

## **Shifting the expert goalposts: the influence of Country Guidance cases in the development and use of expert evidence in Zimbabwe asylum cases in the UK.**

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The legal bases on which asylum cases are decided in the UK are the designated Country Guidance (CG) cases. Whenever a new CG case is agreed, it changes the ways in which lawyers, civil servants, country experts and even applicants behave in preparing arguments for asylum claims. This essay examines how this process has influenced the experiences of country experts (including myself) advising on Zimbabwean asylum cases in the UK. It illustrates how there is a dynamic relationship between country expert advice and CG cases, which leads to some forms of expertise being more in demand than others, and militates against the 'objective' knowledge that ostensibly informs tribunal decisions.<sup>1</sup>

### Country Guidance

Country Guidance cases, in the words of Robert Thomas, 'provide decision-makers with generic guidance as to whether or not country conditions are such that they will generate a risk on return for broad categories of applicant'.<sup>2</sup> CG cases are picked from those in train in the asylum process, as being in some way representative of a large number of comparable cases. Their determination identifies generic categories of risk and/or categories of person at risk, which are likely to recur regularly in the UK asylum process; and it recommends how these should be treated. This assists in ensuring some consistency in decision-making across the various tribunals.

However, as Thomas points out, 'Good country guidance presupposes good country information'.<sup>3</sup> The purpose of the CG hearing is to establish the current situation on the ground: its role is more inquisitorial than adversarial. Yet one of the most striking oddities about the CG system is that the tribunal is treated as a standard asylum hearing, based on the adversarial framework of Home Office versus appellant, battling it out in front of the tribunal adjudicator. Within this framework, country experts are almost exclusively commissioned by appellants – as, indeed, is the case for all

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<sup>1</sup> An earlier version of this essay was published as 'Expert advice in asylum cases: Zimbabweans in the United Kingdom', *Fahamu Refugee Legal Aid Newsletter*, June 2011

<sup>2</sup> Robert Thomas, 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the UK,' *International Journal of Refugee Law*, 2008: 493

<sup>3</sup> Thomas, 'Consistency': 505

standard asylum hearings, too. Even though country experts recognise that their duty is to the courts, their evidence has already been framed by the issues that the appellant's lawyers have asked them to address. The position of the Home Office emerges largely from challenging the appellant's case, rather than from commissioning alternative reports. The tribunal, meanwhile, has no powers to commission experts of its own.

Another quirk of the CG system, which influences the work of country experts in the standard asylum cases, is that a CG ruling stands until challenges lead to a new CG ruling being made. In Zimbabwe asylum cases, this has routinely led lawyers to ask country experts to comment on the current CG case and on whether the situation on the ground has transformed since then. As Thomas observes:

the Tribunal produced country guidance on the situation in Zimbabwe in July 2007 on the basis of evidence about conditions in that country largely concerning the previous two years or so before then. Conditions in Zimbabwe subsequently deteriorated swiftly.<sup>4</sup>

As well as creating what Thomas describes as an 'air of unreality', this situation also ensures that country experts tend to be very familiar with the details of the CG guidance – sometimes more so than the lawyers, who may not routinely deal with cases from Zimbabwe. Where the CG case is favourable to appellants (as many of the Zimbabwe CG cases have been), country experts are encouraged to use it in support of their reports; where it is unfavourable, they are encouraged to treat it as part of the adversarial system, more than as an 'objective' assessment of the situation on the ground.

So, despite their merits, Country Guidance cases have unintended consequences in their influence on the processes of the asylum system. The issues highlighted in CG cases determine the questions asked in standard applications for asylum, the nature of evidence adduced and even the behaviour of applicants prior to putting in an application. The CG cases may be regarded as providing a 'checklist' of factors that claimants have to meet, rather than a description of potential risk factors. This leads, as Thomas notes, to 'the risk that appellants might be tempted to tailor their stories to factors regarded as relevant.'<sup>5</sup> Within the UK, we repeatedly hear that Zimbabwean asylum seekers attempt to build up a suitable 'CG' profile, for example by becoming politically active within the UK branch of the main Zimbabwean opposition party, before putting in an application for asylum or pursuing an appeal.<sup>6</sup> While it is impossible to prove such rumours, the very fact of their existence illustrates the

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<sup>4</sup> Thomas, 'Consistency': 522

<sup>5</sup> Thomas, 'Consistency': 516

<sup>6</sup> This claim appears with some frequency in the UKBA's 'Reasons for Refusal' letters, issued to asylum seekers from Zimbabwe who are deemed not to be 'genuine' political activists. It was also mentioned to me as a possibility by the deputy UKBA Migration Officer at the British Embassy in Harare.

impact that CG cases have on grassroots understanding of what is required to win an asylum application or appeal.

This distorting effect is not unique to the UK. Dr Lynette Jackson, Associate Professor in African History, Gender and Women's Studies at the University of Illinois Chicago, told me that, since 2006, she has been routinely asked to comment on the risks of female genital mutilation (FGM) to African women seeking asylum in the US. This happens even when the women have already been 'circumcised' or when, by comparison with the risks posed to them on account of their political activism, they are at negligible risk from FGM. This is apparently because of US Court ruling in January 2006 that recognised 'fear of FGM' as a 'well-founded fear' under the 1951 Refugee Convention, leading lawyers to regard FGM as a case-winning issue.

Clearly, then, CG cases influence a range of behaviours within the asylum system. This essay will focus specifically on how CG cases have affected the experiences of country experts working on Zimbabwe. It is informed largely by my own decade-long experience of writing country expert reports in Zimbabwe asylum cases, supplemented by interviews with other colleagues also working in this field.

### Country Experts

It is not always easy to find country experts. A basic limitation is that not many people have a suitable range of expertise to comment effectively on asylum cases. For example, Dr Oliver Phillips, Reader in Law at the University of Westminster, has offered country expert advice both in routine asylum cases and in the recent 'LZ' Country Guidance regarding the risks to people in Zimbabwe on the basis of their sexuality.<sup>7</sup> He observed that there are very few experts in the UK able to comment on LGBT (Lesbian, Gay, Bisexual, Transsexual) issues in southern Africa: he could not, for example, think of a comparable expert in the UK who might comment on the situation in South Africa.

Moreover, the adversarial nature of the asylum process acts as a disincentive to experts. The issues here are both ontological and reputational. On the one hand, as Good has illustrated, the legal system places different meanings on concepts of 'truth' and 'fact' and the distinction between 'objective' and 'subjective' perception from the meanings of these ideas within academia. Academics are not good in contexts that require 'yes/no' answers:

Lawyers take the notion of 'fact' as philosophically unproblematic, and are concerned with determining which general principles (laws) these facts call into play. Anthropologists are more aware...of the

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<sup>7</sup> *LZ (homosexuals) Zimbabwe v. Secretary of State for the Home Department*, CG [2011] UKUT 00487 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 8 January 2012

problems of obtaining and using data, and less inclined to talk of 'facts' without hedging the notion around with qualifications.<sup>8</sup>

In an adversarial context, such equivocation appears to suggest a lack of reliability or trustworthiness: this is not a pleasant experience for the conscientious academic.

Furthermore, it is the role of both the Home Office and the adjudicator to exercise scepticism towards the claims of asylum seekers (although the adjudicator has a duty to err towards a finding of credibility, where lives are at risk). They are, therefore, equally wary of the claims of experts giving testimony on behalf of claimants.<sup>9</sup> In offering their expert advice, country experts are exposing themselves to the risk of being deemed partisan, insufficiently expert or merely irrelevant. This is within a context where their academic judgement is necessarily going to be subject to robust scrutiny, if not outright attack, based on a different set of criteria from those used within academia. For example, in 2007, Professor Terence Ranger, the extremely eminent Emeritus Professor of Race Relations from Oxford University, who is one of the world's most respected experts on Zimbabwe, was roundly attacked in the findings of the 'HS' country guidance case:

117. One has to look very hard at the professor's evidence to find upon what, other than his own assessment of the conduct of the authorities generally, he bases the view expressed in the final sentence of the extract of his report reproduced above. It is notable that elsewhere he refers to sources, but here he does not. We are, therefore, at this point dependant only upon his unsupported opinion which, as an expert witness, he is entitled to express. But, it is for the Tribunal to decide what weight to give to that in the context of the evidence before us as a whole.

118. In his conclusions in his recent written report he said that more and more Zimbabweans have been defined as traitors, particularly those with British connections. In his oral evidence he said anyone identified as a failed asylum seeker would be regarded as connected to Britain, and so regarded as a traitor and an enemy ... This is not evidence of what has happened to failed asylum seekers or how they are regarded by the authorities on return to Zimbabwe. This is the professor's view of how they would be regarded.<sup>10</sup>

It is not surprising that many academics, particularly those with partisan views that might creep into their reports, feel that their reputations are vulnerable within the

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<sup>8</sup> Antony Good, "Undoubtedly an Expert?" Anthropologists in British Asylum Courts', *Journal of the Royal Anthropological Institute*, vol 10, no 1, March 2004:130.

See also Robert Thomas, 'Report on a Roundtable Seminar: Asylum Adjudication and Country Guidance. Function, Operation and Future', *International Journal of Refugee Law*, vol 22, no 2, 2010: 337-8.

<sup>9</sup> Robert Thomas, 'Assessing the credibility of asylum claims: EU and UK approaches examined,' *European Journal of Migration and Law*, vol 8, 2006: 86.

<sup>10</sup> HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094, 29 November 2007, §117-118

adversarial system, and decline to participate.<sup>11</sup> Others are more sanguine. One country expert on Zimbabwe, who wished to remain anonymous in case his comments here were used to discredit his reports in court, remarked that, ‘the asylum system as a whole is necessarily flawed. I am not that concerned about [my] credibility vis-à-vis the asylum system, given that that system’s flaws are so self-evident.’

Clearly, suspicions of partisanship are exacerbated by the system itself. Inherent in the adversarial system is the temptation for lawyers to put pressure on country experts to be, in Phillips’ phrase, ‘less tempered, less reserved in my accounts’: for example, by suggesting he use the word ‘persecution’ rather than the more measured ‘abuse’ or ‘discrimination’. But, even without these pressures, most academics who have devoted their careers to the study of a country, being subject to the ties of friendship and often kinship, are likely to have a degree of partisanship regarding events within that country. Miles Blessings-Tendi, who provided country expert reports while writing his doctoral thesis in Oxford, admitted that he was more interested in presenting his analysis of the nature of politics within the state, than in engaging with the specifics of each asylum claim. Stephen Chan, Professor of International Relations at the School of Oriental and African Studies in Oxford stated that he provided expert reports to support appellants’ cases because ‘I saw great merit in retaining the Zimbabwean diaspora in the UK because of the benefits of remittances to Zimbabwe.’ As CG rulings made it easier to claim asylum successfully in the UK, Chan felt that there were too many unfounded and opportunistic claims. He stopped providing country expert reports and has instead ‘been lobbying government to go slow on its returns policy, precisely on the grounds of the remittance economy and its role in financing core MDC communities in Zimbabwe.’ Chan’s openness about his own political positioning demonstrates how difficult it is to put personal relationships and politics to one side in writing country expert reports.

Even beyond these systemic difficulties, the political pressures in Zimbabwean asylum cases are complex and country experts have found themselves caught between conflicting accusations of bias. On the one hand, the Foreign Office maintained a steady hostility towards the Zanu-PF government throughout most of the 2000s; it was loud on the international stage in support of sanctions against members of the Zanu-PF elite, as a response to allegations of human rights abuses in the country. On the other hand, the UKBA, aware of populist concern about immigration, was anxious to limit the number of Zimbabweans claiming asylum in the UK. The Zimbabwean situation, perhaps more than any other, saw Country Guidance rulings swing dramatically from one side of the permissive spectrum to the other, as challenges to rulings followed each other thick and fast. Country experts and the Tribunal were both caught in between, trying to explain and make rulings on a complex situation, while

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<sup>11</sup> Three academics whom I approached to see if they would talk to me about their experiences as country experts all stated, off the record, that they had decided to stop writing expert reports, following damning commentary in an adjudicator’s determination.

both the Home Office and the Foreign Office wanted simple headlines in support of their policies.<sup>12</sup> Understandably, country experts were often reluctant to be embroiled in this political dispute.

Country experts are also constrained by clear limits to the type of advice that they can provide. In Zimbabwean cases, it is very difficult to authenticate documentation, for example. During the 2000s, with rapidly-declining economic conditions, it was impossible for any organisation to maintain consistency in its documentation: there were shortages of paper, ink and design materials. Although I could confirm that, for example, an MDC membership card looked like others I had seen, this was no guarantee of authenticity: anyone could reproduce the cheaply-made cards. So I preferred to say nothing.

Other experts with whom I spoke admitted that they, too, had difficulty with requests to authenticate documents. Both Chenjerai Shire, a linguist at the School of Oriental & African Studies in London, and Steve Kibble, Policy and Advocacy Officer for the London-based Progressio charity, stated that were willing to say that documents such as membership cards, birth certificates or police dockets looked like others they had seen, but no more. Stephen Chan and Oliver Phillips felt better placed to authenticate some types of materials. Chan had been in Rhodesia-Zimbabwe during the transition, and then providing training in new government ministries in the early 1980s. So, as he says, 'I came across a lot of paperwork.' Based on this knowledge, he felt able to use a form of words along the lines of 'This follows the template for such documents...'. However, even Chan was reluctant to comment on the provenance of documents only supplied to him in the form of faxed or photocopied reproductions, and there were cases, such as over the authenticity of a Malawian passport, where he declined to comment. He agreed that it was not possible to comment on MDC cards, which changed frequently and were at times locally-issued according to local designs.

Oliver Phillips, on the other hand, has developed some expertise in authentication of particular types of document. It started with criminal justice documents (dockets, police records, extracts from court rulings, summonses, arrest warrants), with which he was very familiar from his research. This quickly led on to requests for all kinds of other documents. As he had access to birth and death certificates for personal reasons, he also felt able to comment on these. Even in these cases, however, the changing types of paper, ink and typesetting during the period of acute economic crisis posed challenges. Recently, he appeared in person at a case in Sheffield, where there were two conflicting sets of seemingly-legitimate official documents; one set asserted that a man had a criminal record, the other set asserted that he did not. Phillips was able to look at the documentation in the round, drawing on a range of detailed local knowledge regarding the courts from which the documents emanated (their jurisdiction, geographic reach and the types of cases with which they dealt); the type

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<sup>12</sup> Thomas, 'Constistency': 500

of fax machines used and the difficulties in accessing working fax machines during office hours; and the form of wording used. Even so, it took the court an entire day to reconstruct which set of documents was likely to be genuine.

Given the vulnerability to reputational damage that the country expert system creates, most country experts are very reluctant to testify outside their specific area of expertise. Oliver Phillips, despite extensive knowledge of the political situation in Zimbabwe, was very precise about the types of cases he is willing to take on (LGBT issues, HIV-related cases and cases using his knowledge of the Zimbabwean legal system). Those who stray outside their specific expertise not only risk damaging their own reputations, but they undermine the system as a whole. For example, I have had a case referred to me on second appeal, where the initial country expert report on Zimbabwe had been commissioned from a Namibian expert. The report, while extremely lengthy, lacked authority, failed to identify the key issues at stake in the case and, being based largely on reports from partisan sources, seemed to confirm the suspicion that country experts are not impartial.

This experience highlights one of the most important roles of the country expert. While any good researcher will be able to glean factual information from the wealth of material available in the public sphere, the meaning and *interpretation* of that data may not be clear without local knowledge: ‘it is precisely in the assessment and interpretation of the cultural and political significance of such facts that country expertise comes into play.’<sup>13</sup> The role of the country expert is not to assess the credibility of an appellant, but to explain fully the context within which the appellant’s claim should be understood. Often, this involves explaining that something which seems to undermine credibility, such as travelling on false documents, may actually be adduced as evidence of the plausibility of the claim.<sup>14</sup> Sometimes, it involves explaining complex anthropological details such as the nature of marriage or the appropriate guardianship of children. Frequently, in the Zimbabwean context, it involves clarifying the specific nature of political violence, and the role of state within that. But, regardless of the importance of country expertise in unravelling these cultural and contextual issues, the CG cases still tend to provide the framework within which these details must be explained.

#### Sources of information

The case of the Namibian ‘expert’ also highlights the thorny issue of the nature of the sources on which country experts might draw in producing their reports. At a training courses for lawyers dealing with immigration issues, run by HJT Training in March 2007, both legal specialists and country experts emphasized that the adjudicators

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<sup>13</sup> Thomas, ‘Consistency’: 527

<sup>14</sup> Jonathan Ensor, Amanda Shah and Mirella Grillo, ‘Simple myths and complex realities: seeking truth in the face of Section 8’, *Journal of Immigration, Asylum and Nationality Law*, vol 20, no 2, 2006: 7.

expect the content of country experts' reports to be supported by and revolve around material published in the public sphere, rather than based on personal experience. Several of us commented on the irony that material in the public sphere was frequently partisan, based on the interests of expatriate exiles; and likely to be more partisan than the inadmissible anecdotal material we garnered as country experts while visiting the country itself. In the case of Zimbabwe, for example, much of the evidence on human rights abuses is published in the openly oppositional, and sometimes unreliable, expatriate media, such as Voice of America, or the London-based SW Radio Africa and *The Zimbabwean* newspaper. Nonetheless, as with the Country of Origin Information reports compiled by UKBA, published material is regarded by tribunals as 'legitimate' in a way that more informal sources of information are not.

Notwithstanding this principle, in most reports a significant contribution comes from the evidence of human rights organisations and NGOs working in the region. The British Ambassador in Harare also observed to me that the Embassy feeds reports on the state of human rights in Zimbabwe back to London based on information garnered from local NGOs. Analysis and information from local NGOs may be posted online even when not given general publication release and is generally accepted as permissible evidence in the public sphere. As Steve Kibble observed to me, Zimbabwe is *very* well documented regarding collection of human rights abuse data: much more than most other African states.

This makes the work of country experts much easier in some ways; but it has pitfalls. NGOs and human rights organisations tend to have a vested interest in maintaining donors' belief in a chronic or severe situation that needs continual funding. This does not necessarily lead to exorbitant claims about abuse. Phillips, for example, commented that the Gays and Lesbians of Zimbabwe organisation (GALZ) has no vested interest in over-emphasizing levels of sexuality-based violence: somewhat to the dismay of UK lawyers trying to garner evidence that their gay clients would necessarily be at risk if returned to Zimbabwe.

Nonetheless, there is an understandable tendency for locally-based human rights organisations to present the situation in Zimbabwe as consistently dire. Moreover, as Kibble observed, there is an accompanying tendency in the UK, particularly in media and social networking circles, to lionise Zimbabwean NGOs. Their reports are received as evidence of a triumphant resistance in the face of a repressive state that tries to limit the flow of information. Consequently, the reports are rarely given much critical treatment in UK: they are circulated and reproduced freely, without scrutiny. In South Africa, by contrast, there is some irritation with Zimbabwean NGOs, given their tendency to seek approval from EU- and US-based organisations, rather than engaging with the other rights-oriented NGOs in the region. Kibble suggested that country experts should cross-check material coming out of Zimbabwean NGOs

against reports produced by regional NGOs. The latter tend to have a more coherent and less strident way of analysing the situation in Zimbabwe.

The country expert system does not formally recognise the difference between expert advice from someone who is regularly in the region and someone, however expert, whose information is primarily received through news agencies and human rights organisations. As Good comments, absence from the region is not necessarily indicative of lesser expertise.<sup>15</sup> Nonetheless, there is a sense that country experts can lose a full perspective because they are based in the UK. In discussing the perception of country expert reports as partisan, Thomas notes that the higher courts have exhorted the Home Office to balance country expert reports with information from officials posted at diplomatic and consular posts. The importance of actually being based in the country is explicit in this suggestion: ‘such information is produced by a diplomatic post with a permanent presence in the country concerned, as opposed to the temporary presence of a country expert.’<sup>16</sup>

All the country experts with whom I spoke emphasized the value of local informants, even though it was problematic to cite them in reports. Phillips stated that he consults regularly with lawyers in Zimbabwe regarding procedural issues when he needs clarification, but he will be open about such consultation in his reports. Kibble, however, noted that a reliance on local informants may be seen as evidence of partisanship, even though he acknowledged that he occasionally refers issues to two regionally-based oppositional academics, Brian Raftopoulos and Lloyd Sachikonye. I have on occasion sought specific information from local networks about specific claims (such as confirmation of the existence of a named farm and farmer), and explained my reasons for doing so in my report.

Interestingly, Stephen Chan, stated that in many of his reports, his sources of evidence were not only unpublished and based on local informants, but also anonymous. This is because he had been dealing with very specific types of cases: members of the armed forces who could not demonstrate grounds for asylum on the basis of political, religious or ethnic affiliations, but who were claiming exceptional leave to remain on humanitarian grounds. These claimants argued that they would suffer ‘additional hazard’ if returned to Zimbabwe, being at risk of court martial for desertion and being particularly vulnerable because they *would* be traced on return, as their identities were well documented by the state and security services. There was no need for such claimants to demonstrate sympathies with the opposition; the majority of cases were based on desertion from the army during the war in the Democratic Republic of

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<sup>15</sup> Good, “‘Undoubtedly an Expert?’”:127

<sup>16</sup> Thomas, ‘Consistency’: 509. However, when I discussed this with the British Ambassador in Harare, she felt that it would not be appropriate for diplomatic staff to submit reports to tribunals in the UK: the status of such reports, coming from another part of the government that was a party to the hearing, would be even more problematic than those of the country experts.

Congo during the late 1990s and early 2000s. Prof Chan's advice was based on the observation that *published* evidence of 'additional hazard' was effectively impossible to obtain, because courts martial and other disciplinary cases were not recorded in the public domain. Moreover, those who had relevant information were not willing – or even safe – to be publically identified. And so Chan's evidence was based on unnamed government and military sources in the region. Nonetheless, he was able to argue that certain sentences would follow from certain conditions, such as desertion, and to muster evidence on the appalling conditions in military prisons; put together, he argued, these created a weight of evidence in favour of the appellant.

There is, then, a strong sense that local knowledge, garnered from informants in the region, is invaluable. Steve Kibble noted how his reports are regularly replenished and refreshed by personal contacts, in an ongoing conversation. Sometimes these oral sources derive from visits to the region; at other times they come from NGO/human rights delegations to the Zimbabwe Europe Network, which Kibble chairs. This direct conversation inspires useful thoughts and perspectives, giving expert advice an underlying authority, even though it cannot provide data deemed as objective evidence by a tribunal. Kibble observed that, as the time since he has had direct contact with informants in/from the region lengthens, his reports become more based upon press reports and the published record; the authority derived from regionally-based insights accordingly diminishes.

Overall, then, sources of information for country expert reports are fairly tightly constrained. There is a consistent reliance on the output of human rights organisations and NGOs. However, other forms of invaluable local knowledge may be deemed inadmissible for various reasons. The evident changes in the content of reports about Zimbabwe over the past decade has not, then, been driven by changing sources of information – although the growing access to online newspapers has certainly made the job easier – but rather, by changing priorities established in the country guidance rulings.

#### Country Experts and Country Guidance: a dynamic relationship

As noted above, except in very specific circumstances, country experts are instructed by the lawyers representing the asylum seeker, and are asked to provide information that will assist the court in making a decision. In most cases, the hearing is an appeal. The appellant will already have applied for asylum and been refused, receiving notice of refusal alongside a lengthy 'Reasons for Refusal'. Normally, the lawyer will ask the country expert to comment on the Reasons for Refusal, as well as raising specific questions about their client's claim. All the country experts with whom I spoke agreed that, these days, the request will normally be accompanied by extensive documentation, which will always include the appellant's original witness statement, generally supplemented by a further statement in response to the Reasons for Refusal.

Clearly, the briefing of country experts has improved since the situation described by Antony Good in 2004, when he commented that:

the 'instructions' from many solicitors, often the very ones with the tightest deadlines, consist merely of a request to prepare a report, with no indication of what issues to cover.<sup>17</sup>

Good further noted that the expert is often not well briefed on guidance on what is or is not permissible, which may cause difficulties because, in general, country experts are 'unaware of the precise legal status of their own evidence.'

The role of the expert advisor is very tightly constrained: our duty is to the court, not to the lawyer who commissioned the report. We are not being asked to comment on whether the asylum applicant's claims are credible; merely whether they are plausible. It is the role of the adjudicator to decide on the credibility of the witness. Nonetheless, the questions that country experts are asked to address are manifestly influenced by the current CG rulings and, because they are posed by the appellant's solicitor, are generally intended to indicate that the appellant *is* at risk, under the categories of risk or person defined by the current CG case. So the nature of the evidence is routinely oriented towards that outcome, regardless of the care that the country expert takes to remain non-partisan.

The nature of the reports that are required from Zimbabwe experts has changed noticeably over the years. Initially, prior to the development of country guidance on Zimbabwe, these changes were driven partly by changes within Zimbabwe itself and partly by UK immigration policy. So Oliver Phillips observed that from 1995-97, he was generally asked to comment on claims for asylum based on sexual orientation. Very soon thereafter, however, these cases were displaced by claims for exceptional leave to remain, based on the lack of treatment for HIV+/AIDS. The cases of HIV infection in Zimbabwe increased very rapidly after 2002. However, around the same time, the need for effective HIV treatment was excluded, in isolation, as adequate grounds for discretionary leave to remain in UK. Phillips noticed that lawyers stopped asking for details of treatment options in Zimbabwe (somewhat to his relief, as 'it was such a pig to research'.) He states that he hasn't had an HIV case in years. Instead, all of the cases on which he's been asked to comment over the past five to seven years have been about sexual orientation. There have been increasing numbers of claims from women, perhaps because it seems easier to prove persecution of lesbians. It also seems to Phillips that there is a decreasing number of cases that strike him as factually dubious. This probably reflects the decreasing number of economic migrants, as the Zimbabwean economy begins to recover from the period of stratospheric inflation.

For those of us offering expert advice on politics, the first barrage of applications came soon after the 2002 Presidential elections. Prior to that point, many of those

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<sup>17</sup> Good, "Undoubtedly an Expert?": 118

leaving Zimbabwe had been white farmers and their families, who could claim British citizenship in some way, and so did not need to apply for asylum. The increased political violence during and after the closely-contested 2002 Presidential election, combined with worsening economic conditions, led to a steadily and steeply increasing number of Zimbabweans coming to the UK to claim asylum. The Home Office was required to winnow out the economic migrants from those with genuine asylum claims, or human rights grounds to be given leave to remain in the UK. The civil servants working on these cases were under great pressure to refuse as many applications as they could, given growing political hostility towards ‘asylum seekers’ in the popular press – often used as a synonym for ‘illegal immigrant’. Their hastily-judged refusals led to an avalanche of appeals.

For a country expert, this initial spate of appeals in 2002 required a fairly uniform type of response. Appeals revolved around the Reasons for Refusal and the extent and location of the political violence. My expert reports were filled with minutiae of dates and events: was it likely that this person could have been attacked in this way, at that location, at a particular time? Was it possible that a person threatened in Kariba could be traced and attacked in Epworth? Each report required a detailed and expert knowledge of specific constituencies and the patterns of violence associated with them.

It was striking how some of the arguments in the Reasons for Refusal verged on the absurd, apparently barrel-scraping in an attempt to find some reason to turn an application down. For example, in one case, a man from Harare, the capital city, was turned down because he was not ‘really’ an opposition activist, on the grounds that he did not know the address of the MDC offices in Bulawayo. An equivalent argument in the UK would be that someone claiming to be a rank-and-file Labour Party activist from London was not telling the truth, because he did not know the address of the Labour Party offices in Cardiff.

The process lacked robustness; decisions were made on the basis of inadequate or inaccurate data. Applicants were questioned about their knowledge of MDC policies and personalities; on many occasions, the applicants’ knowledge exceeded that of the Home Office. In particular, the Home Office list of MDC shadow cabinet members was apparently inaccurate. In the adversarial context, it was satisfying to explain to the court that an applicant had been refused for giving the ‘wrong’ answer, when in fact they were in the right.

By the end of 2002, the nature of the appeals and the type of expert report required began to change. David Blunkett bowed to political pressures and promised that no Zimbabwean would be forcibly returned, even if their asylum claim had failed. The Home Office began to argue that most refugees from Zimbabwe were not at ‘specific’ risk from the political elite and should therefore return home. Part of the work of the country expert then was to explain the nature of the Zimbabwean state: not a failed

state, but neither a totally dictatorial state in which every individual's fate was determined from the centre. Again, detailed grassroots knowledge was needed here, alongside a general understanding of the workings of local and national state and party structures. But the emphasis was shifting away from minutiae of events, towards more general explanations of how political violence operated in different districts.

Gradually, the battle between asylum seekers and the Home Office became more of a formalised contest, in which the ground-rules were clearly established. Asylum seekers were better prepared in interviews. It became known that applicants would be quizzed on their knowledge of the MDC, and that the accuracy of their answers would be assessed by civil servants using the 'Country of Origin' data on the Home Office web site as their guide. Applying for asylum became, like a driving test or a citizenship test, simply a matter of memorising the answers that were deemed to be 'correct' (even where they were not!).<sup>18</sup> At the same time, the Home Office assessors began to recognise that they needed a more sophisticated understanding of Zimbabwe, not least in order to avoid being exposed in expert advisors' reports.

For several years, certain categories of people were accepted as being at particular risk of political violence. Teachers and MDC activists in rural areas were more likely to be taken seriously than urban businessmen. Claims of MDC activism or police detention had to be supported by documentary evidence. Consequently, for some time the country experts were routinely asked to confirm the authenticity of such documents: something that I felt it was impossible for me to do. Instead, I focused on explaining the reasons why teachers and rural activists had been particularly targeted, and why these risks might still pertain. By this point, it was evident that country guidance was needed: there were clearly-defined forms of risk and categories of people at risk which were recurring in applications.

In August 2006, a landmark CG case, 'AA', was decided. Prof Terence Ranger, who gave extensive expert evidence, noted that 'AA' was chosen as the CG case because the applicant had so little counting in his favour. He had come to the UK on a visitor's visa, overstayed, and, when apprehended, had lied about his identity. He had failed to demonstrate any significant political activism in Zimbabwe, prior to his arrival in the UK. If this man could be granted asylum, then the parameters for eligibility for asylum would be clearly established. The case was difficult to resolve; in the meantime, a further CG case, 'SM', stated that teachers, MDC activists, and possibly returnees from the UK might be at greater risk.

The determination from 'AA', when it finally appeared, was extraordinary. It stated that, if a person were deported to Zimbabwe having failed in an asylum application in

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<sup>18</sup> Jo Pettitt, Laurel Townhead, and Stephanie Huber, 'The Use of COI in the Refugee Status Determination Process in the UK: Looking Back, Reaching Forward', *Refuge: Canada's Journal on Refugees*, vol 25, no 2, 2008: 182-194

the UK, the very fact of having been in the UK and having made claims against the Zimbabwean government in pursuance of the asylum claim would, in itself, put that person at risk on return. All that a person needed to do to be eligible for asylum was actually to claim it!

The nature of the work required from country experts changed significantly in the light of 'AA'. It was no longer necessary to provide minute details of the location of youth militia camps and the patterns of political violence; nor to authenticate documents. The job now was to show a detailed knowledge of the procedures at all the entry points into Zimbabwe. The assumption was that a person was at greatest risk at the point of entering the country. How likely were they to be identified as a failed asylum seeker? I became familiar with *Jane's Defence Review*, not a publication that I'd previously felt much need to read, which provided insider information about security service and army presence at airports and border posts.

Another interesting area of expertise that came into demand after AA was ethno-linguistic analysis. The Home Office began to suspect that people from other parts of southern Africa were claiming to be Zimbabwean to gain asylum under the liberal 'AA' ruling. Chenjerai Shire, a linguist based at SOAS in London, was increasingly called upon to do a Professor Higgins-style analysis of origin, based on vowel sounds, lexical items and praise songs.

The appeals against 'AA' led to a new CG case, 'HS', in November 2007. This rowed back from the very liberal ruling in 'AA' and reasserted that people must be political activists in order to be at risk under the terms of the international asylum conventions. It also indicated that the security service, the CIO, was monitoring the Zimbabwean communities in the UK and identifying people who were particularly active in opposition politics. These people, it was suggested, would be at specific risk if returned to Zimbabwe.

Once again, the country experts were swung into action by the lawyers. A whole new area of expertise was required: could it be demonstrated that the applicant was active in the MDC in the UK? The attention moved away from defence reviews and ethno-linguistic analysis, and moved towards the myriad of websites, publications, schisms and meetings generated by MDC and MDC-linked organisations in the UK. Details of local branch membership, activities of local branches and the overarching importance of the Vigil outside Zimbabwe House in the Strand became essential information. It was at this time, too, that asylum applicants apparently recognised it was useful to build up an 'activist profile' in the UK before putting in a claim or appeal.

Meanwhile, spiralling inflation, declining health services and the collapse of essential infrastructure allowed some lawyers to claim human rights (rather than asylum) ground for applicants to remain in the UK. I found that I had to enhance my

knowledge of Bill & Melissa Gates' Global Fund; the sewerage systems in the high-density suburbs; and the workings of international exchange rates. For one case, I had to research into successful businessmen who were also prominent MDC supporters, in order to expose a particularly mean-spirited refusal to a Bulawayo businessman. (The refusal said that he must be an economic migrant, because no MDC supporters were able to operate businesses in Zimbabwe). I ended up with an unexpectedly detailed knowledge of the dirty world of high-end schisms and betrayals around the boardrooms of Zimbabwe's electronics and internet sectors.

In early 2008, everyone held their breath, waiting to see what changes the election might bring. Expert advisors were gearing up for the possibility of being asked to give advice in appeals from Zanu-PF refugees coming to the UK to escape retribution following an MDC victory. As it turned out, the presidential election, the subsequent run-off election campaign and the eventual Global Political Agreement (GPA) dominated most of the year. The extremity of violence during the run-off campaign was incontrovertible and widely documented. By November 2008, a new Country Guidance case, 'RN', had been established in the UK, responding to the bloody 'How did you vote?' campaign. 'RN' was a very permissive ruling, which indicated that any Zimbabwean who could not *demonstrate* active support for Zanu-PF might be at risk on return.

The 'RN' CG led to relatively straightforward cases and appeals. Unless an applicant or appellant actually had an unmissable history of being a Zanu-PF cadre, it was difficult *not* to be deemed eligible for asylum under 'RN'. All that was asked of country experts was to confirm that the threat of extreme political violence which underpinned 'RN' – evidenced by the existence of youth militias, the lack of electoral reform, sporadic politically-motivated violence around the consultations for constitutional reform – was still in place. There were many other things happening in Zimbabwe under the new Government of National Unity that were much more positive. But the questions specifically posed by the lawyers did not ask us to comment on these.

I began to notice, nonetheless, that many of the cases referred to me during the 'RN' period involved people who had been convicted of a crime while in the UK. Such people – many of whom had committed crimes because they were unable to earn a living without appropriate papers – could be deported as criminals, rather than as failed asylum seekers. Often, the lawyers were simply trying to assert that the claim for asylum should be heard at all, rather than appealing against a refusal. The permissiveness of the 'RN' ruling made it a propitious time to be attempting to make such a claim.

On 10<sup>th</sup> March 2011, a new Country Guidance ruling for Zimbabwe was promulgated. This ruling – known as 'EM and Others' – makes it very much harder for Zimbabweans to argue for asylum in the UK. Whereas 'RN' defined anyone who

could not actively demonstrate support for Zanu-PF to be at risk, 'EM and Others' is much more restrictive and specific in defining categories of people who might be at risk, and even specifies categories of people who should *not* be deemed at risk.

Unsurprisingly, given the history of CG cases for Zimbabwe, 'EM & Others' is already under challenge and leave has been given to appeal against it. However, in the year that it has been in place, it has already had a noticeable impact on the kinds of issues that country experts are asked to address. Everyone with whom I spoke agreed that two issues now dominate the reports they are asked to write: internal relocation options, and the details, timetable and progress of the GPA. The latter is easily explained by an observation in 'EM & Others' that:

'There is a considerable body of evidence to the effect that, if elections were to be held early at the instigation of Mugabe and ZANU-PF, in defiance of international opinion, there is a real risk of violence on the scale of 2008... In such a scenario ("the early election scenario"), a returning failed asylum seeker from the United Kingdom would face a situation in all essential respects akin to that identified by the Tribunal in RN.'<sup>19</sup>

All reports are therefore now required to comment on the threat of early elections: a task perhaps made easier by the fact that a leading Zanu-PF spokesman has announced early elections almost every week since 'EM & Others' was issued.

Internal relocation options, on the other hand, have opened up new areas of research, revolving primarily around social/cultural issues and requiring some engagement with anthropological literature. Internal relocation options were routinely discussed in country expert reports prior to 'EM & Others', because it is incumbent on applicants to demonstrate that this option is not available to them. However, the discussion was, in the past, fairly formulaic and cursory, relying on an explanation of the nature of the Zimbabwean state and its systems of registration and security service information networks. This changed with 'EM & Others' because the new CG specifically suggested that some parts of the country might be safe:

(4) In general, a returnee from the United Kingdom to rural Matabeleland North or Matabeleland South is highly unlikely to face significant difficulty from ZANU-PF elements, including the security forces, even if the returnee is a MDC member or supporter...

(5) A returnee to Harare will in general face no significant difficulties, if going to a low-density or medium-density area. Whilst the socio-economic situation in high-density areas is more challenging, in general a person without ZANU-PF connections will not face significant problems there (including a "loyalty test"), unless he or she has a significant MDC profile, which might cause him or her to feature on a list of those targeted for harassment, or would otherwise engage in political activities likely to attract the adverse attention of ZANU-PF.

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<sup>19</sup> EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98(IAC), 10<sup>th</sup> March 2011, §241

(6) A returnee to Bulawayo will in general not suffer the adverse attention of ZANU-PF, including the security forces, even if he or she has a significant MDC profile.<sup>20</sup>

Again, the situation has changed rapidly since the CG ruling was made. In some Harare high-density suburbs – notably Mbare, the oldest and best-known – there are very powerful youth militia groups, linked to Zanu-PF, who effectively control the districts. There is also Zanu-PF activity in Matabeleland North, Matabeleland South and Bulawayo. So part of the work now is to monitor the extent of this activity.

However, alongside this research into specific geographic areas, there is also the question of how easy it is for someone to relocate. In particular, we are asked to comment on the problems faced by single women attempting to settle as returnees in areas with which they have no connection. The situation is very different from that facing the same women attempting to settle as asylum seekers in the UK. To explain this, we need to set out, in some detail, the complexities of how kinship networks and patronage systems work, and how fundamental these are for access to essential services and resources. Alongside information about politically-motivated sexual violence and gender-based violence more generally, our reports require a growing anthropological content.

We wait to see what the challenge to ‘EM & Others’ will bring. It seems certain that it will throw up new issues in the ongoing tussles between lawyers and the Home Office. Country experts on Zimbabwe will once again have to move with the times, providing the information that delineates the specific features of the chessboard upon which the game takes place. Increasing numbers of such experts, it seems likely, will wish to withdraw from the process, as the situation on the ground becomes ever-more complicated and difficult to encapsulate within the adversarial asylum process. This survey illustrates that country expert reports cannot resolve the political and legal difficulties faced by asylum tribunals. They can, however, if treated kindly, provide an essential contribution to the picture: a contribution that is largely painted on the CG canvas.

Diana Jeater, Visiting Research Fellow, Centre for African Studies, University of Oxford

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<sup>20</sup> EM and Others (Returnees), §267