ILPA's response to the ICIBI's Call for Evidence on the work of Presenting Officers

Background

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

Introduction

This note collates evidence and perspectives from ILPA members. Members are also willing to provide further evidence and discuss issues directly with the Inspection team if required. Please note that ILPA has had sight of, and endorses, the responses submitted separately by our members Goldsmith Chambers and the Helen Bamber Foundation.

Members acknowledge that the HOPO role is a difficult one, and believe that having a 'good' HOPO is a real benefits to most appellants. Members reported that there are many HOPOs who 'fight fair' and put the Home Office case robustly but with compassion, in what are frequently stressful or traumatic circumstances. Members have seen HOPOs draw vital matters adverse to their client's case to the Tribunal's attention, as they properly should. ILPA hopes that this response and the ICIBI's report will help the Home Office to effect positive change in the way that the HOPOs operate.

Concerns

Poor quality Home Office decision-making at first instance

It is important to acknowledge that the role of HOPOs takes place within a context of poor and inadequate first instance decision-making, the quality of which has deteriorated significantly over the last decade.

This may be evidenced by Home Office data on asylum appeal outcomes before the First-tier Tribunal which show a significant increase in the proportion of first instance decisions overturned at appeal.

Year	Total number of asylum appeals	% appeals allowed	% appeals dismissed	% appeals withdrawn
2019 – in part	7420	41	52	6

(data available to Sept 2019 only)				
2018	11627	38	57	4
2017	14299	35	60	4
2016	12581	40	55	5
2015	9224	35	60	5
2014	6178	28	66	5
2013	8325	25	68	7
2012	8285	27	66	7
2011	10597	26	67	6
2010	14723	27	68	4

Source: calculations based on data from *Home Office Immigration Statistics year ending September 2019: Asylum Appeals Lodged and Determined*, table Asy_D07, updated 28 November 2019 at: https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets

There is to our knowledge no public data on the outcomes of immigration appeals more generally. The data that is available would indicate that the Home Office is regularly requiring HOPOs to defend poor quality decisions in cases which should where applicants should properly have been granted protection at an earlier stage without the need to pursue appeal proceedings. The concerns discussed below regarding Home Office practice in proceedings before the First-tier Tribunal are magnified when also seen in this light.

There is also no available data on the proportion of appeals where the appellant is unrepresented and the impact of access to representation on successful appeal outcomes. This would be important information for the inspection team to obtain as well as to consider the case files and record of proceedings for unrepresented appellants. The concerns outlined below are likely to have a particularly harmful effect on those appellants who are unrepresented or poorly represented and are not able to counter the impact of poor Home Office conduct on the outcome of the appeal.

Absence of mechanisms for reviewing cases prior to appeal

It is not apparent that there is any process within the Home Office by which HOPOs review decisions on receipt of the Home Office bundle and seek a review of the decision by the casework team where they consider that the decision cannot or should not be defended. It would be useful for the inspection team to

obtain data on whether this is considered part of the role of the HOPO, whether they are empowered to do this, and whether HOPOs would feel confident in being able to secure a proper review of the case from the initial casework section without adding causing delay to a case.

There also does not appear to be any automatic process by which the Home Office reviews the merits of defending its decision or elements of its decision following the submission of additional material. It is common for material to be submitted following a refusal decision, for example because an appellant funded by legal aid will not usually be funded to provide expert reports or other evidence prior to a negative decision, or because it would not be proportionate to obtain this evidence prior to a negative decision.

The Home Office has recently introduced a process under which representatives may invite the Home Office to review a decision following submission of further evidence (see letter of James Stephens Director of Appeals, Litigation & Subjects Access Requests Directorate UK Visas & Immigration to ILPA dated 30th November 2018 at: https://www.freemovement.org.uk/wp-content/uploads/2018/12/ILPA-historic-appeals-update-Nov-JS-1.pdf). However, the extent to which action is taken in practice is unclear and there appears to be no automatic review of cases where further evidence is submitted to determine whether it is appropriate to pursue the appeal or whether it should properly be conceded.

Lack of engagement prior to the appeal hearing

There is no opportunity to engage with the Home Office to narrow the issues prior to the appeal hearing. It is the practice of the Home Office that the HOPO receives the file the day before the hearing in order to commence preparation for the case. There is no individual holding the file before then nor is there anyone authorised to engage with the content of the file or narrow the issues. In some cases, HOPOs have not received the bundles at all despite service of these having been in time.

This practice causes difficulty in cases where action is required on the part of the Home Office between hearing dates. For instance, there have been examples where a hearing has been adjourned for action to be taken on the part of the Home Office, no follow-up action is taken and this is only identified when the file is considered by a second HOPO picking up the file for the following day and then seeks a further adjournment. Appeals are regularly adjourned because the HOPO has not seen or reviewed the bundles submitted to the Home Office.

The failure on the part of the Home Office to engage with proceedings in advance of the hearing and to narrow issues in dispute has been a long-term problem. It adds costs to litigation and to the legal aid budget because it is necessary to prepare cases anticipating all possible challenges and adds to the strain on appellants subject to unnecessary examination.

A further and different form of failure by HOPOs to engage prior to an appeal hearing is in its regular failure to submit responses under rule 24 of the Upper Tribunal Procedure Rules in those cases where the Secretary of State will contest the appellant's application that there has been an error of law in the determination of the First-tier Tribunal below. It is very common not to receive a rule 24 response setting out the Secretary of State's position in advance of the hearing or to receive a standard response set out in the most generic terms. This means that the appellant's representative has no notice of the arguments that will be made by

the HOPO before the Upper Tribunal and cannot properly prepare to respond to these, giving rise to unfairness.

There is also real difficulty in gaining an opportunity to engage with HOPOs at the appeal hearing itself. It has become very common for HOPOs not to arrive at the courtroom until just a couple of minutes before the start of the list which does not usually allow sufficient time to engage on matters relevant to the hearing. Gaining time to speak to the HOPO often relies on the flexibility of court ushers arranging the start of court and therefore causes delay, or discussion is curtailed altogether. It was previous practice that HOPOs would be present at least ten minutes before the start of the list so that the representatives in the cases listed had an opportunity to raise any specific issues with them.

It should not be forgotten that appellants are often victims of torture or other human rights breaches. Unfamiliarity with the case on the part of the HOPO leads to confusion, unnecessary upset (potential harm) and may cause misunderstandings in the evidence and unwarranted consideration by Judges of credibility issues that do not in reality exist. There is also no continuity. It is well known that in asylum and human rights appeals HOPOs sometimes attend the hearing alleging (for example) that the appellant's bundles were not served on the SSHD when in fact it can be demonstrated that they were, but because time is limited, and the evidence too voluminous to copy and consider that day, the hearing is adjourned. Promises are made to follow up with one department or another, but by the date of the next hearing it is clear nothing has been done, leading the way for a different HOPO to make the allegation made previously by his colleague. If HOPOs retained a caseload, or at least there was some mechanism for ownership of a case, there would be a better prospect of (for example) meaningful co-ordination between teams in the department, directions being complied with, documents being linked to the file, reviews being undertaken, and timeously. HOPOs should be given sufficient time to consider evidence as well as the applicable law and to form a view of the same in the round.

Lack of appropriate engagement at the hearing

It would be useful for the inspection team to obtain information from the Home Office on its view as to the scope of the role of HOPOs and on what they are permitted to do in court other than to ask questions of witnesses and to oppose submissions by the appellant as a matter of course. It would also assist the inspection team to consider the standard instructions to HOPOs and to counsel representing the Home Office.

Members report that several years ago it was possible to negotiate with HOPOs in advance of hearings, when they would generally (not always) agree not to take bad points made in the refusal letter or to accept on the basis of changed caselaw that something in the refusal letter was now wrong. This helped narrow the issues at a minimum; sometimes the appeal would be conceded outright and the appellant would avoid the stress of the hearing.

It is clear from the practice and statements in court by HOPOs, including counsel instructed for the Home Office, that representatives are no longer permitted to concede issues or reach agreement over procedural matters such as reasonable adjournment applications. In one illustrative example, the HOPO opposed an adjournment request sought to facilitate further instructions and evidence where a young asylum applicant

had recently disclosed involvement in prostitution giving rise to concerns of trafficking. There would have been no proper grounds for opposing such an application. In another case, a barrister acting for the Home Office stated that they also had a standard instruction to oppose applications to treat an appellant as a vulnerable witness. If this indication is correct or, is understood by HOPOs to be the correct approach in view of their instructions not to agree or concede issues, it would prevent HOPOs from properly assisting the court in its duty to conduct proceedings fairly.

One member listed the issues as follows:

- concessions that should be properly be made are hardly, if ever, made even in the face of overwhelming or incontrovertible evidence (including where it is based on their own policy position), or settled law; and
- based on what many HOPOs say themselves, they do not appear to have authority to make their own assessment whether consent should be given under s85 NIAA 2002 to raise a 'new matter' which, if not identified prior to the hearing, leads to unnecessary delay, and wasted time and money.
- HOPOs do not appear to understand their duties as an office of the court. Many fail to demonstrate that they appreciate the basic tenets of fairness. For example, many appear oblivious to the natural consequences of failing to provide adequate or any notice when producing new documents/ evidence (e.g. on the day of the hearing), and fail to appreciate that late service usually requires affording the other party an opportunity to make representations, and where necessary an opportunity to procure rebuttal evidence including (expert evidence/opinion). To make matters worse where new evidence is produced on the day of the hearing (e.g. MECOI evidence), the relevance and provenance is rarely and/or clearly understood or explained;
- the flip side is that HOPOs will fail to adduce evidence that undermines their case even though they should;
- HOPOs will argue the SSHD's policy position contained in a CPIN should be treated as conclusive evidence on the elements to be proven by the Appellant in an asylum or human rights appeal, whereas in reality it constitutes the SSHD's litigation position (akin to submissions) based on her (often partial) interpretation of the evidence.

Members report that HOPOs are reluctant and often practically unable to take instructions from a senior caseworker from the Home Office unless pressed to do so by the Judge. The HOPO has to contact the caseworker, who is frequently unavailable, or the caseworker has to contact their line-manager, who is also frequently unavailable. The general impression is that POs have far less authority than they had to use their initiative and common sense having looked at a case. Certainly discretion is rarely exercised unless a decision is to be withdrawn entirely with the consent of the caseworker. The result is serious inefficiency, as the HOPO ends up arguing bad points which waste Tribunal time, and if they are successful those points result in an inevitable appeal which again wastes everyone's time and money (and can place huge stress on appellants).

If instructions are required, for example on whether the Secretary of State consents to a new issue being raised before the Tribunal, the HOPO will not seek instructions if the appellant representative approaches them in advance of the hearing. On a practical level, HOPOs are often not in the building until the very start of the hearing at 10am making any engagement prior to the hearing impossible. It is considered courteous to be present in court at least ten minutes before any hearing for discussions with an opponent, but HOPOs no longer adhere to this proper professional practice.

It is not unusual to have a HOPO ('glumly' as reported by one member) making completely unarguable points as set out in the refusal letter, in the teeth of intense irritation from the Tribunal. This is typified by the inevitable practise of HOPOs beginning every closing submission with the words "I begin by relying on the refusal letter", even where the refusal letter refers to the wrong country, or incorrectly states that a child applicant is 32, or is wildly out of date.

Members report seeing HOPOs make the most extraordinary arguments, often without any real enthusiasm, examples include arguing that a teenager who had never been to Afghanistan and did not speak the language could easily 'readjust' to life in Kabul; and that a person with a Physics degree in English might have needed to hire a proxy for a basic English language test; or that a married couple taking turns to mind their children outside court as they give evidence were not in a genuine relationship.

Members believe that HOPOs are often as frustrated as everyone else by all of this. One member reports recently acting in an appeal in which the HOPO (in the Upper Tribunal) began by arguing the (dreadful) grounds of appeal that had been submitted by the Secretary of State and (wrongly) granted permission, before dispiritedly trailing off and saying "to be honest I wouldn't have appealed this one… I just don't see how the Judge has made a mistake…I know you will make it look like I tried". That HOPO knew he had a terrible case, which could not succeed without a serious injustice, and did not want to waste everyone's time with it – but was clearly still worried his manager would find out that he had not pursued it vigorously.

This type of pragmatism is occasionally seen in the Upper Tribunal, and it is clear that some of the more senior HOPOs at that level feel that they can concede weak cases. But there is far less at the First Tier Tribunal – almost none – and the result is either prejudicial to appellants or to the effective running of the Tribunal or both.

The general approach preventing HOPOs from agreeing or conceding issues means that they cannot take a reasonable approach to issues arising in court and makes it difficult for the Tribunal to maintain a culture of focusing on those issues that are genuinely in dispute. It also pays little regard to the proper role of the Secretary of State in ensuring that fair and correct asylum and immigration decisions are made. The approach adopted by HOPOs is incompatible with these duties as well as their role as officers assisting the court.

The practice of HOPOs acting for the Secretary of State for the Home Department contrasts with that of civil servants representing in other Tribunals who will routinely accept points as appropriate allowing the Tribunal to make their determinations on the issues that are in dispute. For example, representatives for the Department of Work and Pensions in social security tribunals will say that having heard the evidence, they can now accept that what the appellant says is true. This simply does not happen in the First-tier

Tribunal (Immigration and Asylum Chamber). HOPOs representing in error of law cases before the Upper Tribunal do, however, concede bad points. This may be indicative a more robust approach taken by the Upper Tribunal to poor argumentation but also suggests that appropriate practice is possible and could be adopted more widely.

As HOPOs are not permitted to agree or concede issues, more experienced HOPOs who understand that it is not appropriate to oppose a particular matter may adopt forms of coded language in order to adopt a more reasonable or appropriate approach to an appeal. For example, HOPOs who agree that an adjournment would be appropriate will indicate to the appellant's representative that they will not oppose the application strongly and then make the briefest submissions in court indicating that they oppose the application. It is also widely understood that when HOPOs state in court that they rely on the Reasons for Refusal Letter and do not having anything to add in submissions, they are signalling that they are not advancing the case that the appeal should be dismissed. This approach gives rise to a lack of clarity as the judge may still proceed to dismiss the appeal even though the representative of the Secretary of State has considered that the appeal should not be contested. There have also been examples where the HOPO has not robustly take a position, indicating that they simply rely on the Reasons for Refusal letter, and then the Home Office has applied for permission to appeal the positive determination by the First-tier Tribunal because, by not conceding, they preserved their position for appeal.

The use of coded language also has an impact on participation in proceedings and open justice as neither appellants nor those observing the appeal will understand what is happening in the proceedings. HOPOs should be able and empowered to clearly indicate when issues are agreed and points conceded in order to ensure the proper determination of appeals and the fairness and transparency of proceedings.

Lack of knowledge of law, policy and case law

Practitioners regularly deal with HOPOs who lack knowledge of relevant policy or case law. The lack of knowledge of the Home Office own policy guidance is particularly striking. For example, HOPOs are often unfamiliar with the Home Office policy on 'new matters', that is, a ground of appeal not previously considered by the Secretary of State and which the Tribunal does not have jurisdiction to consider unless the Secretary of State gives consent for the Tribunal to do so. The Home Office guidance document, *Rights of Appeal* (v.7.0), dated 30 July 2018 (at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/730527/right-of-appeal-v7.0.pdf) sets out its approach to new matters raised. If a new matter is unavoidably raised at the appeal hearing itself, the Secretary of State's policy guidance states (p.27):

> Even if the new matter is not identified until shortly before or at the hearing, if it can be considered and a decision reached quickly, that should be done. If the new matter cannot be considered before the appeal hearing, for example because the PO needs to check whether a document is genuine and there is insufficient time to do so, the PO should inform the Tribunal that a new matter has been raised and that the SSHD does not consent to it being considered by the Tribunal.

> In order to make best use of Tribunal resources, an adjournment should be sought for the SSHD to consider the new matter. Where possible, a single appeal should consider all matters that have been raised by the appellant.

In practice, however, HOPOs are often unaware of both the policy and the policy document, and have to be pressed to ensure that the proper procedure is followed. This would seem to be a significant omission in training given the particular focus of the policy on appeals practice.

HOPOs often also lack knowledge of the Home Office policy guidance in Asylum Policy Instruction Medico-Legal Reports from the Helen Bamber Foundation and the Medical Foundation Medico-Legal Report Service, published 29 January 2014, updated 13 July 2015 at: https://www.gov.uk/government/publications/dealing-with-asylum-claims-involving-torture-or-serious-harm-allegations-process. The guidance (at 3.5) states that where a medico-legal report from one of these Foundations is submitted after the claim has been refused, the case should be reviewed before any appeal and the report carefully considered in order to assess whether the evidence may have resulted in a different overall assessment of credibility and evaluation of future risk. The guidance is not routinely followed and HOPOs have also opposed appellant applications to adjourn in appropriate cases that have also had the benefit of enabling this step to be undertaken in accordance with the Home Office own policy. The lack of review also rise to a risk of torture survivors being subjected to cross-examination on areas that might otherwise have been accepted by the Home Office.

Further examples include the lack of knowledge of Home Office policy on LGBTI asylum claims (*Asylum Policy instruction: Sexual orientation in asylum claims*, v.6.0, 3rd August 2016 at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf and appropriate questioning in such cases, as discussed below.

HOPOs also tend to lack understanding of important procedural questions, including both the issue of new matters as above and questions of jurisdiction more generally. In one recent case where jurisdiction was in issue in a domestic violence claim under articles 3 and 8 of the European Convention on Human Rights, the HOPO had not even realised that his case was to dispute jurisdiction until the appellant's representative spoke to him prior to the hearing. The case had to be adjourned to permit the HOPO to be able properly to argue the jurisdiction point, which thereby wasted judicial resources and was damaging to the client who had mental health problems.

Most HOPOs have little or no knowledge of the applicable law. If they do, they do not understand its true scope and content. HOPOs regularly refer to cases that have been superseded and are often unaware of authority. There is a tendency to rely on partial and/or incomplete summaries of key cases in static policy documents.

In one notorious case, where counsel pointed out the HOPOs case was wrong in law, she replied: "You have your law, I have mine". Such deep misconceptions are not isolated. HOPOs routinely deploy legally unsound arguments in the form of incorrect or misleading mantras. For example: (a) Adult relationships may only engage Art 8(1) ECHR, if it can be shown there is something "beyond normal emotional ties", (b) No weight

should be attached to a Medico-Legal Report ("MLR") because the doctor "based his assessment on what A told him only"; (c) A country expert report should carry little or no weight because it is based on his "opinion" not on facts that can be verified; (d) New evidence in a second appeal cannot displace the findings in an earlier tribunal decision because the first decision "was not appealed". This is a snapshot only. The problem cannot be emphasised enough.

In asylum appeals, HOPOs appear incapable or unwilling to apply the correct approach to evidence in this jurisdiction i.e. that unless a Judge can be 'sure' that a piece of evidence carries no weight, it must form part of a global assessment of future risk to the lower standard. If the correct approach were applied to evidence, there would be fewer contested appeals, but is necessary, representatives and judges could focus on the points genuinely in dispute. There needs to be root and branch training for HOPOs on law and procedure in asylum and human rights law.

In terms of lack of awareness of appropriate law and case law, HOPOs regularly fail to recognise where the Home Office bears the burden of proof rather than the appellant. For example, HOPOs often develop cross-examination and submissions that fail to appreciate that the Home Office bears the burden of proof where it asserts that a marriage is one of convenience made solely and impermissibly for establishing an application for leave to remain on the basis of marriage. Similarly, HOPOs regularly adopt an approach in appeals brought by EEA nationals against deportation that fails to recognise that, under European Union law, the burden is on the Home Office to demonstrate that deportation of an EEA national is proportionate, in contrast with domestic law regarding the deportation of non-EEA nationals where the individual appellant bears the burden of proof. The approach adopted by HOPOs is often the same in both cases even though the law is completely different.

It is routine for HOPOs in Sri Lankan asylum appeals to follow and maintain arguments in Reasons for Refusal letters undermining the credibility of an appellant based on their ability to leave Sri Lanka through the airport without encountering any difficulties. However, the Secretary of State accepted before the First-tier Tribunal in the Country Guidance case of *GJ (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC) that 'given the prevalence of bribery and corruption in Sri Lanka, having left Sri Lanka without difficulty was not probative of a lack of adverse interest in an individual' (§170). The Tribunal also confirmed that expert country evidence on corruption was 'particularly useful' and 'reliable' and took particular account in its determination of the view expressed that it was possible to leave through the airport even when a person is being actively sought (§275).

The different position adopted frequently by the Home Office and HOPOs in individual appeals misleads the court. Moreover, the Home Office has a specific duty to bring to the attention of the court its policy on relevant matters, as set out in *UB (Sri Lanka) v Secretary of State by the Home Department* [2017] EWCA Civ 85

Whilst a good quality legal representative may challenge the incorrect position put forward by the Home Office and HOPOs in individual appeals effectively, those appellants who are unrepresented or poorly represented risk unfair negative credibility findings and damage to their claim where the points made are unchallenged, which may ultimately have consequences for their access to protection from persecution.

Similarly, in some cases (but not all cases, indicating an inconsistency in practice), both the HOPO and the Reasons for Refusal letter will rely on case law on the treatment of evidence on mental health that has been superceded by more recent cases in the higher courts. For example, in such cases, the Home Office cites the starred tribunal case of *AE and FE (PTSD- Internal Relocation)-Sri Lanka STARRED* (2002] UKIAT 05237 to undermine a medical opinion given by an expert psychiatrist, relying on the following passage (at §8): *'However, his expertise and qualifications do not necessarily mean that his views must be accepted without question. The IAA is accustomed to receiving, reports from psychiatrists which indicate that the asylum seeker in question is suffering from depression or PTSD or both. That there should be a large incidence of PTSD in asylum seekers may not perhaps be altogether surprising, although we are bound to comment that what used to be considered a relatively rare condition seems to have become remarkably common'*. In *Y & Z (Sri Lanka) v SSHD* [2009] EWCA Civ 362, Sedley LJ confirmed, however, that uncontroverted expert medical evidence should not be rejected unless there were acceptable and adequately explained reasons to doubt the expertise of the author or the conclusions she had reached: [11], [37]. This creates particular disadvantage to witnesses who are vulnerable by reason of their mental health diagnosis.

The Home Office, both in Reasons for Refusal letters and in submissions made by HOPOs, also regularly ignore the decision in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40. It was held in *Chikwamba* that it would only be comparatively rarely, certainly in family cases involving children, that human rights appeals should be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave to enter the United Kingdom from abroad. Despite clear, contrary guidance by both the UK Supreme Court and the Court of Appeal, the Home Office regularly asserts that family members can return to their country of origin and apply for entry clearance to the UK. The approach suggests either a lack of appropriate institutional guidance to HOPOs and caseworkers or a conscious strategy to diminish the effect of higher case law authority on the outcome of appeals through raising arguments in a context where cuts to legal aid and lack of representation mean that these may not be challenged.

Reliance by HOPOs on outdated case law in a range of areas is also frequently seen in Tribunal hearing centres outside London.

Institutional failure to learn from appeals

It is very clear from the examples discussed above that evidence from successful appeals, either before higher courts or in individual appeals before the First-tier Tribunal itself, does not feed into or inform changes in practice within the Home Office towards decision-making in other, similar cases as the same issues are regularly raised by HOPOs in individual appeals. One example of this is the recurring theme that an expert providing a diagnosis and opinion is not to be given any weight on the basis that the expert relied on "what the appellant told them". It would be helpful for HOPOs to have basic training on recurring matters that feature in appeals so that they do not make misleading submissions to the tribunal.

In addition, the Home Office does not appear to have any, or any adequate, mechanism for informing its country policy and information teams of information from expert country evidence relied upon by the First-tier Tribunal in making positive findings of fact in protection claims. This means that appellant representatives are regularly obliged to instruct experts to address the same points in individual cases

before the Tribunal. This increases the costs to the legal aid budget and places unrepresented or poorly represented appellants at a disadvantage where they have not, or have not been able, to instruct an expert to challenge assertions made by the Home Office. The lack of institutional learning from expert evidence and appeal outcomes prevents the Home Office from ensuring consistency and fairness in its decision-making and places appellants, particularly those who are unrepresented or poorly represented, at risk of unfair decisions with serious implications for the protection of their human rights.

Use of case law

HOPOs appearing before the First-tier Tribunal generally have a poor understanding of case law and, in some cases, do not have an understanding of the basic rules of precedent. Whilst the standard of representation is generally better before the Upper Tribunal, many of the problems seen persist in the Upper Tribunal also.

It would seem that HOPOs rely on being provided with summaries of cases by the Home Office rather than considering full case reports themselves. In many instances, HOPOs cite cases whilst missing the principle points established. There is also an over-reliance by HOPOs on the headnotes of cases (which are not authoritative) rather than on the full discussion of the evidence and findings in the precedent case.

The Home Office also relies extensively on the use of thematic 'case law bundles', for example on specific issues such as deportation, medical cases under Article 3 of the European Convention on Human Rights, 'very significant obstacles' etc. Their use is particularly prevalent at the hearing centres at Hatton Cross and Harmondsworth. The bundles do not reproduce the whole case report and are often tendentious in the extracts selected. There is no attempt made to select the relevant case law for the particular facts of the case and the appellant representative may be provided with a 60-page bundle of case extracts on the morning of the hearing with no indication of the particular cases or points relied upon, let alone any advance notification.

In general, HOPOs generally do not produce the case law they will rely upon or provide a citation and there is usually no advance warning to appellant representatives of the case law arguments relied upon until reference is made to a case in oral submissions.

Lack of training on cross-examination

It would be helpful for the inspection team to identify what training is provided to HOPOs on legal advocacy, including the cross-examination of witnesses, as their performance in court is generally experienced to be of a poor standard. Similarly, it would be useful to identify what assessment is undertaken before HOPOs being representing in court and how their performance is monitored and supervised. Some specific examples are discussed below.

Unnecessary questioning

It is common for HOPOs to undertake lengthy and unnecessary examination of witnesses rather than a focused approach based on having narrowed the issues in dispute. This can often amount to more of a

'fishing expedition' to identify whether the appellant's evidence gives rise to discrepancies rather than a focused examination of the matters of importance within the Reasons for Refusal Letter.

An area where HOPOs commonly seek to cross-examine appellants unnecessarily is in trafficking cases where the Home Office has accepted that the appellant is a victim of trafficking and has not challenged the credibility of their account. The issues in dispute therefore relate to whether the past history of persecution gives rise to an objective risk on return. In such cases, HOPOs often do not concede that cross-examination of the appellant is not required, even though the material issues relate to the objective evidence. This makes it necessary to consider whether the appellant, who is by definition a vulnerable witness, should be subjected to unnecessary and potentially inappropriate cross-examination or risk negative interferences being drawn from any failure to tender the witness in such circumstances. The uncertainty also means that it is not possible to provide any assurances to witnesses in advance of the hearing of the likely approach to be taken, increasing the stressful and potentially traumatic impact of proceedings.

Lengthy questioning may also arise where the HOPO has not adequately prepared the case or read all the papers. For example, in a substantive rehearing of an appeal before the Upper Tribunal, the HOPO undertook a lengthy cross-examination that subsequently became clear as aimed at impugning credibility when this had been fully accepted and the issue in dispute was different entirely. Having failed to read the papers and give proper consideration to the issues, the HOPO simply adopted a stock line of questioning causing distress to the witness and lengthening the hearing significantly and unnecessarily.

As HOPOs regularly take this position in respect of oral evidence, there is sometimes the expectation in appeal proceedings that witnesses give evidence because this has become the culture. It should of course be the case that HOPOs should only put questions to witnesses having reviewed all the evidence and satisfied themselves that the questions are material. In civil trials, if it is determined that there is a need to hear evidence, the representatives will step outside and agree the focused areas on which oral evidence is required, reducing the length of hearings and the costs of litigation.

Questioning beyond issues in the Reasons for Refusal Letter

The cross-examination of witnesses on issues outside the areas of dispute indicated in the Reasons for Refusal letter takes place less frequently than it has done in the past but it does continue to happen, causing unfairness to the appellant who is not afforded a proper opportunity to respond to points made against them, either through argument or further evidence. Judges may be cautious in curtailing Home Office questioning leading to examination taking place, and influencing proceedings, on issues to which the appellant has not had a fair opportunity to respond.

This is particularly evident in cases where HOPOs rely on an absence of corroborative evidence as a means of impugning an appellant's credibility. For example, the HOPO may make assertions, in their questioning of the appellant and in their submissions, on the type of material the appellant could have produced in support of the appeal but has not presented, even though this was not raised either at interview or in the Reasons for Refusal letter. The particular type of evidence may not have been considered relevant by the appellant in the context of other evidence provided in the case or it may not have been determined by their representative to be practicable to investigate be within the constraints of legal aid funding. Raising such

points against appellants without advance notice gives rise to procedural unfairness and it should also go without saying that there is no requirement of corroboration in refugee law.

In other examples, the Home Office may in their cross-examination seek to reopen issues that have not been disputed. For example, in an appeal considering whether there were significant obstacles to return under paragraph 276ADE(1)(vi) of the Immigration Rules and whether removal was a disproportionate interference in private and family life under Article 8 of the European Convention on Human Rights more broadly, credibility was not expressly in issue in the Reasons for Refusal Letter, but even though this had not been challenged and the appellant had not been put on notice of any challenge, the HOPO still sought in their cross-examination to undermine the appellant's credibility.

Failure to pose straightforward questions

HOPOs regularly fail to put straightforward questions in their cross-examination of witnesses, for example, asking more than one question at a time or posing questions with lengthy and complex explanations. This makes it difficult for witnesses to understand the question that is being asked. It is a difficult that is compounded by the common need for questions to be interpreted into a second language at hearings and by cultural differences and educational disadvantage which may also affect witnesses' understanding.

Unfair or inappropriate questioning

In cross-examining appellants on inconsistencies between statements made at interview or elsewhere, HOPOs often put to the appellant a purported summary of what the witness said without referring back to what was actually said at interview, including both the question and answer recorded. In this way, appellants are called to respond to an inaccurate reflection of the interview record giving rise to unfairness. Sometimes by the time their representative has checked the record and objected to the question, the appellant has already given an answer to the interpreter. And as it has become the practice before the Tribunal that appellants do not have reference to their papers at the hearing, nor would many be able to as these are only provided to them in English, unrepresented appellants would have no opportunity to challenge questions based on an unfair summary of their previous statements.

An area where inappropriate questioning of witnesses is regularly seen is in the cross-examination of LGBTI witnesses in cases where it is alleged that the appellant faces a risk of persecution in their country of origin on account of their sexual orientation. HOPOs may include intrusive and/or improper questions in their cross-examination. In one case, a former unaccompanied minor who was a vulnerable witness and their partner were each asked by the HOPO in court (with the representative's objection overruled by the Judge) when the last time was that they had sexual intercourse with each other, causing considerable humiliation and distress. This is despite the fact that both the European Court of Justice case of *A, B, C v Staatssecretaris van Veiligheid en Justitie (Joined Cases C-148/3 to C-150/13)* [2015] 1 WLR 2141 and the Secretary of State's own guidance prohibit questioning on sexual practices. HOPOs also regularly put questions to witnesses that are based on stereotypes or unfounded notions relating to LGBTI individuals without reference to Home Office policy guidance on LGBTI asylum claims. For example, in one case, a HOPO questioned a vulnerable, a gay appellant from an Arab country on their awareness and use of Tinder, a mobile dating application

popularly (even if not actually) associated with casual encounters. The HOPO relied on this to undermine the credibility of the appellant's sexual orientation even though there is no inferential basis for an awareness of Tinder being indicative of sexual identity and both Home Office policy and the case law of the European Court of Justice (*A, B, C* above*)* warn against the use of stereotypes in determining the credibility of claims based on sexual orientation.

Appellant representatives face dilemmas in restraining similarly inappropriate questions in court as they risk being seen as unduly protective towards their client which may contribute towards a perceived lack of credibility of the appellant.

Behaviour towards witnesses

There is a divergent range of practice among HOPOs in their approach to appellants and witnesses before the Tribunal. There are some HOPOs who stand out as polite, courteous and careful in their approach to the appeal hearing, to their dealings with representatives, and in their cross-examination of appellants. This makes a visible and important difference in facilitating the fair conduct of proceedings by focusing on the issues in dispute, putting witnesses at ease and ensuring their evidence is properly examined.

At the other end of the spectrum, there remain examples of HOPOs who adopt a hostile and aggressive approach to questioning. This type of manner gives rise to distress in witnesses and is inappropriate to the nature of proceedings which determines matters of refugee and human rights protection. For example, an appellant in an asylum appeal is a witness who may have potentially been a victim of crime; an appellant in a human rights appeal may be bringing proceedings because they would otherwise face unjustifiable separation from their home and family.

One member reported that when a vulnerable appellant was asked to address the new evidence of childhood sexual abuse the HOPO said he would 'do or say anything to remain in the UK.' Another member commented that they practice in different jurisdictions and find it striking how often appellants in the immigration tribunal are treated with contempt or dismissed at the outset as being liars. The appellants face a daunting process, generally in what is not their first language, confronted by people in authority that they are required to give personal details to about their histories and fears through an interpreter, never having met any other of the officials before, and having come from being persecuted by those in authority in their countries of origin.

Members also reported HOPOs commenting on the merits of a case loudly in or outside the hearing room, making inappropriate comments about the Appellant or disparaging remarks about asylum seekers generally such as "next they'll be claiming to be gay", and "it's all a pack of lies"; "…so one those NGOs went fishing around the detention centre and wrote a torture report for him eh?", "C'mon, you don't believe any of this do you?", and "I'm going to do everything I can to make sure this guy is deported".

In between these two poles, there is a general lack respect displayed by HOPOs towards the dignity of appellants, informed in all likelihood by an institutional scepticism and culture of disbelief towards their immigration and asylum claims. As HOPOs are a permanent and daily presence at court, their approach has

a strong influence on the culture of immigration and asylum proceedings such that this atmosphere or approach is no longer visible or remarkable and therefore accepted as the norm. In this way, even more egregious forms of questioning may not be curtailed by Judges as they form part of a spectrum where disrespect towards appellants as witnesses is normalised.

The prevailing culture may be contrasted with that observed within other civil tribunals, and even with that found the Asylum Support Tribunal which hears appeals against Home Office decisions on the provision of support to applicants in the asylum process. The culture within the Asylum Support Tribunal is considerably more accessible and respectful to individual appellants, with greater efforts made to ensure their comfort in participating in proceedings and a greater readiness to believe appellants when they give evidence before the court.

Lack of training on dealing with vulnerable witnesses

The problems encountered with HOPOs are increased significantly with regard to vulnerable witnesses. There is a lack of understanding of the Tribunal's vulnerable witness guidance and its implications for HOPOs across the board and, in many instances, actual hostility towards its implementation. It would be useful for the inspection team to obtain details of the training provided to HOPOs on dealing with vulnerable witnesses, including in cross-examination.

The Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance (https://www.judiciary.uk/wp-content/uploads/2014/07/ChildWitnessGuidance.pdf) stresses the importance of identifying and facilitating the participation of witnesses whose evidence may be affected by reason of their age; mental health problems; social or learning difficulties, physical disability or impairment; experience of torture, trafficking, serious harm or Post-Traumatic Stress Disorder; religious beliefs and practices, sexual orientation, ethnic social and cultural background; domestic and employment circumstances; and/or other factors (paragraphs 1-3). The guidance invites Judges to consider matters relevant to safeguarding the welfare of witnesses and the quality of their evidence, including:

- Agreement between the parties in advance of oral evidence as to the matters agreed or in dispute enables questioning to be focussed, sensitive and minimises potential trauma (paragraph 9).
- Ensure questions asked are open ended wherever possible; broken down to avoid having more than one idea or point in each question and avoid suggesting a particular answer (paragraph 10.2(iii)).
- Curtail improper or aggressive cross examination; control the manner of questioning to avoid harassment, intimidation or humiliation. Ensure that questions are asked in an appropriate manner using a tone and vocabulary appropriate to the appellant s age, maturity, level of understanding and personal circumstances and attributes. Pay special attention to avoid re-traumatisation of a victim of crime, torture, sexual violence (paragraph 10.2(iv)).
- A person with special needs may be more easily influenced by the way information and choices are presented and there may be a tendency to guess an answer rather than say don't know (paragraph 10.2(ix))

- People with special needs may need more time to understand and think about a question. Ensure adequate time is given to understand the question; reassure the appellant that don't understand, don't know, don't remember are acceptable answers if true (paragraph 10.2(x)).
- People with special needs are not always used to having their views listened to and may be more easily influenced by others even when they have a different view themselves (paragraph 10.2(xi)).

In cases where an appellant is represented and been supported to submit expert or other medical evidence, Judges will also be guided by evidence and recommendations by clinicians as to whether an appellant is fit to give evidence and on any special considerations required to facilitate their participation.

As it is not possible to engage with HOPOs in advance of a substantive hearing, it is not possible to ensure agreement between the parties on the issues and on how any potentially vulnerable witness should be treated in order to minimise potential trauma or ensure the witness is able to participate effectively and give their best evidence. This can only be done on the morning of the substantive hearing (with all the difficulties around late attendance of HOPOs) increasing the level of pressure and strain on witnesses who do not have an advance level of clarity as to how they will be examined in court if required to give oral evidence. As identified above in relation to trafficking cases, HOPOs also expect to cross-examine witnesses even where there is no good reason for evidence to be called.

It has become increasingly common for HOPOs to oppose applications for an appellant to be treated as a vulnerable witness, relying on spurious grounds for doing so and undermining their duties as officers of the court to play their role in ensuring procedural fairness.

In one case, an expert psychiatrist providing a detailed report diagnosing severe Post-Traumatic Stress Disorder and a high risk of suicide advised that the appellant should not be called to give evidence on account of the impact of doing so on their psychological state and the effect of dissociation and other symptoms affecting their ability to give evidence. The HOPO indicated that they would oppose the application for the appellant to be treated as a vulnerable witness (and therefore would seek adverse inferences if they did not give evidence at the hearing). The HOPO did not, however, press the point in court after the Judge indicated their preliminary view that the evidence was very clear on this issue.

In another case, an expert psychologist who had treated the appellant over an extended period of time advised that the appellant was not fit to give oral evidence and provided detailed reasons explaining this assessment. The HOPO challenged the assessment and also the reliability of the entire (and lengthy) report dealing with the substantive medical issues in the case, stating that it should not be relied upon on the basis that the expert had not addressed the appellant's fitness to give evidence in the report itself even though they had not been instructed to do so and had provided their opinion on this point in subsequent evidence.

In cases where the Judge has agreed as a preliminary issue that an appellant should be treated as a vulnerable witness, the approach adopted by HOPOs to questioning often remains the same. HOPOs lack the knowledge, experience or willingness to adapt their questioning appropriately. For example, HOPOs may continue to ask compound questions that are confusing to a witness. Many do not understand what an open question is and so fail to adapt their questions appropriately to examine witnesses, such as children, who may be improperly influenced by closed questions. It also remains the case that HOPOs adopt hostile

or aggressive questioning styles despite expert psychiatric recommendations before them that this type of questioning may trigger flashbacks or distress causing harm to their welfare and undermining their ability to remain focused on the proceedings, recall aspects of their history and give their best evidence.

HOPOs also oppose entirely suggestions based on standard practice for dealing with vulnerable witnesses in criminal courts such as agreeing the nature and format of questions between the parties (and the court as appropriate) in advance or providing written questions for the witness in advance. There appears to be no basis for opposing reasonable approaches other than a lack of awareness of accepted practice and scepticism towards appellants in immigration and asylum proceedings. It should be noted that if advocates in criminal proceedings adopted similar practices towards vulnerable witnesses as those seen by HOPOs in immigration proceedings, they would be the subject of disciplinary action before their professional body.

The significance of appropriate and in-depth training for handling vulnerable witnesses may be demonstrated by the importance given to this in other areas of legal practice. Barristers are required to undertake specialist training before representing in criminal proceedings before the youth court. The Bar Council and Law Society have developed training in handling vulnerable witnesses for barristers and solicitors appearing in criminal proceedings which is being widely rolled out and likely to become mandatory in the future. The training 'Advocacy and the Vulnerable (Crime)' (https://www.icca.ac.uk/av-elements/) is designed for representatives already professionally trained and experienced in conducting legal advocacy and involves eleven CPD hours training, including the detailed study of different types of vulnerability, the principles of questioning vulnerable witnesses appropriately (see for example: https://www.icca.ac.uk/wp-content/uploads/2019/05/20-Principles-of-Questioning.pdf), a three-hour face-to-face session practising questioning techniques, and subsequent consolidation work. Similar training has been developed for the family Bar.

In comparison, the approach adopted by the Home Office towards the vulnerability of appellants is at best cavalier and at worst risks causing serious prejudice to their welfare and to the interests of justice.

Lack of equality training

One member commented that in their 27 years of practice, they have seen no evidence of HOPOs being given or, if there is any, having any understanding of equality training, which is particularly concerning on LGBTQ+ claims. This is highlighted in the very often, inept, and, at times, offensive, inappropriate cross-examination of vulnerable, anxious appellants. Members reported having to intervene when questions asked are directly contrary to HO guidelines on these claims.

Non-compliance with court procedures or directions

The Home Office routinely fails to comply with judicial directions issued by the First-tier Tribunal, either in a timely manner or at all. Its failure to uphold its duty to the court has persisted over time, taking advantage of the limited powers of the Tribunal to secure compliance. Judges may either become resigned to, or forced to accept, the likelihood of non-compliance, undermining their proper role in managing the fairness of proceedings.

In one example, the HOPO attended court without the appellant's bundle and had failed to contact the solicitor to obtain this in advance having identified that it had not reached the file within the Home Office. As a result, the hearing had to be adjourned but no criticism was made of either the Home Office or the HOPO. In a further example, involving a particularly vulnerable client, the Home Office had applied to adjourn proceedings before the First-tier Tribunal on the day of the hearing in order to deal with an issue it had administratively overlooked. By the time of the subsequent case management review hearing scheduled two months later, the Home Office had still taken no action and was represented by a different HOPO who could not provide any update to the court. The Judge was pressed by the appellant's representative to issue further directions but was initially reluctant to do so on the basis that there would be nothing the court could do if the Home Office continued to fail to comply. The Home Office also escaped censure for the lack of courtesy in at least providing an update or further undertaking at the Case Management Review Hearing.

Lack of consequences for poor conduct

As outlined above, poor conduct of the Home Office and its representatives in appeal proceedings is often not visible through its routine and normalised nature. It is therefore rarely addressed in determinations or in the issue of wasted costs orders. For example, the Tribunal may not take a robust view of Home Office non-compliance because of its regularity. It is therefore unlikely that Home Office non-compliance or poor conduct by HOPOs during proceedings will be identifiable from a paper review of files or determinations. Similarly, the provision of specific examples of poor conduct cannot adequately reflect the scale and general acceptance of poor practice by the Home Office.

There are no published standards regarding the proper conduct of HOPOs in appeal proceedings, so it is unclear what standard they are being held to and there is no mechanism by which complaints may be measured or made. This is in sharp contrast to other professionals appearing before the Tribunal who are required to adhere to professional codes of conduct such as the Bar Standards Board Code of Conduct, the Office of the Immigration Services Commissioner Code of Standards, and risk censure where they fall short of these regulatory standards. Members report that they have seen HOPOs frequently engage in conduct that would be unacceptable at the Bar or for a solicitor, one provided the following example:

> *I acted in an EEA case in which the SSHD was alleging that the appellant was in a marriage of convenience. There was little doubt that her husband was not genuine; he had absconded. However, it was also reasonably clear that she had not acted unlawfully, having essentially been 'taken in' by him. She was a woman who had lived in the United Kingdom lawfully for many years, and whose children lived here too. She had formed a relationship with a much younger man who was a failed asylum seeker, and it was her family's clear view that he was using her. The SSHD on the other hand formed the view that they were both in a marriage of convenience.*
>
> *For the SSHD's case to succeed the appellant would herself have to have deliberately engaged in a marriage of convenience. She said that she had not (indeed she still believed in the bona fides of her vanished husband).*

At the hearing the SSHD failed to produce the transcript of their interview, which was said to have discrepancies showing the relationship was not a real one. Even leaving aside all of the appellant's (overwhelming) evidence that the relationship was genuine: (i) the burden of proof was on the SSHD; and (ii) the SSHD had zero evidence – none – in support of her case of fraud.

There is no way a barrister could properly argue that case. Indeed it was my view that there was no way the SSHD could properly contest the appeal, especially when alleging fraud. The HOPO said she would continue. I insisted that she speak to her boss. She returned having done so, saying that although she had no evidence to rely on she was going to "test the evidence" of the appellant anyway. She also cross-examined the appellant on evidence relating to her former husband which she refused to disclose to me or the Tribunal on the basis that it was "secret evidence" until the judge stopped that particular line of questioning.

As a result this EEA national who had never been in any kind of trouble was the subject of an absurd and wildly unfair fishing expedition of cross-examination while the HOPO tried to cobble together some kind of factual case to support her being removed from the country, after years of lawful residence, as a fraudster. In closing submissions, having come up empty-handed, the HOPO argued that there was "nothing to support the Appellant's position that she was unaware that the marriage was a sham". As well as everything else that was simply untrue.

In my view that conduct was outrageous and there is no way it would have taken place in any of the higher courts, or if there was a code of conduct in respect of advocacy to which HOPOs were properly being held. Frankly, the IJ in that case should not have permitted as much as she did.

This is not an isolated case in the FTT of events that would be breaches of the Bar Code of Conduct if barristers were instructed. Members report that there is a particular problem with: (i) allegations of fraud/criminality being made without any adequate factual basis; and (ii) matters (e.g. perceived implausibilities/inconsistencies) relied on in closing submissions never being put to appellants prior to that point; and (iii) hopeless or unarguable points being relied on because of the lack of discretion referred to above.

The Home Office has in the past maintained that HOPOs are required to adhere to the Civil Service Code (https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code) and that this is sufficient as a code of conduct for HOPOs representing in Tribunal hearings. However, this code does not set out or provide guidance on standards specific to the context of court proceedings, including the HOPO's duty to the court in the administration of justice and the expectations regarding ethical conduct in court proceedings. A complaint against a HOPO in relation to these specific obligations could not properly be dealt with by making a complaint with reference to the Civil Service Code alone.

It would be recommended that HOPOs should be subject to a similar standard of professional regulation as other professionals before the court and required to adhere to a Code of Practice providing guidance

relevant to their role. There is precedent for this approach in the form of The Code for Crown Prosecutors (https://www.cps.gov.uk/publication/code-crown-prosecutors) which sets out general principles highlighting the particular obligations on prosecutors who act in the public interest. These include the following principles that would equally apply to HOPOs:

> 2.5 […] Prosecutors must ensure that the law is properly applied, that relevant evidence is put before the court and that obligations of disclosure are complied with.
>
> 2.7 When making decisions, prosecutors must be fair and objective. They must not let any personal views about the ethnic or national origin, gender, disability, age, religion or belief, sexual orientation or gender identity of the suspect, defendant, victim or any witness influence their decisions. Neither must they be motivated by political considerations. Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.
>
> 2.8 Prosecutors must be even-handed in their approach to every case, and have a duty to protect the rights of suspects and defendants, while providing the best possible service to victims.
>
> 2.9 The CPS is a public authority for the purposes of current, relevant equality legislation. Prosecutors are bound by the duties set out in this legislation.
>
> 2.10 Prosecutors must apply the principles of the European Convention on Human Rights, in accordance with the Human Rights Act 1998, at each stage of a case.

The Home Office has a necessary function as an institution in ensuring that those in need of refugee or human rights protection are granted leave to remain in the UK. There is therefore a particular need to ensure that HOPOs, like prosecutors, are fully aware of their duty to act in the interests of justice and not simply to secure the refusal of an appeal.

An adequate system to adjudicate complaints also requires the articulation of clear and professional standards for HOPOs and an independent and transparent mechanism for considering those cases where HOPOs fall short of these standards.

Summary of areas where further data could usefully be obtained

- Information on the proportion of unrepresented appellants and the outcome of their appeals.
- Information on whether the Home Office considers if the assessment of whether a decision can properly be defended forms part of the role of the HOPO, whether HOPOs are empowered to do this, and HOPOs would feel confident in securing a review of the case from the casework section without causing delay to the determination process.

- Information from the Home Office on the scope of the role of HOPOs and their standard instructions to HOPOs and to counsel on what they are required and permitted to do in court.

- The training provided to HOPOs, including their training on cross-examination, any training on dealing with vulnerable witnesses, how HOPOs are assessed before they begin representing in court and how their performance is monitored and supervised.

Summary of recommendations

The evidence discussed above suggests the following recommendations for improved practice by HOPOs and the Home Office.

- A Code of Conduct for HOPOs representing the Home Office at the Tribunal should be developed in consultation with key stakeholders including ILPA and other specialist NGOs. The Code should address the HOPO's duties to the court, including their duty to assist the court and their duties of due diligence, candour and disclosure of material weighing in favour of the appellant. The Code should also ensure that HOPOs are explicitly advised that their role involves acting in accordance with the role of the Home Office in ensuring that those in need of refugee and human rights protection are granted leave to remain, and not simply in winning cases before the Tribunal. It would also set out guidance to support HOPOs in taking reasonable approaches to cases before the Tribunal, reviewing these and conceding issues where appropriate. It would also address in guidance the matters discussed above. The Code should be published online.

- An independent oversight and complaints mechanism should be established to regulate and ensure compliance with the Code of Conduct, so that where there is non-compliance this can be brought to the supervisory body's attention in the same way that solicitors and barristers are regulated in their conduct

- In depth training should be provided to HOPOs to support them in their role in cases before the Tribunal, with the involvement of stakeholders such as ILPA and other specialist NGOs in the development and delivery of training packages. The training should include all aspects of asylum and human rights law. There are useful and positive precedents for the engagement of stakeholder organisations, individual applicants with direct experience of the determination process, and frontline Home Office staff in the development and delivery of Home Office training on credibility and on claims involving sexual orientation.

- Specific training on dealing with vulnerable witnesses and the cross-examination of vulnerable witnesses should be developed and rolled out. This should also be developed and delivered with the involvement of stakeholders such as ILPA and specialist NGOs such as Freedom from Torture, the Helen Bamber Foundation and other organisations with specialist expertise in areas of vulnerability.

- The Home Office should also review its processes to ensure that there is a dedicated individual responsible for the file once an appeal has been lodged and available to engage with representatives

in advance of the hearing and empowered to narrow and concede issues as appropriate to ensure that the appeal hearing focuses on issues that are genuinely in dispute with minimum harm caused to witnesses during the process.

- Criteria should be applied to the distribution of appeals so that, for example, a highly complex sensitive case is not allocated along with four others the night before to a junior HOPO.

- HOPOs should be given a basic level of authority and discretion so that in circumstances clearly warranting it, they can make concessions and have authority to sensibly narrow the issues.