

The Use of Expert Country Evidence

Discussion Paper

The Aim: To establish, within the different jurisdictions and systems of the IARLJ, some common denominators relating to the presentation and evaluation of country expert evidence as guidelines. Comprehensive or extensive country information can only be useful if the decision maker is able to properly weigh and assess that information in its appropriate context. When part of the evidence comes in the form of statements by, what will be called an ‘expert’, the decision maker needs to be able to assess the probable accuracy of such statements.

The Contextual Background: Knowledge of the conditions in an asylum applicant's country of origin – while not a primary objective – is an important element in assessing the applicant's credibility. There has been much work done on country of origin information (COI), including, e.g., *Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU* by Gábor Gyulai, published by the Hungarian Helsinki Committee (2007) and the composition of the *Judicial Criteria for Assessing Country of Origin Information (CoI): A Checklist*, compiled by the IARLJ's COI-CG Working Party.

These however have primarily addressed the production and assessment of documentary COI. It is now proposed to extend this qualitative assessment to include expert country information i.e. that provided by individual experts, written or oral, to refugee status determination bodies.

Methodology: It is proposed that the IARLJ Expert Medical Evidence Guidelines will serve as a blueprint. It is hoped that members from a wide range of IARLJ jurisdictions will contribute to this project to ascertain how regularly expert country evidence is presented to decision makers, how it is evaluated, what guidance already exists in determining who can be regarded as an expert etc. This contribution would most likely be sought via email interviews or the distribution of a web survey.

Case law will also be examined to identify instances in which country expert evidence has been received and accepted or criticised so as to see if there are commonalities in the treatment of this evidence. Any existing guidelines, policies and practice from the individual jurisdictions or other relevant bodies, such as the European Court of Human Rights or UNHCR, will also be considered.

Framework: Below is an initial, draft framework, using the Medical Evidence Guidelines as a basis. Although presented as guidelines these should be read as raising issues to consider and comment upon, and as including some background information relating to different jurisdictions which will need to be filtered and fed in to the formulation of the guidelines. This should be approached as an opening for discussion. Some initial points are listed at the end of the paper following the draft guidelines.

International Association of Refugee Law Judges' Guidelines on the Judicial Approach to Country Expert Evidence.

1.Introduction

1.1. The International Association of Refugee Law Judges (IARLJ) is committed to ensuring the provision of fair hearings and decisions to all claimants.

1.2. For the purposes of these Guidelines all references to judges include judicial and quasi-judicial decision makers.

1.2.1. These Guidelines are a tool designed to assist judges in the fulfilment of their task of ensuring that proper and adequate account is taken of all evidence, including any expert evidence on a country which is relevant to the decision within the refugee status determination processes or other asylum-related determination processes, which are all matters that affect the lives of individuals directly and profoundly.

1.2.2. For the purposes of these Guidelines 'country expert evidence' encompasses all matters relating to a country: cultural, social, political, economic, security, geographic, demographic, etc.

1.2.3. For the purposes of these Guidelines 'country expert evidence' includes only the evidence of an expert given by way of a written report or orally or both.

1.2.4. In some jurisdictions there may be no procedural provisions relating to who may call expert evidence and/or under what conditions. Judges should be receptive to country expert evidence whenever it is thought helpful.

1.2.5. Any country expert testimony deserves careful and specific consideration, bearing in mind particularly the consequences of any failure to understand the real situation as it affects the claimant in the country in question. The consideration given to a report depends on the quality of the report and the standing and qualifications of the country professional/expert. If the judge decides to reject any report provided by a country expert there is a positive obligation to do more than merely state that it had been 'considered'. The decision maker must disclose how the evidence has been taken into account, especially where any part of it is rejected, expressly or impliedly, particularly when making a negative credibility finding. The failure to give reasons for accepting or rejecting the expert evidence in whole or in part would be likely to be considered to be an error of law or a 'reviewable error'.

2. Use of the Guidelines

2.1. These Guidelines should be used and considered in conjunction with any other relevant guidelines and, of course, any particular rules or provisions laid down in the country where

the decision is being made. It is necessary to ensure equal treatment, with differentiation where appropriate, before the mandated asylum determination body.¹

2.2. Who is an expert?

(a) In relation to the country in general, e.g. an anthropologist giving background information

(b) In relation to the current situation in the country material to the case

2.3. Who calls the expert? What rules should there be regarding issues such as, e.g. disclosure, anonymity, links or relationships the expert may have with individuals or groups in the country in question?

2.4. Can a country expert's opinion in another case be used, and if so, under what conditions?

2.5. How are issues of contradictory evidence to be resolved, e.g. if documentary country of origin information (COI) is counter to the expert's opinion, or there are concerns of contamination of recollection?

2.6. In cases where an expert has not been recently, or perhaps never been, to the country or region in question can the report be accepted as expert country evidence as long as secondary, documentary sources are clearly cited and traceable?

2.7. Guidance on the assessment and weighing of expert country evidence – rely on comparison with other evidence, “common sense”, etc.?

3. The Role of Expert Country Evidence

3.1. Expert country evidence is obtained for one or more of the following purposes:

(a) To substantiate claims of persecution on return.

(b) To provide first-hand knowledge of the country and/or region as it is, and whether an individual or particular group of persons may be at some specified risk if returned, with reasons for this opinion.

(c) To provide the political or conflict analysis or the security situation, and possibly potential future developments.

(d) To contextualise the claimant's case within the situation of the country in question.

¹ See for example *Guideline 8 – Guideline on Procedures with Respect to Vulnerable Persons appearing before the Immigration and Refugee Board of Canada, December 2006*, which aims to provide procedures for dealing with claimants who may encounter additional difficulties due to, e.g. physical or mental health problems, age or gender issues.

(e) To analyse the national laws and the judicial system, including law enforcement. This may need to be covered in order to assess whether basic human rights are respected, in principle and in practice, and the likelihood of the authorities of the country in question being able and willing to provide protection against alleged human rights violations.

(f) To explain cultural and religious practices, ethnicity, language, geography, topography and history of a country that may be needed. The expert may be better placed to give this information than any documentation. In relation to the cultural milieu an anthropologist or sociologist, for example, may be in the best position to give valuable information.

(g) To evaluate documentary country of origin information (COI).

(h) To convey information the expert has gained from his/her own sources, e.g. key actors within the country, émigré academics, etc.

3.2. An assessment of the entire country situation as it may affect the claim could be central to the case and relevant for any prognostic assessment leading to a holistic decision.

3.3. An advantage of expert country evidence over documentary COI may sometimes be that it will better reveal what the situation looks like on the ground. Documentary COI, however well researched, can often give a sanitised or detached view, leaving the decision maker uncertain as to how it relates to the claim.

3.4. Some guidance may be necessary on how to approach country evidence as a whole, but the decision maker will need to weigh all the country evidence – expert, documents and the testimony of the claimant and any other witnesses.

4. Standards to Ensure Uniformity and Consistency of Expert Country Evidence

4.1. Expert country evidence should include the credentials of the author of the expert report.

4.1.1. In general, to evaluate any particular source it is important to ascertain:

(a) Who produced the information and for what purposes, taking into account such considerations as the mandate and philosophy of the country expert.

(b) Whether the country expert is independent and impartial.

(c) Whether the country expert has established knowledge.

(d) Whether the information is couched in a suitable tone, i.e. is objective rather than subjective.

4.1.2. Specifically it is important to establish:

(a) The qualifications of the expert.

- (b) How the expert obtained the information on which the report is based.
- (c) The membership of any professional bodies held by the expert.
- (d) The expert's relevant experience.
- (e) The expert's current Curriculum Vitae, including relevant publications and presentations.

4.2. Expert country evidence should demonstrate a critical and objective analysis of the country situation, remain impartial and refrain from giving any opinion as to the overall credibility of the claimant. The expert may offer an opinion as to whether the claimant's narrative is credible within the context of the country situation, however the final status determination decision remains with the decision maker.

4.3. A holistic approach should be adopted in the evaluation of expert country evidence. It will be considered in relation to all the other evidence, that of the claimant, other witnesses and documentary evidence.

4.4. Knowledge of conditions in the claimant's country of origin, while not a primary objective, is an important element in assessing the claimant's credibility and indispensable for any prognostic assessment which may be at the heart of a decision.

5. The Calling and Application of Expert Country Evidence

5.1. The same tests for treating a witness as 'expert' will apply here as much as in any other jurisdiction.

5.2. An advantage of expert testimony is the opportunity it provides, if the court wishes, to see and cross-examine the expert as to the content and methodology of his/her report. This may assist the decision maker in assessing whether the opinion given is based on facts that can be verified, e.g. by corroboration with other sources.

5.3. Some countries only allow expert evidence to be called by the court while others demand that attempts be made for it to be agreed between the parties and copies given to the court beforehand.

5.4. On occasion neither party may call such evidence but the court may deem it to be essential. What can or should be done in such cases will depend on local conditions, including readiness of funds for an expert, availability of legal aid, access to registers of experts, etc. In many countries such expert evidence may not be readily available or the court itself does not have the funds with which to fund a country expert.

5.4.1. The decision maker may be faced with the task of deciding whether s/he can call expert country evidence *suomoto* and if so, how it should be done and with what accompanying directions to ensure a fair hearing.

Starting Points for Discussion

Below are the main areas of discussion and points of contention that have arisen from the initial feedback provided on the Draft Guidelines on the Judicial Approach to Country Expert Evidence:

1. Paragraph 1.2.1. had originally read "...other asylum-related determination processes, for example immigration/migration appeals, humanitarian and human rights appeals." Concern was raised that this was broadening the remit too widely. Should the guidelines be addressed solely to refugee status determination? This sentence had however been taken directly from the Medical Evidence Guidelines, in which case should they be amended accordingly?
2. Section 2, The Use of the Guidelines, has been left deliberately vague as this was considered one of the parts most needing input, dealing as it does with some of the fundamental issues, e.g. who can be considered an expert, the reliance on other sources, whether to be 'expert' it is necessary for the person to have visited the country (how recently, for how long?)etc.
3. In section 3.1. (c) re the mention of "potential future developments". Should this be included? Is it helpful, or is it expecting too much conjecture, making experts list that while X might happen, so too could Y etc.?

Rebecca Wallace, Director, Centre for Rural Childhood, Perth College UHI, and Assistant Rapporteur to the Expert Evidence Working Party

Karen Wylie, Research Associate, Centre for Rural Childhood, Perth College UHI