



Chairperson's Guideline No: 2018/3

Witnesses

Preliminary Issues

[1] Background

- [1.1] The International Protection Act 2015 and the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 set out various matters relating to the conduct of Appeals before the Tribunal. These guidelines are intended to supplement the Act and Regulations and not to supplant them. In case of conflict, the provisions of the Act or relevant Regulation shall take precedence over these guidelines.
- [1.2] These guidelines apply to appeals involving witnesses appearing before the Tribunal.
- [1.3] These guidelines are informed by the Act, the Regulations, Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, and the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (December 2011). Consideration has also been given to relevant case law and academic commentary.
- [1.4] These guidelines are issued pursuant to s.63(2) of the Act.

[2] Definitions

[2.1] In these guidelines the following terms have the following meanings:

“Act” means the International Protection Act 2015 and shall include, where the context so permits or requires, any secondary legislation made thereunder.

“Appeals Regulations” means the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 (S.I. No. 116 of 2017).

“Appeal” means an appeal under the Act.

“Appellant” means an appellant pursuing an appeal before the International Protection Appeals Tribunal and shall, where the context so admits or requires, include his or her representative, if any.

“International protection officer” means a person who is authorised under section 74 of the Act to perform the functions conferred on an international protection officer by or under the Act.

“Presenting officer” means an officer of the Minister or another person nominated by the Minister to be present at and participate in an oral hearing before the International Protection Appeals Tribunal and, in person or through a legal representative, explain to the Tribunal the recommendation of the international protection officer that is the subject of the appeal (per s.42(6)(b) of the Act).

“Procedures Directive” means Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

“Qualification Directive” means Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

“Tribunal” means the International Protection Appeals Tribunal established under the Act and shall, where the context so requires, include a Tribunal Member assigned to determine an appeal.

“UNHCR Handbook” means the UNHCR “Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status”, December 2011.

“Vulnerable persons” means persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.¹

“Witness” means a person who gives evidence, including on oath or by affirmation, to the Tribunal.

[3] Basic Principles

- [3.1] The UNHCR Handbook states that while the burden of proof *“in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases it may be for the examiner to*

¹ Article 21 of Directive 2013/33/EU.

use all the means at his disposal to produce the necessary evidence in support of the application".² International protection decision making therefore requires a more engaged role of the decision-maker in the examination process.

- [3.2] Witnesses include, but are not limited to, appellants. Witnesses besides appellants may include family members, persons from the same country of origin as the appellant, and other persons who may be able to provide testimony corroborating an appellant's claim. The Tribunal Member should be mindful that particular issues can arise in respect of witnesses besides appellants.
- [3.3] Oral evidence can be of critical importance in the determination of international protection appeals. Appellants and witnesses of fact may be able to provide the Tribunal with evidence about events relevant to an appellant's case. Furthermore, expert witnesses with specialist knowledge of, for example, country conditions may be able to give an expert opinion on the factual evidence or provide the Tribunal with important contextual information. Generally, this note applies to the taking of evidence from both appellants and witnesses, while noting particular issues that arise in relation to either category. Section 16 of this note applies to expert witnesses in particular.
- [3.4] The Tribunal must treat witnesses with dignity, fairly and with respect according to their needs irrespective of race, religion, background, gender, age, sexuality or any disability.
- [3.5] Where required and possible, additional support should be provided, and any reasonable adjustments to the process of conducting a hearing should be made to ensure that all witnesses have equal access to information and support. This might include, for example, the use of an interpreter.
- [3.6] Barriers to effective examination at hearings before the Tribunal range from technical complications to the cultural, educational, linguistic and psychological factors that affect how witnesses who may be victims of human rights abuses communicate their past experiences.
- [3.7] It should be borne in mind that witness examinations in international protection hearings may produce elements of testimony that are unclear, conflicting, vague or incomplete.³
- [3.8] The Tribunal has the task of assessing the credibility of claims made by alleged victims of persecution, serious harm and human rights violations. Credibility assessment therefore can be critical. It is for this reason that, when assessing evidence provided by an appellant, the Tribunal should always apply best legal practice in respect of credibility assessment. Those principles may apply by analogy when assessing the

² UNHCR Handbook, para.196.

³ See Rosemary Byrne; "Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals", in *International Journal of Refugee Law*, Volume 19, Issue 4, 1 December 2007, p.614.

evidence of witnesses who are not appellants. There will be no need, however, to make a specific credibility finding on a supporting witness whose evidence is found to have limited corroborative value.⁴

- [3.9] In spite of the discretion afforded to fact-finders, with the assessment of credibility at the core of the undertaking, how decision-makers should approach testimonial evidence is not clearly defined. These guidelines are designed to give the Tribunal assistance in these circumstances.

Pre-Hearing Matters

[4] Oral Hearing?

- [4.1] Section 42(1) of the Act provides that the Tribunal shall hold an oral hearing for the purposes of an appeal under s.41 where the appellant has requested a hearing in the notice of appeal, or the Tribunal is of the opinion that it is in the interest of justice to hold an oral hearing. Thus, it may be that the interests of justice will require an oral hearing in order that the Tribunal may hear witness evidence, even though, except where otherwise provided, an appeal may be determined without an oral hearing (s.42(3) of the Act).
- [4.2] An applicant may, pursuant to s.42(2)(a) of the Act, withdraw a request for an oral hearing, although even in this event the Tribunal, pursuant to s.42(2)(b), must consider, having regard to the interests of justice, whether to hold an oral hearing, and it may be in interests of justice to hold one in order to hear witness evidence.

[5] Directing Witnesses' Attendance

- [5.1] The Tribunal has a power to direct the attendance of a witness at a hearing. Section 42(8)(a) provides that, for the purposes of an oral hearing, the Tribunal may direct in writing any person, other than the Minister or an officer of the Minister, whose evidence is required by the Tribunal, to attend before the Tribunal on a date and at a time and place specified in the direction and there to give evidence and to produce any document or thing⁵ in his or her possession or control specified in the direction.
- [5.2] Pursuant to s.42(7) of the Act, an appellant may request that the Tribunal direct the attendance of a witness. Where an appellant's notice of appeal includes such a request, the Tribunal must determine whether the proposed witness should be directed to attend before it pursuant to s.42(8). In making this determination, the Tribunal is required to have regard to the nature and purpose of the evidence proposed to be given by the witness as indicated in the notice of appeal.

⁴ *Kumaz* (11085; 22 June 1994).

⁵ Excluding a document or thing relating to information, which the Minister or the Minister for Foreign Affairs and Trade directs that the information be withheld in the interest of national security or public policy ("ordre public"). See, e.g., *A.P. v Minister for Justice and Equality*, unreported, Court of Appeal (Gilligan J., Peart and Hogan JJ. Concurring), 17 April 2018.

[5.3] In directing a witness to attend, the Tribunal should arrange that the witness be written to with information about the Tribunal and the appeal process before the hearing so that the witness can know what to expect, and so that any necessary arrangements can be made. The notice to the witness should inform the witness that:

- (a) he or she should arrive at the Tribunal in good time for the scheduled hearing;
- (b) on arrival at the Offices of the Tribunal, he or she should present himself or herself at reception, and not speak to other witnesses about the case before the hearing;
- (c) he or she should inform the Tribunal if he or she requires an interpreter;
- (d) in the event that he or she gives evidence on oath or by affirmation, whether he or she would prefer to take an oath or to make an affirmation, if he or she would prefer to take an oath, what holy book he or she requires for that purpose; that Old Testaments, New Testaments, and Korans will be provided by the Tribunal and that if the appellant wishes to use their own, or another, religious text, that he or she should bring that with them to the hearing.
- (e) that he or she should inform the Tribunal of any other special requirements or needs that he or she might have relevant to attending at the Tribunal as a witness; and
- (f) that any requirements in respect of interpretation, the oath, or special requirements be notified to the Tribunal 10 working days before the date of the hearing.

[6] Witnesses for combined hearings

[6.1] It should be borne in mind that the Tribunal may conduct two or more oral hearings together where it appears to the Tribunal that (a) each of the cases concerned relates to some common matter, (b) each of the cases concerned relates to members of the same family, or (c) it is otherwise reasonable and just that the cases should be heard together (reg.8 of the Regulations). In such circumstances, two or more hearings may involve the same witness or witnesses (including appellants) such that it will be efficient to combine the hearings.

[6.2] However, combined hearings should generally be used: *“only ... where the factual basis of each claim is so intertwined that it is only by considering them together that there can be a fair and proper evaluation of the evidence. In practice this is likely to be confined to family cases where each member relies on the same Convention reason of reasons arising out of a contemporaneous factual background”*.⁶

⁶ Tahir (00/TH/01307; 7 June 2000).

[7] Witnesses who are applicants for international protection with concurrent applications

- [7.1] If a proposed witness, whose evidence in the Tribunal's opinion is likely to be relevant to the case, has an outstanding claim for international protection, the Tribunal should give consideration to postponing the appeal hearing pending the determination of the witness's first instance decision, if the witness's evidence is likely to be relevant to his or her own case. This is because the testimony of an applicant for international protection should be given first in the context of an interview before an international protection officer, and should not be tested for the first time in an appeal context, which has an adversarial aspect.⁷ There is however no general rule that appeals should be postponed or adjourned whenever there are concurrent applications for international protection from related applicants.⁸

[8] Vulnerable witnesses

- [8.1] Vulnerable persons, including children, should be called as witnesses only where the Tribunal determines that the evidence is necessary to enable the fair hearing of the case consistent with natural justice, and that the vulnerable person's welfare will not be prejudiced. Whether to direct the attendance of a vulnerable person as a witness should be decided by reference to all available evidence and the submissions of the appellant and international protection officer. It may be appropriate for the Tribunal to invite input from interested parties, such as a child's parent or guardian.⁹ It may be appropriate for the Tribunal to direct that the evidence should be given by other means directed by the Tribunal pursuant to s.42(8)(c) of the Act.

[9] Arranging for interpretation

- [9.1] The Act provides that, in conducting an oral hearing, the Tribunal shall, where necessary for the purpose of ensuring appropriate communication during the hearing, provide the appellant with the services of an interpreter (s.42(6)(c)). While there is no analogous express provision in respect of witnesses generally, any witness is in principle entitled to give evidence in his or her language. Therefore, the Tribunal should ensure that it ascertain what language or languages a witness speaks, and request attendance of an appropriate interpreter, where necessary. The Tribunal should bear in mind that not all witnesses will speak the same language or languages as the appellant and that a witness's language will not necessarily be stated on the appellant's papers.

⁷ *Ex p Kimbesa* (29 January 1997, unreported).

⁸ [Rajan v Secretary of State for the Home Department \(01/TH/002244\)](#).

⁹ [Senior President of Tribunals' Practice Direction on Child, Vulnerable Adult and Sensitive Witnesses](#) (UK Tribunals Judiciary, First Tier and Upper Tribunal), paras 2-4.

[10] Special Arrangements

- [10.1] The Tribunal should bring to the attention of the staff of the Tribunal, in good time before a hearing, any particular needs of a witness that come to the attention of the Tribunal, in order that the witness's needs may be facilitated if possible.

At the Hearing

[11] At the outset of the hearing

- [11.1] Measures should be taken to ensure that the hearing room is a safe environment for all and to ensure that witnesses have appropriate places to wait on the Tribunal's premises while evidence is being given by the appellant or other witnesses.
- [11.2] The Tribunal should assure any witness that the hearing is confidential, and explain to witnesses that the hearing is held in private (pursuant to s.42(4) of the Act).
- [11.3] The Tribunal should explain to any witness the working rules that the Tribunal is applying for the hearing, and that it may be some time before he or she will be called to give evidence.
- [11.4] In setting the working rules for the hearing, the Tribunal should bear the following principles in mind:
- (a) In conducting an oral hearing, the Tribunal shall permit an officer of the Minister or another person nominated by the Minister to be present at and participate in the hearing and, in person or through a legal representative, explain to the Tribunal the recommendation of the international protection officer that is the subject of the appeal (per s.42(6)(b) of the Act).
 - (b) In conducting an oral hearing, the Tribunal may direct that it proceed in a particular order (reg.7(a) of the Regulations).
 - (c) The Tribunal may wish to set limits on elements of the hearing such as examination and cross-examination.
 - (d) An oral hearing must proceed with due expedition (s.42(6)(e) of the Act).
 - (e) The Tribunal must conduct an oral hearing as informally as is practicable, and consistent with fairness and transparency (s.42(6)(d) of the Act).
 - (f) Subject to the above principles, and the principles of fairness, natural justice and good administration, and bearing in mind the fundamental matters it has to determine, the Tribunal has discretion to conduct the hearing in a manner it considers appropriate depending upon the circumstances of the case.

[12] At the start of a witness's examination

- [12.1] The Tribunal should endeavour to put the witness at his or her ease so that the witness can focus on his or her evidence.
- [12.2] The Tribunal should explain to the witness how his or her examination will proceed, and how to address the Tribunal.
- [12.3] The Tribunal should ensure that the witness understands that if he or she has any problems speaking in English, or through the interpreter provided, that he or she should inform the Tribunal.
- [12.4] The Tribunal should tell the witness that breaks may be taken, and if he or she requires a break, for any reason, that he or she tell the Tribunal so that the Tribunal may take appropriate action.
- [12.5] The Tribunal should inform the witness that he or she may take time in answering questions, and that he or she must inform the Tribunal if he or she does not understand any question.
- [12.6] The Tribunal should explain to the witness that the appellant's legal representative (if there is one), the presenting officer (if there is one), and the Tribunal, may have questions for him or her.

[13] Interpreters

- [13.1] If necessary, a witness should be provided with an interpreter who is able to ensure appropriate communication between the witness, the Tribunal and any other participant at the hearing.
- [13.2] The Tribunal shall ensure that the interpreter is effective, and that there is adequate understanding between the interpreter and the witness. If concerns arise in relation to the effectiveness and suitability of the interpreter, the Tribunal will pause the hearing to clarify matters and, if necessary, postpone the hearing to a later date.
- [13.3] Where the Tribunal hears evidence on oath or by affirmation other than through English, via an interpreter, the interpreter should be directed under s.42(8)(c) to swear the interpreter's oath (or provide an affirmation). The appropriate forms of oath and affirmation are set out in the appendix to this Guideline. See the following section for more information on oaths and affirmations.

[14] Oath/Affirmation

- [14.1] For the purpose of an oral hearing, the Tribunal may take evidence on oath or on affirmation and for that purpose may cause persons attending before it to swear an oath or make an affirmation.¹⁰ This power includes a power to administer the oath or affirmation.
- [14.2] The Tribunal should take evidence on oath or affirmation unless the Tribunal is of the opinion that to do so is not in the interests of justice. In particular, the Tribunal may take the view that it is in the interests of justice for a child under 14 years of age not to swear an oath or make an affirmation.
- [14.3] An oath or affirmation is valid so long as the person taking it appreciates the solemnity of the occasion and the additional moral obligation to speak the truth, which arises in the situation.
- [14.4] The power to administer an affirmation can be used only where the witness objects to swearing an oath, either on the grounds of having no religious belief or because it is incompatible with his or her religious belief.¹¹
- [14.5] The Tribunal should explain that in giving evidence on oath or by affirmation, the witness is promising to tell the truth, and that it is an offence to give false evidence after taking the oath or giving the affirmation. The Tribunal should explain that an oath has religious significance and an affirmation does not, and that the witness's evidence will be considered in the same way whether the evidence is given under oath or by affirmation.
- [14.6] For the purpose of taking the oath or affirmation, the Tribunal should hand the witness a card with the appropriate oath or affirmation, which the witness should read.
- [14.7] In the event that the Tribunal anticipates taking an oath other than in the Christian, Jewish or Islamic forms, the Tribunal should seek guidance from the Chairperson in advance of the hearing in order that appropriate arrangements can be made. Regard may be had to *Stringer on Oaths* for guidance in such circumstances.¹²
- [14.8] Where the Tribunal hears evidence on oath or by affirmation other than through English, via an interpreter, the interpreter should be directed under s.42(8)(c) to swear an interpreter's oath (or provide an affirmation).
- [14.9] The appendix to this guideline provides the applicable oaths in the Christian, Jewish and Islamic forms and the applicable affirmation, and an interpreters oath and affirmation.

¹⁰ Section 42(8)(d) of the Act.

¹¹ Section 1, Oaths Act 1888.

¹² *Stringer, Oaths and Affirmations in Great Britain and Ireland* (1928, 4th Ed.)

[14.10] Copies of the Old Testament, New Testament and Koran will be made available in the hearing room.

[15] Principles to bear in mind when the witness is giving evidence

[15.1] In conducting an oral hearing, the Tribunal is obliged to allow for the examination and cross-examination of the appellant and any witnesses (s.42(6)(f) of the Act).

[15.2] In conducting an oral hearing, the Tribunal must ensure that a witness is present only for the duration of his or her evidence (reg.7(b) of the Regulations). While an appellant should not be present for the duration of evidence of another witness, he or she may be present for the duration of the opening part of the hearing, until another witness gives oral evidence, and any legal submissions.

[15.3] The Tribunal should afford an opportunity to the appellant and the presenting officer (if there is one) to raise further relevant questions based on their own enquiries.

[15.4] Questioning should be done in a sensitive manner, taking into account the witness's personal characteristics or vulnerability, as appropriate.

[15.5] In the event that the Tribunal considers that questions being put to a witness are unreasonable, unfair, offensive or aggressive, the Tribunal should intervene to ensure that appropriate standards are applied.

[16] Principles to bear in mind when weighing the evidence of witnesses besides appellants.

[16.1] There is no need to make a specific credibility finding on a supporting witness whose evidence is found to have limited corroborative value.¹³

[16.2] Consistency between witnesses should be given credit just as inconsistency might lead to concerns.¹⁴

[16.3] It would be wrong to discount evidence because it comes from a friend of the appellant.¹⁵

[16.4] Witnesses with refugee status or subsidiary protection should prove the basis on which their status was granted.¹⁶

¹³ *Kurnaz* (11085; 22 June 1994).

¹⁴ *Turkak* (11597; 7 December 1994).

¹⁵ *R (Sri Lanka)* [2004] UKIAT 00056 (25 March 2004).

¹⁶ *AB (Witness Corroboration in Asylum Appeals) Somalia* [2004] UKIAT 00125.

[16.5] Findings upon the evidence of a material witness in previous proceedings form a firm basis on which later decision makers should make their determinations regarding claims that have arisen from the same factual matrix.¹⁷

[17] Expert Witnesses

[17.1] An expert witness is someone whose level of specialist knowledge or skill in a particular field is such that it qualifies him or her to give an opinion on factual matters falling within the area of his or her expertise. Expert evidence may therefore be produced in support of an appeal where there are relevant issues that require a particular expertise which may not otherwise be available to the parties or to decision-makers.¹⁸ The opinion of an expert is admissible in evidence if the subject is one on which competency to form an opinion can only be acquired by special study or experience.¹⁹

[17.2] Expert evidence should be the independent product of the expert, uninfluenced by the application and appeal. Expert witnesses should assist the Tribunal by providing objective, unbiased opinion on matters within their expertise, and not assume an advocacy role.²⁰

[17.3] The UK Upper Tribunal (Immigration and Asylum Chamber) has summarised the duties of an expert witness as follows:

- “(i) to provide information and express opinions independently, uninfluenced by the litigation;
- (ii) to consider all material facts, including those which might detract from the expert witness’ opinion ;
- (iii) to be objective and unbiased;
- (iv) to avoid trespass into the prohibited territory of advocacy;
- (v) to be fully informed;
- (vi) to act within the confines of the witness’s area of expertise; and
- (vii) to modify, or abandon one’s view, where appropriate.”²¹

[17.4] Where an expert witness’s key purpose is to give his or her opinion on the factual evidence, the expert witness should normally give evidence after all witnesses of fact and should be present to hear that other evidence.

[17.5] An expert witness may refer to the learning of others in his or her field to support his or her opinion.

¹⁷ *AA (Somalia) & AH (Iran) v The Secretary of State for the Home Department* [2007] EWCA Civ. 1040.

¹⁸ Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis, Produced by the International Association of Refugee Law Judges European Chapter (IARLJ-Europe) under contract to EASO (*forthcoming*).

¹⁹ *McFadden v Murdock* [1867] IR 1.

²⁰ Compare Practice Direction 10, [Practice Directions, Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal, 10th February 2010, amended 13th November 2014.](#)

²¹ *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC), para.25.

[18] At the conclusion of the witness's evidence

[18.1] After the witness has given his or her evidence, the Tribunal should thank the witness for his or her contribution to the appeal. The Tribunal should explain to the witness that he or she is free to leave the hearing, and the Tribunal's premises. In respect of appellants, the Tribunal should explain to an appellant after he or she has concluded his or her evidence that he or she should leave the hearing room for the duration of other witnesses' evidence, but may wish to return to the hearing room to be present for legal submissions, and the Tribunal should make appropriate arrangements to facilitate this.



**Hilka Becker
Chairperson
International Protection Appeals Tribunal**

Dated the 5th day of September of 2018

Appendix

Forms of Oaths and Affirmations

1. Witness's Oath - Christian

A copy of the New Testament is handed to the witness.

Witness: "I swear by Almighty God that the evidence I shall give to the Tribunal shall be the truth, the whole truth and nothing but the truth."

Tribunal: What is your name please?

Witness: *States name*

Note: New Testament raised in right hand, left hand not raised.

2. Witness's Oath - Jewish

A copy of the Old Testament is handed to the witness.

Witness: "I swear by Almighty God that the evidence I shall give to the Tribunal shall be the truth, the whole truth and nothing but the truth."

Tribunal: What is your name please?

Witness: *States name*

Note: Old Testament raised in right hand, left hand not raised.

3. Witness's Oath - Islamic

A copy of the Koran is handed to the witness. He or she places his or her right hand flat upon the book and puts the other hand upon his or her forehead, bringing his head down to the book and in contact with it. He then regards the book for some moments.

Tribunal: What is the effect of the ceremony you have performed?

Witness: I am bound by it to speak the truth.

Tribunal: What is your name please?

Witness: *States name*

4. Witness's Affirmation

Witness: I solemnly sincerely and truly declare and affirm that the evidence I shall give to the Tribunal shall be the truth, the whole truth, and nothing but the truth.

Tribunal: What is your name please?

Witness: *States name*

5. Interpreter's Oath

Interpreter: I swear by Almighty God that I will well and truly interpret and explain to the Tribunal the evidence given in this oral hearing, according to the best of my skill and understanding.

Tribunal: What is your name please?

Interpreter: *States name*

6. Interpreter's Affirmation

Interpreter: I do solemnly sincerely and truly declare and affirm that I will well and truly interpret and explain to the Tribunal the evidence given in this oral hearing, according to the best of my skill and understanding.

Tribunal: What is your name please?

Witness: *States name*