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ROLE CONFUSION IN THE ASYLUM COURTS: SOME INSTANTANEOUS ETHICAL DILEMMAS

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[DRAFT: PLEASE DO NOT QUOTE WITHOUT PERMISSION]

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Abstract:

This paper deals with ethical dilemmas associated with field research into the legal processes of claiming asylum in the UK. In addition to the obvious and familiar (though not necessarily easily resolvable) issues which always arise when researching vulnerable groups of people, a more novel set of problems arose as a result of acting — over the same time period — as both expert witness providing evidence for asylum appeal hearings in the British courts, and researcher conducting fieldwork in those same courts. Despite initial assurances that these dual rules would not pose problems, and despite attempts to keep them spatially, temporally, and sartorially separate, in practice this separation was constantly breached through the sudden and unexpected actions of solicitors, barristers, and the judiciary. These breaches, which partly reflect the different ethical codes of the legal and anthropological professions, are illustrated in a number of case studies. These ethical incongruencies are then related to the broader kinds of misunderstanding that arise between lawyers and expert witnesses, reflecting their distinctive professional worldviews and discourses.

In my own mind, at least, my spells of fieldwork in South Asia never raised any clear ethical issues beyond the basic principle of informed consent. Research in the asylum courts was different. Even before it began, I was enmeshed in one ethical web arising from my role as expert witness. The research itself raised more complex ethical considerations than any I had experienced before. Most interesting of all, a third set of ethical issues arose in connection with my attempts to keep my two personae distinct.

The expert's ethics

When someone applies for asylum, their claim is considered by the Home Office. Most applications are refused, but most refusals entail rights of appeal, at public hearings before adjudicators from the Immigration Appellate Authority. The losing party generally has a further right of appeal to the Immigration Appeal Tribunal, before a panel of three. A few cases even reach the Court of Appeal or House of Lords.[1]

A refugee is someone falling within the scope of Article 1A(2) of the 1951 Refugee Convention [overhead]. Refugees must have a *well-founded* fear of persecution, so the courts must decide whether their fear is indeed justified. To do this they often require expert evidence, in legally admissible form, on the situation in the country of origin.

Lord Woolf's review of English civil law in the late 1990s, and the resulting *Civil Procedure Rules*, paid particular attention to expert witnesses, and took as their main starting point the statement of an expert witness's duties and responsibilities given by Mr Justice Cresswell in his High Court decision in the *Ikarian Reefer* case, which involved a disputed marine insurance claim.

> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
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> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness. . . should never assume the role of an advocate.

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[1] The 'ethnographic present' covers the period prior to the revisions of the appeal system introduced by the *Asylum and Immigration (Treatment of Claimants, etc) Act* of 2004. There have been several changes in the asylum process since then, but these do not affect the arguments of this paper in any material way.

> 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
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> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
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> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

Let us look very briefly at some of these principles. On the first point, the 'form' and 'content' of expert reports are in fact bound to be influenced by the 'exigencies of litigation'. For example, while solicitors cannot ask experts to modify their opinions, it is perfectly proper to ask for them to be rephrased, or for whole sections to be deleted (Speaight 1996). Secondly, experts are clearly not providing 'independent assistance' insofar as they are engaged and paid by one of the litigating parties. As for the third duty, does it apply only to their opinions on questions actually put, or to omissions generally? The fourth principle raises the complex issue of the bounds of disciplinary competence, which has been discussed elsewhere (Good 2007). Regarding the fifth, social science experts may well have problems deciding how exactly their data relate to notions of 'truth', and as for 'the whole truth', no anthropologist, I imagine, ever claims access to that (see Jasanoff 1995: 48). To an extent, therefore, these principles do not fully clarify matters for experts but raise other issues which may leave them still unsure of their role.

The Law Society's version does at least raise the issue of experts' *own* professional standards:

> 9. Experts must comply with the Code of Conduct of any professional body of which he/she is a member.

For British anthropologists the relevant professional body is the Association of Social Anthropologists, but its guidelines currently say little about the ethics of consultancy or 'applied anthropology'. There is significantly more guidance in North America. The AAA's *Statement of Professional Responsibility* (AAA 1986) is

supplemented by guidelines from the National Association for the Practice of Anthropology (NAPA 1988). Like all other professionals, anthropologists should be competent, efficient and timely in their work. They should not undertake work which would violate their professional commitment to deal fairly with all affected categories of people; and all issues surrounding uses of their data, including confidentiality and disclosure, should be clarified in advance (1988: 8). Ultimately though, even these guidelines point out that no code can possibly 'anticipate unique circumstances' (ibid.)!

The English *Civil Procedure Rules* themselves are, naturally enough, drafted from the court's perspective rather than the expert's, as section 35.3 exemplifies:

> (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.

Those instructions come in practice from a solicitor, but ultimately that solicitor is acting on behalf of an asylum applicant. How, then, can these *Rules* be reconciled with what NAPA terms an anthropologist's '*primary* responsibility. . . to respect and consider the welfare and human rights of *all* categories of people affected by decisions, programs or research in which we take part' (1988: 8; my italics)? The same NAPA paragraph supplies a partial answer; anthropologists also have 'the responsibility to assure, to the extent possible, that the views of groups so affected are made clear and given full and serious consideration by decision makers and planners'. In short, it is by writing good, balanced reports that responsibilities to all parties are best discharged.

Rather more complex is the matter of bias and advocacy. Paragraph 1.3 of the practice direction in the *Civil Procedure Rules* makes clear that:

> 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.

This requirement is ethically unproblematic in principle, but its observance in practice is easier said than done. It seems clearly unethical to write a report on a claim one knows to be false, but on the other hand, writing a report does not imply being convinced of the claim's validity, because the decision as to whether or not a story is

true is ultimately not an issue for expert witnesses. In effect, the question they address is: *what if* the story is true? Their answer must draw attention to evidence supporting or casting doubt on the applicant's account, but it must definitely *not* purport to decide on the truth of the story or the validity of the claim. Provided the account is plausible and consistent with the general evidence, an expert can proceed on the assumption that the appellant will be found credible by the court, but the distinction between assessing plausibility and confirming credibility is again clearer in principle than practice. The line between balanced assessment and advocacy often proves uncomfortably blurred.

Consequently, experts always tread something of a tightrope when drawing specific conclusions. There is a big difference, for example, between showing that members of rival Tamil parties are prime targets for LTTE assassination squads, and stating that this particular appellant would be especially at risk, but the court might view an expert's failure to put things in this more personalised form as an index of doubt over the appellant's claim. Yet experts who blunder into pronouncing directly on the validity of claims attract criticism and find their views given less weight. This is particularly crucial in relation to credibility, because the court usually regards any comment on this as overstepping legitimate limits.

In the final analysis, professional codes mean little as long as they remain applicable to only one set of stakeholders in the overall legal process. Willmore (1998: 48) argues that only a code produced through debates involving all concerned parties and the broader public, and backed up by some kind of exclusionary power when breached, would have the 'binding force' needed to make its precepts stick. Such an outcome depends, however, on relative equality among all stakeholders, and is highly unlikely in legal contexts, given that judges and lawyers see no need to give any ground to the ethical concerns of others. In the absence of any such common code, the issue for experts is often more one of avoiding bad or self-defeating practice — violating the rules of the game — than of acting in a way which is truly *unethical.* Matters such as steering clear of issues of credibility, are really just practical considerations for anthropological experts, who observe such rules so as to maximise

the weight of their reports, rather than because there would be anything ethically questionable, in their *own* professional terms, about not doing so.

The researcher's ethics

Turning now to research ethics, informed consent was an issue in my work, of course, more so than usual given the sensitivity of the topic. I tried to ensure that everyone in court knew who I was and what I was doing there, though in practice it was not always possible to do this beforehand. When I was shadowing adjudicators, some drew attention to, and explained, my presence at the start of proceedings; otherwise people made their own assumptions until I disabused them. Some were quite flattering — a trainee adjudicator, Lord Chancellor's assessor, or UNHCR observer; others less so, to me anyway — a journalist; someone from the Home Office. Once the reason became clear, my presence usually aroused explicit interest. Home Office Presenting Officers (HOPOs) and appellants' counsel chatted during adjournments, sharing opinions and asking about my findings, while interpreters were intrigued by my ability to speak Tamil. In contrast, most asylum applicants seemed indifferent to my presence, though a few expressed pleasure that someone from a university was there to hear their story.

Once or twice I had to withdraw because a particular appeal was to be heard by an all-female court, for reasons all too easy to imagine, but only once was there a specific objection to my presence. This was the appeal of Ms B from Kosovo (HX/06920/2001), whose parents were assumed to be victims of ethnic cleansing. Before the hearing, the HOPO made an on-the-spot offer of four years of Exceptional Leave to Remain, but Mr A, her counsel, confirmed that his client wished to pursue her asylum appeal. She had achieved such good A-level results that she had four offers of places in medical schools. With ELR status she would be classed as a non-EU student, liable for overseas fees, whereas if recognised as a refugee she would be a home student.

Mr A then raised Rule 40 (b) of the *Immigration and Asylum Appeals (Procedure) Rules 2000*, which provides for private hearings to protect the interests of

minors.[2] As I was the only person in court apart from those who *had* to be there, this was clearly aimed at me. The adjudicator explained that I was a university researcher and suggested that Mr A might wish to consult his client outside. They returned almost at once, and Mr A stated that his client had no objection to my presence. I was not really surprised by this. Given her desire to enter the British university system, it seemed unlikely that she would seek to exclude one of its representatives. In fact she herself had not instigated the objection, which in the adjudicator's opinion had been a ploy by Mr A to remind her forcibly about the youth and vulnerability of his client.

The very existence of Rule 40 does however raise the issues of anonymity and confidentiality. There are conflicting pressures for researchers. Many applicants are wanted persons in their countries of origin, though only a few have high public profiles. Some have suffered appalling torture and sexual assault, and it seems voyeuristic to give their experiences gratuitous extra publicity. On the other hand, most court proceedings are fully in the public domain. Moreover, for other researchers to assess my opinions properly, they need to know which cases gave rise to them. Such issues arise in several different forms. Are witness statements, say, in the public domain once cited in a public hearing? To my surprise, there was considerable confusion over this among lawyers. Actual Tribunal decisions, though, are straightforwardly public documents, and some are even published in Law Reports. In that sense there is no point in concealing applicants' identities; even so, I sometimes choose to do so for the compassionate reasons just explained.

Whether appellants should in fact have been so easy to identify by name is another matter. Personal names were used in virtually all case documents at that time;

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[2] **Exclusion of public 40.** (1) Subject to the provisions of this rule, any hearing by the appellate authority shall take place in public. (2) Where the appellate authority is considering an allegation referred to in paragraph 6(1) of Schedule 4 to the 1999 Act in accordance with paragraph 6(2) of that Schedule, all members of the public shall be excluded from that hearing. (3) Subject to paragraph (4), the appellate authority may exclude any member of the public or members of the public generally from any hearing or from any part of a hearing where [...]

(b) in the opinion of that authority, the interests of minors or the protection of the private life of the parties so require; or [...]

(4) Nothing in this rule shall prevent a member of the Council on Tribunals or of its Scottish Committee from attending a hearing in that capacity (www.opsi.gov.uk/si/si2000/20002333.htm#40; accessed 15 May 2008).

moreover, daily case listings were on view in hearing centres, with appellants' names prominently displayed. During my research, the IAA web site even began posting these listings electronically the night before. This was convenient for me as researcher, allowing me to plan in advance which hearings to observe. However, while I was discussing this web-site with an adjudicator over lunch, our conversation was overheard by one of his senior colleagues, who clearly had no idea of the existence of the site and was outraged to discover that appellants' names could be so easily accessed by anyone, including the security services of their home governments. The upshot was that web listings disappeared entirely, and when they returned, weeks later, they carried only case numbers rather than appellants' names. While annoying for my parochial concerns, the underlying principle seemed entirely right — though of little more than symbolic value, because a really dedicated security agent need only saunter round to the hearing centre, where the actual names were still being posted on the lists.

That incident illustrates another general ethical consideration. I was moving to and fro among different groups involved in the legal process: adjudicators, barristers, HOPOs, solicitors. In his study of a Crown Court, Rock (1993: 180-96) distinguishes four 'circles' among those whom legal proceedings bring into juxtaposition. The first circle, most tightly constrained in terms of permissible contacts with others, contains the judiciary themselves. The second comprises court administrators and officials, who are there virtually every day. The third circle includes solicitors and barristers, regular but sporadic users of the court who come and go in relation to particular cases. The fourth circle comprises the 'public', including asylum applicants themselves; for most such people, this is the first and only visit they will ever make to the court in question. The distinctions between these circles have to do with their different legal functions, which, in an adversarial system, often require that they be kept separate, outwith the formal environment of the courtroom itself. For example, the regional adjudicator in Glasgow expressed some disquiet to me when, after moving to new premises, they found themselves in the same office block as the Home Office Presenting Officers'

Unit, albeit six floors apart. He commented that they would need to be careful not to give even the appearance of undue fraternisation.

In Rock's terms I was a member of the fourth circle but, in true anthropological style, an anomalous and potentially dangerous one, in view of my unusual freedom to cross over into other circles. Asylum courts have other characteristics expected of a tightly-knit professional sub-culture (Rock 1993: 185n), including high levels of legal gossip. I was an ideal channel for such gossip; indeed it was generally all I had to offer in verbal exchanges with informants. Barristers were particularly eager for snippets of information about the discussions adjudicators engaged in 'upstairs', and the extent to which they had reached common views on the latest key issues. Yet there were obvious limits to what I could properly say; unguarded comments by adjudicators or barristers on particular cases could not find their way through me to the other party, especially not when I was being given privileged access to case documents. Sometimes, though surprisingly rarely, I was explicitly told that a particular comment was in confidence, but mostly I could only do what felt right in each situation, trying always to err on the side of caution. I depersonalised whatever I did say ('Some adjudicators think...' rather than 'As Mr X told me this morning...'). In general, dealing with such an astute group for whom presentation of information is their stock-in-trade, I felt justified in assuming that they would not let slip matters that they absolutely did not wish to go further.

Role confusion

At the very start I sought the views of barristers, solicitors, and adjudicators about how I should behave during the research. For example, would it be ethically proper to continue to write expert reports during my fieldwork? Without exception, people took a far more relaxed view of this than I had expected, possibly because — like me at that stage — they had not really thought through its implications.

I did all I could, though, to keep my two personae apart. On the few occasions when I attended to give oral evidence, I changed my style of dress; the legal camouflage of the pinstripe suit was replaced by a tweed jacket or brown lounge suit. I

also tried to keep the two roles spatially and temporally apart, by not going upstairs to the judicial floor (to which I had a security pass) for a few days before and after such appearances. Whether any of this was apparent to others I cannot say; but it did feel more fitting to maintain such boundaries and separations.

Even so, my double role did present me with ethical dilemmas on numerous occasions. The most common was that I would possess, in my vantage point at the back of the court, some factual information about Sri Lanka, or awareness of some aspect of Tamil culture, which might make a material difference to the adjudicator's assessment of the appeal. While this made me uncomfortable, it was clear that nothing could be done about it. My declared status in court was that of academic researcher; I had no legal qualifications or right of audience; and could justifiably have been ejected had I attempted to intervene. What is more, no adjudicator would ever have trusted me again. I did not feel able to intervene less formally either, through a quiet word during an adjournment. On a very few occasions I did — rightly or wrongly — make elliptical comments outwith the formal hearing which could, if pursued, have impinged on how evidence was understood. For example, I would tell the adjudicator about a relevant aspect of Tamil culture, in general conversation, without relating it back to any particular incident in a hearing. After all, as noted earlier, my own professional ethical imperatives are not identical to those of the law, and include responsibilities to all research subjects, including asylum appellants.

Quite apart from its impropriety, the efficacy of intervening directly would also have been questionable. With no more than, at best, a cursory glance at the papers, I was in a poor position to relate my general knowledge to the circumstances of individual appellants. Most asylum appeals, rightly, 'turn on their own facts'. This is illustrated by one occasion on which, though ostensibly present as a researcher, I was suddenly co-opted by the court itself into the persona of expert witness.

I was observing a Tribunal hearing in a Tamil appeal (CC/16014/2000) which was being chaired by the Tribunal's President, Mr Justice Collins, with whom, it is probably relevant to note, I had been discussing my research the day before. As often

happens, Mr Gulvin the HOPO and the appellant's counsel, Ms Jane Terry, engaged in horse-trading before the hearing. They agreed that there were problems with the written decision and that, as there had been an adverse credibility finding, remittal for rehearing seemed the most likely outcome.

On arrival in court, the President immediately raised the fact that Ms Terry's bundle contained a 'recycled' country expert report by Dr Elizabeth Harris. He pointed out that it was a breach of rules to produce a report written for another appeal, without the explicit permission of the expert who wrote it. He ruled that it should not have been before the court, and formally refused to accept it as part of the evidence.[3]

In the grounds of appeal the key issue, as ever, was the safety of the adjudicator's credibility finding. Ms Terry went through the alleged deficiencies of the determination. The Chair agreed that it was not as clear as it might be, but noted that the story had some unusual features which might reasonably have led to it being doubted. In particular, the appellant claimed to have been detained on at least eight occasions by pro-government militias or the army, but to have been released each time, generally on payment of a bribe.

> *Chair*: Eight arrests, eight releases, it does rather beggar belief?
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> *Counsel*: There are many reports in the background material of repeated arrests.
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> *Chair*: You had better draw that to our attention again.
>
> *Counsel*: I can't draw attention to specific references, as I hadn't anticipated this as an issue.
>
> *Chair*: Surely it is central to your account?
>
> *Counsel*: There was no reference to it in the determination.
>
> *Chair*: No, but you could have used commonsense.
>
> *Counsel*: The adjudicator is supposed to give reasons; it is not proper to make a decision without reasons.
>
> *Chair*: *You* have to provide *us* with reasons. An account of someone who has never done anything wrong — of course, such a person can be arrested and tortured, we know that, but here we have eight within a year, don't we, which may strike one as implausible?

[3] The practice of 'recycling' is discussed below.

Ultimately the discussion turned to what the Tribunal should do. Ms. Terry argued that the appeal should be remitted and reheard. The Tribunal questioned whether the case was strong enough to justify that, and asked her yet again to point them to evidence that it was plausible for someone to be arrested and released so many times. She was clearly unable to do so, probably because the solicitors had only supplied her with the bundle ten minutes before the hearing. Mr Justice Collins suddenly pointed out that I was present, and might be able to help her if I was willing to do so. I remained silent, unsure whether it was proper for me to speak, until he asked me directly whether I would have any objection. An instant answer was required and I seemed to have little option, so I said that if he thought this was a proper course of action, I had no objection in principle but was not sure how much assistance I could give. He replied that while this was of course possibly the case, he was prepared to rise for five minutes to allow Ms. Terry to consult me. Mr Gulvin voiced no objection, so I suddenly found myself being led off to a nearby conference room by Ms. Terry.

The only document on country evidence she had available was the Home Office's own *Country Assessment,* so I suggested a quick look in there. We found one reference to repeated arrests in Colombo, but I was prepared to let her say that in my opinion this applied to other parts of the country too. She asked whether I wanted to speak myself, but I said I would prefer her to paraphrase my remarks. We returned to the hearing room.

> *Counsel*: I refer to paragraph 5.2.26 in the *Country Assessment*. . . regarding Dr Good's view on repeated brief arrests. It refers principally to Colombo, but in Dr Good's view it is applicable also to other parts of the country like Vavuniya.
>
> *Chair*: Yes, but in the context of *round-ups* of Tamils.

It became clear that I was not going to get away with a non-speaking role. Mr Justice Collins began addressing me directly. I explained that although I was unable to cite chapter and verse, it was entirely possible that given notice I could have done. I talked about detentions at checkpoints around Vavuniya. He asked about detentions apart from those at checkpoints, and I said I had plenty of evidence from the statements

of other asylum applicants but I assumed this did not count as objective evidence. He responded that 'it might, or it might not', and asked whether I could cite examples of individuals being targeted for repeated arrest. I knew of cases in Trincomalee and the East coast where people had been detained by first one side and then the other in quick succession and I had no doubt this happened in other parts of the island too.

The HOPO declined the opportunity to cross-examine me. In his closing submission he seemed about to argue that the Tribunal should uphold the decision, but ended by supporting remittal. The court was cleared briefly while the Tribunal debated. As was his personal custom whenever possible, the President then proceeded to dictate their determination into a tape recorder in open court.[4] The quoted passage comes from the edited written version, which is virtually identical.

> 17. [. . .] Secondly, we are most grateful to Dr Goode [sic] who happens to have been sitting in the Tribunal and who was able to give assistance on background material in relation to frequent arrests. We appreciate that it is most unusual for someone who happens to have come to the Tribunal to be asked to participate in any way, but the circumstances were unusual and certainly we, and we think Miss Terry, were grateful for the opportunity to receive some assistance from that quarter. But the determination of this Tribunal will be that this appeal is allowed and the case is remitted to be reheard afresh by an adjudicator other than Miss Clayton or Miss Lingard.

Most adjudicators and barristers to whom I related this incident reacted with scandalised amusement: 'But he can't *do* that!' But he *had* done it; and after all, he *was* the President. Months later, when the topic came up in conversation with the President himself, he commented that, no doubt very properly, I had been extremely cagey in my response. That caginess was entirely deliberate, for although I did not have chance to formulate precise reasons until later (an instant decision was called for), I was not at all comfortable with the position into which I had suddenly been placed. There was first of all a problem of research ethics; I was asked to switch at a moment's notice from the persona I had publicly assumed beforehand into another with quite different expectations. The HOPO did not object, but I cannot imagine he would have been

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[4] He was the only member of the immigration judiciary who did this: all others 'reserved' their decisions, which appeared in writing later.

happy had he truly been pushing for the Tribunal to uphold the initial refusal. There was also the practical difficulty that I was inadequately prepared, with no chance to study the appellant's particular circumstances. It was one of several pivotal moments when — especially if the outcome had been contested — an inappropriate response could have jeopardised my position and made further research far more difficult.

Early in the hearing, as noted above, an issue arose over the admissibility of an expert report. It had become very common for certain solicitors to commission reports from experts in particular cases, and then — to save money or out of laziness — to use these reports repeatedly in later cases with the original names blanked out. I was unaware of such 'recycling' when I began the research, but soon discovered that the appellant's bundle in virtually every Sri Lankan appeal included, without her knowledge, this same report by Dr Elizabeth Harris, the Methodist Church's Secretary for Interfaith Relations. The Tribunal itself strongly objected to this practice and had tried several times to stamp it out. I had made clear in my first meeting with the President that I was entirely in agreement — not, as many lawyers assumed, for financial reasons, but because experts' reputations, and the weight given to their opinions, were being put at risk in ways beyond their control and of which they were wholly unaware.

To guard against this, I now routinely conclude reports with the declaration that they are not to be cited as evidence in any other cases without my written permission. At the time, though, I was also concerned about inadvertently finding myself observing cases in which one of my own reports had been recycled. On two occasions, this did actually happen. The first took me so unawares that I did not even discover it until afterwards. I had been introduced that morning to a Tribunal chairman, Dr Hugo Storey, talked about my research, and sat through the entire hearing over which he presided (HX/51414/2000). Only after the Tribunal rose did I discover that the appellant's bundle contained recycled reports by both Dr Harris and myself. The appellant's representative had not mentioned it when I introduced myself, and it had not been specifically referred to during the hearing. Indeed, as my report dealt with a

male asylum seeker from Trincomalee, whereas this appeal involved a female rape victim from Jaffna, its relevance was not at all clear. Nonetheless, I felt highly compromised. What if Dr Storey thought I had known about my report all along, and deliberately failed to mention it? I telephoned him as soon as possible to clarify the position, and fortunately he seemed not in the least put out, assuring me that he would have assumed this anyway. Even so, it was obvious that doubts over my honesty could easily have arisen.

The second occasion was more intriguing, though less worrying ethically. Again I had been introduced to the Tribunal chairman that morning. Our conversation covered 'recycling', and I recounted the incident with Dr Storey, making clear that I disapproved strongly of my reports being recycled. When I went down to the hearing room and introduced myself, the barrister announced that one of my reports was in her bundle. Without specifically mentioning my earlier conversation, I explained that the Chairman knew I did not approve of recycling. She said that they were only proposing to rely on the section discussing social restrictions of widowhood, but I pointed out that, as that was a purely general discussion, I would have consented to its use had her solicitors troubled to ask me. When the hearing turned to the expert evidence, the following exchange took place:

> *Counsel*: I submit, the adjudicator failed to have regard to the extensive objective evidence before him. [. . .] Two expert reports are relied on, and I am aware Dr Good is in court today. . .
>
> *Chair* (archly): Was Dr Good's report before the adjudicator? It was produced without permission. It was quite wrong to produce it, as it was improperly obtained, and we will discount it significantly.

At the end, Counsel returned doggedly to the issue covered by my report:

> *Counsel*: Re Dr Good's report, I have been roundly rapped on the knuckles, but the only point relied on is the status of widows. The Tribunal has accepted that she *is* a widow, returning without her family.
>
> *Chair*: The persecution didn't arise because she was a widow; she became a widow because of the persecution. You can't back-date.
>
> *Counsel*: The issue is, what will happen to her if returned? I am not seeking to suggest that her past persecution was because she was a widow, but it *is* relevant to her going back.

Chair: She has parents?

Counsel: Yes.

Chair: In-laws?

Counsel: Yes, but they are on bad terms, which is where Dr Good's report is relevant.

Remarkably, this appeal was allowed, and allowed precisely on the basis of the social disabilities of her widowhood. In strictly legal terms this decision looked shaky as the determination came close to admitting that persecution had not been shown to be reasonably likely. That is no doubt why the determination mentioned my report only in passing, and made no mention whatever of it being 'improperly obtained'! Even so, I felt far more comfortable this time regarding my position. It was obvious from our conversation earlier that neither I nor the Chair knew in advance that my report was in the bundle, which had landed on his desk only minutes before. My main concern this time was whether or not to say anything in advance to counsel. As explained, I decided that it was only fair to warn her, as I would have felt myself acting in bad faith by discussing the case with her beforehand without mentioning this.

My most convoluted set of ethical dilemmas concerned a family about whom I wrote a whole series of reports. Mr P had been in the UK since 1989 with refugee status; when I became involved his son was in the UK seeking asylum, and Mrs P and their daughter were in Vavuniya, Sri Lanka. In August 1999, I wrote a report on the circumstances of mother and daughter, and in July 2000, a report in connection with the son's asylum appeal. In October 2000 I wrote a supplementary report covering subsequent events in Sri Lanka, and in December 2000 another report on new evidence about the ill-treatment of his cousins. His appeal was dismissed by an adjudicator, and I wrote a fourth report in February 2001. There was yet a fifth report in April 2001, dealing with two adverse findings by the adjudicator. He had not found it credible that the appellant did not know the details of his father's asylum claim, or that he had never questioned his mother about the size of the bribe paid to secure his release from detention. I argued that the reasoning in both instances was ethnocentric. I was asked to give oral evidence before the Tribunal in April 2001, but in the event I was not called;

they accepted, on the basis of my report, that the credibility finding was unsafe, and remitted the appeal to be heard afresh. I went to give oral evidence at this fresh hearing in August 2001, but again was not needed. The HOPO conceded the case at the start, ostensibly on learning the latest position regarding other members of the family but also, counsel surmised, because he was apprehensive about cross-examining me.

Complex though this sequence may sound, the legal course followed by this appeal was quite a standard one, except that — fortunately — it is most unusual to have to write quite so many reports about a single appellant. Things proved far less straightforward, from my viewpoint, where the family reunion was concerned. The issue was that Mrs P had the right to come and join her husband in the UK, but under para 317 of the *Immigration Rules* their daughter, being over eighteen, did not [overhead].[5] However, Mrs P was refusing to come if it meant leaving her daughter alone in the 'frontier' conditions of Vavuniya, the first government-held town south of the LTTE-dominated region. The daughter's representatives therefore had to show that there were indeed 'exceptional compassionate circumstances' in her case.

This appeal was heard in May 2001, when her brother's appeal had been remitted but not yet reheard. The evening before, I noticed the appeal listed on the web-site, before an adjudicator with whom I was on friendly terms. Next morning, I sought him out to say that I wished to attend the hearing, but wanted to make sure he was comfortable with this, as I suspected a report of mine might be used. His opening sally as I entered the room, 'Ah, Dr Anthony Good! The well-known expert on Sri Lanka!', showed that I was right; no fewer than four of my reports were in the bundle.

He expressed surprise that I had not been called as a witness, and explained his preliminary views on the appeal. He liked to identify a key issue in each case, and here

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[5] 317. The requirements to be met by a person seeking indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom are that the person:

(i) is related to a person present and settled in the United Kingdom in one of the following ways. . .

(f) the son, daughter, sister, brother, uncle or aunt over the age of 18 if living alone outside the United Kingdom *in the most exceptional compassionate circumstances*. . . (italics added).

he had underlined the following paragraph in one of my reports, which he felt went to the heart of the issue, and to which the Home Office would need a satisfactory answer:

> All of this general background can be seen to have potential relevance in the case of Mr P's daughter. The fact that several family members have suffered harassment (and in one case, execution) in the past from the LTTE, rival Tamil militant groups, and the government security forces, could serve to bring her to the attention of any of these organisations, and in my judgment adds significantly to the general vulnerability which she would suffer as a young, unattached and unsupported Tamil woman.

I blithely explained that I liked to be as above-board as possible, and went down to advise the HOPO as to who I was. He was the only person in court so far, and he too saw no problem with my presence, commenting that it was an open court.

By the time the adjudicator arrived to deal with other cases, there was still no-one in court for Ms P's hearing. Counsel finally appeared, explaining that Mr P had somehow not been informed of the hearing today, but was now on his way. Counsel left, casting puzzled glances at me. Moments later, he reappeared and motioned me outside. He explained that it had indeed been intended to call me as a witness, but through bureaucratic error I, like Mr P, had not been informed of this; hence his surprise at seeing me there.

After a hasty conference with counsel, and a quick read through relevant documents brought by the instructing solicitor, who had rushed to court to try and rectify matters, I went back inside. The court had temporarily risen, and I had the embarrassing task of explaining to the HOPO that I had misrepresented myself, and was to be a witness after all. Understandably he did not look best pleased.

The next problem was that although a Tamil interpreter had been booked none had actually been provided. The HOPO confirmed that he wished to cross-examine Mr P, and reluctantly accepted the Adjudicator's suggestion that they hear my evidence that day and then adjourn. I am almost certain that this was because the adjudicator was curious to hear me give evidence, and the case would revert to another adjudicator if he adjourned it unheard. Counsel for Ms P was also keen on this plan, because he had divined that the adjudicator was sympathetic. Throughout the discussion they

maintained the fiction that, 'after all, Dr Good has come to court specially and it would be unreasonable to ask him to return later', though they all knew this was not actually the case.

Most of my examination-in-chief and cross-examination dealt with social and cultural matters, especially the predicament of Miss P as, potentially, a single girl with no chaperone. I explained to counsel that women in such a position would be widely assumed to be sexually available. At best, given the prevailing conditions in Vavuniya, her reputation and the honour of her family would be damaged, and this view of her was likely to be a self fulfilling prophecy, in that she would become a target for unwelcome sexual advances and harassment, further damaging her reputation. At worst she could become a target for sexual assault, either by civilians sexually harassing her, or by members of the security forces should she be taken into custody for any reason. I noted the high incidence of rape in connection with the ethnic conflict.

The HOPO's cross-examination focused on her marriage prospects and whether she could marry in her parents' absence. I agreed that this could happen, but added that if living parents did not attend their daughter's wedding, adverse conclusions would be drawn by people generally. Mr P had two older brothers in Colombo. One was in poor health; the other was estranged and had explicitly refused to help arrange her marriage. I explained that the mother's brother was the key relative where marriage was concerned, and expected to make the largest wedding gifts. I acknowledged that if the father was deceased, some other relative could play his role in marriage negotiations and at the actual ceremony. I also pointed out that many marriages were not registered, and it was the ceremony, including the participation of all appropriate relatives, which was regarded as validating the marriage. Once I got onto the topic of cross-cousin marriage, en route to explaining who the key relatives were where weddings were concerned, the HOPO's eyes quickly glazed over, and he decided he had no further questions. Counsel later expressed surprise that the HOPO had not raised any human rights or security issues with me, as this would make it hard for him to challenge my

evidence in his closing submission. Afterwards the adjudicator adjourned the case, part heard, to a date some six weeks ahead.

These events raised a string of ethical problems. First, I had again inadvertently misrepresented my status to some protagonists. I felt particularly awkward about the HOPO, who would justifiably have smelled a rat had he not seen for himself what happened. In fact, it was all such an obvious mix-up, and unfolded so publicly, that this seemed less problematic than might otherwise have been the case – at least where his personal feelings were concerned, though it was still, perhaps, questionable procedurally.

Far more difficult to deal with was the fact that I already knew the adjudicator's preliminary view regarding the key issues to be decided, conveyed to me on the assumption that I was not an active participant in the hearing. I had to be very careful not to let any of this information slip out while talking to counsel. I did say — as seemed only right — that I had spoken to the adjudicator about the propriety of me sitting in as an observer, but I made no mention of the fact that we had actually discussed the issues, to ensure that no clues about the adjudicator's view could be wheedled out of me during examination-in-chief. While it made me feel awkward to be concealing things from counsel, it seemed by far the lesser of two evils.

I had very little choice over actually taking part. I was there, able to give evidence, and once the adjudicator decided he wanted to hear it, there was no basis for me to decline. Even so, the adjournment left me awkwardly placed. As a witness in a 'live' case I could not be seen hob-nobbing with the adjudicator in the meantime. As he was one of the most regular, and most sociable, attenders at Taylor House, it was odds on that if I went up to the adjudicator's floor I would meet him. The only option was to avoid going upstairs until the hearing was concluded, even though this severely limited my interactions with other adjudicators. The prudence of this decision was illustrated on the one occasion when I did in fact go upstairs because I needed urgently to speak to another adjudicator, whose office I reached by a circuitous route so as to avoid passing the other man's door. Scarcely had I arrived, however, than in walked that very man

himself. I leapt to my feet: ‘Oh dear, I’ve been trying to avoid you!’ He looked utterly baffled, and I had to explain. He made a mock gesture suggestive of exorcising a vampire, and backed cheerfully out of the room. Clearly he was less concerned than I was, but even so I did not venture upstairs again until after the resumed hearing.

At that hearing, the HOPO sought an adjournment — ‘I am trying hard to help’, he said — on the grounds that the Entry Clearance Officer in Colombo should have referred the matter to the Home Office to see whether the Secretary of State was prepared to exercise discretion. This had never been done, and he claimed that until the Secretary of State had declined to exercise discretion, the appellant had no decision to appeal against, so the whole hearing was premature. Counsel was against adjournment: he was fairly confident of the outcome, and given the time the family had been waiting already, wanted a speedy decision. The adjudicator was again keen to proceed: he refused the adjournment request, and the hearing continued. Mr P was examined and cross-examined very briefly. The HOPO was now just going through the motions, as was made clear by his closing submission, which ran in its entirety as follows:

> *HOPO*: Sir, this is an entry clearance case and I have no power to concede. Therefore the only thing I can do is ask you to look at the explanatory statement, particularly in light of *Joseph*, and ask you to uphold the ECO’s decision. Unless I can help you further, sir . . . ?

Counsel had a rival precedent to *Joseph*, namely *Husna Begum v. Entry Clearance Officer, Dhaka*. Ms Begum had won her appeal even though her case was substantially weaker than Ms P’s, in that her father was an illegal immigrant from Bangladesh who had been granted Exceptional Leave to Remain under an amnesty. The Tribunal which originally heard the appeal had dismissed it brusquely, asserting that her appeal was an attempt to misuse the Rules ‘to keep together a family that thinks of abandoning its vulnerable members’.

This proposition was rejected by the Court of Appeal, however. Lord Justice Pill criticised the Tribunal for its ‘emotive comments about the family’. There were reports from two experts , Dr Werner Menski of SOAS and Dr Katy Gardner of Sussex

University. Lord Justice Buxton attached particular weight to Gardner's comment that 'Even if she were to move in with her aunt and uncle, which would be highly unconventional, their infirmity would mean that she would not have the necessary protection and support.' The appeal judges unanimously remitted the case for re-hearing by a different Tribunal, and that renewed appeal was allowed. Not surprisingly, once *Husna Begum* had been accepted as a valid precedent, Ms P won her appeal.

Three weeks later, I was observing a completely unconnected 'family visitor's appeal' (VV/01116/2001) in Glasgow. During an adjournment the HOPO told the appellant's solicitor that she would base her argument on the Tribunal decision in *Husna Begum*. I blurted out that I thought *Husna Begum* had been overturned after going to the Court of Appeal. The HOPO said that must be a different case. I asked who had chaired the Tribunal and she said Mr Ockelton. This confused me, as I had it in my mind that the Tribunal had been chaired by Dr Storey. I knew I had no such decision by Mr Ockelton in my database, so I assumed she was right and this was a different case. In any event, I was not sure that I should have said even as much as I had. Though it was during an adjournment rather than the formal hearing, I was potentially interfering in the conduct of the appeal. Moreover, I could not quote chapter and verse on the spot, and was not a lawyer, so why should either side believe me?

When the HOPO quoted from the decision in her final submission, however, I recognised one of the passages criticised by the Court of Appeal. I had been right after all. At the end of the hearing, the adjudicator reserved her decision. After she had gone I asked the solicitor for a glance at the determination which the HOPO had produced. It was indeed the first Tribunal decision in *Husna Begum*. I confirmed to him, not without some misgivings, that this decision had indeed been criticised by the Court of Appeal, remitted, and reversed by a subsequent Tribunal. He commented that this would at least give him an appealable issue if the adjudicator's decision went against his client.

I still had absolutely no idea whether I had behaved correctly. I did not know what the ethical position might be from a legal perspective — if indeed there *was* any

principle covering such an unusual situation — nor could I think of an equivalent situation within anthropology which might provide guidance. I told the adjudicator in Ms P's case what had happened (he had written his decision allowing her appeal by then, so I was no longer under constraint). Happily, he felt I had done the right thing, and that it would have been improper to press the point during the actual hearing.

Concluding comment

This paper has addressed the tensions of being simultaneously a professional practitioner and an academic researcher. It was written for a seminar series, organised by Ian Harper and myself, under the broad theme of 'Ethics and Interdisciplinarity'. Our starting point was the recognition that we anthropologists increasingly find ourselves in situations where our own professional codes of ethics, such as they are, do not by themselves suffice, for at least three kinds of reasons. Firstly, it is becoming more and more likely that those trained as, and defining themselves as, anthropologists, will find themselves occupying posts whose job titles label them as something else — health workers, maybe, or social development advisers. Secondly, even within the confines of our academic anthropology departments we increasingly find ourselves, thanks to the joys of the hegemonic audit culture, compelled to align ourselves ethically with a wide range of more or less strange bed-fellows, whose locally contingent identities may have drastic, and sometimes quite threatening, implications for our ability to continue with anthropological 'business as usual'.

Thirdly, as here, our research and professional activities as anthropologists are increasingly likely to require us to negotiate some mutually-acceptable ethical 'space' within which we can interact with other professionals governed by different codes. For some, such issues arise most forcibly at the point of publication, through issues of anonymisation perhaps, or — more dramatically — by fear of the kind of furore surrounding the recent book by David Mosse (2004), in which he reflected back anthropologically upon his decade as social development adviser for a major development project in northern India, and consequently found himself accused of bad

faith by some of his previous collaborators (cite source). Here, though, I have focused instead upon ethical dilemmas played out in the performance itself.

Nelken distinguishes three approaches to understanding the particular kinds of professional disagreement that arise between lawyers and scientists — among whom, for present purposes, ethnographers can certainly be included (Good 1996; 2006):

- *trial pathology approaches* focus on the 'more intractable features of adversarial systems' (Nelken 1998: 14), including pressure towards providing overly precise responses (Clifford 1988b; Jones 1994);
- *competing institutions approaches* stress the centuries-old power struggle between the legal and scientific professions (Jones 1994), a matter which I discuss at some length elsewhere (Good 2007); and
- *incompatible discourses approaches* note that disciplinary conventions are far more than mere rules; they express a distinctive form of life, a 'total pattern of activities which includes discursive practices' (Shapin & Schaffer 1985: 52).

Yet despite all these possible bases for conflict, my ethical squeamishness largely washed over the hard-nosed legal professionals who witnessed my dilemmas in court. What is more, the presentation of my anthropological notions to audiences of barristers and judges has not so far provoked even a flicker of the outcry generated among project managers by David Mosse's book. Perhaps you can suggest why this is?

Bibliography

American Anthropological Association (1986). *Statements on Ethics: Principles of Professional Responsibility*. <http://www.aaanet.org/stmts/ethstmnt.htm>

Clifford, James (1988). Identity in Mashpee. Pp 277-346 of his *The Predicament of Culture*. Cambridge MA: Harvard University Press.

Good, Anthony (1996). Anthropology is a generalising science or it is nothing. Pp 30-6 in Tim Ingold (ed.). *Key Debates in Anthropology*. London: Routledge.

——— (2006). Writing as a kind of anthropology: alternative professional genres. In Geert De Neve & Maya Unnithan (eds). *Critical Journeys: the Making of Anthropologists*. Aldershot: Ashgate Press.

——— (2007). *Anthropology and Expertise in the Asylum Courts* Routledge-Cavendish: Abingdon & New York.

Jasanoff, Sheila (1995). *Science at the Bar: Law, Science and Technology in America*. Cambridge MA: Harvard University Press.

Jones, Carol A.G. (1994). *Expert Witnesses: Science, Medicine and the Practice of Law*. Oxford: Clarendon.

Lord Chancellor's Department (no date). *Civil Procedure Rules, Part 35: Experts and Assessors* <http://www.lcd.gov.uk/civil/procrules_fin/contents/parts/part35.htm> consulted 13 November 2002

Mosse, David (2004). *Cultivating Development: An Ethnography of Aid Policy and Practice*. London: Pluto Press.

National Association for the Practice of Anthropology (NAPA) (1988). Ethical Guidelines for Practitioners. *Anthropology Newsletter*, November, pp 8-9 <http://www.aaanet.org/napa/code.htm>

Nelken, David (1998). A just measure of science. Pp 11-36 in Freeman, Michael & Helen Reece (eds.) *Science in Court*. Aldershot: Ashgate.

Rock, Paul (1993). *The Social World of an English Crown Court: Witness and Professionals in the Crown Court Centre at Wood Green*. Oxford: Clarendon.

Shapin, Steven & Simon Schaffer (1985). *Leviathan and the Air-Pump: Hobbes, Boyle, and the Experimental Life*. Princeton, NJ: University Press.

Speaight, Anthony (1996). Seven essentials. *New Law Journal* 146: 1100-02.

Willmore, Christine (1998). Codes of practice: communicating between science and law. Pp 37-60 in Freeman, Michael & Helen Reece (eds.) *Science in Court*. Aldershot: Ashgate.