BJPsych Advances (2024), vol. 30, 422–424 doi: 10.1192/bja.2024.42

COMMENTARY

Psychiatric evidence in immigration and asylum cases – a tale of two experts†

Keith Rix

Keith Rix is Visiting Professor of Medical Jurisprudence in the Faculty of Medicine, Dentistry and Life Sciences, University of Chester, Chester, UK, Honorary Associate Professor, Norwich Medical School, University of East Anglia, Norwich, UK, and a retired forensic psychiatrist.
Correspondence Keith Rix. Email: bjpadvances@rcpsych.ac.uk

First received 19 May 2024
Final revision 3 Jun 2024
Accepted 7 Jun 2024

†Commentary on… Psychiatric evidence in UK immigration and asylum cases. See this issue.

SUMMARY

In an article in this issue of *BJPsych Advances* a courageous psychiatrist describes judicial criticism of his expert testimony in a case before the UK's Upper Tribunal (Immigration and Asylum Chamber). This commentary reflects on the value of criticism and feedback on expert witness work, contrasting the psychiatrist's positive response to the judge's words with the reaction of an expert witness in clinical negligence case, who rejected criticism of his evidence.

KEYWORDS

Appraisal; continuing professional development (CPD); criticism; expert evidence; feedback.

In its guide to good practice for surgeons acting as expert witnesses, the Royal College of Surgeons says 'As in all surgical practice, it is simple to make errors in expert work' (Royal College of Surgeons 2019: p. 28). Psychiatrists, like surgeons, can learn from errors in expert work. Such learning is part of the process of continuing professional development (CPD).

The cover of this special issue of *BJPsych Advances* illustrates the process of CPD for the expert psychiatric witness. But it is a simplified illustration. It illustrates how feedback on expert witness practice obtained through the Royal College of Psychiatrists' Multi-Source Assessment of Expert Practice following the conclusion of a medico-legal case can inform the personal development plan of the expert who then seeks to improve their expert witness practice through further education and training. But, feedback can also be informal in the form of a letter or email from the expert's instructing party. And it can also take the form of judicial criticism, which is on the public record.

The wise expert

In his article in this issue, Dr Galappathie (2024) has been quite 'upfront' in referring to the case of *CE (Cameroon) v Secretary of State for the Home Department* [2023], in which he is on the public record as the subject of judicial criticism. Although the judge thought that Dr Galappathie might in future provide opinion sufficiently reasoned and impartial to establish his objectivity and expertise, the judge decided that the court's conclusion regarding Dr Galappathie's approach to risk assessment could properly be considered by the Upper Tribunal (Immigration and Asylum Chamber) and the First-tier Tribunal in respect of any future risk assessment opinion he prepared.

It would not have been surprising if Dr Galappathie had decided to decline further instructions in immigration and asylum cases. With his permission, I can tell you what he did. He sought peer support, he reflected on the criticism at his next annual appraisal, he set about a programme of learning so as to be able to avoid such criticism in the future, he added the detail of this criticism to his *curriculum vitae*, and he referred to it in his written responses to solicitors who were contemplating instructing him. He found that, far from 'dropping him', his instructing lawyers were as supportive as his fellow psychiatrists. They continued to instruct him and assisted him with his learning. As a result of his guided study and research, he is now able to assist fellow psychiatrists who provide, or aspire to provide, assistance to tribunals in immigration and asylum cases, by contributing his article to this special issue. Furthermore, he has been engaged to talk on this topic at the 2024 Annual Grange Conference at Hazlewood Castle.

Proof that Dr Galappathie has learned his lesson has come in a series of judgments, two of which I mention here. In *TNGB v. Secretary of State for the Home Department* [2024], the judge said 'Dr Galappathie acknowledges the tribunal's criticism made of a past report he prepared in another case, and I find that he has adequately addressed those criticisms in his report on the appellant […] I therefore find that I can place significant weight on the report of Dr Galappathie'. In *Murugesu v Secretary of State for the Home Department* [2024], the judge said 'At paragraph 15 of the doctor's report, he reflects upon the serious criticisms of a report which he drafted in 2020 in a different Upper Tribunal appeal (unreported) and

acknowledges some of the criticisms […] I have looked at the report [in the present case] carefully and consider it to be worthy of some weight'.

Mr Justice David Williams, a Family Division High Court judge, in his 2023 Sir Michael Davies Lecture to the Expert Witness Institute on the subject of judicial criticism, distinguished between constructive and destructive criticism of experts (Williams 2023). He identified giving positive feedback and the provision of copies of judgments to experts as examples of constructive criticism. He said that destructive criticism is rarely encountered in the law reports.

Dr Galappathie's experience bears out the statement of Mr Justice Williams that harsh criticism may be necessary and can contribute to the improvement of standards and it shows the aptness of Mr Justice Williams's use in his lecture of a much cited quotation from Frank A. Clark: 'Criticism like rain should be gentle enough to nourish a man's growth without destroying his roots'. He could also have quoted Winston Churchill: 'Criticism may not be agreeable, but it is necessary. It fulfils the same function as pain in the human body; it calls attention to an unhealthy state of things' (*New Statesman* interview, 7 January 1939).

In dealing with criticism, Mr Justice Williams suggests the following. First, clarify the capacity in which you are acting. if you are what he calls 'a witness with expertise', that is giving expert factual evidence, and if you have made clear the limits of your expertise, you should not be criticised if you have been unable to resist pressure from the court to offer opinion that falls beyond your expertise. So, heed advance notice of challenges. It was unfortunate that Dr Galappathie did not receive the invitation to attend court to explain his methodology. Do not be defensive; be objective. Ask for time to respond. Seek support. Dr Galappathie found such support in his medico-legal peer group.

… and the not so wise expert

Dr Galappathie's response to criticism is to be contrasted with that of a medical expert who gave evidence in *Beatty v Lewisham and Greenwich NHS Trust* [2023], a clinical negligence case, where the expert was taken to a previous case in which he was subjected to judicial criticism for making mistakes and failing to justify his conclusions by providing reasons. His explanation was that the judge failed to understand the evidence. A judge's comments may be difficult to accept but should nevertheless be seen as a learning opportunity. Unlike Dr Galappathie, it does not appear that he took this opportunity. The judge went on to express regret at having to say that he was not a satisfactory witness. He was combative in answering some perfectly fair and reasonable questions. He betrayed at several points in his evidence a degree of partisanship which came close to advocacy. For example, when pressed about the previous case, he said that it was 'one of the few cases I was involved in we didn't win'. Further, there were mistakes in his reports 'such as […] should not be made in expert reports'. More importantly, nowhere in his main report did the court see any attempt to identify the key issue in the case or to supply any reasoning directed to the conclusion that the standard of care was inadequate. There was a looseness in his language. The judge said that perhaps his most egregious shortcoming was to reach an opinion in his main report without properly analysing the witness statement of the allegedly negligent surgeon. As observed by Whitfield & van Dellen (2021), '[t]o be offering an opinion as an expert medical witness on whether a colleague has been guilty of negligence counts as one of the gravest responsibilities that doctors encounter'. His answers to questions in the joint agenda were unacceptably terse. The judge finished by saying that the obligation to set out the reasoning for conclusions exists even if the reasons seem blindingly obvious to the maker of the opinion.

Conclusion

It was a past President of the RCPsych, the late Professor Andrew Sims, whose fervent belief in, and promotion of, CPD resulted in the publication of the forerunner of this journal, *Advances in Psychiatric Treatment.* Dr Galappathie's case is a vivid and also public example of how CPD works, both for the benefit of the doctor and for the public good. If alive today, Andrew Sims would have said that Dr Galappathie's case illustrates exactly what he had in mind.

With still growing numbers of immigrants and asylum seekers, and what may be even tighter timescales for the processing of their applications and appeals, psychiatrists will be needed more and more to assist the tribunals and courts as, thankfully, Dr Galappathie has not been deterred from doing. Those who do so will be the better prepared for reading his article and should be grateful for his humility and courage in responding as he has done to judicial criticism.

Funding

This work received no specific grant from any funding agency, commercial or not-for-profit sectors.

Declaration of interest

None.

References

Galappathie N (2024) Psychiatric evidence in UK immigration and asylum cases. *BJPsych Advances*, **30**: this issue. Available from: https://doi.org/10.1192/bja.2024.33.

Royal College of Surgeons (2019) *The Surgeon as an Expert Witness: A Guide to Good Practice*. RCS (https://www.rcseng.ac.uk/standards-and-research/standards-and-guidance/good-practice-guides/expert-witness/). Cited 17 May 2024.

Whitfield H, van Dellen A (2021) For debate: the short report – legal and ethical implications. *Annals of the Royal College of Surgeons of England*, **103**: 544–5.

Williams D (2023) *Sir Michael Davies Lecture 2023: The Criticism of Expert Witnesses in the Courts ['The Good, The Bad, and the Ugly']*. Expert Witness Institute. Available from: https://portal.ewi.org.uk/Knowledge-Hub/Questions-and-Answers/sir-michael-davies-lecture-2023-the-criticism-of-expert-witnesses-in-the-courts.

Cases

Beatty v Lewisham and Greenwich NHS Trust [2023] EWHC 3163 (KB).

CE (Cameroon) v Secretary of State for the Home Department [2023] UKAITUR PA011122020.

Murugesu v Secretary of State for the Home Department [2024] UI-2023-000246.

TNGB v Secretary of State for the Home Department [2024] PA 0004021.