

Anthropologists as providers of Country of Origin Information (COI) in the British asylum courts

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Abstract: Country of Origin Information (COI) is crucial to most legal findings regarding the plausibility and credibility of asylum seekers' narratives of persecution. COI comes from various sources: Country Reports from governments, multinational agencies and NGOs; printed and electronic media; and evidence from 'country experts' such as anthropologists. This paper analyses the evolving role of COI in asylum decisions in British asylum courts. Drawing on interviews, observation, and the author's own role as a 'country expert', it describes how COI is produced by the Home Office's Country of Origin Information Service, and how it is used in the refugee status determination process by key actors such as UKBA case owners, asylum lawyers and Immigration Judges. The paper then describes three fact-finding visits to Sri Lanka, to gather up-to-date information on the human rights situation. It explains how these field visits helped shed light on important issues arising in Sri Lankan asylum claims, but also reflects on how such evidence is received and evaluated by judges. It also explains the problems posed for anthropological expert witnesses by recent judicial attempts, in the form of 'Country Guidance' cases, to adopt standardised views on such factual matters as the treatment of apostates in Iran, or the risk faced by LTTE suspects returned to Colombo.

A refugee is someone who has a ‘well-founded fear of being persecuted’ for one of the reasons specified in the 1951 Refugee Convention. In order to demonstrate that their fear is indeed ‘well-founded’, asylum applicants need to show that people of their political or ethnic or social or sexual background are likely to be at risk in their home country. In other words, they must produce Country of Origin Information (COI) demonstrating the existence of such a risk. Moreover, their fear concerns something that may happen to them *in future*, so refugee status determinations are always risk assessments. In practice, though, the most effective method of demonstrating a risk of persecution in the future, is to show one has suffered persecution in the past. The stories that asylum-seekers tell about their personal experiences of suffering are the principal—often, the only—evidence they have, and the key decision for officials or judges is whether they believe that story. The focus is on the credibility of the applicant, in two senses. Is their story *internally* consistent, without contradictions and confusions over dates and places; and is it *externally* consistent with information about the situation in their home country? This second, external aspect of credibility obviously requires, yet again, that the applicant’s narrative should be judged in relation to the available Country of Origin Information.

In short, COI is crucial in almost every asylum claim, in establishing both the existence of certain general categories of persons at risk in asylum applicants’ countries of origin, and the plausibility and credibility of the stories told by individual claimants. The UNHCR *Handbook* states at para 42 that ‘A knowledge of conditions in the applicant’s country of origin... is an important element in assessing the applicant’s credibility’ (UNHCR 1992),¹ while Article 4(3)(a) of the EU’s *Qualification Directive* states that the assessment of asylum applications must take into account ‘all relevant facts as they relate to the country of origin at the time of taking a decision on the application’.²

In practice the outcomes of most asylum applications depend upon decision-makers deciding which version of these ‘relevant facts’ they prefer. Indeed, as the UK Asylum and Immigration Tribunal has stated, if an asylum judge ‘fails to relate an appellant’s story to the background evidence on the appellant’s country, he has necessarily applied the wrong approach’ (*Jeyakumar*). COI therefore figures importantly in refugee status determination procedures in the UK and Europe generally, though there remain important national differences in how it is produced and used (Gyulai 2011: 7).

¹ ‘Decision-makers must assess an applicant’s claim and his/her credibility and place his/her “story” in its appropriate factual context, that is, the known situation in the country of origin’ (UNHCR 2004: para 9).

² The Qualification Directive (*Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees...*: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>; accessed 11/09/10) aims towards a situation whereby member states ‘apply common criteria for the identification of persons genuinely in need of international protection’ (*Preamble*). It was implemented in UK domestic law through the *Refugee or Person in Need of International Protection (Qualification) Regulations 2006* (SI 2525/2006).

The Refugee Status Determination Process in the UK

Asylum claims in the UK are administered by the UK Border Agency (UKBA), a branch of the Home Office. Immediately after making their claim, applicants undergo screening interviews to establish their identity and collect basic personal information. A few weeks later there is a far more detailed asylum interview with a UKBA case owner. This focuses on establishing the basic chronology of the applicant's story and testing its internal credibility. The case owner then has to reach a decision about the asylum claim. If the applicant *is* awarded refugee status no reasons are given. Mostly, however, the claim is refused, and the case owner writes a Reasons For Refusal Letter (RFRL) explaining and justifying that decision. Most RFRLs claim that the applicant's story lacks credibility, because of alleged inconsistencies in their answers; because aspects of their narrative are inconsistent with available COI; or because their story is deemed inherently unlikely.

Most refusals entail rights of appeal to an Immigration Judge (IJ) from the Immigration and Asylum Chamber of the Tribunal Service. The administrative structure of the immigration courts changed several times over the past decade, but the structure of appeal hearings themselves, and the ways in which evidence is used, did not change.

Most asylum seekers are legally represented at their appeal. The documents for the appeal, including their own witness statement, are prepared by their solicitor, but the advocate who actually represents them in court is usually a barrister (also referred to as 'counsel'). UKBA is represented in court by a Home Office Presenting Officer (HOPO), who is generally not a trained lawyer.

Hearings begin with a brief 'examination-in-chief'. The appellant is asked by their barrister to confirm that the contents of their asylum interview transcript and witness statement are true and that they wish to submit them as evidence. The appellant is then cross-examined by the HOPO. This is the longest part of the hearing. HOPOs ask very detailed questions, in the hope of receiving replies that seem inconsistent with the asylum seeker's previous interviews and statements, which they can then use to cast doubt on the appellant's credibility. Very occasionally, other witnesses may then be called to corroborate parts of the story or give expert evidence.

The HOPO then makes closing submissions to the judge, arguing that the refusal of asylum should be upheld. HOPOs generally attack appellants' credibility, but they also cite 'objective evidence' in the form of COI that is said to support UKBA's decision. The appellant's barrister then tries to rebut the credibility points, and offers rival interpretations of the COI. The IJ later produces a written determination announcing the decision, which must indicate how much weight has been given to each piece of evidence.

Uses of COI in the Refugee Status Determination Process

Clearly, COI is crucial throughout this process. It underlies the decisions by UKBA, and later the Immigration Judge, regarding the asylum seeker's credibility, and forms the basis

for assessing the risks involved in refouling that person to their home country. COI material comes from a variety of sources including reports produced by experts, news services, NGOs, government bodies, and international agencies.

The 'official' source of COI is UKBA's Country of Origin Information Service (COIS). COIS produces reports at 6 monthly intervals for the 20 odd countries generating most asylum applications (http://rds.homeoffice.gov.uk/rds/country_reports.html; accessed 08/09/2010). In the past, when Country Reports were produced by COIS's precursor, the Country Information and Policy Unit (CIPU), they were severely criticised by asylum NGOs and others for basic factual errors and highly questionable interpretations (Asylum Aid 1995, 1999; IAS 2003a, 2003b, 2004). For example, a detailed IAS study of 21 of the CIPU Country Assessments published in April 2003 concluded that:

the Home Office is extremely selective in its use of information, consistently painting a far more positive picture of country conditions than the sources the Home Office has relied upon. The reports are also full of inaccuracies and out-of-date material (IAS 2003a: 4).

Partly to meet such criticisms, the Home Office set up an independent Advisory Panel on Country Information to review these reports and recommend improvements (<http://apci.homeoffice.gov.uk/>; accessed 08/09/2010). Nowadays, these reports contain no editorial content whatever; they consist entirely of quotations from pre-existing (mostly publicly-available) electronic sources, with no comment or evaluation of this material by UKBA staff themselves. Of course, there are still questions regarding the selection of sources and of passages to be quoted. Problems may also arise from the fact that the picture presented is not always coherent. Reports often contain material from different sources which is potentially or actually contradictory. COI users, be they judges, lawyers, HOPOs or UKBA case-workers, may then find it difficult to reach balanced judgements, given that they themselves do not have detailed knowledge about the country in question.³

UKBA also produces policy-related COI. In particular, its Operational Guidance Notes (OGNs) summarise 'the general, political and human rights situation in the country and [provide] clear guidance on whether the main types of claim are likely to justify the grant of asylum' (www.ukba.homeoffice.gov.uk/policyandlaw/guidance/csap/; accessed 08/09/2010). OGNs are not produced by COIS, but by UKBA's Country Specific Asylum Policy Team (IAS 2009: 4). OGNs are policy documents. The COI they contain is not

³ The *UK Borders Act 2007* created an independent Inspectorate to oversee UKBA's activities, and from March 2009 APCI's role was taken over by an Independent Advisory Group on Country Information, reporting to the Chief Inspector (<http://icinspector.independent.gov.uk/country-information-reviews/>; accessed 08/09/2010). It operates in a very similar way to APCI, with some of the same personnel.

subject to independent scrutiny and is arguably selectively chosen to bolster policy.⁴ They should not therefore be used as sources of COI by case owners drafting RFRLs. However, while UKBA consistently asserts that this does not happen, asylum lawyers (and even UKBA case owners themselves, pleading convenience and pressure of time) are adamant that it *does* (IAS 2010a: 65). In any event, case owners believe OGNs have considerable authority (IAS 2010a: 65), so even if they rely on OGNs only for broad policy steers, the information they contain is bound to influence decision-making.

At the appeal hearings in the Tribunal, the COI material used by HOPOs in presenting their arguments is drawn almost entirely from COIS *Country Reports*. Barristers cite them too, but usually also submits other documents such as generic reports by human rights bodies, medico-legal reports by doctors, or reports by so-called ‘country experts’. It is very common for anthropologists, political scientists, human geographers, and others with detailed knowledge about the countries of origin of asylum seekers to be asked to prepare such reports. At least half my anthropology colleagues in Edinburgh have done so on at least a few occasions over the years.

Expert Reports

Expert witnesses in some professional fields are routinely expected to belong to Expert Witness organisations, and to have undergone specialised training. Even in asylum cases, the doctors who write medico-legal reports are expected to adhere to certain protocols, such as the DSM-IV (American Psychiatric Association 2000) for PTSD diagnoses, or the Istanbul Protocol (OHCHR 2004: 34-35) when assessing scarring. Country experts, however, are almost entirely unregulated in terms of qualifications and training, and there are no protocols to be observed—only the general rules over an expert’s duties as set out in the *Civil Procedure Rules* (Ministry of Justice 2011a)⁵ and the Tribunal’s own *Practice Directions* (Ministry of Justice 2011b; Judiciary of England and Wales 2010, Part 10).

Experts are therefore left very much to their own devices when it comes to structuring their reports and even to deciding what may or may not properly be included in them. In general they get no advice from their instructing solicitors on such matters,

⁴ Huber (IAS 2009: 61) notes that ‘problems with the use of COI in Home Office OGNs [include] inaccuracy, underuse, misuse, and misinterpretation’.

⁵ The duties and responsibilities of expert witnesses in civil litigation in the UK are set out in section 35 of the Civil Procedure Rules. Paragraph 35.3 states:

- (1) It is the duty of an expert to help the court on the matters within his expertise.
- (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

The applications of these rules are explained in a Practice Direction associated with section 35. Paragraph 1.3 of this Practice Direction states:

An expert should assist the court by providing objective, unbiased opinion on matters within his expertise, and should not assume the role of an advocate.

even if they commit the cardinal sin of offering opinions on the appellant's credibility—a prime example of an issue that is the prerogative of the Immigration Judge.

I therefore had to develop my own strategies and structures, which evolved over the years as my understanding of the appeals process grew.⁶ My reports now begin with a table of contents, listing the headings, sub-headings and the paragraph numbers within each section. An opening background section says when and by whom I was instructed and lists the documents that have been shown to me. I then summarise the key points in the appellant's narrative, and briefly consider whether this narrative is plausible, and consistent with the background evidence, before dealing with my specific instructions, beginning each section by quoting verbatim from the instruction concerned.

The same issues tend to recur, so reports contain significant amounts of generic material. It is of course important to tailor responses to the unique situation of each appellant, but most asylum seekers are not high-profile enough to have figured in news reports or other documents that might corroborate their specific stories.⁷ Virtually every report involves discussions of the prevalence of torture in the context of the Prevention of Terrorism Act and Emergency Regulations; the culture of impunity and the ineffectiveness of the Sri Lankan Human Rights Commission; and the quality of official record-keeping, which speaks to whether the Sri Lankan authorities are likely to identify a returning failed asylum seeker at the airport or thereafter. Annexes to the report contain my CV, and a declaration that I have observed the legal obligations of an expert witness—above all, my awareness that my over-riding responsibility is to the court. In the body of the report, sources are obsessively cited and quoted to add weight to my analyses, as this example from a recent report shows:

188. The UN Committee Against Torture recently considered the situation in Sri Lanka. There were numerous submissions to UNCAT, including by the *International Committee of Jurists* (www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23899; accessed 27/11/2011); *Freedom from Torture* (cited at para 48 above); and *Amnesty International* (www.amnesty.org/en/library/asset/ASA37/016/2011/en/2bb1bbe4-8ba5-4f37-82d0-70cbfec5bb2d/asa370162011en.pdf; accessed 01/12/2011)...
189. UNCAT has subsequently published its findings. I quote here only very briefly:

Para 6: ...the Committee remains seriously concerned about the continued and consistent allegations of widespread use of torture and

⁶ Ten years ago, I routinely included potted histories of the ethnic conflict in Sri Lanka, but abandoned this practice once the Home Office's *Country Reports* improved, and once I realised that experienced IJs heard so many Sri Lankan cases that they were already familiar with the factual background.

⁷ There are exceptions of course. I have written reports on two Members of Parliament and several reasonably well-known journalists, as well as in the Suresh case that may be familiar to Canadian listeners.

other cruel, inhuman or degrading treatment of suspects in police custody...

There is a tension built in to this system. On one hand, experts are required to adopt an objective attitude towards the evidence; their overriding duty is to provide information to help judges reach their decisions. On the other hand, the legal process is adversarial, and experts are always hired by the lawyers representing asylum applicants; the Home Office never uses experts of its own. One consequence of this paradox is that HOPOs, and UKBA generally, tend to see experts as hostile witnesses whose evidence is meant to support the asylum claim. Many judges, too, suspect experts of being 'hired guns' aiming to provide evidence in favour of the claim, either because they have been paid to do so or because, for political or humanitarian reasons, they are sympathetic.

HOPOs therefore do their best to discredit experts. If, as is usually the case, the expert is not actually present in court, the HOPO will attack both the report's contents and the expert's credentials. If the expert *does* give oral evidence, most HOPOs are ill-equipped to sustain such critiques, but even so they will try to convince the judge that the expert's opinion is biased or incomplete and should not be relied upon.

It is an inevitable byproduct of an adversarial legal process that expert witnesses should face criticism from those who do not wish the expert's opinion to influence the judges. Even so, it is impossible not to be irritated by some of the objections raised. As is often the case in legal argument, lawyers will argue from entirely opposite premises on different occasions. Again this is a matter of pragmatism; the overriding aim is to win one's case, not to maintain logical coherence. For example, the HOPO may, according to circumstances, seek to reduce the weight of the expert's opinion by arguing that it is out of date because the expert has not visited that country for some time; or, where this argument does not apply, will belittle the recent evidence which the expert has uncovered as being purely anecdotal, unsupported by documentary sources, and hence not to be relied upon. For lawyers, unlike anthropologists, documents carry far greater weight than the testimony of first-hand, personal experience.

Consequently, there are at least two reasons for paying regular visits to the country on which one claims expertise. The first and most obvious is to observe the situation at first hand; to interview people in key positions or with specialised knowledge; and—even in this electronic era—to collect documentary evidence not available outside the country. The second reason, less trivial than might at first sound, is simply to undercut potential criticism by the HOPO by demonstrating recent in-country experience.

The Field Visits and the Ethnic Conflict

I have made three visits to Sri Lanka with the specific purpose of collecting human rights information. Each time, I was accompanied by a British immigration solicitor who has specialised for more than 15 years in asylum claims by Sri Lankan Tamils. I first met and

interviewed him in 2001 during my initial research into the uses of expert evidence in asylum appeals precisely because, at that time, he was unique among immigration lawyers in *not* using country experts, but instead paying regular visits to Colombo to collect evidence for himself.

The roots of Sri Lanka's long-running ethnic conflict lie partly in demography. Sinhalese make up around 70% of the population, whereas only 20% are Tamils. Geographically, Tamils are concentrated in the northeast of the country while Sinhalese predominate in the Central Highlands and Southwest coastal strip. The operation of the universal franchise after independence meant that the key to electoral success was to play in an increasingly chauvinistic way for the support of the Sinhalese majority.

While I was first in Ceylon in 1970-72, it became the Republic of Sri Lanka under a Left Front government headed by Mrs Bandaranaike's SLFP, and the new constitution abandoned earlier safeguards preventing ethnic discrimination; most importantly, given the high priority Tamils give to education, quotas were introduced limiting their access to universities. As a result the Tamil United Liberation Front (TULF) was formed and fought the 1977 elections on a separatist platform. It won several seats but its relative lack of influence led to the appearance of militant 'Tamil Tigers' groups. There were serious anti-Tamil riots in 1983, after Tigers killed 13 Sinhalese soldiers in Jaffna, and the ethnic conflict is generally dated from this event.

Violent Tamil resistance grew in scale, and in 1987 the Indian government (which had been covertly supporting these militant groups) intervened as a mediator. An Indian Peace-Keeping Force (IPKF) was sent to Sri Lanka but instead spent two years fighting the militants before withdrawing ignominiously. The largest group, the LTTE, began assassinating constitutional politicians from TULF, as well as members of rival militant groups, whose survivors reformed as pro-government paramilitary groups like EPDP and PLOTE. From 1990 onwards, the LTTE formed the *de facto* administration of the Jaffna peninsula and parts of the east coast.

After more than a decade of military escalation, punctuated with occasional brief ceasefires, a formal ceasefire agreement was signed by the government and LTTE in February 2002. Though closely observed by both sides at first, there was a gradual slide back into violence from 2005 onwards. The government formally withdrew from the ceasefire in January 2008, precipitating the military conflict that ended in May 2009 with the complete military defeat of the LTTE, and the deaths of huge but still unknown numbers of Tamil civilians.

Our field visits took place at different stages in the ceasefire process. The first was in August 2003, when the ceasefire had been in operation for a year and was being largely observed by both sides. The land route linking the Jaffna peninsula and government-controlled areas in the south had been opened, and it was possible for us to make this journey through LTTE-controlled territory and, under the auspices of the

TULF party, to visit one of the extensive High Security Zones in Jaffna, from which the entire civilian population had been forcibly evacuated. We also spent a day with the staff of the Sri Lanka Human Rights Commission in Jaffna.

Because the situation was relatively relaxed at that time, none of our informants were at all concerned about remaining anonymous. Nonetheless, we were under surveillance from the security forces. The solicitor was contacted by a Tamil lawyer in London, who had been phoned up by Colombo police, asking questions about us and whether we had any kind of official status. On this and subsequent visits, we therefore had to bear in mind the potential risk we posed to our informants. This was particularly relevant for my solicitor companion because, in seeking evidence that he could submit directly in British courts, he did not merely interview people and make his own notes, as I did, but had to produce signed witness statements. Many of these contained allegations of human rights violations by the army or police. In order to reassure the statement-givers, such statements were faxed back to London and the paper copies were handed over so the statement-givers could personally destroy them.

Our February 2006 visit also took place while the ceasefire was officially still in effect, but being far less rigorously observed. On this occasion, I travelled with my wife to the east coast city of Batticaloa, not only to find out more about the human rights situation in the east, but also because I had a PhD student working there. In Batticaloa I was also able to see the effects of the tsunami just over a year earlier, and to witness the astonishing levels of security on Eastern highways. On this visit, people in Colombo were still willing to speak freely and allow use of their names. In Batticaloa, on the other hand, where a factional split in the LTTE had occurred a few months earlier, leading to widespread killings, disappearances and abductions, people were very cautious about revealing information and anxious that their names should not be used. On our third visit, in February 2010, almost no-one from the NGO sector was willing to be quoted by name, even in Colombo, because of the levels of threat and harassment against news reporters or NGO activists working on human rights violations. For this reason too, our visit was confined to Colombo and it did not seem appropriate to produce a public-domain report.

The Human Rights Commission

Many different issues arose during these three visits, which had a bearing on the evidence in my subsequent expert reports. I shall mention just one of these, from the 2003 visit.

The Sri Lankan government created a national Human Rights Commission (HRC) in 1996. This was undoubtedly a positive step, though the legislation establishing the HRC did not comply fully with international humanitarian law, and there were problems over implementing its provisions. For example, although HRC staff could visit authorised detention centres, some prisoners were held in unauthorised places. Most crucially,

HRC's mandate did not cover pro-government militias, which work in tandem with the security forces and do much of their dirty work as regards abductions and disappearances.

UKBA Reasons for Refusal Letters in 2003 regularly cited the creation of the HRC as evidence of improvement in the human rights situation. A typical paragraph read:

A National Human Rights Commission was established in 1996, tasked with monitoring government human rights practices, ensuring compliance with constitutional fundamental rights provisions and investigating complaints of human rights violations. Although the Commission has been criticised for failing to pursue aggressively its broad mandate, it has undertaken numerous visits to places of detention.

It was therefore clearly important to try and assess at first hand the conditions under which the HRC was operating, and during our 2003 visit to Jaffna I spent a day in the local HRC office. A UN human rights trainer, assigned to this office, told me that there were problems over the narrow operational definition of torture used by the HRC, which was limited to physical ill-treatment. Staff complained that too much time was wasted on complaints concerning familiar South Asian grievances like salary arrears, promotions, transfers, and appointment procedures.

I was shown HRC's log books in which complaints were recorded and actions taken were noted. When complaints of torture were received, the HRC response was to undertake mediation; the two parties were brought together and the officer was asked to admit the truth of the allegation and to pay compensation. The advantage for the soldier concerned was that the matter went no further; they faced no disciplinary proceedings.

Most significantly, HRC's Regional Coordinator Mr Chandrasekara, who was by general agreement one of its most committed and effective officials, was subject to army harassment. He was often stopped at military checkpoints while travelling on official business, and had made formal complaints. I was shown a letter from the Jaffna Military Commander, referring to an incident when Mr Chandrasekara refused to allow an armed soldier to travel in his vehicle during a visit to a High Security Zone, on the grounds that HRC had to maintain independence and neutrality. Mr Chandrasekara maintained that he was entitled to move around unescorted, but the letter asserted in strong language that were he to make similar demands in future, soldiers had been ordered to refuse him entry to the Zone without needing to refer the matter to senior officers.

Attempts by the security forces to restrict the movements of HRC staff and potentially compromise their neutrality escalated after my visit:

In September 2004 a police officer assaulted HRC officer Ruwan Chandrasekera, who was investigating a complaint at the Jaffna police station. The case, scheduled to be heard in November, was delayed indefinitely because Chandrasekera relocated to Canada (State Department Report on Sri Lanka, 28 February 2005).

Mr Chandrasekera was not the first HRC official forced to flee the country under threat. The 2002 US State Department Report had noted that HRC's Vavuniya office director had fled the country after receiving death threats.

This kind of information is of great importance in assessing HRC's capacity to oversee the kinds of improvements in human rights observance constantly referred to in Refusal Letters. It is also precisely the kind of information, concerning daily practice rather than paper regulations, which anthropologists are especially qualified to provide. In our own professional terms, one day observing the workings of an office scarcely qualifies as fieldwork. Even so, it provided me with insights that have been helpful in assessing numerous asylum cases ever since. In particular, it has allowed me to illustrate to judges the practical difficulties involved in monitoring human rights observance on the ground.

Anthropological evidence in the courts

As regards the weight attached by the court to the evidence in such reports, there is a curious reversal from the situation in academia. When we anthropologists present our seminar papers to colleagues, the element most immune from criticism is our own ethnography; as James Clifford pointed out, 'I was there' is a clinching argument unless you are willing to question my competence or my honesty (Clifford 1988: 25; Good 2006: 101). In legal contexts, however, ethnographic observations are liable to be dismissed as 'anecdotal', and prime authority is accorded to documents. The fact that the latter too are ultimately traceable back to originating observations is ignored.

For example, two of the field visits just described led to generic, public domain reports for general use in connection with Sri Lankan asylum claims. In those reports, I explicitly disavowed any claims to completeness and explicitly avoided drawing any conclusions of my own. For example, my 2006 *Visit Report* stated on its title page:

This report does not purport to provide a comprehensive overview of all human rights issues in Sri Lanka, or of events subsequent to the visit. The topics covered are limited to those arising from discussions during the visit, and from documents supplied to me while in Sri Lanka, supplemented with material from other relevant documentary and electronic sources.'

I also made it clear that I was simply reporting what was said or shown to me by particular, named informants. The 2006 *Report* said:

In this report, I distinguish clearly between what I observed for myself and what I was told by others. Where assessments are those of particular persons, this is indicated where possible.

The report therefore consisted almost entirely of paragraphs such as:

At my interview with Home For Human Rights, Colombo, I was given much detail on recent disappearances, and provided with copies of a number of affidavits by relatives of the disappeared. Mr Xavier and Mr Ganeshalingam noted that there had been very few disappearances for a long period after the start of the current ceasefire, but these began again after Mr Kadirgamar's

assassination and the immediate reintroduction of the ERs on 13 August 2005 and increased after the Presidential election on 17 November 2005. Since then there have been about 100 civilian disappearances in the North and East.

Even so, one panel of IJs (*Santhirakumar Subramaniam*), faced with this *Visit Report* in a case where I had not been asked for a specific report, responded as follows:

Turning now to the expert evidence adduced on the appellant's behalf, we are bound to say, with respect to Professor Good, that we are not impressed with his report. Although Professor Good is plainly qualified by his experience and background as recorded at paragraphs 1 to 7 (inclusive) to give expert evidence on the matters covered by it, **he has fallen into the trap of expressing his views freely but failing to identify his sources, except in the most general terms.** In that regard, it is not sufficient for an expert merely to make *ex cathedra* pronouncements on the various issues placed before him. If his views are to be given any significant weight, he must also state with sufficient clarity *how* he knows these opinions to be true. Failure to do so is bound to devalue the evidential weight of his opinion.

I can only interpret this response, which at first seemed bewildering, as a kind of genre mistake; a complete failure to recognise the nature and status of the material and sources, which were of course mainly people rather than documents.

Judicial Evaluation of COI

Virtually all asylum appeal determinations make reference to COI, though sometimes this may be very brief. On the other hand, it is often left unclear precisely what COI had been before the Tribunal and how this has been analysed and assessed.⁸ In their determinations, IJs use COI for a variety of purposes, such as corroborating information about specific places and individuals; evaluating the weight of expert reports; assessing general credibility; and estimating future risk (Townhead, in IAS 2009: 36).⁹

As noted earlier, the more comprehensive the COI available the more likely it is to contain assessments and opinions that are potentially or actually contradictory. Partly for this reason, a checklist of criteria for evaluating country information has been developed by the International Association of Refugee Law Judges, under the general headings of the relevance and adequacy of the COI; its source; its nature and type (which rather oddly turns out to refer mainly to impartiality and balance); and whether it has received prior judicial scrutiny (IARLJ 2009: 150-51).¹⁰ The topic was also considered in the recent ECtHR decision, *NA v. United Kingdom*.

⁸ This does not apply to recent CG cases (see below), whose *raison d'être* is the analysis of COI, and which have adopted the practice of appending full bibliographies.

⁹ IJs display a range of different approaches to COI, though they all appear to treat it in a far more nuanced way than UKBA case owners (IAS 2010a: 23-24, 56-57).

¹⁰ Remarkably, in the IAS survey 'only 1 out of 5 IJs had heard of or were familiar with the IARLJ guidance, which deals with COI usage and analysis. Rather, when analysing, emphasis was placed on judgement and the normal judicial procedures of weighing up evidence' (IAS 2010a: 24).

120. In assessing such material, consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations.

121. The Court also recognises that consideration must be given to the presence and reporting capacities of the author of the material in the country in question. In this respect, the Court observes that States... through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment... It finds that same consideration must apply, a fortiori, in respect of agencies of the United Nations...

122. While the Court accepts that many reports are, by their very nature, general assessments, greater importance must necessarily be attached to reports which consider the human rights situation in the country of destination and directly address the grounds for the alleged real risk of ill-treatment in the case before the Court. Ultimately, the Court's own assessment of the human rights situation in a country of destination is carried out only to determine whether there would be a violation of Article 3 if the applicant in the case before it were to be returned to that country. Thus the weight to be attached to independent assessments must inevitably depend on the extent to which those assessments are couched in terms similar to Article 3 (citations omitted).¹¹

The determination in the recent CG case *TK v. SSHD* states, at para 5, that 'at least within the context of Article 3 jurisprudence, judges should now be assessing COI by the standards set out by the Court [in] *NA*',¹² which it summarises as 'accuracy, independence, reliability, objectivity, reputation, adequacy of methodology, consistency and corroboration'.

However, it is widely claimed by legal representatives and researchers that the level of critique applied by IJs to COI supplied on behalf of appellants is conspicuously lacking when it comes to Home Office country reports even though they too are produced by one side in an adversarial process (Natasha Carver in IAS 2005: 40). For example, in the starred determination in *Devaseelan*, the Tribunal seemed to apply quite different standards to a report from the Medical Foundation (Peel & Salinsky 2000), the premier UK source of expertise on torture, and the Home Office Country Report:

Medical Foundation Report: 'We must also add that this Report is structured as a reply to (or rebuttal of) the Home Office's reasons for refusing many Tamil asylum claims. Nobody could regard the whole report as anything other than partisan. It is written against the Respondent, by those who have taken the side of Appellants. In its proper place, it is none the worse for that. But it should not under any circumstances be regarded as "objective evidence"' (para 74).

¹¹ Thus, for example, the Court attaches less weight to UNHCR reports when these are 'focussed [sic] on general socio-economic and humanitarian considerations' (*NA*, para 122).

¹² *TK* actually says 'in paras 132-135 of *NA*', but the relevant discussion is at paras 118-122.

Home Office Country Report: ‘We note that the CIPU Bulletin is also a partisan document, in that it comes from an organ of the Respondent. It is, however, little more than a compendium of material from other published sources, which are listed in the bibliography. [...] The Bulletin is arranged in such a way that the source of each statement in it can readily be traced’ (para 75).

In adopting such reasoning the Tribunal is arguably prioritising style over substance, and ignoring the possibility that sources may be used selectively. Moreover the Medical Foundation report is largely a summation of evidence produced by medically examining all Sri Lankan clients referred to them for medico-legal reports or therapy. A strong case could therefore be made that, as a product of scientific research, it is the very opposite of partisan.

Country Guideline (CG) Cases

Certain COI issues constantly arise in asylum appeals by claimants of particular nationalities. It is clearly inimical to justice if that information is assessed differently in different appeals. So from 2000 onwards the Tribunal introduced the concept of Country Guideline cases, that assess the COI on issues commonly arising in claims from particular countries.¹³ Para 12.2 of the Tribunal’s *Practice Directions* explains:

A reported determination... bearing the letters “CG” shall be treated as an authoritative finding on the country guidance issue identified in the determination... As a result... such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:- (a) relates to the country guidance issue in question; and (b) depends upon the same or similar evidence (www.tribunals.gov.uk/Tribunals/Documents/Rules/IAC_UT_FtT_PracticeDirection.pdf; accessed 12/09/2010).

A CG determination thus sets a kind of ‘factual precedent’¹⁴ for IJs hearing similar cases. In *S & Others* Laws LJ broadly approved of this, with certain caveats:

28. While in our general law this notion of a factual precedent is exotic, in the context of the IAT’s responsibilities it seems to us in principle to be benign and practical. Refugee claims... are inevitably made against a political backdrop which over a period of time... is, if not constant, at any rate identifiable...

29. But... there must be safeguards. A principal safeguard will lie in the application of the duty to give reasons with particular rigour. [O]pinion evidence will often or usually be very important, since assessment of the risk of persecutory treatment in the milieu of a perhaps unstable political situation may be a complex and difficult task in which the fact-finding tribunal is bound to place heavy reliance on the views of experts...

¹³ The current roster of starred appeals, CG determinations and reported cases can be found on the Tribunal web site (www.tribunals.gov.uk/ImmigrationAsylum/utiac/CaseLaw/CaseLaw.htm; accessed 10/09/2010).

¹⁴ The Tribunal itself later expressed unhappiness over this term on the grounds that, unlike true precedents, findings in CG cases were always at the mercy of new evidence or a changed situation (*NM & Others*).

Many early CG cases utterly failed to live up to such standards. Some cited only one source, the COIS Report (*SSHD v. MG*; Natasha Carver, *ibid.*: 47). The same cannot be said now—*TK (Sri Lanka)*, for example, cites 450 sources—but it is still possible to query the comprehensiveness and balance of the sources used, for which, of course, the lawyers are at least as responsible as the Tribunal. In *FS*, for example, a CG case on apostasy in Iran, the Tribunal considered a large body of COI in a seemingly fair and balanced fashion. However, insofar as that material was religious in character, it came entirely from Christian sources; not a single source represented the views of Muslim scholars. As a result, the tribunal’s analysis was unavoidably riddled with orientalist presumptions, such as the conflation of *Iranian* law and *Islamic* law (Good 2009: 42-43).

Risk assessments must be based on the country situation on the date of the hearing (*Ravichandran*); consequently, CG cases risk being ‘out of date on the day they are promulgated’ (Yeo, in IAS 2005: 16). In my view, CG cases arguably have a place for issues where changes are unlikely in the short or medium term (cultural attitudes towards rape victims, for example), but seem utterly inappropriate for matters where the situation might change at any moment, such as the level of risk faced by Tamils if returned to Colombo, which was a principal issue in the last four CG cases dealing with Sri Lanka.

Whatever its merits in promoting consistent decision-making, the CG system also poses problems for ‘country experts’, as I have already experienced on two occasions:

‘the Appellant’s representatives ought to have ensured that Dr. Good’s report addressed... the Practice Directions’ (*JDJ*).

‘Leaving aside our disappointment that both [experts] (especially Professor Good) should have seen fit to go over old ground’ (*TK [Sri Lanka]*).

The problem here is that while lawyers may be bound by such ‘factual precedents’, experts clearly cannot be, because, with the greatest of respect, the opinion of a British IJ as to the prevailing situation in a given country or region carries no weight at all, *as evidence*, for a country expert. In forming and justifying their opinions on the issues, it is impossible for experts to ignore material simply because it was considered and pronounced upon in an earlier CG determination. If IJs are going to reserve to themselves the right to decide what COI is relevant to an expert’s opinion, there seems little point in commissioning expert reports at all.

Conclusions: On the ‘Objectivity’ of COI

William Twining has argued (1984; 2005; 2006a, b) that techniques for assessing factual evidence receive little attention in law schools and in the writings of academic lawyers, among whom there is also a ‘bifurcation... between the literature on the “logic of proof”... and the largely empirical literature on the role of narrative and stories in fact determination’ (2006a: 332). What is more, most legal adjudications of factual issues are ‘enquiries into particular past events in which the hypotheses are defined in advance by

law’ and in which ‘cases are artificially constructed units extracted from more complex and diffuse contexts’ (2006b: 447). All this seems likely to be especially true of asylum adjudications, because of the centrality of the asylum-seeker’s narrative.

Being thus under-theorised, the assessment of factual evidence by judges tends to reflect

a tradition of relatively complacent commonsense empiricism that... has devoted far more attention to the rules of admissibility than to questions about the collection, processing, presentation, and weighting of information... The rationality of the process is by and large assumed; the elusiveness of reality is barely acknowledged (Twining 1984: 40).

As social scientists we find ourselves frequently at odds with such ‘commonsense’ legal approaches to COI. For example, it has been standard practice in the British immigration courts to refer to COI as ‘objective evidence’, which has caused disquiet among expert witnesses because it appears to take no account of the contextualisation and interpretation to which all such knowledge is subject, whatever its source (Good 2007: 223-24). In a recent Country Guideline case (*TK*, at para 7) the Tribunal questioned this terminology for a rather different reason, namely, that ‘to refer to such evidence as “objective” obscures the need for the decision-maker to subject such evidence to scrutiny to see if it conforms to the COI standards just noted’ (a reference to *NA v. UK*; see above).

From the expert’s perspective, though, while it is disconcerting to hear one’s analyses being referred to by lawyers and judges as ‘objective evidence’, it is important to recognise that lawyers use a notion of objectivity quite different from that of philosophers and social scientists. For lawyers, it seems, ‘objectivity’ is a pragmatic, not a metaphysical notion. Rather than implying something external to the observer, and therefore capable of independent verification, it plays much the same role as the notion of ‘the Reasonable Man’ for the Barotse judges described by Max Gluckman (1955). For lawyers, in short, objectivity is nothing more than the subjectivity of the Reasonable Man. It follows that, in claiming objectivity for one of my expert reports in a court of law, I would merely be stating that no reasonable expert on Sri Lanka would be likely to reach different conclusions.

As for UKBA’s position, a clue may be gained from an argument advanced in the 2006 CG case *LP (Sri Lanka)* in which I gave written and oral evidence, UKBA’s lawyers were particularly concerned to try to minimise the weight of the expert evidence of Chris Smith, a British security specialist with excellent contacts among senior police and military officers in Sri Lanka. Dr Smith had made extensive use in his report of information gathered directly by him during interviews with key officials such as the Inspector General of Police. In written submissions to the court, the Home Office argued that the role of a “country expert” in asylum cases differed from that of experts in other forms of civil litigation. Normally, it argued, the role of experts is to use their specialist

knowledge to interpret the significance of, for example, medical diagnostic findings. It went on:

The role of a ‘country expert’ in an appeal before the AIT is rather different. Here, the issue relates to conditions in a specified country or region. **It is unlikely that any specialist knowledge is required in order to interpret the information. Rather the role of a ‘country expert’ is to assist with the provision of the ‘raw data’**, in terms of providing comprehensive and balanced factual information... Whilst the AIT may be assisted by the opinion of a ‘country expert’, it is important that the tribunal is provided with the factual material upon which that opinion is based, in order to conduct its own assessment of the conclusions to be drawn from it (italics in original; bold added).

UKBA was clearly attempting to limit country experts to mere gatherers of factual information for judges to interpret. Moreover, the reference to ‘raw data’ laid the groundwork for an argument advanced in court, that Dr Smith’s evidence should not be accepted unless he also provided the interview notes he had made at the time. This argument was no doubt largely tactical, but the very fact that it was deemed worth advancing expresses a particularly naive form of Twining’s ‘commonsense empiricism’, that assumes these notes would be freer from bias and, by extension, that COI does exist, prior to its interpretation, as a form of ‘raw data’, ‘out there’ in the world.

Of course, *LP*’s barrister argued against this, saying that ‘a filtering process needs to be applied to the evidence and that is why an expert is needed’. Even this, in my view, does not go far enough; the process of providing COI is not one of filtering out a ‘truth’ that exists out there but has been contaminated by selectivity or bias; it is fundamentally and inevitably interpretive by its very nature. A similar point is made by Redmayne (2001: 14-16) when he points out that not all biases are motivational (the evidence provider is biased because s/he wants one side to win); there are also, and inevitably, cognitive biases whereby the very perception of the evidence is affected by the scientific and professional paradigms within which the observer has been trained or acculturated (Polanyi 1958; Kuhn 1962; Bloor 1976).

Of these two forms of bias, judges focus only on the first. For example, research found that some IJs were already questioning the objectivity of COI even before the comments in *TK* cited earlier, for ‘two main reasons: political agendas and selective information’ (IAS 2010a: 56). This is true at least as far back as the 2000 determination by Mr Justice Collins, the then President of the Tribunal, in *Slimani*: experts ‘all suffer from the difficulty that very rarely are they entirely objective in their approach... Many have fixed opinions about the regime in a particular country’. In short, IJs consistently see expert bias as purely ‘motivational’, a failing from which they appear to regard themselves as mercifully free. They seem wholly unaware of the possibility of ‘cognitive’ bias, which of course applies to them equally.

Happily, the judges in *LP* concluded that ‘in this jurisdiction experts are not merely the providers of raw data but they can be the interpreters of it as well’. Although the Home Office argument was mainly aimed at Dr Smith, it would have raised problems for me too if the judges had accepted it. There is no decision in English law as to whether anthropologists’ field notes are privileged documents, but in any case, if the court had demanded access to my notes I would have refused on grounds of professional ethics. Just to add a little extra frisson, I realised that the notebook in which I was transcribing these proceedings was the very one used on my 2006 visit to Sri Lanka, so that, unbeknownst to anyone else in court, I actually had with me the very evidence that the Home Office was unsuccessfully attempting to elicit!

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