The assessment of expert evidence in asylum appeals

by

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Introduction

Asylum decision-making is notoriously problematic.[1] This is partly because of the particular nature of the decision task. Asylum adjudication, as Sedley LJ once explained, does not involve a conventional lawyer's exercise of applying a litmus test to ascertained facts but 'a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose'.[2] The task of prognosticating the risk of persecution or ill-treatment must usually be undertaken on the basis of incomplete, uncertain, and limited evidence. Also, underlying the decision exercise are unusually high error costs which arise from the acute and pervasive tension between maintaining immigration control and protecting individual rights: asylum adjudication raises the constant problem of either refusing protection to the genuine claimant or affording it to the non-genuine claimant.

The asylum decision task is, of course, conditioned by the legal tests contained in the Refugee Convention and, in the UK and other EU member states, the European Convention on Human Rights and the EC Qualification Directive. Much attention has been devoted to the rules and principles of asylum and human rights law, and their elucidation by the higher courts. However, the vast majority of decision making occurs within the administrative agency responsible for the initial consideration of claims, the Home Office, and at the first-tier of the judicial apparatus in which 'Immigration Judges' determine fact-based merits appeals by holding hearings in which asylum appellants give evidence and are cross-examined. The legal tests provide a broad framework in which decisions are to be taken but there are many other influences on decision making such as policy and organisational factors, resource considerations, and time pressures. Furthermore, there often remains a considerable role for the decision maker's own personal judgment in assessing whether or not an individual has established, to a reasonable degree of likelihood, that he will be at risk of persecution or ill-treatment on return.

Deciding whether or not an individual qualifies for asylum is therefore an overwhelmingly fact-based form of decision making. It is also an unusual type of decision making, which is often complex and difficult to manage, because it involves an assessment of both the *particular* circumstances of the individual's case and the *general* social and political situation in the country from which refuge is being sought. The dual nature of the decision task is normally divided into its two distinct, though related, components: is the story of the particular applicant credible? If so, then are the conditions in the country concerned such that he would be at risk on return? To adopt the analysis proffered by Zahle, the evidentiary aspects of asylum decision making commonly involve two types of risk assessment questions.[3] The first question concerns the existence of a group of people who will be at risk of persecution or ill-treatment ('risk-group existence'). For instance, are members of Somali minority clans or Jamaican homosexuals generally at risk on return? The second question requires an assessment of the position of a particular asylum applicant: can it

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[1] *Saad, Diriye and Osorio v. Secretary of State for the Home Department* [2002] Imm AR 471, 479 (CA); National Audit Office, *Improving the Speed and Quality of Asylum Decisions* (2003-04 HC 535), 37; *HK v. Secretary of State for the Home Department* [2006] EWCA Civ 1037 at para 27 (Neuberger LJ) (CA).

[2] *R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah* [1997] Imm AR 145, 153 (HC).

[3] H. Zahle, 'Competing Patterns for Evidentiary Assessments' in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden/Boston: Martinus Nijhoff, 2005), 13-26 at 21.

concluded from the facts of an individual asylum case that the particular asylum applicant belongs to this risk group ('risk-group affiliation')? For instance, is the particular individual applicant a member of a Somali minority clan or a homosexual from Jamaica?

Seeking answers to these deceptively simple questions involves the difficult tasks of eliciting the necessary evidence and weighing it up for what it is worth and occupies the bulk of decision makers' time. Determining who is in need of international protection requires an essentially evaluative or interpretive appraisal of evidential material of many kinds and qualities against the eligibility criteria for asylum.[4] As it is impossible to know whether or not fact-based decisions are correct in any objective sense, attempts to assess the quality and legitimacy of the decision process cannot be made by reference to the substantive decisions produced. Instead, such attempts must consider the inputs into the decision process – the training and qualifications of the decision personnel; the procedures for collecting facts; the nature of the relevant evidential materials; the standard of proof; reason-giving requirements; onward rights of challenge – and, for the purposes of this paper, expert evidence.[5]

This paper will examine the use of expert evidence in asylum appeals by drawing upon data collected during the course of an empirical legal research project into the procedure and determination of asylum appeals by the Asylum and Immigration Tribunal (AIT).[6] The paper is organised as follows. First, it considers the broader issue of how legal decision-makers – courts and tribunals – ought to approach expert evidence. The paper then proceeds to consider the handling of expert evidence by the AIT and relevant aspects of the asylum adjudication process. The paper then examines in more detail the handling of medical, psychological, and country expert evidence by drawing upon the empirical data collected in the research project.

Expert evidence and courts

The use and assessment of expert evidence by courts and tribunals has a long history as a contentious and difficult issue. Expert evidence is provided to courts in order to enable them to find facts and make decisions on issues that are outside of their area of knowledge and specialism. As courts and tribunals are legal decision-makers, they do not normally possess expert or specialist knowledge except on legal issues. Expert evidence is designed to assist them in making accurate and correct factual findings and therefore make just decisions; in this way, expert evidence can also enhance the legitimacy and acceptability of the judicial process.

However, the problem is that difficulties often arise in relation to the assessment of such expert evidence. Experts produce evidence because they are possessed of specialist knowledge – but how are courts to assess whether such evidence is in fact predicated upon such knowledge? At the same time, there have been longstanding concerns as to the role and usefulness of experts and, in particular, as to the wisdom of assigning to them an almost exclusive role in pronouncing upon issues within their area of expertise.

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[4] See especially *Karanakaran v. Secretary of State for the Home Department* [2000] 3 All ER 449, 477-480 (Sedley LJ) (CA).

[5] See generally R. Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25 *Legal Studies* 462-498.

[6] This project was funded by the Nuffield Foundation and involved: observation of appeal hearings, interviews with Immigration Judges, representatives, Home Office officials, medical and country experts, and analysis of appeal determinations.

In the context of judicial assessment of expert evidence, two principal issues come to the fore.[7] First, how should judicial decision-makers assess the reliability of expert evidence? Secondly, through which procedures should expert evidence be adduced to the court? The first issues concerns the tensions that arise between a non-expert court or tribunal handling evidence from an expert with specialist knowledge? The court or tribunal wishes to ensure accurate decision-making; expert evidence may or may not promote this objective. If an expert proffers a non-expert court advice drawing upon his or her specialist knowledge, how can the court or tribunal decide whether or not to accept that advice? The second issue concerns the procedure by which expert evidence is adduced to the court or tribunal. The court or tribunal will need to assess the expert evidence adduced. How should a judicial decision-making process be organised and designed so as to enhance assessment of this evidence, accurate factual determination, and other procedural goals? Precisely how these questions are answered will depend upon the tribunal's attitude toward expert evidence, the purpose for which it is adduced and the procedural mechanisms by which such evidence comes before the tribunal.

Expert evidence in asylum appeals

What then of the use of expert evidence in asylum appeals? It is perhaps best to begin with a taxonomy of the different types of expert evidence frequently submitted in asylum appeals. First, there are medical expert reports which identify some physical scarring on the appellant's body which is consistent with a claim that the appellant has been previously subject to torture or ill-treatment. The purpose of such reports is to corroborate and /or lend weight to the account of the asylum seeker by a clear statement as to the consistency of old scars found with the history given. Secondly, there are HIV/AIDS reports which provide data on the advanced or otherwise state of this condition. Such reports are produced to determine whether or not it would contravene Article 3 ECHR to return the appellant to their country of origin because there are exceptionally compelling humanitarian grounds arising from the non-availability of medical treatment in that country. Thirdly, there are psychological reports. Fourthly, there are age assessment reports which proffer an opinion as to the appellant's likely age when that has been disputed. Fifthly, there are country expert reports. These reports are can be either general in nature or appellant-specific. For instance, country expert reports may deal with general country conditions; how are members of an opposition political party treated in a particular country? What treatment can homosexuals expect to receive in Afghanistan? Country expert reports may also consider the specific circumstances of an individual appellant; for instance, is this particular appellant a member of a Somali minority clan? Is the appellant actually of their claimed ethnicity; for instance, as Tutsis are recognised by the Tribunal country guidance to comprise a risk category, is the particular appellant of that ethnicity?

The handling of expert evidence by the AIT is conditioned in large part by a number of particular features of the asylum appellate jurisdiction. First, the ordinary rules of evidence do not apply in the context of asylum and human rights appeals; the Tribunal may consider any evidence which is relevant to an appeal even if it would be inadmissible in a court of law.[8] The real criterion for assessing evidential material is then either its relevance or the weight that the judge decides to attach to it. Of

[7] D Dwyer, *The Judicial Assessment of Expert Evidence* (Cambridge UP, 2008), 3.
[8] Asylum and Immigration Tribunal (Procedure) Rules SI 230/2005, r.51(1).

particular important here is the lower standard of proof used in asylum cases; the appellant need only demonstrate that their case is reasonably likely to be true. The significance of this as regards expert evidence is that the admissibility of such evidence is rarely, if ever, raised (as it would be in criminal and civil courts). The issue is more commonly, what weight that can properly be attributed to such evidence. The general rule is that a judge is not obliged to accept any expert evidence; there is no requirement for a judge simply to accept with demur expert evidence from any source however experienced, specialist, or eminent. However, if a judge is minded to reject such evidence, and attach little or no weight to it, then proper and adequate reasons must be provided.[9]

Secondly, unlike virtually all other judicial decision-making processes, experts in asylum cases do not normally attend appeal hearings to give live oral evidence and/or to be cross-examined. Instead, expert evidence will normally take the form of a written report. The consequence of this is that the judge will not normally have the expert cross-examined before her and therefore have to decide what weight to afford the report without the benefit of such testing of the expert evidence. The expert will not be able to elaborate upon their report and answer any questions posed by either party. Typically, the Home Office will argue that little weight be attached to the report while the appellant's representative (if any) will contend that the expert report carries great weight; the judge has to decide what weight it possesses but without the opportunity to have the expert questioned, cross-examined, or answer questions that the judge herself might wish to ask. The position is different in the context of country guidance hearings, those cases in which the Tribunal seeks to provide an authoritative assessment of country conditions in order to promote consistent decision-making amongst Immigration Judges; country experts will often attend such hearings and it has become increasingly common for more than one expert to prepare a report. However, as regards the vast majority of first-instance merits appeals before Immigration Judges, experts will not attend appeal hearings.

Thirdly, expert evidence is almost always adduced before the Tribunal by appellants. An expert will receive his or her instruction from an appellant's representative. Again, unlike other jurisdictions, in particular the civil justice process, there is no mechanism by which a joint expert report can be agreed upon by the parties during the preliminary course of the adjudication process before the appeal hearing. The alternative option, by which the court or tribunal is presented with competing expert reports, is rarely taken up because the Home Office does not engage with appeal hearings in this manner; its approach is that it simply does not have any responsibility to commission a competing expert report. The Home Office does not normally produce its own expert report but prefers instead to focus its case on undermining the appellant's expert evidence (though in a recent country guidance case, the Home Office for the first time produced its own country expert report).[10] There may also be cost issues. The Tribunal does not possess any ability to

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[9] See, eg, *FS v Secretary of State for the Home Department (Treatment of expert evidence) Somalia* [2009] UKAIT00004.

[10] *JC v. Secretary of State for the Home Department (double jeopardy: Art 10 CL) China CG* [2008] UKAIT00036 (AIT). In this country guidance decision, the Tribunal considered whether or not the risk of prosecution or re-prosecution of Chinese nationals who have committed offences overseas on their return to China was sufficient to engage international protection under the Refugee Convention, the ECHR or require humanitarian protection. The Tribunal was presented with a range of country information totalling well over 1,000 pages; it also had the assistance of significant and detailed expert evidence from six country experts one of whom was recognized to be the world's leading authority on Chinese law.

commission expert reports for itself and is generally disinclined to adopt a more pro-active stance toward the collection of evidence. Traditionally, this has been an adversarial appellate jurisdiction: the appellant bears the burden of proof; it is for the parties to present the evidence that they wish to rely upon; and, to maintain its independence, the Tribunal should refrain from descending into the arena.

Furthermore, it is important to highlight the targets under which the Tribunal operates as regards the timely and efficient disposal of appeals; the AIT operates under a target to complete 75 per cent of asylum appeals within six weeks commencing from when the Tribunal receives the appeal and finishing when the Tribunal's written determination is promulgated.[11] The consequence of this is that because the Tribunal's organisation is geared up to fulfilling this target, allowing for arrangement to be made for either joint or competing expert reports is not possible. The commissioning of expert reports will often require an appeal to be adjourned, something which the emphasis on timeliness usually discourages.

One consequence of this feature of the provision of expert evidence in asylum appeals – that it is almost always adduced by appellants – is that it raises the suspicion that such evidence is unlikely to contain anything which is in any way disadvantageous to an appellant's case. Representatives are unlikely to present expert evidence which does not fully advance their appellant's case; furthermore, experts may occasionally feel that they are being paid for producing reports favourable to appellants. In other words, if there is a suspicion that expert reports are only going to be presented if they are favourable to appellants, then this weakens the overall weight that they might be attributed.

While the AIT does not have a similar process of joint or competing expert reports, as operates under the Civil Procedure Rules, it has though incorporated within its Practice Directions, some of the sentiments contained within those rules, especially as regards the independence and objectivity of experts. So, the AIT's practice directions stipulate as follows. It is the duty of an expert to help the Tribunal on matters within the expert's own expertise. This duty is paramount and overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid. Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation. An expert should assist the Tribunal by providing objective, unbiased opinion on matters within his or her expertise, and should not assume the role of an advocate. Furthermore, an expert should consider all material facts, including those which might detract from his or her opinion. The basic idea behind these provisions is clearly to stress the importance of experts behaving as independent witnesses whose primary duty is to the Tribunal rather than the appellant.

The upshot of these features is generally to make the presentation, handling, and assessment of expert evidence in the asylum jurisdiction more difficult and problematic than elsewhere. So, how is expert evidence handled in practice by the AIT?

Medical expert reports

Many appellants may claim that they have been previously subject to torture or ill-treatment; this may be a serious indication that their fear of future harm is well-

[11] Tribunal Service, *Reforming, Improving and Delivering: Annual Report and Accounts 2007-08* (2007-08 HC 802), 98.

founded, unless there are good reasons for supposing otherwise.[12] To substantiate such claims, appellants may submit medical reports detailing physical scarring in order to corroborate and/or lend weight to such an account by giving an opinion as to the consistency of the scarring with claimed past ill-treatment. The principal question that arises in relation to such reports is: what weight should be attributed to them? As judges are not medical experts, some deference to medical expertise might be expected. At the same time, it is not for medical experts but judges to assess overall credibility. The purpose of a medical examination is not to determine whether or not the appellant has been telling the truth; it would not be right for a doctor to approach a patient whose medical condition he has been asked to diagnose in a spirit of scepticism.[13] Doctor-patient relationships are based on trust and confidence underlying which is the therapeutic purpose of medical diagnosis and treatment. By contrast, judge-appellant relationships operate in the context of a formal and legal adjudicatory process, one of the primary functions of which is for the judicial fact-finder to assess the appellant's credibility after collecting evidence through the legal process – oral evidence and cross-examination. Judges may be reluctant to grant asylum merely because there is a medical report identifying scarring – especially so the judges make adverse credibility findings. The role of medical evidence, like that of psychiatric evidence, obviously raises broader issues as to the respective roles of professional judgment and legal decision-making and the tensions that arise between different perspectives on the asylum decision process.[14]

But underlying such general tensions, there are more specific limitations with medical evidence: the inherent difficulty is that medical reports detailing scarring can normally only identify the nature of the scars and not their precise cause. If a medical report concludes that scarring is consistent with persecutory ill-treatment, it may be consistent with other causes also; a medical report identifying consistency between the physical scars and an appellant's account of previous torture does not mean that the scars could not have been caused through other means (or even self-inflicted). The role of such evidence is therefore often limited because a medical report giving an opinion that scarring is consistent with ill-treatment only has the modest effect of not negating the appellant's case; it cannot prove that the scarring was actually caused in the way claimed.[15] A medical report may be able to offer a description of physical

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[12] Immigration Rules (1994 HC 395) r 339K. The other principal situation in which medical reports will be used is in HIV/AIDS cases in which the appellant is claiming that their condition makes removal contrary to Article 3 ECHR. However, the test in such cases has been set so high that removal in such cases will only be unlawful in those rare instances where very exceptional circumstances mean that the humanitarian grounds against removal are compelling. See *N v Secretary of State for the Home Department* [2005] UKHL 31; *N v United Kingdom* (App no 26565/05) ECHR 27 May 2008.

[13] *Cinar v Secretary of State for the Home Department* [2002] UKIAT06624 [7].

[14] Another factor concerns the relative incapacity of the Home Office to subject expert medical evidence to cross-examination. Home Office presenting officers do not possess the requisite expertise with which to question either the methodology used in the preparation of a medical report or the conclusions reached. Neither does the Home Office commission its own medical experts to provide a rebuttal of the medical evidence commissioned by the appellant. Furthermore, a doctor who has prepared a medical report will not normally attend the appeal hearing for their evidence to be cross-examined by the Home Office or to be asked questions by the Immigration Judge. It is not therefore usual for medical evidence to be tested in open court.

[15] The Tribunal's approach toward medical expert reports has changed considerably over the years. Its initial view was that such reports deserved careful and specific consideration. See *Mohamed v Secretary of State for the Home Department* (12412), date notified 4 August 1995 (IAT); *Ibrahim v Secretary of State for the Home Department* [1998] INLR 511 (IAT). However, the Tribunal, in *HE v Secretary of State for the Home Department (DRC – Credibility and Psychiatric Reports)* [2005] Imm AR 119, 125 subsequently indicated that this former approach could not be longer regarded as sound:

conditions and an opinion as to the degree of consistency of what has been observed with what has been said by the applicant. But for those conditions, such as scarring, to be merely consistent with what has been said by the applicant, does no more than state that it is consistent with other causes also. At the same time, if a medical report is relied upon, it may not necessarily be determinative but it must be dealt with as an integral part of the findings on credibility as a whole. What the judge should not do is to assess the appellant's credibility solely by reference to their evidence and then, if that assessment is negative, to ask whether the conclusion should be shifted by the medical expert evidence; to do so is to separate artificially the medical evidence from the rest of the evidence.[16]

Of particular importance is the Court of Appeal's guidance on medical reports.[17] If a medical report is to have any corroborative effect and/or lend weight to the account given by the asylum applicant, then it should contain a clear statement of the doctor's opinion as to consistency, directed to the particular injuries said to have occurred as a result of the torture or other ill-treatment relied on as evidence of persecution. In the case of injury marks which are inherently susceptible of a number of alternative or everyday explanations, that reference be made to such fact, together with any physical features or pointers found which may make the particular explanation for the injury advanced by the appellant either more or less likely. Where the doctor finds there to be a degree of consistency between the injuries/scarring and the appellant's claimed causes which admit of there being other possible causes (whether many, few or unusually few), it is particularly important that the medical report specifically examines those to gauge how likely they are, bearing in mind what is known about the individual's life history and experiences.[18]

In response, medical experts have argued that they cannot reasonably be expected to consider explanations for which there is no context according to the evidence before them. For the Tribunal to demand doctors to consider possible alternative explanations for scarring, it is raising the standard of proof beyond that of the reasonable degree of likelihood test.[19] The problem is that while medical evidence should be taken into account when assessing whether the appellant's account is reasonably likely, it comprises only one aspect of the evidence; if the judge, when surveying the evidence as a whole, makes adverse credibility findings, then the medical evidence must be assessed but it cannot usually indicate whether or not the scars were caused in the way claimed; the next best alternative is to ask the medical expert to consider whether it is likely that they were caused in the way claimed, taking into account other possible causes consistent with the appellant's past.

'The experience of the Tribunal over a number of years since then is that the quality of reports is so variable and sadly often so poor and unhelpful, that there is no necessary obligation to give them weight merely because they are medical or psychiatric reports. The consideration given to a report depends on the quality of the report and the standing and qualifications of the doctor'. See also *PT v Secretary of State for the Home Department (Medical Report, Analysis) Sri Lanka CG* [2002] UKIAT01336 [8]; *Ademaj, Ademaj, and Urim v Secretary of State for the Home Department* [2002] UKIAT00979 [13].

[16] *Virjon B v Special Adjudicator* [2002] EWHC Admin 1469; *Mibanga v Secretary of State for the Home Department* [2005] EWCA Civ 367.

[17] *SA (Somalia) v Secretary of State for the Home Department* [2006] EWCA Civ 1302.

[18] *RT v Secretary of State for the Home Department (medical reports – causation of scarring) Sri Lanka* [2008] UKAIT00009.

[19] D Rhys Jones and S Verity Smith, 'Medical Evidence in Asylum and Human Rights Appeals' (2004) 16 *International Journal of Refugee Law* 381, 392-393.

Secondly, as the Court of Appeal noted, the Istanbul Protocol provides instructive guidance concerning medical reports.[20] This states that for each lesion and for the overall pattern of lesions, the doctor should indicate the degree of consistency between it and the attribution given by the patient.[21] Ultimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story.[22] Doctors requested to supply medical reports supporting allegations of torture by asylum claimants would be well advised to bear these passages of the Istanbul Protocol in mind and also to pay close attention to the requirement that medical evaluations for legal purposes should be conducted with objectivity and impartiality.[23]

What happens in practice? All judges interviewed noted that the quality of medical reports varies tremendously. Some reports are written by doctors with specialist experience in detailing torture; others are written by those with the necessary experience. It is also apparent that medical experts are not always provided with all the documents regarding the appellant's case. The end result may be a report which is in itself at odds with the rest of the existing evidence and documentation. To some extent the problem might lie with those instructing medical experts. As one judge noted, medical expert reports were 'very often inadequate' because 'the commissioning of these reports is done in a hurry to meet timescales and also those who commission reports do not always know exactly what is that they are trying to achieve'.[24]

Perhaps the most important limitation of medical evidence is that it can rarely tell judges more than whether or not the scarring is consistent with past torture. Where a medical report which contains diagnostic conclusions which are wholly dependant upon the history or symptoms asserted by the appellant, whose very truthfulness on such matters is at issue before the judge but was not before the medical expert, then only limited weight may be placed on such evidence if the judge concludes that the appellant's account lacks credibility. A medical report that simply accepts the appellant's evidence concludes that what the appellant said happened because he said it happened, or accepts as truthful the appellant's own description of symptoms may be considered by an Immigration Judge to be of limited value in assessing credibility. The problem is that medical doctors are more usually concerned with questions of identifying and treating medical conditions rather than with questions of causation. Ultimately, asylum decision-makers want to know about causation of scarring and are encouraging medical experts to give their opinions on this; by contrast, medical experts, with the exception of those specialist in documenting torture, are not, on the whole, geared up to performing this task. As one judge explained:

> The appellant might say "I was tortured so badly that my arm was broken", and the medical report will say "on examination there is a healed fracture in the arm, this is consistent with what the appellant says happened to him or her". But all the medical expert can do is to identify the fracture. The rest of the account comes not from the medical examination strictly but from what the appellant has said

[20] United Nations, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNHCR, 9 August 1999).
[21] Ibid, [186].
[22] Ibid, [187].
[23] *SA (Somalia)* (n 17) [30].
[24] Immigration Judge interview 3.

> caused the injury. So, at that point you realise that after all the paragraphs in the medical report, the valuable section is just the identification of the injury and the section which is said to corroborate the appellant's account, does not really do that.[25]

This reliance on the appellant's story is a challenging feature of medical reports on scarring because inconsistencies and discrepancies that damage the appellant's claim of torture as well as the core of his/her account may be uncovered at the hearing. In these cases the medical report cannot be accorded any weight. This does not mean that medical experts should assess the credibility of the appellant's account themselves nor is this expected from them. In fact, doing so is likely to comprise the perception of the doctor's impartiality. In one decision, the judge noted that the medical expert clearly overstepped 'the role of any practitioner' by producing supportive considerations as to the appellant's credibility which surpassed considerations on the nature of physical findings.[26]

What it does mean though is that the weight to be attributed to medical evidence is case-specific. In one appeal, the appellant claimed to have been violently raped on the basis of clan membership; a medical expert had reported that the appellant's scars were 'consistent' with the appellant's story. Nevertheless, the judge concluded that the fact that the scarring was consistent with the cause given by the appellant did not necessarily mean that the scarring was caused in the way described.[27] By contrast, in other cases the scale of injuries might be taken as possessing greater significance. For instance, in one appeal, the medical report stated that the appellant had some 68 scars on her body which were consistent with having been severely beaten, kicked, burnt with cigarettes, and raped. The judge concluded that 'given the sheer number and seriousness of these injuries, I cannot rule out the possibility that the appellant was detained and subjected to severe ill-treatment over a prolonged period as described'.[28]

How might the production of medical evidence be improved? It is not apparent that all medical experts are aware of the Istanbul Protocol. There may be a need for better training of medical experts in the preparation of reports. Secondly, there might be a need for better instructions of medical experts by some representatives. A third suggestion is that medical experts could attend appeal hearings more frequently in order to supplement their report with oral evidence.

Psychological reports

Psychological reports are occasionally relied upon by appellants to provide an account of their psychological experiences or trauma that they might suffer from. A key aspect of determining asylum appeals concerns an appellant's credibility, and credibility may be considered damaged if an account is inconsistent. However, inconsistencies may arise because of the trauma suffered by an appellant. Individuals with a "traumatic memory" might have increased difficulty in recollecting their own autobiographical experiences even if, or precisely because, these experiences have been painfully traumatic. Rather than indicating of a lack of credibility, discrepancies may be attributable to the difficulties appellants, who have been subject to traumatic events,

[25] Immigration Judge interview 2.
[26] Case 24.
[27] Case 80.
[28] Case 153.

experience in recounting those events.[29] Asylum applicants with high levels of post-traumatic stress disorder (PTSD) may be more likely to give inconsistent accounts if they have to wait a long time between interviews. Late or non-disclosure by applicants of a particularly traumatic event does not necessarily imply a lack of honesty on their part as it may have been prompted by the shame or embarrassment of having been subjected to, for instance, sexual violence.[30] Furthermore, claimants suffering from depression or PTSD may experience a reduced ability to recall past events consistently. Emotional distress and trauma may explain either late or non-disclosure of the full details of an appellant's story rather than an attempt to deceive the decision-maker.

Appreciating the import of such research, the Tribunal has recognised that 'there is a great need in asylum cases to take of any psychological difficulties when it comes to assessing credibility. However, this requires examination of the particular circumstances obtaining in any individual case'.[31] It would be absurd, the Tribunal noted, if the diagnostic criteria concerning PTSD were to be read to mean that all persons suffering from the condition have a memory loss which prevents them from giving a proper account of themselves in the context of an asylum claim. Not all inconsistencies may be a consequence of traumatic memory and late disclosure is not always a consequence of trauma or emotional distress. It is therefore for the judge in the individual case to decide whether any inconsistency is explicable on the basis of the fallibility of human memory, the claimant's inability to recall their story fully, a reluctance to do so in light of traumatic experiences suffered, or because the story is untrue. Additionally, not all evidence of trauma or of a traumatic memory, or even of the manifestation of PTSD, may be an indicator of past persecution and exposure to torture. Many appellants may be depressed not because of past trauma but because of the uncertainty facing them and the prospect of being returned to their country of origin.

For the sample of cases, there were examples in which Immigration Judges took into account the need for caution in considering the significance of discrepancies in the account of an appellant who had been diagnosed as suffering from a depressive illness. The difficulty for the judicial fact-finder is apparent. Such discrepancies could well be indicative of a fabricated account; on the other hand, they could also be in keeping with the appellant's depressive illness as individuals who have suffered traumatic events may have difficulties in recounting those events. Judges might take into account the confused evidence given by the appellant. For instance, in one appeal, a 70 year old appellant gave inconsistent evidence; the judge concluded that he 'could see from the appellant's evidence that she was genuinely confused and did not deliberately give misleading evidence'.[32]

Alternatively, the appellant might submit a psychiatric report diagnosing depression or PTSD. However, the controversial issue is the weight to be attached to such reports. From the judicial perspective, it is not the function of psychiatrists to assess credibility but to treat their patient; at the same time, some psychiatrists do see

[29] J Herlihy, P Scragg and S Turner, 'Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interviews study' (2002) 324 *British Medical Journal* 324; J. Herlihy and S. Turner, 'Should discrepant accounts given by asylum seekers be taken as proof of deceit?' (2006) 16 *Torture* 81.
[30] D Bögner, J Herlihy and CR Brewin, 'Impact of sexual violence on disclosure during Home Office interviews' (2007) 191 *British Journal of Psychiatry* 75.
[31] *A v Secretary of State for the Home Department (Turkey)* [2003] UKIAT00061 [18].
[32] Case 129.

their role as one of assessing credibility, or at least, informing that assessment. However, the Tribunal's view is that such reports can usually have only a very limited role in assessing credibility.[33] The psychiatrist is usually unable to verify objectively the symptoms of post-traumatic stress disorder or depression. A psychiatric report, diagnosing PTSD or some form of depression, may often contain observations of an appellant's behaviour but it is difficult for the psychiatrist to treat what he observes as objectively verified because they are the more readily feigned or exaggerated. Secondly, there may be other obvious potential causes for the signs of anxiety, stress and depression. Asylum appellants may suffer depression because they have sought to escape deprivation and poverty in their home country and face removal to that country; they might be desperately anxious not to avoid returning to their country which may not be a pleasant place to which to return. The difficulty is that it is very rare, and it will usually be very difficult, for a psychiatrist to assess such other factors without engaging in the process of testing the truth of what the applicant says; this is not his task and if there is a therapeutic side to the interview, it may run counter to those aims as seen properly by the doctor. Where a psychiatric report merely recounts a history which the judge is minded to reject, and contains nothing which does not depend upon the truthfulness of the applicant, the part which it can play in assessing credibility is negligible.[34]

This approach has, unsurprisingly, been disputed by some psychiatrists who have argued that the Tribunal's approach is based upon a mistaken understanding of their role, profession, and discipline. For example, in one appeal, a psychiatrist, contended that the Tribunal's approach took no account of the way in which psychiatry works in general and that a psychiatric expert could make an assessment of the cogency, consistency and coherence of an individual's story as this was an important part of an expert's function to ensure that the treatment and therapy prescribed was appropriate.[35]

It is then for judges in individual cases to assess the weight to be accorded to such evidence. For instance, in one appeal, the appellant's wife had been diagnosed as suffering from PTSD. During the course of her evidence, she had stated that she was having problems remembering a number of things; the Immigration Judge concluded that in judging the veracity of her evidence, due allowance must be given for her mental state.[36] In another appeal, credibility was the only issue at stake, it being accepted by the Home Office that the appellant would, if found credible, be at risk on return to the Ivory Coast. The Home Office had though identified credibility concerns with the appellant's account such as various implausibilities to which the appellant had sought to explain. The judge concluded that the appellant was credible; although

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[33] *Secretary of State for the Home Department v AE and FE* [2002] Imm AR 152 (IAT) 155-156; *HE v Secretary of State for the Home Department (DRC – credibility and psychiatric reports) Democratic Republic of Congo* [2005] Imm AR 119 (IAT) 126-127.

[34] In *HH v Secretary of State for the Home Department (medical evidence; effect of Mibanga) Ethiopia* [2005] UKAIT00164 [18], the Tribunal noted that 'very many appellants fail in their appeals because they are not found credible, notwithstanding that they have been diagnosed by appropriate specialists as suffering from PTSD'.

[35] In response to the Tribunal's comment in *AE and FE* (n 33) 155 – 'that that 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 a relatively rare condition seems to have become remarkably common' – one psychiatrist interviewed noted that there may be a number of explanations for this increase including greater awareness amongst clinicians of the possible higher incidence of PTSD in the asylum population, as well as increased diagnostic capacity.

[36] Case 76.

his account was unusual, it was not so implausible as to make it extremely unlikely to be true. Furthermore, the psychiatric report strengthened this conclusion. While it was not for the psychiatrist, the judge noted that he could 'be assisted by the views of a skilled and experienced psychiatrist who has had the opportunity of observing the demeanour and reactions of the appellant whilst giving his account…By definition, if that be correct, then he must have suffered some trauma in the past'.[37] The expert evidence was not pivotal but it lent weight to the veracity of the appellant's account. By contrast, in another appeal, the judge expressed concern over the psychiatric report: it had been based only on a one hour appointment and relied upon what the psychiatrist was told by the appellant; furthermore, the expert had 'carried out non-objective tests and gives no readings of where the appellant came on the diagnostic scale'. The judge therefore rejected that the appellant had PTSD.[38]

The difficulties of assessing such evidence, and the inexact and complex nature of assessing credibility requires an awareness on the judge's behalf of the different issues that might adversely impact on an individual's appeal. As one judge noted, 'no-one is going to be perfect in the assessment of credibility, but it is the awareness of all these different things, this particularly difficult problem of how the traumatised give evidence of which there has been quite a bit of research but we have not seen much of it in our training'.[39] At the same time, judges identified some common problem areas with of psychiatric reports: the simple diagnosis of PTSD without any assessment of whether or not any discrepancies in an appellant's account could be accounted for by the experience of trauma itself; that such reports are usually based on the psychiatrist's observation of the appellant and the appellant's own recounting of their story often makes assessing their weight difficult; furthermore, short appointments of the appellant with the psychiatrist may not, in the opinion of some judges, allow sufficient opportunity for the psychiatrist to make a full assessment of the appellant's mental state. A further factor concerns the identity of the individual psychiatrist; judges recognised that reports written by psychiatrists with experience of working with asylum appellants, such as through the Medical Foundation, may be of a higher quality than those prepared by others. A further point is that psychiatrists rarely attend appeal hearings, it is not common for their evidence to be subject to cross-examination and the Home Office is rarely in a position to challenge such evidence other than to argue that it ought to be accorded much weight. For these reasons, judges expressed some scepticism as to the value of such reports. Like all of the evidence presented in asylum appeals, a psychiatric report must be taken into account but the degree of weight to be attached to such evidence is often matter for the decision-maker in the context of the particular case; a judge may reject such a report but must give adequate reasons for doing so.

Country expert reports

In addition to the sources of country information considered so far, the Tribunal may also be presented with country expert evidence. Such evidence is typically prepared by an academic or other 'expert' who, for whatever reason, has taken a particular interest in a country which generates asylum applications.[40] Given the individual's

[37] Case 162.
[38] Case 142.
[39] Immigration Judge interview 14.
[40] Individuals who act as country experts normally include: academics (both retired and current), such as social anthropologists, geographers and sociologists; journalists; and other individuals, such as independent researchers, who may have first-hand experience of the country concerned.

specialist knowledge of the country concerned, he may be instructed to provide a country expert report in order to provide the Tribunal with further evidence in order to determine whether or not the appellant would be at risk on return. However, underlying this general purpose there is a degree of ambiguity and tension in the function of country expert evidence; indeed, the assessment of such evidence can often be highly contentious. From the Tribunal's perspective, the role of a country expert is to assist it by giving expert evidence in a field where specialist knowledge, concerning the conditions in a particular country or region, is required, in particular in providing comprehensive and balanced factual information relating to the particular country issues that the Tribunal must resolve.[41] Country expert evidence can therefore promote better quality decisions by assisting the Tribunal when assessing risk on return. At the same time, there are concerns as to the precise ambit of country expert evidence. As expert evidence is overwhelmingly commissioned by appellants, the suspicion may often arise that a country expert is simply someone who has been paid to produce a report that will assist the appellant to succeed in his appeal. Country experts might moreover overstep their boundaries of their role or be criticised for bias. A further question concerns how country expert evidence is to be assessed, an issue that sometimes raises tensions between the relative expertise in country conditions between the Tribunal and country experts.

The issue of the relationship between expert evidence and independent judicial decision-making is, of course, not unique to asylum adjudication. The broader issue as to the use of expert evidence by judicial decision-makers has long presented problems: how can a non-expert court make findings that require specialist knowledge? If expert evidence is adduced in order to assist the court, then how can the court assess whether or not to accept the expert evidence? Furthermore, how should legal procedures be organised so as to promote accurate decision-making and other adjudicatory goals? These broader questions are reflected in the on-going debate over the handling of expert evidence in both the criminal and justice systems.[42] While the issues are not particular to asylum adjudication, there tend to arise there more frequently and sometimes in a more acute manner than in other jurisdictions.

One reason for this is, of course, the inherently contentious nature of asylum adjudication; another is the 'rather unusual nature of country expert evidence in asylum appeals'.[43] In ordinary litigation, an individual presenting expert evidence has to demonstrate that they possess the necessary qualifications in order to give such evidence. That evidence is usually of two different senses: the expert's opinion, as distinct from fact; and opinion based on sources, which are themselves hearsay evidence, which do not need to be disclosed. By contrast, in asylum appeals, the normal rules of evidence do not apply; an 'expert' is merely a witness giving factual, hearsay, and opinion evidence. Country experts are not required to demonstrate any qualification to be described as such; indeed, there is no formal qualification by which someone can be identified reliably as a country expert. As the Tribunal has noted, 'a real problem arises in this jurisdiction from the use of the word "expert"'.[44] Any

[41] *MA v Secretary of State for the Home Department (Draft evaders – illegal departures – risk) Eritrea CG* [2007] UKAIT00059 [238].
[42] See M Redmayne, *Expert Evidence and Criminal Justice* (Oxford, Oxford University Press, 2001); D Dwyer, *The Judicial Assessment of Expert Evidence* (Cambridge, Cambridge University Press, 2008).
[43] *Zarour v Secretary of State for the Home Department* (01TH00078), date notified 2 August 2001 (IAT) [29].
[44] *LP v Secretary of State for the Home Department (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG* [2007] UKAIT00076 [38].

individual, irrespective of their lack of relevant qualifications or experience, who wishes to pass themselves off as an expert may be tempted to seek to do so; at the same time, the Tribunal needs to take account of the views of a reputable, experienced, and well-informed individual. In practice, the range of people who act as country experts in asylum appeals ranges very broadly. At one extreme are those individuals with particular expertise in the relevant country; at the other are individuals who could not reasonably be said to possess any such expertise.[45]

The issue for the Tribunal is not therefore the admissibility of expert evidence (as it would be in both the criminal and civil justice systems) but the weight to be attributed to it and it is often the assessment of country expert evidence which causes difficulties. The simple reason for this is that judges are not themselves country experts and therefore assessing specialist evidence naturally raises difficulties; at the same time, for the Tribunal routinely to accept expert evidence without scrutiny would result in de facto delegation of decision-making to country experts. To some extent, the Tribunal had sought to advance its own cause by proclaiming itself to be 'a specialist Tribunal that has its own level of expertise' and that explaining it is for the Tribunal on the basis of the totality of the material before it, including expert evidence, to conduct its own assessment and reach its own conclusions.[46] It is important to note though that such statements are made largely in the context of country guidance cases by senior judges and are not intended to be generally applicable to all judges. In any event, country experts have frequently disputed this claim and argued that the Tribunal should adopt a more deferential approach toward their evidence. The issue of country evidence therefore implicates the relationship of the independent adjudication process to country experts and contrasting perceptions of the respective expertise of both.

Another problematic characteristic of the provision of country expert evidence in asylum appeals concerns the procedural arrangements by which such evidence is presented before the Tribunal. In civil litigation, the Civil Procedural Rules have, following the Woolf reforms, provided that expert evidence may be presented to the court either by way of competing expert reports or a single jointly instructed expert report.[47] By contrast, in the asylum jurisdiction, country expert evidence is normally presented to the Tribunal after the expert has been instructed on the behalf of appellants. Country experts are invariably instructed by appellants and are therefore party experts as opposed to joint experts or court experts. While the Home Office could instruct its own country experts, it usually declines to do so, preferring instead to focus its case on critically examining or undermining the evidence of the appellant's country expert.[48] It is therefore rare for an appellant's country expert

[45] The Immigration Law Practitioners' Association (ILPA) and the Electronic Immigration Network (EIN) together maintain an online directory of country experts.
[46] *MA* (n 41) [239].
[47] CPR 35, 'Experts and Assessors'; Lord Woolf, *Access to Justice: Final Report* (London, HMSO, 1996). See generally S Burn, *Successful Use of Expert Witnesses in Civil Disputes* (Crayford, Shaw and Sons, 2005); L Blom-Cooper (ed), *Experts in the Civil Courts* (Oxford, Oxford University Press, 2006).
[48] According to the Home Office (letter to author, dated 11 November 2008), it does not routinely commission country expert evidence; '[i]n general, we prefer to rely on objective country of origin material which is drawn from as wide a range as possible of reliable sources, with the aim of achieving an accurate picture through corroboration'. A former senior immigration judge, J Barnes, 'Expert Evidence – The Judicial Perception in Asylum and Human Rights Appeals' (2004) 16 *International Journal of Refugee Law* 349, 353, has noted that '[a]pparently on grounds of public cost the Secretary of State is not prepared to commission his own specific reports notwithstanding that the vast majority of expert reports are funded by the public purse through legal aid'. Furthermore, there may be the

report to be challenged by a competing report produced by another country expert on behalf of the Home Office. While the Tribunal has on many occasions noted that it would be desirable for the Home Office to present its own country expert evidence, its failure to do so does not imbue the appellant's expert evidence with any greater value than it merits when considered alongside the rest of the country information presented.[49] As regards court appointed experts, the Tribunal itself has neither the ability nor the resources with which to commission its own country expert evidence or to direct that evidence be given by a single joint expert.

A further feature is that, in most asylum appeals in which country expert evidence is adduced, the expert will not normally attend the appeal hearing in order to present oral evidence and be cross-examined. Instead, expert evidence will take the form of a documentary report but without the attendance of the country expert at the hearing to answer any questions concerning its contents. While it might be possible in other jurisdictions to do without attendance of experts in court by narrowing down the range of contested issues prior to the hearing, the short time-scales of the asylum appellate process normally preclude this. The attendance of country experts before the Tribunal has become more common in country guidance cases before senior judges but it is comparatively rare in ordinary asylum appeals because country experts are not normally either inclined or paid to attend appeal hearings. (Furthermore, it is not unknown for an expert's report prepared in relation to one appeal to be relied upon in appeals by other asylum appellants from the same country.) The consequence of this is that a judge presented with a country expert report on behalf of an appellant will have to decide what weight to place upon that evidence but normally without a competing expert report against which to test it and without the expert having been cross-examined.

Unsurprisingly, the focus of country expert evidence tends to vary depending on the nature of the particular country issue raised in an appeal. Some expert reports will deal only with general country conditions (for instance, conditions in Sri Lanka); others reports may be far more specific (for instance, the treatment of young Tanzanian women forced into marriage); and other reports may take issue with the Tribunal's country guidance. Country expert may also be commissioned to report on the circumstances of the individual appellant's case, by, for instance, advancing an opinion as to whether a claimed past event in the appellant's history could have happened. Other types of expert reports may provide an opinion as to whether or not the appellant is a member of their claimed clan or ethnicity. For instance, in relation to Somalia, the Tribunal's country guidance has recognized that in assessing risk on return, an important consideration will be whether an appellant is a member of a majority or minority clan; members of minority clans will in general be at risk on return.[50] Expert reports submitted in such appeals will therefore often focus on whether or not the appellant is a member of a minority clan by considering the dialect used by the appellant or their knowledge of the physical environment in Somalia. Similarly, appellants from the Democratic Republic of Congo may submit an expert

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perception that as the Home Office wins most appeals, it does not need to instruct its own country experts.

[49] *HH & Others v Secretary of State for the Home Department (Mogadishu: armed conflict: risk) Somalia CG* [2008] UKAIT00022 [281]; *SI v Secretary of State for the Home Department (expert evidence - Kurd - SM confirmed) Iraq CG* [2008] UKAIT 00094 [56].

[50] *NM v Secretary of State for the Home Department (Lone women – Ashraf) Somalia CG* [2005] UKIAT00076.

report in support of their claim to be of Tutsi ethnicity which considers whether or not the appellant possesses the physical characteristics of a Tutsi.

The Tribunal, country expert evidence, and country expertise

So, what is the Tribunal's general approach toward the assessment of country expert evidence? In general, the Tribunal has stated that a competent country expert report is entitled to respect and due consideration but from the point of view of the judicial decision-maker, such reports may sometimes (if not often) amount in the end to just one among other items of evidence which have to be weighed in the balance.[51] An expert's report can assist but this does not mean that heavy reliance is or should necessarily be placed on such reports. 'Expert evidence' is not necessarily synonymous with 'independent and reliable evidence'; all will depend on the nature of both the particular report and the particular expert.[52] Country experts should assist the Tribunal by providing objective, unbiased opinion on matters within his or her expertise and should not assume the role of an advocate.[53] Furthermore, such experts are in a privileged position because they are able to give evidence relying on hearsay and opinions based on expertise drawing on such hearsay evidence as well as personal knowledge. As judges rarely receive a competing expert report or see experts cross-examined, it is important, from the Tribunal's position, to assess carefully country expert evidence to determine whether such evidence is of weight in assessing future risk or whether the expert is merely acting as the appellant's advocate. The Tribunal is not therefore bound to accept the views of a country expert. At the same time, adequate reasons must be given for rejecting an expert report; peremptory rejection will be an error of law.[54]

One particular concern on the Tribunal's behalf with country experts is that, in its opinion, such experts are of variable quality. While some country experts are highly respected, others range from the generally reasonable to the unacceptable. Nevertheless, 'all suffer from the difficulty that very rarely are they entirely objective in their approach and the sources relied on are frequently (and no doubt sometimes with good reason) unidentified. Many have fixed opinions about the regime in a particular country and will be inclined to accept anything which is detrimental to that regime'.[55] Consequently, the Tribunal's concern is that country experts often act more as advocates than as independent, expert witnesses. Given the comparatively small number of individuals who act as country experts, judicial experience of individual country experts, and their reputations, is likely to be influential. The Tribunal has stated that it is 'frequently aware from experience of the reliability of the various

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[51] *MA* (n 41) [240].

[52] *AZ v Secretary of State for the Home Department (risk on return) Ivory Coast CG* [2004] UKIAT00170 [49]. See also *Secretary of State for the Home Department v SK (Return – Ethnic Serb) Croatia CG* (Starred determination) [2002] UKIAT05613 [5]; *GH v Secretary of State for the Home Department (Former KAZ – Country Conditions – Effect) Iraq CG* [2004] Imm AR 707 (IAT) 726-727; *MA* (n 41) [235]-[241].

[53] Asylum and Immigration Tribunal, *Practice Directions* (2007) [8A.4].

[54] *K v Secretary of State for the Home Department* [2006] Imm AR 161 (CA) 165; *CM (Kenya) v Secretary of State for the Home Department* [2007] EWCA Civ 312 [13] (Moses LJ); *FS v Secretary of State for the Home Department (Treatment of Expert Evidence) Somalia* [2009] UKAIT0004.

[55] *Slimani v Secretary of State for the Home Department (Content of Adjudicator Determination) Algeria* (Starred determination) (01TH00092), dated notified 12 February 2001 (IAT) [17].

experts whose reports are produced'.[56] Some experts have been recognised by the Tribunal as reliable and others as unreliable. Some experts may have a long track record with the Tribunal and their reports may have been given considerable weight, others may have either fallen out of favour or the weight attributed to their reports been qualified. Each expert must be assessed in respect of the report presented in the particular appeal and even a generally reliable expert must be judged in the context of their individual reports; an expert is only as good as his last report.[57]

There are a number of criteria against which the Tribunal evaluates the reliability of country expert evidence. First, country experts must possess sufficient expertise in the particular country concerned and that the expert's opinion is based on current and reliable knowledge relating to conditions in that country.[58] Secondly, their reports should be independent, balanced, and objective.[59] The expert's obligation to assist the Tribunal on matters within his own expertise is paramount and overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid.[60] The expert should therefore provide objective and unbiased opinion on matters within his area expertise by giving a balanced picture of country conditions, in the sense of considering all material facts including those which may detract from the opinion formed.[61] For instance, if an expert recognises the need to approach country information with an approach of critical enquiry, recognizing that country conditions can change, then this is likely to add to the weight placed on the expert's opinion, as will the absence of any preconceived or fixed notions concerning country conditions. By contrast, a tendency to exaggerate, the use of tendentious language, or the making of assertions or sweeping generalizations that either go beyond the evidence or lack a sound empirical basis may cast doubt on an expert's objectivity.[62] For the Tribunal, the procedural features of the provision of country expert evidence – that country experts are instructed by appellants and do not normally attend appeal hearings to be cross-examined or have their opinions contradicted by opposing experts – makes country experts' duty to the more not less significant. One point commonly made by country experts is that the Tribunal tends to engage in a far more thorough scrutiny of their specialist evidence when compared with Home Office country reports despite the facts that the latter are also produced by a party to the appeals process. However, from the Tribunal's perspective, the lack of expert reports advanced by the Home Office means that the equality of arms which should characterise adjudication does not exist.

Thirdly, sourcing of an expert's opinion will enable the Tribunal to assess its reliability. Country expert reports must be verifiable as to the facts and, so far as it

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[56] Ibid. [18]. For a notably robust rejection of a country expert report, see *Isik and Bingol v Secretary of State for the Home Department* (00TH02424), date notified 15 November 2000 (IAT).
[57] *LP* (n 44) [42].
[58] *LP* (n 44) [36]; *AA v Secretary of State for the Home Department (Expert evidence, assessment) Somalia* [2004] UKIAT00221 [8]; AIT, *Practice Directions* (2007) [8A.6].
[59] *LP* (n 44) [37] and [42]; AIT, *Practice Directions* (2007) [8A.4].
[60] AIT, *Practice Directions* (AIT, 2007) [8A.2].
[61] AIT, *Practice Directions* (AIT, 2007) [8A.5]; *HGMO v Secretary of State for the Home Department (Relocation to Khartoum) Sudan CG* [2006] UKAIT00062 [161].
[62] *BK v Secretary of State for the Home Department (Failed asylum seekers) Democratic Republic of Congo CG* [2008] UKAIT00098 [251]-[252] [269]. Furthermore, the fact that a particular expert has regularly produced expert reports for appellants might itself be a cause for concern. No country expert should have any interest in the outcome of an appeal. However, it may be relevant to consider whether an individual expert derives a significant level of income from producing country expert reports. See *AA v Secretary of State for the Home Department (Expert evidence, assessment) Somalia* [2004] UKIAT00221 [9].

consists of opinions, give a proper basis in either verifiable fact or the country expert's own relevant experience.[63] However, direct sourcing may often be impossible if the sources are individuals in the particular country who have supplied information to the country expert and consequently fear reprisals.[64] Fourthly, the value and objectivity of country expert evidence can be evaluated by comparing it with other sources of country information.[65] If the Tribunal sees that a particular expert constantly seeks to paint a worse (sometimes rosier) picture than do other recognised sources, this may prompt the view that the expert is no longer impartial.[66] Finally, country experts should not seek to assess whether or not country conditions will place an individual appellant at risk on return; '[i]rrespective of the vocabulary in which country experts express their opinion, it remains for judicial decision whether their opinion evidences the existence of a real risk of persecution or of ill treatment within the meaning of the Refugee Convention and Article 3'.[67] Country experts are not normally legally trained; while their opinions, which necessarily come from a different perspective from that of the Tribunal, may be extremely informative, assessments of risk are for the Tribunal.[68] An expert who expresses a view as to the particular situation of an appellant is likely to be viewed by the Tribunal as having exceeded his own area of expertise and thereby trespassing upon the judicial function.

It is apparent that the Tribunal has found it difficult on occasion to manage the contentious nature of country expert evidence. Country experts have often complained that their integrity and expertise has been routinely denigrated before the Tribunal, while the Tribunal has been occasionally criticised by the Court of Appeal for not paying due regard to country expert evidence. For instance, Brooke LJ has noted that, given the extremely difficult task of assessing the credibility of asylum appellants, judges need all the help than can be given by a country expert. In response, the Tribunal, accepting the problematic nature of decision-making, noted that country experts could not expect their opinions to be accepted automatically as that would be to substitute trial by expert for trial by a judge; while it is the country expert's task to put forward facts or views, it is the judge's task to assess them.[69] Elsewhere, the

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[63] *Zarour v Secretary of State for the Home Department* (01TH00078), date notified 2 August 2001 (IAT) [22]. As the Tribunal continued, at [23], this is not to say that a source must be quoted for each and ever fact set out by the country expert; while judges 'will not expect the panoply of footnotes to be seen in academic publications, they are entitled to expect that country experts…have provided material in their reports or letters on which any facts about which there is likely to be any argument can be verified, and any opinions properly evaluated'.

[64] *Zarour v Secretary of State for the Home Department* (01TH00078), date notified 2 August 2001 (IAT) [28]; *AZ* (n 52) [49].

[65] *AZ* (n 52) [49].

[66] As the Tribunal put it, in *AS v Secretary of State for the Home Department (Kirundi/Buyenzi – "country expert" evidence) Burundi* [2005] UKAIT00172 [4], the fact that a country expert is an academic 'does not of course mean that anything falling from his pen is to be accepted as Gospel; but that decision-makers are entitled to accept his reasoned conclusions on general questions, without detailed sourcing, where those do not go against other information from generally accepted background sources before them, or reported decisions of the Tribunal. (On the other hand, it would in our view be a wrong approach in law not to engage in vigorous critical analysis of "country experts"' views, where those were out of line with such material)'.

[67] *NM* (n 50) [95].

[68] *LP* (n 44) [199].

[69] *R (Es Eldin) v Immigration Appeal Tribunal* (Court of Appeal, 29.11.2000, unreported) (CA) [18] (Brooke LJ); *Zarour* (n 54) [20]. As the Tribunal, ibid. [21], has put it, 'country experts, like other expert witnesses, should not be treated as seers, whose vatic pronouncements are to be brought down from the mountain on tablets of stone, and treated with all reverence as the last word on the subject in question'.

Tribunal's comment that a country expert's report was 'particularly partisan' and 'lacking in objectivity' was found by the Court of Appeal to have been 'unwarranted'.[70] If the Court of Appeal thinks that on occasion the Tribunal has gone too far in criticising country experts, then experts themselves often revile their treatment by the Tribunal and its potential impact on their reputations. The fall-out from this can be an unedifying spectacle. For instance, on one occasion, the Tribunal publicly apologised to a country expert whose views it had stated should in future be treated with caution after the expert concerned commenced libel proceedings against the Tribunal.[71]

While the Tribunal will subject country expert evidence to close scrutiny, it has though resisted Home Office attempts to restrict the role of country experts to that of solely presenting data concerning country conditions rather than also interpreting its significance and expressing opinions. The Home Office has, for instance argued that the role of a country expert is different in significant respects from that of most other expert witnesses, such as medical experts. This is because specialist knowledge may be needed to interpret the significance of medical data but it is unlikely that any specialist knowledge is required to interpret data concerning country conditions. However, the Tribunal's view that country experts can legitimately interpret the significance of country conditions.[72] The crucial issue is the degree of weight to be attached to such opinions.

At the centre of the controversy are competing claims between the Tribunal and individuals commissioned to adduce country evidence as to who possesses real country expertise. In justifying its role in assessing country conditions, the Tribunal has relied upon the more familiar principle that, as a specialist tribunal, it 'builds up its own expertise in relation to the limited number of countries from which asylum seekers come'.[73] Expert knowledge is a longstanding rationale for having tribunals.[74] However, it is important to distinguish between legal expertise in the rules governing

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[70] *FK v Secretary of State for the Home Department (FGM – Risk and Relocation) Kenya CG* [2007] UKIAT00041 [96]; *FK (Kenya) v Secretary of State for the Home Department* [2008] EWCA Civ 119 [15] (Sedley LJ). See also *Karanakaran v Secretary of State for the Home Department* [2000] 3 All E.R. 449, 472 (Brooke LJ) and 473 (Sedley LJ), where the Court of Appeal ruled that it had been 'completely wrong' for the Tribunal to dismiss 'highly relevant evidence of in-country conditions from experts with respectable credentials' as mere speculation and remitted the appeal back to the IAT and noted that both parties could submit updated country evidence. When the case returned to the Tribunal, *Karanakaran v Secretary of State for the Home Department* (00TH03086), date notified 12 September 2000 (IAT) [9], none of the expert reports had been updated; in any event, the Tribunal found the experts' reports to be contradictory, unsatisfactory, and 'profoundly unhelpful to a Tribunal that has to make its own evaluation'.

[71] *SD v Secretary of State for the Home Department (expert evidence – duties of expert) Lebanon* [2008] UKAIT 00070. See also A Hirsch, 'Asylum tribunal apologies for questioning academic's evidence' *Guardian* (London, 27 October 2008) <www.guardian.co.uk/education/2008/oct/27/alan-george-libel-case>; M Newman, 'Tribunal experts fear attacks on integrity' *Times Higher Education* (London, 6 November 2008) 8.

[72] *LP* (n 44) [18]-[42].

[73] *Secretary of State for the Home Department v SK (Return – Ethnic Serb) Croatia CG* (Starred determination) [2002] UKIAT05613 [5]. See also *Balachandran v Secretary of State for the Home Department* (20262), date notified 17 December 1999 (IAT) [9]; J Barnes, 'Expert Evidence – The Judicial Perception in Asylum and Human Rights Appeals' (2004) 16 *International Journal of Refugee Law* 349. Higher up the judicial hierarchy, the House of Lords, in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 [30] (Baroness Hale) has described the AIT as 'an expert tribunal charged with administering a complex area of law in challenging circumstances'.

[74] The Franks Committee, *Report of the Committee on Administrative Tribunals and Enquiries* (Cmnd 218, 1959) [38].

a particular adjudicatory function and special expertise in the particular subject-matter.[75] From the perspective of country experts themselves, judges do not normally possess a deep understanding of country conditions as they are not, irrespective of claims to the contrary, experts in country conditions.[76] While judges may become thoroughly informed at a factual level as to the political histories of countries producing asylum appellants, it is in the assessment and interpretation of the cultural and political significance of such facts that expertise comes into play, which judges, as legal specialists, tend to lack. Consequently, judicial claims to expertise in country conditions are considered to be unreal and reinforce judicial hegemony over country experts. Independent expertise is therefore crucial in order to assist judges make correct assessments of such conditions. From the perspective of country experts, the Tribunal's willingness to question and scrutinize their evidence means that their expertise is regularly not taken seriously.

A second concern on the behalf of country experts is the Tribunal's presupposition that country information must be 'objective evidence'; for experts, it is mistaken to assumed that it is possible to assemble 'objective evidence' free from any prior theoretical framework.[77] The Tribunal may dismiss an expert's report on grounds of bias because it implicitly assumes that it does not conform with established notions of objectivity but from an expert's perspective merely expecting such objectivity is naïve as experts necessarily operate within explanatory paradigms in which facts are interpreted.[78] From this perspective, the difficulties between the Tribunal and country experts reflect deeply ingrained differences as to how lawyers and social scientists think and approach the same subject-matter. For country experts, such as Good, the key point is that lawyers take matters which have been established to the appropriate standard of proof to be facts in an absolute sense whereas for social scientists and anthropologists, 'facts' are almost always products of a particular theoretical approach; the 'truth' is generally more provisional, contested, and theory-laden than legal processes habitually acknowledge.[79] Thirdly, country experts have also expressed concerns that when they do attend appeal hearings, their integrity and credentials are attacked by the Home Office, a practice which, it is claimed, the Tribunal often acquiesces in.[80] It is though a touch naïve if country experts, perhaps more accustomed to the more sedate atmosphere of the seminar room rather than the

[75] Sir Andrew Leggatt, *Tribunals for Users – One System, One Service* (2001) [1.12]-[1.13]. As Leggatt noted, while civil courts allow expert opinion on the facts of case to be submitted, tribunals offer a different opportunity because their membership may include lay members whose qualifications and expertise are considered to provide specialist knowledge in the particular subject-matter; the incorporation of such members with greater expertise may make for better decisions. In this respect, it is important to note that the composition of the AIT does not allow for the membership of any individuals with specialist knowledge of country conditions.

[76] A Good, 'Expert Evidence in Asylum and Human Rights Appeals: an Expert's View' (2004) 16 *International Journal of Refugee Law* 358, 359; A Good, *Anthropology and Expertise in the Asylum Courts* (London, Routledge-Cavendish, 2007) 233.

[77] A Good, '"Undoubtedly an expert"? Country experts in the UK asylum courts' (2004) 10 *Journal of the Royal Anthropological Institute* 113.

[78] Cf generally TS Kuhn, *The Structure of Scientific Revolutions* (Chicago, University of Chicago Press, 3rd edn, 1996).

[79] Good traces the differential approaches between the tribunal and country experts to the basic differences in the professional training of lawyers and social scientists and suggests that this dispute is only one aspect of the continuing power struggle between the judiciary and professional experts. See generally CAG Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Oxford, Clarendon Press, 1994); M Redmayne, *Expert Evidence and Criminal Justice* (2001).

[80] Letter from the Country Experts' Working Group to the President of the Asylum and Immigration Tribunal, 12 April 2007 (on file with author).

adversarial context of the court room, to expect their specialist evidence to be accepted without question. For such evidence not to be properly tested not only risks the Tribunal relinquishing its responsibility to determine appeals but also that appeals may not be accurately decided.

The underlying tensions between the Tribunal and country experts may then be ascribed to different ways of organising the asylum adjudication process and of administrative justice more generally. To point out the obvious, this debate between country experts and Tribunal is clearly evaluative: much depends on the vantage point or perspective of those involved; the viewpoints expressed depend on the background assumptions of the contributors. As non-expert and independent decision-makers, judges are accustomed to making factual findings on the evidence presented before them through formal judicial procedures in which both parties can participate. By contrast, experts make findings based upon their professional judgment and specialist knowledge. For judicial decision-makers, this type of intuitive fact-collecting subject to professional judgment eschews precisely the systematized fact-finding procedures that the legal process values. Legal decision-makers may then be sceptical of placing greater reliance on experts as it would result in decisions based on more subjective and intuitive modes of decision-making and therefore also more inconsistency and unpredictability. Experts, however, are sceptical of the lack of expertise in country conditions judges display necessary to interpret their cultural significance of country conditions. Some compromise between such different ways of organising the decision process are inevitable because the underlying incompatibility between them. As Fisher has noted, disputes over risk (on return) are endemic and self-generating because the assessment of risk always involves the assertion of one culture over another.[81]

In practice, this compromise is achieved in the following way. While country experts are able to give evidence and their opinions, these will not automatically be accepted by the Tribunal but fall to be evaluated and compared with other sources of country information. Judges are not themselves country experts; however, judges, especially senior judges who undertake country guidance work, possess experience in assessing evidence about country conditions. Furthermore, while reliable expert evidence will be accorded weight, it remains for the Tribunal to assess whether or not country conditions are such that they generate risk on return.

The commissioning of country expert evidence

Country expert reports are invariably instructed by appellants' representatives and will be presented to the Tribunal as part of the appellant's bundle of evidence. Appellants without representation are highly unlikely to have their own expert reports. Experts rarely attend hearings; from the 28 appeals in which expert evidence was presented, in only one did the expert attend the hearing. The simple reason is cost: the financing of expert reports will be met with a disbursement from the Legal Services Commission but not costs for attending hearings. There may be other reasons though such as: the amount of time hearings take up and aggressive cross-examination by the Home Office.[82]

The instruction of country experts is the responsibility of the appellant, or rather, his representatives; such instructions should be both clear and precise and

[81] E. Fisher, 'The Rise of the Risk Commonwealth and the Challenge for Administrative Law' [2003] *Public Law* 455, 470.
[82] Interviews with country experts.

contain all relevant information concerning the nature of the appellant's case.[83] However, country experts interviewed noted some variation in the quality of their instructions; some representatives may provide good, clear instructions while others may not. For their part, representatives interviewed noted that the short timescales of the appeal process often create difficulties in terms of finding a country expert who is able and willing to produce an expert report and also in relation to instructing the expert.

That a country expert report has been commissioned does not necessarily mean that it will be produced before the Tribunal. As expert reports are commissioned on the behalf of appellants, it is possible that representatives may be disinclined to present any expert report to the Tribunal that is detrimental to their client's interests. Experts interviewed noted that representatives tend to expect expert reports to be favourable to their appellants, the assumption being that experts get paid for producing reports that enhance an appellant's case. As representatives' role is to advance their client's case, they are unlikely to present detrimental reports to the Tribunal. If an expert's report is not favourable to an appellant, then representatives may not present it to the Tribunal.[84]

This illustrates something of the tension in the position of the country expert's position. On the one hand, as the Tribunal's practice directions indicate, their purpose is to assist the Tribunal on matters within their own area of expertise. On the other hand, they are commissioned to produce reports on the behalf of appellants. One cynical suspicion about country experts is they are simply 'hired guns' or 'professional liars' who have been paid to say whatever is of assistance to appellant's case. At the same time, if representatives are tempted not to produce expert reports to the Tribunal that are not perceived to be beneficial to their client's interests, then this may in turn engender the perception that expert reports are only ever beneficial to appellants and that they are not sufficiently objective and balanced. This view might be reinforced if only those country expert reports that to the advantage of appellants are produced before the Tribunal. On a practical level, judges may become accustomed to seeing reports from a particular expert that are always in an appellant's favour, thereby raising legitimate concerns.

The handling of country expert evidence by judges

How then do judges handle such reports? The crucial for the judge is assessing what weight to attach to such reports. For judges, difficulties in assessing weight arise for a number of reasons, such as whether the report is up to date or merely regurgitating what is already known from other sources of country information. Judges also noted that they will only tend to see expert reports if they are beneficial to an appellant and consequently, the perception arises that most experts tend to accept the appellant's account to be credible. Judges recognised the assistance provided by genuinely helpful country expertise: it may be able to help fill in the gaps in country information, for instance, by confirming that a particular incident in the country concerned not mentioned in other sources of country information did actually occur. Perhaps the most problematic aspect for judges is the variable quality of country expert reports; the weight given to expert reports may vary considerably depending on the authoritative standing of the individual expert, their background, and how they

[83] Asylum and Immigration Tribunal, *Practice Directions* (2007) [8A.1].
[84] Interviews with country experts.

write their reports. According to judges, some experts appear to be genuinely knowledgeable and impartial whereas others appear to approach country conditions from a particular standpoint, predisposed toward a negative view of those conditions and merely grinding their axes. For judges, the difficulty lies in determining which is which, a difficulty compounded by the fact that country experts rarely attend appeal hearings to be cross-examined and the disinclination of the Home Office to produce its own report to rebut that submitted on the appellant's behalf.

In attributing weight to country expert evidence, judges tend to adopt a binary approach: they either accept or reject such evidence. The value to be derived from a report depends entirely on what it brings to the individual appeal. It is not therefore unusual for a report by a country expert to be accepted in one appeal and for a different report produced by the same expert to be rejected in another appeal. From the sample of appeals, country expert evidence was submitted in 28 appeals; in 18 appeals, the evidence was accepted; in the remainder it was rejected. The controversy aspects of country expert evidence should not therefore be overplayed as judges often accept such evidence. For instance, in one appeal, the expert report - concerning the treatment of young girls forced into marriage on return to Tanzania – was found by the judge to be consistent with other country information and extremely helpful.[85] However, difficulties in handling country expert evidence can arise and are illustrated by considering the following issues: the extent to which country expert reports need to be sourced; and their role in assessing credibility.

The extent to which country expert reports are sourced can be useful in assessing their weight; at the same time, an expert may only have been able to collect information from various sources on the understanding that they would remain undisclosed. The degree of sourcing required will though depend on the nature of the information disclosed. For instance, in one appeal, a country expert had made a number of claims about conditions in Mauritania – that due to societal discrimination against black Mauritanian nationals, such individuals would on return be interrogated and detained by the authorities; and that individuals without proper documentation would have no rights. However, in the absence of any sources or consideration of extant country information, the judge dismissed the report as mere speculation.[86] Likewise, in another appeal, a Somali expert had suggested that a person returning to Somalia would be at risk of being kidnapped. However, the expert had not provided any specific source for this other than noting that it had been frequently reported in the Somalia media and the expert's Somali friends had told her about it; the Tribunal found this to fall 'rather short of what might reasonably be expected from an expert report'.[87] Un-sourced assertions which have not been verified are unlikely to attract much weight. By contrast, in other appeals, un-sourced evidence may be accepted if there was a valid reason for not disclosing the source. For instance, in one appeal, the key issue had been whether or not the appellant, a Sri Lankan national, would be wanted on his return as he had been previously detained for being a LTTE member by the authorities. The expert report's provided detailed confidential, off-the-record information obtained from a Sri Lankan police officer to the effect that once an individual's details had been entered onto the police's computer database, they would remain there for life, was accepted by the Tribunal; as his personal details were likely to have been put on the database, there was a risk of harm on return.[88]

[85] Case 177.
[86] Case 115.
[87] Case 39.
[88] Case 62.

Similarly, the degree to which expert evidence may assist when assessing credibility varies. A judge might give weight to an expert report favourable to an appellant and yet disbelieve an appellant's account; the converse is also possible. Country experts have no role in concluding whether or not an appellant is credible; this may prompt a judge to question the expert's objectivity and to view the expert as having intruded into judicial fact-finding. At the same time, an expert report might assist in the overall appraisal of an appellant. So, in one appeal, an expert had stated that he could not verify the veracity of the appellant's story, there were several reasons why it was consistent with what the expert knew. The Judge attached considerable weight to the expert report.[89] By contrast, in another appeal, it was decided that the expert, who had not met the appellant, had provided an opinion concerning clan membership, had exceeded her expertise by seeking to explain the appellant's language preference.[90]

Reforming the provision of country expert evidence

Given the nature of the issues, the degree to which expert evidence can be assessed by a judicial decision-maker is likely to remain a problematic and contested, if not intractable, issue. How, if at all, might the provision of country expert evidence be reformed? Current procedures do not seem satisfactory because of the perception that country experts are pressurized to produce reports favourable to appellants and that adverse reports may never see the light of day. There are though a number of possible procedures: first, greater-self regulation by country experts themselves; secondly, greater use of competing expert reports upon the behalf of both the Home Office and appellants; and, thirdly, conferring upon the Tribunal the ability to commission for itself country expert reports. As regards the first option, country experts do not, unlike other experts, form a distinct profession, there is no professional, regulatory body; formal self-regulation by country experts might enhance confidence in them. However, this would not appear to be practically feasible; country experts typically have full-time positions elsewhere and it is unlikely they would have either the resources or inclination to establish any formal system of self-regulation.

The more realistic options are then either greater use of competing expert reports or conferring upon the Tribunal a power to commission its own country expert reports. An adverse comparison is often made with the provision of expert evidence in civil litigation. The general perception is that the adjudication process is disadvantaged because of the lack of input by the Home Office to rebut the appellant's evidence and a perceived inequality of arms between the parties. Greater use of competing expert reports might also be said to reflect better the shared duty to ascertain and evaluate all the relevant facts. The difficulties are though the cost and practicalities of having competing expert reports. While an appellant's expert report is funded by the Legal Services Commission, it is not apparent that the Home Office possesses the resources to commission its own report in each appeal in which the appellant produces an expert report. Furthermore, there would also need to be greater co-ordination between representatives and the Home Office prior to the appeal hearing, which time-limits normally preclude. Secondly, the number of experts on a particular country issue may sometimes be so small that it may be difficult to see who

[89] Case 17.
[90] Case 58.

else could be instructed by the Home Office to act as an expert in addition to appellant's expert.

When then of the third option – the Tribunal being able to commission a single joint expert report? A former senior judge has suggested that for country expert reports to be demonstrably impartial, the solution may be for experts to be appointed by the Tribunal at the request of the parties to an appeal so that there is a clear remit as to the area of expert testimony required in a given case.[91] The principal advantage of this option would that be the expert commissioned by the Tribunal could be said to be genuinely objective. As the expert is not associated with either of the parties to the dispute, he cannot be said to have been subject to any influence either for or against the appellant. The Tribunal would receive arguments from the parties as to whether or not an expert's report is necessary; if the Tribunal considered a report to be necessary, then it could, as under the Civil Procedure Rules, either select an expert from a list prepared by the parties or direct that the expert be selected in such other manner as the Tribunal may direct.[92] Furthermore, such a procedure would reduce the risk that unrepresented appellants do not collect expert evidence. As regards funding, the Tribunal could itself finance such reports. Alternatively reports could be commissioned on payment by the appellant or the Home Office, the important difference with the current procedure being that the Tribunal would be able to see the report even if adverse to a party's case. Such a procedure would not increase current costs but would require greater co-ordination between the appellant and the Home Office to agree upon who is to act as the single joint expert. For any such power to be effective, not only must the Tribunal be in full control of both the commissioning and instruction of experts.

Potential difficulties though arise in the practical operation of such a power on the Tribunal's behalf. First, again the timescales of the appeals process would not normally prohibit the Tribunal deciding whether or not to instruct a country expert. The first occasion in which a judge encounters an appeal is at the CMR stage; while it is often necessary for an appellant wanting to present expert evidence to have their appeal adjourned, one concern would be that the general pressure on judges not to adjourn might dissuade them from commissioning expert evidence. A second concern relates to the situation when the judge refuses to commission an expert report; it is easy to envisage intense judicial review litigation against the Tribunal's refusal to commission a report at all or its decision to commission a report from one particular expert and not from another. Furthermore, there is the risk that such unscrupulous appellants and their representatives might deliberately deploy this tactic simply to prolong the appeals process. In any event, if the Tribunal refused to commission a report, then would this preclude an appellant from commissioning their own report? If not, then would such a report be viewed as a less objective than a report commissioned by the Tribunal? Of course, no solution is problem-free. On balance, it might be preferable for the Tribunal to be able to commission its own expert reports. However, as timescales preclude this in ordinary appeals and are unlikely to be adjusted to accommodate such a change, the other option might be to limit the use of Tribunal commissioned expert evidence to the most important cases, namely country guidance. Alternatively, appeals in which expert evidence is commissioned would just have to be adjourned.

[91] Barnes (n 73) 354.
[92] CPR 35.7(3).

Doing away altogether with country evidence is simply not an option; improving the means by which such evidence is provided is though. If the Tribunal were able to commission its own expert evidence, then the difficulties would not disappear; though they might be ameliorated by reducing the perception that expert reports detrimental to appellants' case were being routinely screened out and not presented to the Tribunal. In this way, it might enhance the perception of the independence and objectivity of country expert evidence.

Conclusion

The use of expert evidence in asylum appeals is likely to remain a controversial issue. This controversy arises in large part because of the inherent uncertainties which do not merely exist around the outskirts of asylum adjudication but go to its fundamental core: how can we know who is and who is not genuinely in need of international protection? Given the innate impossibility of providing an objectively correct answer to this question and the different approaches adopted by legal and professional decision-makers, it is important to consider how the provision of expert evidence ought to be enhanced. This paper has argued that various limitations constraint the use of expert evidence in asylum appeals – some of these are perhaps inherent – but are others are not. It is therefore appropriate to conclude by suggesting that it is the procedure by which expert evidence is presented to the Tribunal requires re-examination and that it is in this respect that the most likely improvements to the assessment and provision of expert evidence are to found.