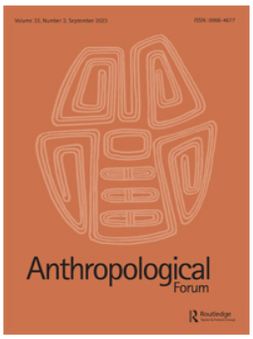

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Article 1F and Anthropological Evidence: A Fine Line Between Justice and Injustice?

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ABSTRACT

While all anthropological experts take pride when their evidence plays a vital role in securing protection for an asylum applicant, we also acutely remember the cases in which our research and reports were rejected, particularly when our reports appear to be unfairly rejected. In this paper, I discuss two cases in which the British Home Office argued that an asylum applicant was not entitled to protection because he participated in war crimes/crimes against humanity. However, the evidence provided by War Crimes Unit in the United Kingdom's Home Office took the form of assertions based on a very poor understanding of Ethiopian politics and limited research. In the first case, the Immigration Judge accepted the evidence submitted by the Home Office and refused the applicants claim for asylum, but on appeal the Home Office withdrew the case against the applicant. In the second case, the Immigration Judge adopted some of my evidence for the applicant but denied his claim. This paper explores the pitfalls of litigation and the ability of the state to tilt the scales of justice against asylum claimants.

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In this paper, I draw on my experience as a social anthropologist who has worked as a 'country expert' in asylum proceedings for nearly 30 years on 800-plus cases in which individuals from Eritrea and Ethiopia have sought asylum in the UK, USA, Canada, New Zealand, The Netherlands and Israel (cf. Campbell 2017).[1] There can be a steep learning curve, and a measure of frustration, in understanding one's responsibilities as a country expert and how judicial procedures in asylum claims work. However, frustration and serious doubts about fairness arise when Immigration Judges (IJ's) and officials of the British Home Office (HO) act arbitrarily in asylum claims.

In this paper, I examine two cases which, in my opinion, illustrate the arbitrary and unfair manner in which officials act in judicial proceedings. In both cases, the applicants were nationals of Ethiopia whose claim for asylum was initially refused by the Home Office on the grounds that they had been involved in crimes against humanity between 1974 and 1991 when the Ethiopian military (*Derg*) was in power. These cases

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raised the possibility that independent expert evidence might assist the court to better understand a dark period in Ethiopian history and allow it to differentiate between those who committed serious offences and those who should be granted refugee status. In both cases, the initial decision by the Home Office to refuse asylum was based on evidence provided by the War Crimes Unit[2] in the Home Office which submitted lengthy 'Reasons for Refusal Letters' (RFRLs) that were based, in my opinion, on a selective reading of a small number of academic publications and a poor understanding of Ethiopian history and politics.

This paper is organised as follows: in section (i) I briefly set out the obligations of experts in British asylum proceedings. Section (ii) discusses the two cases, my evidence, and how the authorities dealt with my evidence, how they assessed my evidence and how they decided the claim. Finally, I conclude with a discussion of the 'slope' of asylum litigation and note that regardless of the quality of an expert's evidence, the relevant authorities have the power to reject and/or instrumentalise one's research and use it to refuse an asylum application, in effect thwarting a fair and just decision.

Asylum and the Role of Country Experts in the UK

The role of an expert witness – in the United Kingdom the appropriate term for this role is 'country expert' – involves acting as a cultural broker for asylum applicants who find themselves up against a monolithic, bureaucratic asylum system dominated by officials, Immigration Judges (IJ's, see Barnes 2004; Vetters and Foblets 2016) and lawyers, many of whom have little time or, it sometimes appears, interest[3] in hearing asylum appeals; indeed most officials exhibit little sympathy for or understanding about their plight. The role of a country expert is to assess the oral and written evidence that applicants are required to provide the British Home Office; an experts' evidence should address the specific issues raised by an individual's claim and it should look at the wider socio-economic and political conditions raised by an applicant and the situation in their country of origin.[4] An expert's legal terms of reference are set out in the 1951 Refugee Convention (UNHCR 1951) which states that 'contracting states', i.e. those states who have signed the Convention, have a legal obligation to fairly assess whether an asylum applicant has a genuine fear of persecution understood to mean 'a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group … [or due to] serious violations of human rights'.

At the same time, experts are instructed by immigration lawyers who set out the specific issues to be addressed in their clients' claims (cf. Henderson, Moffat, and Pickup 2022). In the UK an expert is regulated by the United Kingdom's *Civil Procedure Rule 35(3)* which states that his/her obligation are to the court and not to those who instruct him or her.[5] Specifically, rule 35.3 states that

(1) It is the duty of experts to help the court on matters within their expertise.
(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

While the initial task of assessing an applicant's claim falls to low-level officials in the UK's Home Office, in the 1990s immigration lawyers began to instruct 'country

experts' who are drawn from a wide range of professions, e.g. anthropology, journalism, political science, geography, etc. who possess a demonstrated knowledge about an applicant's country of origin to write reports for their clients. While most reports are based on desk/library-based research, a small number of experts draw upon or undertake fieldwork to better address and make sense of key elements of an individual's asylum claim which neither judges nor lawyers would be aware of to provide information which is not found in the Country-of-Origin[6] reports which are produced by government departments and submitted to IJ's by the Home Office (Gibb and Good 2013). For example, country experts examine diverse aspects of culture, marriage, kinship, discrimination (based on ethnicity, religion or gender), structural violence, government policies, political conditions, national law, etc. (Fassin 2013; Good 2007; Hamlin 2014; James and Killick 2012). While the role played by country experts is invisible to asylum applicants, their reports have assisted large numbers of individuals to secure refugee status by documenting how foreign state and legal institutions function (Koblinski 2015; Lawrence et al. 2015).

There are several accounts of how the asylum system in the UK is organised which set out the work of different actors, i.e. Home Office officials, IJ's, immigration lawyers, asylum applicants and country experts (Barnes 2004; Campbell 2017; Gill and Good 2019; Good 2007). With respect to how the evidence of country experts fits into judicial processes, there are also several good studies which show how the judicial authorities have created new rules of evidence and procedural/admissibility rules which have forced experts to fit their evidence into an artefact of the laws design, namely a written report, that identifies the sources they rely upon and which addresses the issues identified by lawyers (Golan 2007; Jones 1994; Redmayne 2001). As Jones (1994) has argued in relation to the situation in the mid-nineteenth century and which remains true today, the judiciary has, through the creation of these rules, devised a 'stick to beat the expert witness' which allows judges to 'dismiss expert evidence as the weakest kind of testimony'.

For instance, in a review of the history of DNA profiling which has long been acknowledged as a decisive form of evidence in criminal trials, Jasanoff (2006) discusses how scientific/expert evidence is dealt with by judges. She shows that judges do not recognise biases or flaws in the conduct and interpretation of forensic science, and argues that,

> What counts as true for the law need not count as true for science, and in exceptional cases even scientific truths may not be accepted as valid for legal purposes. Three dimensions of difference are worthy of note, each reflecting underlying normative concerns that differentiated science from legal practice: first, the divergent roles of fact-finding in science and law; second, the unequal need for certainty in scientific and legal contexts; and third, the disparate ethical constraints framing the production and use of knowledge in the two institutional settings (333).

In a recent paper examining how expert evidence is decided in the UK's Immigration and Asylum Chamber, Campbell (2022) has shown that under the IAT's procedural rules IJ's have wide scope to accept or reject expert evidence. An IJ's decision depends on whether the Home Office provides alternative evidence that challenges an expert's submission, but also on whether the Home Office attacks the qualifications of an expert or whether the expert oversteps himself by seemingly advocating on behalf of an applicant.[7] There is

also substantial evidence indicating that IJ's lack the training to accurately assess testimonial (Byrne 2007) and quantitative evidence (Redmayne 2001: chaps. 3–4) and that IJ's do not treat appellants fairly (Gill et al. 2018). In short, asylum decision-making is often said to resemble a lottery (Ramji-Nogales, Schoenholtz, and Schrag 2007).

Outliers or Normal Cases?

In this paper, I have chosen two cases, out of the hundreds I have worked on and written about (cf. Campbell 2017) to consider in detail. I have chosen these cases in part because they raised extremely difficult issues concerning how individuals suspected of involvement in crimes against humanity. The Case of Mr X. In November 2009 I received a request from a solicitor to write an expert report for an Ethiopian national, Mr X, who arrived in the UK in 2003. He applied for asylum on the basis that he feared persecution due to past involvement in the Ethiopia People's Revolutionary Party (EPRP) and later when he was a local government (*Kebele*) official in Addis Ababa. He claimed that he had been briefly detained by the military government (*Derg, the* Amharic term for the Provisional Military Administrative Council) before being released and forced to serve the government for 10 years before he fled the country.

I was not provided with the Statement of Evidence (SEF) form containing Mr X's evidence, but I was given a copy of the five-and-one-half page Home Office's RFRL which set out a one paragraph comment on the Ethiopian People's Revolutionary Party (EPRP) arguing that the applicant's information was vague, lacking in detail and inaccurate (though the Home Office gave no information to substantiate it's claim). The RFRL also argued that the incidents he cited referred to his actions in 1978 and that in view of his recent residence in Ethiopia he 'would not be of any interest' to the authorities now. At ¶12 it referred to a newspaper cutting he provided, but disputed whether it referred to him and noted that it was dated 1993; the HO did not accept that the document was reliable. Furthermore, Ethiopia had not attempted to arrest members of his family and recent trials for war crimes were 'held in open court under the gaze of the international community' which, the Home Office concluded, meant that X would not face persecution and, in any event, he 'had not provided sufficient evidence that you are of any adverse interest to the authorities'.

Mr X's witness statement indicated that the RFRL was based on poor research, that the applicant was forced to join the *Derg* when he was released from detention (he worked for the Derg for three years before joining the Ethiopian navy), that during his one visit to Ethiopia in 2000 his wife showed him an Ethiopian newspaper article indicating that he was wanted by the authorities; he immediately left the country. He also asserted that the Home Office and the IJ had confused the date of the newspaper article (1993 in the Ethiopian calendar was 2000 in the European calendar).

At his 2003 appeal, where he was legally represented, the IJ: (a) summarised his evidence (accepting that he had been detained and that he had been forced to undergo 'brainwashing' and that he 'was put to work by the TPLF[8] government'; (b) considered a report by a psychologist (who concluded that there was evidence of torture) but the IJ concluded that X could find adequate treatment on return to Ethiopia; (c) considered the '1993' newspaper article which the IJ dismissed because it was undated; (d) considered an Ethiopian legal document that indicated that X had been indicted for a war crime, but

rejected it because it was undated and the 'purported chronology' was wrong. Both documents were said to be self-serving and were rejected. Finally, the IJ cited further information about the Ethiopian People's Revolutionary Party (EPRP) and the confused political situation at the time. The IJ then dismissed X's appeal.

After his appeal was dismissed, X remained in the UK until he was picked up by the police for working illegally. It was at this point that the Home Office withdrew its initial decision and a former Ethiopian High Court Judge and I were requested to write expert reports for a fresh appeal. The instructions we were asked to address were very specific:

i The likelihood that the Ethiopian Federal Court's decision against Mr X was politically motivated?
ii Whether the Ethiopian judiciary is independent of the executive (… are there any instances where the Ethiopian government has used the judiciary to arrest or eliminate political opponents).
iii Comment on the potential risk of persecution of Mr X's due to his alleged involvement with the EPRP and the previous government, and his failure to attend the Red Terror Trial at which he was convicted in his absence.
iv Comment on prison conditions in Ethiopia for those convicted during the Red Terror Trials and the treatment of prisoners in Ethiopian prisons generally.
v If Mr X is returned [to Ethiopia] … , will he be arrested on arrival … or might he evade the Ethiopian authorities and relocate and live safely elsewhere?
vi What effect might the recent Memorandum of Understanding between Ethiopia and the UK, which allows for the two countries to exchange information and return individuals wanted for terrorist activities, have for Mr X?
vii Finally, I was asked to comment on other matters which may be relevant to the appeal.

Both experts were given a copy of the Ethiopian Federal High Court's decision on Mr X by an Ethiopian attorney who also provided an affidavit that X had been tried *in abstenia* and that an arrest warrant had been issued for him, and a statement by one of the other individuals named in the same indictment who was sentenced to 12 years for War Crimes (this person knew the applicant and stated that he was innocent of the crimes he was accused of).

Below I briefly summarise the key issues set out in the two expert reports. The first six and one-half pages of my report dealt with the background to and operation of the Red Terror Trials which were ongoing in 2010. In particular, I noted serious legal concerns about the trials including (i) the vague definition of genocide used by state prosecutors; (ii) continuous delays in the trials; (iii) that a very basic system of public defenders was in place to assist the accused; (iv) 'equality of arms' between the prosecution and the defence did not exist; (v) defendants had to meet all the costs of interviewing and calling witnesses; and (vi) the indictments were very general and did not include specific information about the alleged crimes committed by defendants.

Regarding whether the Federal Court decision against X was politically motivated, I argued that the issue of partiality arose from the Special Prosecutors Office which was only tasked with investigating crimes committed by the political opponents of the current government and not crimes committed by government officials (it was a form

of victor's justice on display in the courts). I was also able to show that the judiciary was not independent of the executive because judges and prosecutors were vetted by the ruling party and appointed by the government. This fact was reinforced by the way in which the Judicial Administration Commission, which regulates judges, operates; appointments and dismissals of judges were politically driven.

I argued that on arrival in Ethiopia Mr X would be arrested and detained, quite possibly without having a fresh trial because he would be imprisoned for life as set out in the original court decision. On a related note, prison conditions were extremely poor, especially for those convicted of genocide. The effect of the 2008 MOU between Ethiopia and the UK[9] called for an independent body to monitor individuals returned to either country. However, an effective, independent monitor did not exist in Ethiopia (there were known cases in which individuals wanted in the UK were imprisoned in Ethiopia and mistreated). Finally, I pointed out that the Home Office was misinformed about how Red Terror trials were conducted (there was no guarantee that X would have access to legal representation), that the dates attributed to the Ethiopian documents by the IJ and Home Office were wrong (Ethiopia's Gregorian calendar is seven years behind the European calendar) and finally that the Ethiopian authorities typically harass and imprison the wife and family of individuals it sought to arrest.

The expert report submitted by the former Ethiopian High Court judge provided considerable background information on the Red Terror trials and the reorganisation and operation of Ethiopia's courts under the current government which led to serious case backlogs, etc. Regarding the fairness of the Red Terror trials, these were conducted in regular courts which had been reorganised and/or were created and staffed by the current government. He argued that the federal judiciary was weak and was 'subjugated' to the executive, particularly the federal courts. Indeed, the Ethiopian government directly interfered in the courts by bringing pressure to bear on certain judges to resign just as it carefully vetted the appointment of new judges. I therefore argued that if Mr X were to be returned to Ethiopia, he 'would most likely be bound to face the sentence without (re)trial or, if he were very luck, he might be retried. The latter scenario is unlikely'.

At this point, the War Crimes Unit in the Home Office issued a new twenty-one-page RFRL which purported to give far more background information on Ethiopian politics between 1974 and 2008. Most of the sources cited were derived from a small number of journal and newspaper articles and two books. Of the one hundred twenty-one endnotes, nineteen cited Selassie (1997) and sixty-eight citations were to Human Rights Watch (1991). There was not a single citation of the leading study on the Red Terror trials by Tronvol, Schaefer, and Aneme (2009) nor from any of the numerous other studies of the Red Terror.

A hearing date was set for January 2011, but the date passed. I was eventually told that the hearing was 'postponed'. Mr X was eventually released on bail and allowed to live at home. At or around this time the Home Office dropped its case against him, which presumably meant that Mr X's appeal was successful and that he was given Leave to Remain in the UK.[10] It was not made clear to me by the law firm representing him, whether he was granted legal status (in which case he could work, attend an educational institution, etc.) or whether he would probably be required to report to the police on a regular basis. If this was the case he could be picked up and deported at any time. If he was granted

status, it is entirely possible that he was only given limited leave to remain and might, once again, be subject to deportation.

The case of Mr Y. In 2019 I was instructed to provide a report for Mr Y, an Ethiopian national who had claimed asylum in the UK in November 2012. He claimed to have been a lieutenant serving as a counter-intelligence officer in the Ministry of Interior under the *Derg* between 1983 and 1991. He was tasked with undertaking surveillance of specific individuals linked to the Tigray People's Liberation Front (TPLF), the Eritrean Peoples' Liberation Front and the Ethiopian People's Revolutionary Party. He subsequently served as a civilian immigration officer in Assab, Eritrea (at that time it was a province of Ethiopia). In May 1991 the *Derg* was overthrown by the Tigrayan People's Liberation Front (TPLF) and he was detained and tortured for two years without being charged with a crime.[11] He was released but was banned from participating in political activities, was liable to rearrest and was kept under surveillance. Between 1993 and 2012 he worked in the private sector. In 2001 he became involved with a banned political party, Ginbot 7.[12] He claimed to have been detained for two months in 2001 on suspicion of being a member of Ginbot 7 and was followed and repeatedly threatened by the security forces. In 2009 he was detained for a month and held without charge. He used his passport to travel to the UK and subsequently learned that the authorities had detained his wife and family and were searching for him. At this point he applied for asylum.

He was interviewed by the Home Office in 2013, but he was not issued a RFRL until December 2018.[13] The thirty-six page RFRL was written by the Special Cases Directorate of the HO (formerly called the War Crimes Unit) which argued that under Art. 1F of the Refugee Convention, he was not entitled to protection. Three principal sources were relied on: 17 citations were to Selassie (1997), 27 citations were to Human Rights Watch (1991) and there was one citation to a Country-of-Origin report on Ethiopia. All other citations were to international legal cases. The RFRL set out a three-page chronology of 'international crimes and other abuses' which occurred in Ethiopia between 1976 and 1991 followed by a thirteen-page 'legal analysis' of crimes against humanity before turning to analyse his claim. The HO argued that as a 'senior intelligence officer' he was involved in 'aiding and abetting' in the commission of crimes against humanity committed by the *Derg*. The HO argued that he was 'ideologically aligned' with the Derg and did not attempt to disassociate himself from it, and thus did not commit the crimes under duress. Regarding his alleged activities with Ginbot 7, the HO noted that the party 'does not exclude the use of violent means to overthrow' the government and that numerous individuals had been indicted for membership in it. However, because his name was not on a list of the individuals who were detained. It was not accepted that he had been arrested and detained. In short, the HO did not believe key elements of his account.

I was instructed by his solicitor in April 2019 to write an expert report which addressed seven issues. First. I was asked to confirm the relation between the Ethiopian and Gregorian calendars and how the dates given by the appellant relate to the *Derg* government in Ethiopia? It was clear that the Home Office had completely miscalculated the dates from the Ethiopian calendar to the European calendar – a difference of seven years – which invalidated their indictment of Ys involvement because, at key points in the HO narrative, Y was a child who lived overseas.

Second, I was asked to provide background information about the government of Emperor Haile Selassie and the rise to power of the *Derg* in 1974. I set out how the personal rule, and failings, of Haile Sellasie contributed directly to his violent overthrow in 1974 which was marked by 'a multiplicity of protests and extemporaneous social movements' that included students, peasants and soldiers (Toggia 2012) which led to 'bloody killings, assassinations, detentions and murders which were pursued by the Derg. The Derg's acts were met by similar acts undertaken by those who opposed it and 'the battle lines between the different parties which relied on

> revolutionary violence … may not have been clearly delineated because of constant realignments during the period which was characterized by defections, assassinations, mass arrests, execution of high-ranking officials, temporary alliances and the decimation of supporters (Toggia 2012, 270).

Third, I was asked whether the political regime governing Ethiopia was materially better in the 1980s? I set out the horrendous human rights record of the Derg, fuelled in part by war against Somalia and against insurgent groups in Eritrea. Estimates of the number of people who were killed or disappeared during this period ranged from 55,000 to 500,000.

Fourth, I was asked about how the Ethiopian state was organised after 1983. I noted that the government became highly centralised and more powerful (a massive increase in the size of the military occurred). Though the *Derg* built hospitals and schools, roads and basic infrastructure, it operated an oppressive, highly militarised security/police service which operated at all levels of society, in part by armed force and in part through the operation of numerous 'security networks'.

Fifth, I was asked how the regime's method of operation changed in the 1980s? I noted that the Derg's goal was national unity and integration which was to be achieved under the control of the state. However, in May 1991, the Derg was overthrown by the Ethiopian People's Revolutionary Democratic Front composed of the Tigrayan People's Liberation Front (TPLF) and the Eritrean People's Liberation Front (EPLF). The Derg's failure was rooted in its single-minded approach to one-party rule and its commitment to national unity which ran up against deepening economic problems, including problems linked to the pursuit of 'socialist' policies, and a succession of increasingly effective liberation movements in Eritrea, Tigray and in southwestern Ethiopia.

Sixth, I was asked whether someone who operated as an immigration/port official, such as the appellant, would have been considered a part of the repressive apparatus of the state? I argued that the appellant was a lieutenant in the military, a relatively low-level official, who was not in a position to question orders from superior officers nor was it likely that he would have known why he was tasked with investigating certain individuals. In short, the app. lant would not have been able to question orders from his superior without being persecuted himself.

Finally, I was asked whether the appellant's claim that he was detained and tortured for his activities in the *Derg* were credible, and whether it was likely that he had been detained and tortured for his involvement with Ginbot 7. I argued that there was significant evidence to support both claims.

Mr Y's appeal was heard in the First Tier Tribunal of the IAT in August 2019; I was not called to give evidence which means that I was unable to clarify any of the evidence in my

expert report. The IJ began by citing Art 1F of the Refugee Convention[14] which states that,

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Paragraphs 13–24 of the IJ's decision made it clear that the Home Office disputed Y's entire account, and paragraph 25 stated that the standard of proof required is 'a reasonable degree of likelihood', the so called 'lower standard'. The IJ then turned to my expert report and from my summary of events in Ethiopia under the Derg he selectively quoted one sentence and one paragraph. The sentence is 'all of these groups/organizations/ political parties were responsible for murdering Ethiopians'. The paragraph cited was an estimate of the number of people who had been murdered or disappeared, i.e. tens of thousands. Both parties accepted my evidence about the *Derg*, and the IJ set aside Home Office arguments that Y had been involved with the *Derg* between 1975 and 1983 because, at the time, Y was a child and was not in the country.

Problematically, the IJ concluded that Y's account caused confusion because he had cited dates in both the Ethiopian and European calendars which reduced 'the coherence' of his account (even though his evidence to the Home Office on this issue was clear and coherent). The IJ also argued that due to the passage of time between the key events and the present, that Y's account was 'hard to follow'. However, the IJ concluded that the above-indicated problems represented his 'wilful ambiguity when answering other questions and some straightforward contradictions in his account'. For instance, in his oral evidence Y was said to have refused to clarify his military rank when working for the *Derg*. He was also said to have changed his account saying he was not involved in surveillance as an immigration office and that he was 'not a member of the *Derg*' (note that according to my evidence, low-level military officers were not members of the *Derg* which was the ruling military council composed of senior officers). For these reasons, the IJ found that Y had undermined his credibility.

The IJ then focused on a letter issued by the International Red Cross issued to Y when he was detained in 1991 by the TPLF regime which toppled the *Derg*.[15] The IJ asserts that his detention 'suggests he was a 'central military or civil official', 'someone who held a significant role within the Derg regime' (this assertion was not based on any evidence). The IJ also dismissed Y's evidence of involvement with Ginbot 7 as 'vague, inconsistent and incredible'. Citing British case law, *Chivers* (10,758)[16], the IJ considered that there were several reasons why an asylum applicant might exaggerate aspects of his claim, nevertheless he dismissed this and other elements of Y's claim which he found to lack credibility.

The IJ then cited *R (JS Sri Lanka) v SSHD 2010 UKSC 15*:

> Put simply, I would hold an accused disqualified under Art 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact have furthered that purpose.[17]

It is also important to note that at paragraph 2 of *R (JS Sri Lanka)*, which was cited by the IJ in Y's appeal, that Lord Brown noted 'that because of the serious consequences of exclusion for the person concerned the article – i.e. the exclusion clauses of Art 1F – must be interpreted restrictively and used cautiously'. I am concerned, in view of how the IJ instrumentalised my evidence, that he did not 'cautiously' apply the exclusion principles. In support of this finding, the IJ cited my evidence that the Derg was responsible for crimes against humanity' and concluded that Y 'was an elite member of the Derg who took instructions on one occasion directly from the president, that he was a very well-known and feared member of the Derg and had been involved in the surveillance of people suspected to be opponents of the Derg'.

At this point the IJ once again slightly twists my instructions by insisting that rather than asking me about his activities as an immigration officer, I should have been asked whether Y operated as a counter-intelligence officer (Y had confirmed this in his Home Office interview). The IJ wrongly concludes that I did not see all the appellant's evidence, and once again twists and instrumentalises my evidence to conclude that 'the implication of Dr X's evidence is clear', 'that immigration officers were to be feared'. He then extended this conclusion to Y who was, the IJ argued, involved in 'counter-espionage'. In concluding the case, the IJ again refers to my evidence regarding the regimes crimes and concluded that: 'I find it likely that those people the appellant identified through his surveillance as opponents of the regime would have subsequently been victims of crimes against humanity. I find further that as an elite member' of the *Derg* regime at that time … the appellant would have been well aware of that fact'.

It is important to observe that the finding that Y was a 'well known and feared member of the Derg' was not based on any evidence (only an assertion by the Home Office). Such bald assertions by the Home Office were accepted by the IJ but were not established facts: they represented unfounded suppositions which the IJ accepted.

The case was subsequently passed to a different law firm who prepared an appeal though, despite having pointed out problems with the determination (as discussed above), the only issue raised in Y's new appeal concerned potential problems that might confront him if he were to be returned to Ethiopia, including the fact that he had skipped bail![18] I have not been informed as to whether his appeal was heard.

Conclusion

The above cases, while perhaps not representative of asylum hearings in the UK, nevertheless point to key issues and dilemmas for all asylum applicants and country experts. The first, and most obvious issue concerns the ability of the Home Office to arbitrarily end asylum proceedings by, apparently, withdrawing its earlier decision (the precise outcome of the appeal was not communicated to me but the Home Office may or may not have allowed applicants have his appeal heard and to be exonerated from the accusations made against him). By apparently withdrawing its decision to detain him, but not necessarily granting him Leave to Remain, X may have been left in a highly precarious legal situation. If he was not granted Leave to Remain, and he once again came to the attention of the UK Border Force or the Police for working illegally, driving without a license or he was arrested during an immigration raid, he might have been detained and deported.

The situation is slightly different for Mr Y due to how the IJ selectively cited[19] my evidence to support his conclusion that Y committed crimes against humanity, actions which seemingly reflect the IJ's scepticism of expert evidence and the strong tendency to rely on arguments by the Home Office. In this case, the IJ's apparent inability to distinguish between the Ethiopian and European calendars together with his instrumentalisation of my evidence seems to have led him to read 'implications' into my report which were relied upon to refuse the appeal. There also appears to be a serious issue of differentiating between the actions of the individual and the actions of a military unit of which he was a member. This is a serious problem because, as the Supreme Court found in *JS (Sri Lanka) v. SSHD*, mere membership of a terrorist organisation or an organisation that was subsequently deemed to have performed serious human rights abuses – short of evidence that the person specifically committed crimes against humanity – should not have been enough to refuse the applicant asylum (see Waldman and Meighen 2018; Weisman 2018).

In both cases the stated reasons for refusing asylum are based upon a very limited knowledge of Ethiopia; in situation like this IJ's need to question the assertions of the Home Office and look carefully, and yes critically, at the evidence provided by country experts. One is left to wonder how IJ's – who are tasked with considering all the evidence and to give reasons for their decisions – and Home Office officials view and decide such cases.

It is important to consider the role of the War Crimes Unit/Special Cases Directorate (SCD) in the Home Office about which there is very little information in the public domain. A 2012 disclosure for an FOI request to the Home Office[20] revealed that between July 2010 and December 2011, eight hundred and five cases were referred to the unit which made two hundred and seven 'adverse recommendations.' Of those whom the Unit sought to exclude from protection – though no information is available concerning appeals against decisions by the Tribunal – seventy-eight were applications for nationality, one hundred and three were applications for asylum, seventeen were applications for leave to remain, seven were applications for leave to enter, and two individuals were banned because of an exclusion order. In short, the unit deals with a large number of cases, but there is no data regarding how its officials are trained, how it is staffed and whether such decisions are overturned on appeal.

The Home Office released a redacted document in 2017[21] which outlined the guidance and discretionary powers relied upon by the SCD. The key test is whether an applicant is 'of good character' which is based on the unit's assessment of whether the information available to it provides 'sufficient evidence to support the view that the applicant's activities or involvement constitute responsibility for, or close association with, war crimes or crimes against humanity'.[22] Its decisions are supposedly based on an individual's 'admission or allegations about involvement in groups known to have committed war crimes or crimes against humanity'. The document goes on to say that while a person may not have had a direct involvement in war crimes', if their actions in any way 'contributed' towards war crimes, they are nevertheless guilty.

The question of an individual's contribution to, or participation in, such crimes needs to be carefully tested, as is evident in recent arguments by Simeon (2022), who discusses whether Art. 1F should be excluded from the Refugee Convention. In sharp contrast, Mahon's (2019) careful analysis of the application of Art. 1F in the period following 9/11 shows that it resulted in definitional confusion: 'courts have been inconsistent in

the sources used to define terrorism. Inconsistency and fragmentation do not befit the humanitarian purposes of the convention or the narrow aims of the exclusion clause' (p.19). Instead what is needed is a high uniform threshold of 1FC, i.e. a universal definition of terror. Mahon argues that the law 'disregards the moral dilemmas each refugee faces.' Furthermore, Mahon argues that

> For policymakers, 'terrorism' is an appealing classification that catalyses candid analysis: here is terrorism, there is exclusion. But the simplicity of this analysis attests to its failure to consider each case individually. This is an injustice—to the refugee, to the standard of proof in Art. 1F, and to the object and purpose of the exclusion clause. It is essential that terrorism and asylum be disconnected. Terrorism is an emotive word that smudges and distorts the dispassionate calculus of exclusion (19).

In this regard, an overly cautious decision by an IJ to refuse a claim in which Art. 1F is raised sidesteps the careful scrutiny which should be pursued. The UK has 'removed' individuals suspected of war crimes from the UK, and it has failed to mount a trial against asylum applicants accused of war crimes.[23]

The key issue in both of the cases discussed in this paper concerns what Nader (2001/2002) has called 'the direction of law' which, she argues, is 'dependent in large measure on who is motivated to use the law and for what purposes'. Elsewhere I have examined many examples where the UK government has changed procedural rules, altered the right of appeal of asylum applicants, cut legal aid available to asylum applicants to fight their case, and wrongfully persecuted asylum seekers in defiance of Art. 31(1) of *the Refugee Convention* (Campbell 2017). The result of such changes, and the willingness of the Home Office to litigate against asylum applicants in the appellate courts, means that the ideal of law as a cornerstone of a just society has been undermined by the British state with the result that it has become increasingly difficult for asylum applicants to secure protection. The final brick in the wall preventing asylum applicants from securing protection is the passage into law of the *Nationality and Borders Bill (2021)*[24] which adopted Australian law and practice aimed at 'offshoring' asylum applicants to Rwanda.[25]

I began by noting that anthropological experts tread a fine law between justice and injustice. The ability to seek justice on behalf of asylum applicants depends in part on our ability to undertake high quality research and to write effective expert reports, but just as crucially it also depends on the wider socio-political context in which we work and where the individuals we provide evidence for lodge their applications/cases. National laws and procedures are becoming increasingly restrictive, and for this reason, it is time to rethink our responsibilities to the individuals we attempt to assist. This issue, however, cannot be addressed in this short paper.

Notes

1. I am grateful for the detailed comments of four different reviewers on this paper.
2. It was subsequently renamed the Special Cases Directorate.
3. An immigration judge and a Home Office Presenting Officer hear at least one asylum claim and three to four other types of appeal per hearing; asylum appeals can last up to four hours.
4. This task is difficult to achieve; indeed IJ's may reject an experts report for this reason and/or because they are uncomfortable with or unable to comprehend specific cultural issues, such as witchcraft (cf. Bianchini 2021).
5. See: https://www.justice.gov.uk/courts/procedure-rules/civil/rules

6. Immigration Judges in the UK tend to rely on Country-of-Origin reports which are produced by the US State Department or by the Country and Policy Information Team in the British Home Office.
7. While the Government rails against 'abusive' asylum claims', my experience suggests that few such false claims reach the appeals process (see: https://www.migrationwatchuk.org/news/2021/09/23/what-is-the-evidence-that-our-asylum-system-is-being-abused).
8. The Tigrayan People's Liberation Front.
9. See: 'Letter to the British Foreign Secretary Miliband on Diplomatic Assurances with Ethiopia' at: https://www.hrw.org/news/2009/09/17/letter-british-foreign-secretary-miliband-diplomatic-assurances-ethiopia (accessed on 6 July 2022).
10. At this point Mr X's solicitor left the firm and I have been unable to obtain any further information on the case.
11. He submitted a certificate issued by the ICRC indicating that he had been visited by them while in prison.
12. For information on Ginbot 7 see: https://hornaffairs.com/category/organization/ginbot-7/ (accessed 7 July 2022) and US 2017.
13. I have copies of his entire file.
14. See: Convention relating to the Status of Refugees | OHCHR. The IJ also cited domestic legislation and Art. 17 of the Qualification Directive.
15. After the Derg fell, its successor indefinitely detained over 20,000 government opponents without charge or trial between 1992 and 1994. 'The majority were released in 1994. However, several hundred opponents and suspected opponents are still detained and political arrests are continuing with little or no protection in most cases for the human and legal rights of detainees … Most political detainees in Ethiopia have been held either on the basis of repeatedly renewed 14-day court orders or outside the legal and judicial process altogether. More are now being formally charged. The Criminal Procedure Code requires that detainees should be brought to court within 48 h of arrest. They can then be remanded by the judge for 14 days while the offence which they are suspected of having committed is investigated, or formally charged, or released. The 14-day investigation period is renewable without any specified time limit but it has not been judicial practice to renew remands indefinitely. When investigations are completed, detainees must be charged within 15 days or released but there is no specified time-limit before trial. There is no legal provision for "preventive" or administrative detention, that is, detention without charge or trial.' (Amnesty International 1995, sec. 3).
16. See: https://www.casemine.com/judgement/uk/5a8ff8d460d03e7f57ecde7c
17. Current Home Office guidance on assessing culpability for war crimes under Art. 1F and Art, 33(2) of the Refugee Convention, appears to negate the principle of non-refoulement (see UK 2022). According to Henderson, Moffat, and Pickup (2022: chap. 14) the Tribunal has been pushing for a more restrictive view on exclusion which the Home Office subsequently adopted. However, it is clear from their analysis of domestic and international case law that the burden of proof lies with the Home Office in proving its case and that short of certifying the case under sec. 55 of the *Immigration, Asylum and National Act 2006* (which did not happen with Y). The Tribunal began its assessment of Y's claim by erroneously considering the exclusion clause first.
18. In August 2023, I contacted the firm which represented him and was told he was living in the UK. My details were emailed to him, but he has not contacted me.
19. One reader suggested that perhaps the IJ did not selectively site my evidence, rather s/he may not have understood the evidence? Either way, this is an indictment of judicial training.
20. Source: FOI 22693 'War Criminals' (31 May 2012) at: https://www.gov.uk/government/publications/war-criminals
21. Source: 'War Crimes, Crimes Against Humanity and Genocide' (archived 27 July 2017) at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/633473/warcrimes.pdf

22. It is important to note that 'close association' with a war crime is not necessarily evidence that a person has committed a war crime.
23. Singer (2017, 24) has analysed data on Home Office initial decisions to exclude individuals accused of war crimes and shows that between 2005 and 2008 'on average only 0.1 per cent of initial decisions for this reason and 0.2 per cent of refusals' were made. She also argues that exclusion from asylum results in individuals being granted 'restricted leave' of residence for a six-month period when an individual cannot be removed despite Home Office attempts to remove individual at the earliest possibility.
24. See: Nationality and Borders Bill – GOV.UK (www.gov.uk); see UNHCR's comments on the bill at: https://www.unhcr.org/uk/uk-immigration-and-asylum-plans-some-questions-answered-by-unhcr.html.
25. Since this paper was written, the Supreme Court has ruled that offshoring asylum applicants to Rwanda is unlawful (see https://www.ein.org.uk/blog/supreme-court-rules-rwanda-plan-unlawful-legal-expert-explains-judgment-and-what-happens-next#:~:text=Upholding%20an%20earlier%20decision%20by,be%20persecuted%2C%20tortured%20or%20killed).

Disclosure Statement

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