and indeed the adjudicator Mr Rapinet also found that the practice was an abuse. The Home Office subsequently withdrew the reason.

27.27 *Breach of Temporary Admission*

These are less straightforward, but it by no means follows that someone who has breached TA should or can be detained. Problems often arise because asylum seekers do not renew their TA on time. This is very common, particularly as the Tmmigradon Service only send reminder levers in English, even when aware that the asylum seeker does not understand the language, and often refuses to copy such letters to representatives. Where the asylum seeker remains at her TA address, such failure to renew TA should not justify detention. Where the asylum seeker is no longer living at her TA address, the question is whether there are substantial grounds for believing that this demonstrates an intention to abscond. Asylum seekers are often part of extended families living at different addresses in London. To detain asylum seekers simply for staying the night with a relative at another London address without telling

the Home Office, could not be consistent with the Home Office's claims to detain only a tiny minority. Problems can also arise when asylum seekers are stopped by police and questioned, usually without proper interpreters, and give a relative's address rather than their own address. If this happens to your client, you must make representations immediately, explaining why your client gave that address, pointing out the lack of a proper interpreter, and confirming that she continues to live at her TA address.

27.28 Sometimes previous failures to attend Home Office interviews will be offered as justifications for detention. This was the case in *Stefanowicz*, where the Home Office relied in opposing bail before the Court of Appeal, on the applicant's failure to attend two interviews a year before the applicant was detained. Not surprisingly, this was rejected by the court, and bail was granted.

Making representations to the Immigration Service

27.29 You should always make representations to the Immigration Service that your client should be released. You should give the address at which your client will live, and explain what kind of accommodation it is, and who lives there.

27.30 Particularly where there are some factors which might tend to justify detention, you need to set out the positive factors in favour of release, such as family in the United Kingdom, particularly minor children, settled accommodation, appeal outstanding, and ill-health. Remember that the over-riding question is whether your client is imminently likely to go to ground, and if this is obviously impractical and unlikely, for example because your client does not speak English or is elderly, then this should be pointed out. Even if there are substantial reasons for believing that your client will abscond, remember that the Home Of lice explicitly requires that compassionate circumstances be taken into account, and the balance between such compassionate circumstances and the public interest in preventing absconding is obviously of a different order from criminal cases when the court must consider claims that the detainee is at imminent risk of re-offending.

27.31 While Rule 25(1)(b) allows an application for bail to an adjudicator to be made either orally or in writing, rule 25(1)(a) only provides for an application for bail to an immigration officer or police officer to be made orally. The only practical difference in the Immigration Service granting bail as opposed to TA is that a recognizance and sureties can be required. This can be helpful in avoiding the need to go before an adjudicator if you can agree bail terms with the Immigration Service. Presumably "oral" applications can be made by telephone.

Judicial remedies

27.32 Even if you consider that the detention is unlawful, provided you can obtain a prompt hearing before an adjudicator, you must apply to the adjudicator for bail, rather than going straight to judicial review. However, in the past, the IAA has refused to list bail hearings for a week or more because of lack of court time and the refusal of the Immigration Service to produce detainees at hearing centres where they can be heard more quickly. The Court of Appeal has held that the same priority will be given to a judicial review of detention as is applied to habeas corpus (which takes precedence

over any other court business) *(R v Stoke-on-Trent Justices, ex parte Cawley* (1996) 1 All E.R. 464). This is adhered to in practice, and High Court judges have expressed surprise at the failure of the IAA to hear bail applications on non-working days (as the High Court will). An adjudicator cannot provide an alternative remedy if you cannot get one to hear your application, and the High Court has been prepared to hear applications which the IAA will not list for several days.

27.33 If the IAA refuses to list an application promptly where you consider the detention to be unlawful, then you should inform the IAA that if it does not provide you with a prompt hearing, you will have no alternative but to apply for judicial review.

27.34 If you do not consider the detention to be unlawful in that it is neither an abuse. *Wednesbury* unreasonable, nor plainly inconsistent with the Home Office's policy, then you cannot apply for judicial review. However, an adjudicator is not limited to considering the legality of the detention. It was held in *Brzezinski* that an adjudicator was not bound by Home Office policy and could reject it if it extended detention beyond a small minority of asylum seekers. However, given that current Home Office undertakings were not inappropriate -

> *"he too would have regard to the same matters of policy. He too would no doubt and should, and I have no reason to think did not, approach the matter on the basis that the overriding consideration was whether the person was likely to comply voluntarily with any restrictions imposed upon him, including any arrangements for removal. That would lead any reasonable person to similar conclusions as to the extent to which it was necessary to employ these particular restrictions on the liberty of people to be one, where it should be used in a small minority of cases as the Secretary of State makes clear his policy leads to that conclusion."* (transcript, page 8)

27.35 For the detention to be unlawful, it has to be unreasonable to say that the asylum seeker is sufficiently exceptional as to bring her within the small where detention is justified. By definition, it will be unreasonable to say in respect of most asylum seekers that they are that exceptional. However, even within the minority where there are enough adverse factors that one could reasonably reach the view that they come within the Home Office's 1.5% where detention is justified, that is very far from saying that no reasonable person could grant bail.

27.36 In respect of those cases, the adjudicator must exercise his own independent statutory discretion and make up his own mind on the facts presented to him as to whether he thinks the asylum seeker is within the small minority in respect of whom the High Court has held that he could refuse bail, regardless of whether continued detention could be reasonable or in accordance with Home Office policy. He is not limited to reviewing the Home Offce's position, and if he so limits himself, he would be acting unlawfully. The fact that the detention is in accordance with current Home Office policy should not prevent you persuading an adjudicator to grant bail, but is likely (as long as Home Office policy remains to restrict detention to a small minority) to prevent you obtaining your client's release through judicial review.

Applying to an adjudicator

27.37 Given the risk of delay, you should lodge an application for bail with the LA MA immediately you are instructed in relation to the detention. Do not wait for the result of written representations to the Immigration Service.

27.38 An application for bail to the IAA may be made *"orally or in writing"* (rule 25). Note that there is no requirement in the rules that notice must be given before making a bail application. So if for example, the hearing of a detained asylum seeker is adjourned on application by the Home Office, you are entitled to apply for bail there and then, and should point to the Home Office's policy that detention is particularly difficult to justify where it is prolonged through the actions of the Home Office.

27.39 Nearly all bail applications are made orally. A written application will usually be unsatisfactory. There is no legal aid for representation at an oral hearing and a written application can be paid for by legal aid. However, note that even if it is impossible to arrange representation, legal aid is available for a MacKenzie friend, and you can still submit written representations.

27.40 A written application for bail should, by rule 25(2) contain:

> *(a) the full name of the appellant;*
>
> *(b) the address of the place where, and the purpose for which, the appellant is detained at the time when the application is made;*
>
> *(c) whether an appeal is pending at the time when the application is made;*
>
> *(d) the address of the place where the appellant would reside if his application for bail were to be granted;*
>
> *(e) the amount of the recognizance in which he would agree to be bound;*
>
> *(f) the full names, addresses, and occupations of two persons who might act as sureties for the appellant if his application for bail were to be granted; and*
>
> *(g) the grounds on which the application is made and, where a previous application has been refused, full particulars of the change in circumstances which has occurred since that refusal.*

Sureties and recognizance

27.41 The standard practice is to require the applicant for bail to enter into a nominal recognizance. seekers are not likely to be able to enter into a substantial recognizance.

27.42 While rule 25(2)(f) states that a written application should contain the names of two potential sureties, the Scottish version (rule 25(7)(a)) states that the application should provide the names *"of such persons, if any"* who would act as sureties. This should not be misunderstood as meaning that you cannot apply for bail in England unless you

can provide two potential sureties. Any such rule would represent an unlawful fetter on the adjudicator's discretion to grant bail. Amnesty International, in *"Prisoners without a voice: The Detention of Asylum Seekers in Britain "*, expressed concern that special adjudicators had themselves adopted an unwritten convention of refusing bail to any asylum seeker who could not provide two sureties of £2000 each. The High Court confined in *Brzezinski* that the availability of sureties should only be a consideration if the adjudicator had first found that detention was otherwise appropriate and necessary.

Suitable sureties

Immigration status

27.43 The surety should preferably be a British citizen or have either Indefinite Leave to Remain, asylum, or exceptional leave. In *R v An Adjudicator, ex parte Tuncany Colak* (CO/1074/96), Tucker J granted leave to move where the adjudicator had stated that she would not accept sureties who had only ELR.

27.44 For obvious reasons, it will often be the case that the only people in this country who know your client well enough to stand surety are also asylum seekers. If you offer another asylum seeker as a surety, or someone whose leave may not last the durationof the bail, you will have to make representations as to why they will nevertheless make suitable sureties. The Home Office accepted in *Brzezinski* that asylum seekers should not be rejected as sureties simply by reason of their immigration status and that the question should be decided according to the individual circumstances of the case. This should be pointed out if either the HOPO or the adjudicator asserts that no asylum seeker can be a satisfactory surety. The objection is normally that it will be more difficult to enforce the surety, but this problem can be solved by having the surety lodge the money with you if you or with a solicitor if you are not able to hold such funds. You should also emphasise that the purpose of requiring surety is to give that person a stake in ensuring that the detainee complies with conditions and that the amount of the surety can only sensibly be considered in relation to the surety's means.

Occupation, personal circumstances and character

27.45 You should take instructions on the surety's occupation (if any), home (even if it is not proposed that your client will live with him), and family ties. Obviously, the more stable his background, the better. If he has been a successful surety before, then that should be mentioned.

Funds to cover the surety for the duration of the bail

27.46 The surety must be able to provide evidence that he has sufficient funds to pay his surety, and there should not be any apparent risk that he will lose those funds during the duration of the bail. The most usual evidence will be a bank statement or savings book. Note, however, that there is High Court authority that an adjudicator should not require that the funds offered by the surety be readily available and that therefore equity in a property can be acceptable as surety *(ex parte Shamamba* (1994) Imm AR 502).

Where the funds came from

27.47 You should check any bank statement or savings book, preferably before the day of the hearing. If you offer a surety in the sum of £2000, and the surety provides a bank statement which shows a balance of £2000, but also shows that £1900 of it was deposited the day before the hearing, then the HOPO will claim this to be evidence that the money has been given to the surety by someone else for the purposes of the bail hearing. Take instructions. Your surety may prefer to keep money in cash. He may have deposited his cash savings into a bank account to provide convenient evidence of his ability to meet the surety. Or he may have consolidated funds from different accounts for the purposes of the bail hearing. He may have sold something.

27.48 If the savings are from his salary, then be sure that you are clear as to how it has been feasible to save that amount from his salary, and how this is reflected in the bank statements provided. A surety should not be rejected simply because he has borrowed the money to stand surety. A stated above, the point is simply to demonstrate the stake a person has in ensuring your client complies with bail, and the question is therefore to what extent the potential surety is responsible for funds offered, not how he came by them.

Connection with your client and ability to supervise him

27.49 You should establish why the person is prepared to stand surety. It is preferable if he knows your client personally and can vouch for his character. However, given the likely scarcity of possible sureties, a person who knows your client's family will often be acceptable. The surety should be prepared to maintain frequent contact with your client on bail, and be confident of his ability to exert influence over him.

27.50 Any surety should attend court, and must bring with him proof of immigration status and other matters as discussed above.

The bail hearing

27.51 The HOPO will not usually have your client's full asylum file in court if the listing is only for a bail application, and instead will have a document called the 'Bail Summary'. Previously, some HOPOs operated a rather bisque practice of reading out the Bail Summary verbatim but refusing to provide representatives with a copy. The Home Office have now undertaken that representatives will be provided with a copy of the Bail Summary at the hearing. If the HOPO does not give you a copy, you should point out to the HOPO, and if necessary to the adjudicator, that you are entitled to it. It may become important if bail is refused and you have to consider judicial review.

27.52 The Bail Summary is usually fairly short, is prepared by the Immigration Service, and explains why your client was detained and the reasons for maintaining detention. Normally, the hearing will start with the HOPO being asked whether he has anything to add to the Bail Summary. Almost invariably, he does not. If the HOPO cannot give satisfactory details of the grounds on which he is asking the adjudicator to deny

your client her liberty, you should argue that the only proper course is for the HOPO to withdraw the allegation.

27.53 The adjudicator will then invite you to make submissions. If the bail summary relies on reasons which were not disclosed to you prior to the hearing, then you should ask for an explanation from the HOPO, and if you require any further details, ask the HOPO to take instructions.

27.54 Your examination-in-chief should cover the areas discussed under "Suitability". Depending upon how well your surety knows the client, you may also ask for an assessment of your client's character, and what makes the surety confident that she will not abscond.

27.55 The HOPO will then have an opportunity to cross examine your sureties. Any cross-examination will generally be designed to persuade the adjudicator of one or more of the following: that the surety does not know your client or does not know her very well; that the surety's immigration status in this country is uncertain; that the proof offunds which the surety has provided is suspect; that it is likely that the funds have been provided to the surety by someone else for the purposes of this application; that the surety is of bad character.

27.56 Just as during cross-examination in substantive asylum appeals, you should object if you think any question asked by the HOPO is unfair or misleading or if the HOPO's tone is hectoring or he is interrupting the witness before he has finished his answers. You should also object if the HOPO starts asking questions which are irrelevant to the issue of whether the witness is an acceptable surety.

27.57 After cross examination, the adjudicator may ask questions and you should then have an opportunity to re-examine. Pay particular attention to any questions the adjudicator asks as they may indicate any areas which concern him The same caution should be applied to re-examination as in substantive appeals.

27.58 You and the HOPO will be given an opportunity to add anything or make any comment on any of the oral evidence. Before finishing, ask the adjudicator whether there is any other issue which concerns him which you have not dealt with.

The adjudicator's decision

27.59 If the adjudicator grants bail, it will be necessary to fill out bail forms. Sometimes the court clerk will fill these out, or you may be asked to complete them. Both the sureties and your client will need to sign the appropriate forms. Some adjudicators like the forms to be signed in court and you should ask the adjudicator before filling in the forms.

Remedies if bail is refused: judicial review

27.60 Ask the adjudicator reasons if he refuses bail. The Home Office agreed in *Brzezinski* that adjudicators were under a duty to give reasons for refusing bail. Your options are to judicially review the Secretary of State for continuing to detain your client and/or the adjudicator for refusing to grant bail, or to renew your bail application before

another adjudicator. You have no right of appeal to the Immigration Appeal Tribunal against the adjudicator's refusal to grant bail.

27.61 Detailed guidance on challenging detention through judicial review is outside the scope of this guide, but you can challenge both the adjudicator's refusal to grant bail, and the Secretary of State's continuing responsibility for the detention. In *Brzezinski*, the Home Office argued at leave stage that if the adjudicator refuses bail, you can only challenge the adjudicator's refusal on judicial review and not the continuing detention by the Home Office.. It was rejected by the High Court, and the Home Office did not pursue the argument at the full hearing. Unlike criminal courts, an adjudicator may only grant bail, not remand in custody. It remains the Home Office's detention, and the Home Office retains a duty, recognised by its policy, to keep detention under review and release as soon as possible, regardless of whether the adjudicator has refused to exercise his independent statutory power to grant bail, and particularly since the adjudicator is not bound to review consistency with Home Office policy.

Renewed bail hearings

27.62 While rule 25(2)(g) states that you should indicate particulars of a change in circumstances if bail has previously been refused, there is nothing in the rules preventing a renewed application for bail where there has been no change in circumstances, and any such rule would arguably be ultra vires the 1971 Act. You could additionally rely on Home Office policy which emphasises that passage of time in itself represents a relevant change in circumstances:

> *"It is not sufficient, on review, simply to conclude that the factors which led to detention remain unchanged and thus that continued detention should be authorised Rather, the longer a person has been detained, particularly if it is as a result of a failure on the part of the Home Office to resolve the case, the greater is the onus on us to justify continuation of detention."* [emphasis as in policy]

27.63 Adjudicators, given that the High Court has determined that they exercise an independent statutory discretion, are entitled to reach different decisions on the same circumstances, and indeed would unlawfully fetter their discretion if they regarded themselves as bound by decisions of previous adjudicators to refuse your client bail. If costs do not prevent it, it will be worth renewing bail applications even without a change of circumstances if judicial review is not an option.

Appendix

Legal Sources

This guide deals only with appeals to the adjudicator. The equivalent guide to the initial application to the Home Office is the *Best Practice Guide to the Preparation of Asylum Applications from arrival to first substantive decision*, Fiona Lindsley (ILPA, 1994, second edition in preparation).

The *UNHCR Handbook* (full title, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees)* (UNHCR, 1992) is indispensable (see chapter 1). It is available at a cost of £5 from UNHCR, 2nd Floor, Millbank Tower, 21-24 Millbank, London SWlP4QP.

The two main textbooks on international refugee law are both somewhat weighted towards Canadian caselaw, but the analysis in both has been quoted and relied upon by English courts at all levels. They are *The Law of Refugee Status*, James Hathaway (Butterworths, 1991) and *The Refugee in International Law*, Second Edition, Guy Goodwin-Gill (Oxford University Press, 1996).

The best accounts of British refugee law are contained in the immigration textbooks, *Macdonald 's Immigration Law and Practice*, Fourth Edition, Ian Macdonald QC and Nicholas Blake QC (Butterworths, 1995); *Immigration: Law and Practice*, David Jackson (Sweet & Maxwell, 1996); and *Supperstone & O'Dempsey on Immigration and Asylum*, Fourth Edition, Michael Supperstone QC and Declan O'Dempsey (FT Law and Tax, 1996). The *JCWI Immigration, nationality & refugee law handbook* Sue Shutter (JCWI, 1997) has just been updated to cover the 1996 Act.

Butterworths Immigration Law Service (Butterworths, loose-leaf) provides statutory material, policy statements, and caselaw extracts. The *Immigration Law Handbook*, Margaret Phelan (Blackstone Press, 1997) provides statutory and other material, including the UNHCR Handbook and relevant social security and housing provisions.

The *Immigration Appeal Reports* (HMSO, quarterly) is the only official series of law reports covering refugee law. *Tolley's Immigration and Nationality Law and Practice* (Tolley's, published quarterly) contains both articles and reports of caselaw. The March, July and November issues of *Legal Action* (Legal Action Group, monthly) contain *Recent developments in immigration law* by Jawaid Luqmani, Chris Randall, and Rick Scannell. The various legal publications of the new *Refugee Legal Centre Subscription Service* (see below) should contain a comprehensive roundup of current caselaw.

The Asylum and Immigration Act 1996, A compilation of ministerial statements made on behalf of the government during the Bill's passage through Parliament, compiled by Katie Ghose (ILPA, 1996) is an essential resource, particularly on the special appeals procedure, as are *"The Risks of Getting It Wrong "- the Asylum and Immigration Bid Session 1995/6 and the Determinations of Special Adjudicators*, Alison Harvey (Asylum Rights Campaign, 1996) and *'No mason at all' - Home Office Decisions on Asylum Claims* (Asylum Aid, 1995). These are He only detailed

analyses of the way in which adjudicators and the Home Office respectively reach decisions. Other sources include *Asylum Seekers - a guide to recent legislation* (Resource Information Service in association with ILPA,1996); the *International Journal of Refugee Law*, edited by Guy Goodwin-Gill (Oxford University Press, quarterly); and the Immigration Advisory Service's *Immigration Law Digest* (bi-monthly) and *Case Law Digest* (for/nightly), the latter containing the full transcripts of cases reported in it, both available from the IAS Research Unit, Blackfriars House, 7~ Floor, Parsonage, Manchester, M3 5JA.

Unreported caselaw

Because of the absence of full law reports of judicial decisions on refugee law (apart from those contained in the Immigration Appeal Reports), access to unreported transcripts is vital. At the present time, unreported IAT transcripts are only readily available direct from the IAT at Thanet House, which will fax them free upon faxed request. However, you normally need to know the IAT's reference number (given in brackets after the case name) rather than simply the case name.

Unreported High Court and Court of Appeal transcripts can be obtained at a price from the official shorthand writers, details of whom will be available from the Crown Office and the Civil Court of Appeals Office respectively at the Royal Courts of Justice (0171 936 6000). Lexis has these available in searchable form. If you do not subscribe, Lexis Direct (0171 400 2828) will conduct searches on your behalf for a basic charge of £45. Sweet & Maxwell (01422 888000) also provides transcripts of unreported decisions from the Court of Appeal and the High Court Crown Office list at a cost of £12.50 per transcript.

The RLC's subscription service will include the transcripts of cases which are reported in its various legal publications. The position will also improve dramatically after the full launch of the Electronic Information Network which will provide all determinations of the Immigration Appeal Tribunal along with all immigration related decisions of the High Court and above, searchable according to a comprehensive keyword index.

The Refugee Legal Centre Subscription Service

This service, launched in 1997, enables asylum representatives to gain far more effective access both to legal sources and in particular country of origin information. The legal resources include a fortnightly roundup of cases of interest, a precedents manual on refugee law updated quarterly, and a quarterly summary of all refugee-related IAT determinations. Full transcripts are also available. Bundles on country of origin conditions can be ordered, and there is a weekly bulletin detailing new evidence on country of origin conditions, including expert reports. The basic subscription costs £275 per annum.

The Electronic Immigration Network and the Interned

The *Electronic Immigration Network is* currently at pilot stage. The full launch will be later this year. It will provide an on-line subscription service through Poptel, offering bulletin boards and a caselaw database with a wide range of refugee related

material. Further details are available from:
EIN, c/o Rochdale REC, 1st floor, Champness Hall., Drake Street, Rochdale OL16 1PB
tel: 01706 352374, fax: 01706 711259, email: ein-admin@mcrl.poptel.org.uk

The *Electronic Immigration Network* also has a site on the World Wide. It contains a host of extremely useful links to refugee related resources on the Internet from Amnesty and US State Department reports to Australian case law and other useful sites such as the Web's search engines, the on-line version of Hansard, and searchable newspaper archives. Many of the organisations mentioned in this Guide are also linked. It is *at http://www.poptel.org.uk/ein/*

Organisations offering training, support and information

United Nations High Commissioner for Refugees,
PO Box 2500, 1211 Geneva 2 Depot, Switzerland, and
2nd Floor, Millbank Tower, 21-24 Millbank, London, SW1P 4QP, tel: 0171 828 9191
UNHCR receives notice of every asylum appeal and is entitled to be joined as a party to any appeal. If you think your appeal raises a point of wider importance on which UNHCR may have a view, then you may want to submit to UNHCR that it should intervene. It also produces position papers and a range of publications, including the UNHCR Handbook (see above), and *Ref World* which is available both on UNHCR's web site (linked from the EIN's site) and on CD-ROM (which has a much greater selection of material both on law and countries of origin than is available on the Web site).

Immigration Law Practitioners' Association,
Lindsey House, 40/42 Charterhouse Street, London EC1M 6JH,
tel: 0171 251 8383, fax: 0171 251 838A
ILPA runs regular training courses on refugee law as well as publishing the ILPA Case Digest, the *IMPS Directory of Experts on Conditions in Countries of Origin and Transit* and best practice guides.

Refugee Legal Group
c/o NILC, 161 Hornsey Road, London, N7 6DU, tel: 0171 607 2461
The RLG meets on the first Tuesday of each month to share information on all issues of interest to asylum representatives. Monthly minutes are sent to those on the mailing list.

Amnesty International United Kingdom
99-119 Rosebery Avenue, London, EC1R 4RE, tel.: 0171 814 6200, fax: 0171 833 1510
The Lawyers' Network meets monthly and publishes a regular newsletter. You should approach the Refugee Office at AIUK with queries on country of origin conditions rather than the International Secretariat. Amnesty's subscription service covers both country of origin reports and urgent action bulletins.

Refugee Council,
3-9 Bondway, London, SW8, Telephone 0171 820 3000
The Refugee Council provides resources on country of origin conditions and UK refugee issues, including law, health, wefare rights, housing and employment. Publications include *Refugee Resources* in *the UK, contacts and addresses.*

Joint Council for the Welfare of Immigrants,
115 Old Street, London EC1V 9JR, tel: 0171 251 8706, fax: 0171 251 5110
JCWI publishes a quarterly bulletin as well as updates on asylum and immigration matters and the JCWI Handbook (see Legal Sources above).

European Legal Network on Asylum (ELENA),
care of *European Council on Refugees and Exiles (ECRE),*
Bondway House, 3 Bondway, London SW8 1SJ,
ELENA tel.: 0171 820 1156, ECRE tel.: 0171 582 9928
ECRE and ELENA run an annual training conference on asylum law, taught in recent years by James Hathaway and Walter Kalin, as well as other conferences and publications.

Thanet House Users Group
This is organised by the IAA, Thanet House. It meets occasionally, but the Chief and Deputy Chief Adjudicators attend to deal with a range of matters of concern in relation to the appeals process.

Free legal representation

The following organisations provide free representation:

Immigration Advisory Service
County House, 190 Great Dover Street, London SE1 4YB
tel: 0171 357 6917, fax 0171 378 0665

JCW1 (address above)

Asylum Aid, 244 Upper Street, London N1 lRU

The Refugee Legal Centre (details above) offers free representation at the appeals process.

The Free Representation Unit, Room 140, In floor, 49-51 Bedford Row, London WC1R 4LR
provides free advocacy at hearings but cases have to be referred by a solicitor or other referral agency which must maintain conduct of the appeal.

Detained asylum seekers

Amnesty Lnternational has published two recent reports on Home Office detention of asylum seekers, *Prisoners Without a Voice: Asylum-seekers Detained in the United Kingdom* (second edition, 1995) and *Cell Culture: the Detention and Imprisonment of Asylum-seekers in the United Kingdom* (1996). The *Detention Advice Service,* 244

Upper Street, London, Nl lRU, telephone: 0171 704 8007 provides advice, support and legal referrals to detainees and support to legal representatives of those detained.

Additional copies

To order additional copies of this guide, please contact:

ILPA
1st floor
Lindsey House
40~42 Charterhouse street
London EC1M 6JH

tel: 0171251 8383
fax: 0171 251 8384

e-mail: ilpa@mcrl.poptel.org.uk