Immigration Law Drafting Webinar

Representations, Skeleton Arguments & Grounds

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No 8 CHAMBERS

Introduction: Pipe's Principles

1. **The difference good drafting can make;**
2. **The danger of cut and paste;**
3. **Long does not necessarily mean good;**
4. **Get the law right;**
5. **Be clear and avoid legalese;**

Justice Susan Glazebrook http://www.civillitigationbrief.com/wp-content/uploads/2018/03/Effective-written-submissions.pdf

'Being concise is not the same as short (although, where possible, short is a good idea). Being concise means getting rid of unnecessary detail.'

'Speak English, not lawyer in your submissions.'

'Meet the usual rules of good writing. Use short sentences. One idea per paragraph. Keep adjectives and literary flourishes to a minimum. An argument can ironically appear weaker if it is adorned with hyperbole and adjectives.'

'Make sure your submissions are logically structured, pleasingly arranged, with plenty of road signs.'

'Typos make you look sloppy. Inaccuracies in the facts and the law are even worse. Get someone to check your work. You can get too close.'

The Power of Language

This is the opening paragraph of Lord Denning's judgment in *Lloyds Bank Ltd v Bundy [1974] EWCA Civ 8 (30 July 1974)* http://www.bailii.org/ew/cases/EWCA/Civ/1974/8.html

'Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want to get him out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Going out means ruin for him.'

Representations

Laying the Foundation

HJT Mastering Immigration Law (1)

17.4.5 REPRESENTATIONS

Specific Criteria

Complete formalities correctly –

– write in form of letter with salutation

provide client's full name, date of birth, nationality

Explain stage case has reached (pre decision/post decision)

Refer to documents that are being enclosed (a schedule is the clearest way for the reader to ensure that they have been sent everything)

Briefly set out all relevant introductory matters –

make clear what the factual basis of the case is

make it clear for whom you are applying for leave to enter (including dependants) and what form of leave you are seeking (e.g. discretionary outside the rules, or a form of leave to remain within the rules).

note any further evidence which is not yet available but which is imminent, unless there is a question over whether such evidence will actually support the claim.

HJT Mastering Immigration Law (2)

Make substantive representations

set out any relevant legal propositions, both Convention rights and case law interpreting those rights

apply to the facts of the case: ensure that for each proposition you identify (a) the fact(s) relevant from the client's case; (b) the country/medical evidence that supports the proposition; (c) the application of the law in the light of this combination of client-specific and independent facts.

show why any error in the case's processing so far has led to unfairness

cross refer between sources: to objective country evidence, medical evidence, to statements: show your drafting expertise by always succinctly summarising your source rather than including lengthy quotes: only quote verbatim where a passage is vital or particularly persuasive

address other material that has been provided (e.g. Home Office policy guidance).

offer explanations for any conduct which might antagonise the Home Office (failure to comply with immigration formalities, a change in a visit's purpose away from the original basis for entry clearance being granted).

General Criteria

Logical structure

Be concise: do not repeat facts

Be precise

Use correct, plain and professional English

Maintain ethical standards

Be persuasive

Skeleton Arguments

Strengthen the Bones

Benefits of a Good Skeleton

28.6 If the judge has started with a negative impression of your case, that may affect his interventions during oral evidence. If his interventions leave your client and other witnesses feeling uncomfortable or believing that the judge is leaning against them, it may affect their confidence and the quality of their evidence. That in turn may influence the judge's assessment of their evidence and reinforce any negative impression. It should not, of course, happen this way. But by providing a skeleton argument, you ensure that the judge has an accurate factual summary, is alerted to the real issues, and that misleading allegations in the refusal letter are answered before they have an opportunity to infect the judge's view of your client.

Best Practice Guide to Asylum and Human Rights Appeals

https://www.ein.org.uk/bpg/chapter/28

Advice from Desmond Browne QC (1)

https://www.graysinn.org.uk/sites/default/files/documents/members/Written%20Advocacy.pdf

'they are an example of getting your retaliation in first – of persuading the court of the merits of your case before the first words leave your mouth. They should aim to prepare the ground for the oral submissions that will follow.'

'Try and present the Court with a document which can be used as the basis of the judgment.'

'A skeleton not only needs to read well, it needs to look good. How it looks really does matter: make it look enticing.'

'Group your paragraphs under explanatory headings indicating the topic being covered; and, if necessary, use sub-headings.'

Advice from Desmond Browne QC (2)

‘Use wide margins and wide spacing of lines, at least 1.5. This enables the judge to write comments. Use a large font: Times Roman is commonly used and use font size 12.’

‘Pagination is imperative. So is simple paragraph numbering: a surprising number of judges dislike American-style numbering. So use 1, 2, 3; a, b, c in preference to 1.1, 1.2, 1.3. Another dislike of… judges is footnotes: the Law Reports don’t have footnotes. Case references are contained in the body of the text, unlike textbooks. If you cannot resist the temptation to use footnotes, at least never put any point of substance into a footnote. If it really is a point of substance, put it in the main text.’

‘Finally, proof read carefully; a third person will pick up typos, spelling mistakes and bad grammar much more readily than the author.’

Be Clear & Concise

'One good thing can be said about [counsel's] skeleton argument... , which is that it was short enough to make it reasonably clear how he put his case... This is usually not so with the skeleton arguments of counsel in this field, which are all too often so intolerably prolix that they may be better described as well-fleshed corpses, doing more to conceal than reveal what the case is about.'

Zarour v Secretary of State for the Home Department (01/BH/00078)

ME (Sri Lanka) v The Secretary of State for the Home Department [2018] EWCA Civ 1486 (28 June 2018)

24. Of the 25 pages of [counsel's] skeleton argument, approximately 19 consist of quotation, some of which are themselves over 3 pages long. Where an authority is cited, the skeleton argument does not state the proposition for which it is cited. There is no cross-referencing to any paragraph in either the decision of the FTT or the UT or any attempt to explain why the FTT's findings of fact were inconsistent (which is the ground on which Underhill LJ granted permission to appeal). Despite a recitation of the asserted facts, based on the evidence of ME and his witnesses rather than the FTT's findings of fact, there is only a single cross-reference to the bundle relating to a scarring map. That scarring map was not referred to by the FTT because it was common ground that ME had been beaten as he had alleged. Most importantly the skeleton argument failed to define and confine the areas of controversy by reference to the grounds of appeal, which it does not mention at all.

https://www.bailii.org/ew/cases/EWCA/Civ/2018/1486.html

DIRECTIONS TO REPRESENTED APPELLANTS (PRESIDENTIAL PRACTICE STATEMENT No 2 of 2020)

2.4 The ASA must contain three sections: (1) a brief summary of the appellant's factual case; (2) a schedule of issues; (3) the appellant's brief submissions on those issues which should state why the appellant disagrees with the respondent' s decision with sufficient detail to enable the reasons for the challenge to be understood. A template is available online.

2.5 The ASA must:

be concise;

be set out in numbered paragraphs;

engage with the decision letter under challenge;

not include extensive quotations from documents or authorities;

identify but not quote from any evidence or principle of law that will enable the basis of challenge to be understood.

PRACTICE DIRECTION 52A – APPEALS §5.1

(1) The purpose of a skeleton argument is to assist the court by setting out as concisely as practicable the arguments upon which a party intends to rely.

(2) A skeleton argument must–

be concise;

both define and confine the areas of controversy;

be set out in numbered paragraphs;

be cross-referenced to any relevant document in the bundle;

be self-contained and not incorporate by reference material from previous skeleton arguments;

not include extensive quotations from documents or authorities.

(3) Documents to be relied on must be identified.

(4) Where it is necessary to refer to an authority, a skeleton argument must –

(a) state the proposition of law the authority demonstrates; and

(b) identify the parts of the authority that support the proposition.

If more than one authority is cited in support of a given proposition, the skeleton argument must briefly state why.

https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part52/pd_part52#V

Grounds

Being Appealing

Types of Grounds

1. Grounds from SSHD/ECO decision (now more of a tick box with online procedure);
2. PTA Grounds from FTT decision;
3. Administrative Review Grounds;
4. Judicial Review Grounds;
5. Appeal Grounds to the Court of Appeal.

Joint Presidential Guidance 2019 No 1: Permission to appeal to UTIAC (1)

29. It is reasonable to expect a professional representative to set out the basis of the application for PTA with an appropriate degree of particularity and legibility. The parties are under a duty to assist the Tribunals in their overriding objective and to co-operate with them. For those reasons, a judge is entitled to expect that the grounds of appeal should set out in simple language, clearly and concisely why the decision of the First-tier Tribunal was wrong; that they address the relevant part of the decision and the way in which it is said to be wrong in respect of each way in which the decision is said to be wrong. A judge is entitled to point out where this has not been done; the judge's role is to evaluate the claimed errors, not to read through overlong grounds padded out with unnecessary quotations from statute or case law to discern if they disclose an arguable error.

Joint Presidential Guidance 2019 No 1: Permission to appeal to UTIAC (2)

Renewed applications

32. An application to the UT for permission to appeal is a fresh application and must include all the grounds on which the appellant seeks to rely, including those contained in the application to the FtT. It is sufficient to say that those grounds are relied upon. But if grounds set out in the first application are not included in the renewed application, a judge is entitled to assume that the appellant no longer wishes to rely on them. This should be recorded in the reasons for grant or refusal of permission.

33. An application to the UT is not an appeal against the decision of the Judge who considered the application to the FtT and should not be drafted in that way. It is sometimes helpful for applicants to say why they disagree with the reasons given by the FtT for refusing permission, but it is never obligatory.

Joint Presidential Guidance 2019 No 1: Permission to appeal to UTIAC (3)

36. There are obvious limits to the circumstances when PTA should be granted [4]:-

(i) A complaint with an assessment of facts that it was legitimate for the FtT Judge to make (even applying the reasonable degree of likelihood approach applicable to material aspects of protection claims) cannot normally be characterised as an error of law (but see E & R [2004] EWCA Civ 49).

(ii) Whilst disregard or misstatement of evidence that was placed before the FtT may amount to an error of law, or a failure to act fairly, the submission of further evidence following the hearing to contradict a finding (even if it would have been admissible in the original proceedings) cannot usually be said to be an error of law (see CA [2004] EWCA Civ 1165), unless the evidence is submitted to demonstrate unfairness or the decision is based on an entirely false factual hypothesis (see E & R[2004] EWCA Civ 49) or concerns questions of jurisdictional fact.

Joint Presidential Guidance 2019 No 1: Permission to appeal to UTIAC (4)

(iii) An error of law in the decision being challenged on a topic that is completely irrelevant to the substance of the decision in hand is unlikely to justify the grant of permission, unless the point itself is of some general importance in the context of immigration and asylum appeals and deserves further consideration on that basis alone. A grant of permission on this basis is more appropriately made by the UT (i.e. on a "renewed application").

(iv) A point of law that is not arguable whether because the statute is clear, the contention extravagant and unsustainable or there is stable, binding precedent of the higher courts, is unlikely to justify the grant of permission. However, if there is a case for the UT/higher courts to reconsider the point in issue, permission should be granted as a refusal of permission does not give rise to a right of appeal to the Court of Appeal. It will be rare for a judge to decide to grant PTA because he or she considers a binding precedent may be reviewed by a superior court with power to do so. But this may be appropriate in circumstances where, if the matter were before the UT, the latter could certify a point of law of public importance, so as to enable the Supreme Court to decide whether to grant permission to appeal, direct to that Court [5]. As with (iii) above, the UT, rather than the FtT, will be best placed to take a view on a matter of this kind.

Errors of Law: R (Iran) & Ors v Secretary of State for the Home Department [2005] EWCA Civ 982

9. When the court gave this guidance in Subesh, it was aware that it would not be of any relevance to an appellate regime in which appeals were restricted to points of law. It may be convenient to give a brief summary of the points of law that will most frequently be encountered in practice:

i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");

ii) Failing to give reasons or any adequate reasons for findings on material matters;

iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;

iv) Giving weight to immaterial matters;

v) Making a material misdirection of law on any material matter;

vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;

vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.

https://www.bailii.org/ew/cases/EWCA/Civ/2005/982.html#para9

Materiality: OK (PTA; alternative findings) Ukraine [2020] UKUT 44 (IAC) (27 January 2020)

15. In considering Ms. Panagiotopoulou's submissions as to an implicit challenge to a different paragraph being identifiable within this ground, we commence on the basis that this Tribunal will expect a professional representative to set out grounds of appeal with an appropriate degree of particularity and legibility. When examining this ground, it is clear to us that [80] and [82] comprise at their core an observation as to the relevant Country Guidance decision and a subsequent comment as to it being unclear why the appellant's mother did not approach a second lawyer when seeking representation. The author of the grounds has erroneously sought to elevate the observation and comment into findings of fact. We are satisfied that this ground of appeal, which proceeds on the basis that having been sentenced to a custodial term the appellant would be detained on return, does not implicitly engage with the findings made at [86] that even when taking the evidence presented at its highest, the appellant's personal circumstances are such that she could not establish to the requisite standard that if she were a draft evader she would be prosecuted, and if in the unlikely case she were to be prosecuted, as the mother of three young children that she would not receive a sentence of imprisonment. Consequently, the appellant has not challenged the alternative finding at [86] establishing that she does not possess a well-founded fear of persecution on her return to Ukraine and therefore this appeal must fail.

16. We observe that when considering applications for permission to appeal to this Tribunal, judges must give careful consideration to whether there is any, or any meritorious, challenge to an alternative basis for refusing or allowing an appeal as the absence of such challenge will normally be determinative as to the prospect of success.

https://www.bailii.org/uk/cases/UKUT/IAC/2020/44.html

Weight: Durueke (PTA: AZ applied, proper approach) Nigeria [2019] UKUT 197 (IAC) (7 June 2019)

(i) In reaching a decision whether to grant permission to appeal to the Upper Tribunal on a point that has not been raised by the parties but which a judge considering such an application for permission considers is arguably a Robinson obvious point or other point falling within para 3 of the head-note in AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC), the evidence necessary to establish the point in question must be apparent from the grounds of appeal to the Upper Tribunal (whether or not the appellant is represented at the time) and/or the decision of the judge who decided the appeal and/or the documents on file. The permission judge should not make any assumptions that such evidence was before the judge who decided the appeal. Furthermore, if permission is granted on a ground that has not been raised by the parties, it is good practice and a useful aid in the exercise of self-restraint for the permission judge to indicate which aspect of head-note 3 of AZ applies.

(ii) Permission should only be granted on the basis that the judge who decided the appeal gave insufficient weight to a particular aspect of the case if it can properly be said that as a consequence the judge who decided the appeal has arguably made an irrational decision. As the Court of Appeal said at para 18 of Herrera v SSHD [2018] EWCA Civ 412, it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence.

(iii) Particular care should be taken before granting permission on the ground that the judge who decided the appeal did not "sufficiently consider" or "sufficiently analyse" certain evidence or certain aspects of a case. Such complaints often turn out to be mere disagreements with the reasoning of the judge who decided the appeal because the implication is that the evidence or point in question was considered by the judge who decided the appeal but not to the extent desired by the author of the grounds or the judge considering the application for permission. Permission should usually only be granted on such grounds if it is possible to state precisely how the assessment of the judge who decided the appeal is arguably lacking and why this is arguably material.

https://www.bailii.org/uk/cases/UKUT/IAC/2019/197.html

Reasons Challenge: VV (grounds of appeal) [2016] UKUT 53 (IAC) (13 November 2015)

(1) An application for permission to appeal on the grounds of inadequacy of reasoning in the decision of the First-tier Tribunal must generally demonstrate by reference to the material and arguments placed before that Tribunal that (a) the matter involved a substantial issue between the parties at first instance and (b) that the Tribunal either failed to deal with that matter at all, or gave reasons on that point which are so unclear that they may well conceal an error of law.

(2) Given that parties are under a duty to help further the overriding objective and to co-operate with the Upper Tribunal, those drafting grounds of appeal (a) should proceed on the basis that decisions of the First-tier Tribunal are to be read fairly and as a whole and without excessive legalism; (b) should not seek to argue that a particular consideration was not taken into account by the Tribunal when it can be seen from the decision read fairly and as a whole that it was (and the real disagreement is with the Tribunal's assessment of the evidence or the merits); and (c) should not challenge the adequacy of the reasons given by the First-tier Tribunal without demonstrating how the principles in (1) above have been breached, by reference to the materials placed before that Tribunal and the important or substantial issues which it was asked to determine in that particular case.

(3) Where permission to appeal is granted, an Appellant should review whether the grounds of appeal are genuinely arguable in the light of any response from the Respondent to the appeal. Whether or not the original grounds are pursued, it is generally inappropriate to seek to raise new grounds of appeal close to the date of the hearing if, for example, that would cause unfairness to a Respondent or result in the hearing being adjourned.

http://www.bailii.org/uk/cases/UKUT/IAC/2016/53.html

Judicial Review Grounds

31. It is good practice, in every case, to list the public law misdemeanour/s said to contaminate the target of the Applicant's challenge in a single paragraph, divided into subparagraphs where appropriate. In this format, the public law misdemeanour/s asserted should be succinctly stated. Next, the author should be satisfied that the grounds as a whole contain adequate particulars and sufficient supporting evidence. A clear distinction must be made at all times between the alleged facts (on the one hand) and the asserted public law misdemeanours, duly particularised (on the other). The claim must be formulated with the duty of candour owed to the court foremost in the minds of the practitioners and litigant.

32. Where, for example, it is contended that the impugned decision is unlawful by virtue of having taken into account certain immaterial considerations, these should be succinctly expressed. Ditto where it is contended that there was a failure to take into account some obligatory fact or factor. Where the ground of challenge is illegality, the relevant legal rule or rules in play and the asserted breach or breaches thereof should be crisply expressed. A bare pleading that the impugned decision is unlawful, unreasonable and irrational, or one framed in comparable terms, is never acceptable. The judge should not have to forage, dig and mine in order to identify the essentials of the Applicant's case. The mischief of prolixity is strongly discouraged. Attention should be paid to the overriding objective from the outset of the proceedings

SN, R (on the application of) v Secretary of State for the Home Department (striking out : principles) (IJR) (Rev 1) [2015] UKUT 227 (IAC) (23 April 2015)
http://www.bailii.org/uk/cases/UKUT/IAC/2015/227.html

Judicial Review Grounds Template

1. Introduction (decision targeted and remedy sought)
2. Statement of Facts
3. Relevant Legal Provisions
4. Grounds of Challenge (summary of challenge followed by numbered grounds)
5. Conclusion/Prayer (remedy and costs)

Don’t forget duty of candour!

‘While your role is to persuade, this must be done in an ethical manner. So you have a duty to put before the court contrary authorities and not to misrepresent the facts or the law.

Candour more generally can be seen as a powerful weapon of advocacy. Know and deal with the weak points of your case up front. Do not leave out inconvenient facts but try and place them in the best light. The same applies to contrary authorities.’
Justice Susan Glazebrook

Questions?

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