

3. STATELESSNESS-IN-QUESTION

EXPERT TESTIMONY AND THE
EVIDENTIARY BURDEN OF STATELESSNESS

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Sitting there, waiting for the bus to start moving, Asad examined the new stamp on his watermarked travel document. He glared at it resentfully and restrained himself from tearing it to shreds. It occurred to him that the document itself had probably been invented for the purpose of fleecing people without documents. It was something for which you paid one set of officials clearly; and when you presented it to another set, many hundreds of miles away, it announced that you were up for more fleecing. Not for the first time in the last few days he felt a fool, a person whose purpose on this planet was to be duped.

—Jonny Steinberg, *A Man of Good Hope*

In 2015, the Home Office of the United Kingdom attempted to deport a Gambian woman to her birth country. “Princess” (not her real name) had lived in Austria since the age of ten, and came to the United Kingdom in 2010 to escape her father’s attempt to coerce her into a marriage.¹ In 2013, she was lured back to Gambia, where she was forcibly subjected to genital cutting. Upon return to the United Kingdom she bore a child with a UK “settled person” of Tanzanian origin. Princess applied for refugee status for her daughter, based on her fear that she too would be cut if returned to the Gambia. The Home Office, however, held that the daughter was *not* eligible for refugee status because she *was* eligible to *apply* for registration as a “British national.” The rejection letter stated, in the “absence of any information to the

contrary, such as the rejection of your application . . . you appear to be entitled to British nationality.”

Princess insisted that she could not afford the application fee of £749. Her lawyers argued that “eligibility” is not a recognized nationality status. In my expert report, I explained that the infant was a Gambian national, according to Gambian law, and that, were she returned to Gambia, the risk of cutting would be high. In early 2016, a judge of the First Tier Tribunal ruled that one either *is* or *is not* a British national; no liminal status existed in between. Princess could not afford the nationality application; her daughter is not a UK national. She was thus eligible to apply for protection, and he granted refugee status.

The confounding encounter of Princess and her daughter with immigration regulations illustrates the burden placed on individuals to document—or be seen to be actively acquiring documentation of—citizenship. The imagining, by British bureaucrats, of a contingent, pre-applicatory status, a pseudo- or protonationality, the hypothetical existence of which negates or obviates access to humanitarian and refugee protections, may surprise or shock. But it is only one of the many examples of arbitrary or outright capricious interpretations of immigration rules and regulations refugee lawyers and advocates encounter seemingly routinely, each with uniquely idiomatic and insidious impacts on the lives of society’s most vulnerable.

This chapter discusses the predicament of Princess and her kinfolk and, relatedly, the experience of serving as an expert witness in citizenship disputes and statelessness claims of African migrants. Expertise pertaining to country conditions is employed with increasing frequency in refugee matters (Lawrance and Ruffer 2015). Asylum claims in particular “exist at the juncture of law, advocacy, human rights, and expert evidence” (Andrews 2015, vii), and they rely on experts to furnish data, analysis, and evidence. Seeking asylum represents a striking challenge whereby asylum seekers “demand recognition as individual rights-bearing subjects amid the bureaucratic indifference and xenophobic hostility endemic to the nation-state” (Lawrance et al. 2015, 5). As an expert witness in the United Kingdom in approximately a dozen citizenship disputes and statelessness claims by West Africans, I routinely testify to the applicability of citizenship and nationality laws, analyze documentary evidence, and evaluate personal narratives of claimants against known country conditions.

The role of expert testimony in navigating statelessness claims is an underappreciated dimension of the lived experience of citizenship in question. While thematic content and rhetorical format have emerged as areas of research, the contours of expertise in statelessness claims have not been described or analyzed in depth. British jurisprudence supports the contention that arbitrarily

denying citizenship or nationality is a form of persecution and may constitute a protection basis.² Further, courts also have held that the role of documentation, or lack thereof, in establishing the context of persecution “is essentially a question for a fact finding Tribunal.”³

Country conditions experts have unique capabilities to participate in assessments recognizing new persecutory harm paradigms, such as forced marriage, homophobia, or female genital cutting (Berger et al. 2015; Lawrance and Walker-Said 2016; Musalo 2015) based on broader principles of human dignity, autonomy, and consent, or on medical humanitarian concerns (Lawrance 2013, 2015). The “unique evidentiary challenges” residing at the heart of what we might call statelessness-in-question makes expertise “critical” (Musalo 2015, 93).

Expert evaluations are often crucial for statelessness determinations. These are invariably “a mixed question of fact and law” (UNHCR 2014b, ¶24). Thus, a “purely formalistic analysis of the application of nationality laws” (UNHCR 2014b, ¶24) is often insufficient. Expert testimony affects the evidentiary burdens borne by stateless migrants in complex ways. Drawing on actual statelessness claims and the growing body of critical studies of irregular migration, immigration detention, and asylum (e.g., Fuglerud 2004; Good 2007, 2015; Griffiths 2012, 2013; Hall 2012; Hertzog 1999; Le Courant 2013; Whyte 2011), I argue expert testimony is often a double-edged sword. Like the medico-legal reports examined by Didier Fassin and Estelle D’Halluin (2005), expert country conditions reports are often necessary but rarely definitive. On the one hand, depending on the expert’s charge, a report can highlight paths to, and obstructions of, an individual’s capacity to document his or her relationship with a state. On the other hand, the limitations on expert testimony are such that it cannot anticipate all hypothetical formulations, and it may unwittingly provide openings for denying a claim.

Statelessness affects millions of people worldwide (see Babo, Flaim, Price, and Sadiq, this volume), but for migrants seeking protection in a host country like the United Kingdom, their experiences can be particularly complex. Over several years I have observed patterns with respect to the reception of expertise. Case histories are a productive site for analyzing these patterns. The stories contained herein reveal that the extraordinary imbalance between the agency of the individual and the power of the state makes it difficult to prove statelessness. The stories also show how additional, seemingly unrelated matters, such as being convicted of a crime, can give rise to a context in which statelessness is almost unprovable. A number of migrants I have encountered have served time for criminal convictions, but their unresolved civil status extends the criminal sentence effectively to a form of banishment. The case histories discussed

here review the constraints on expertise, the application for and production of documents in support of yet additional papers, and finally, the treatment of statelessness claims in practice, all of which point to important patterns.

The Trials of Boubacar

“Boubacar” was seventeen when he arrived in the United Kingdom in 2004 and applied for asylum because of political persecution in his home, the Republic of Guinea. He was convicted of robbery in the United Kingdom in 2007. After serving one year of a three-year sentence, he was further detained under the Immigration Act until July 2011. After a decade of court proceedings seeking asylum and humanitarian protection for Boubacar, his barrister argued that his client had been arbitrarily deprived of his nationality and was stateless. Statelessness, the barrister contended, was brought about by the Guinean authorities’ refusal to grant him an Emergency Travel Document (ETD).

Before the First Tier Tribunal immigration judge (IJ), Boubacar’s advocates described his predicament as a “state of limbo.”⁴ Boubacar has no documentation of his identity. He left Guinea a child. He has never seen his birth certificate and never had a Guinean government-issued ID card or a passport. He assisted with UK Home Office (UKHO) efforts to acquire an ETD, but based on his failure to conform to specific bureaucratic requirements, the UKHO has deemed him uncooperative.

My expert report—produced as a paid consultant for Boubacar and for most of the cases discussed in this chapter—stated that, while Boubacar was a Guinean citizen under Guinean law, that law places the burden of proof entirely on the individual. The Guinean embassy is under no statutory obligation to provide an opinion as to whether or not Boubacar is a national. I described Boubacar as “effectively stateless,” having seemingly exhausted all lawful means and personal agency to prove his identity and establish his nationality. Lawyers for the government countered that, whereas deprivation of a right to citizenship and denial of a right to return “can amount to persecution” and constitute a basis for refugee protection, Boubacar produced no evidence that Guinean authorities deprived him of citizenship.⁵

The IJ agreed with the UKHO. He wrote, Boubacar “claims that he wishes to return to Guinea and that he has done everything he can to establish his nationality so that he can be returned,” but “I have significant credibility concerns as to whether he can be believed.” According to the judge, Boubacar “has been remarkably inactive in taking any further steps on his own initiative.” He has “made no attempt to contact” his former college, “no attempt to get help from

Guinean nationals with whom he is in contact in the UK,” and no attempt “to contact” the “birth registration authorities in Guinea”; he has “not asked for help from his solicitors,” has made “no attempt to contact members of his family,” and has not “approached any agency such as the Refugee Council or the Red Cross.” In rejecting the statelessness claim, the judge concluded, “If the Appellant were to take reasonable steps on his own initiative to obtain proof of his identity and nationality, I have no reason to believe . . . he would be refused” an ETD. As of 2015, Boubacar is acting on the judge’s suggestions and, based on their futility, appealing the decision.

Boubacar’s predicament is a classic illustration of a contemporary problem encountered by asylum seekers and refugees who seek protection under national laws operationalizing the Convention on Statelessness (1954) and the 1967 Protocol, namely, how to demonstrate genuine and thorough, if not exhaustive, engagement with the responsibilities imposed by the burden of proof of identity. The United Nations High Commissioner for Refugees (UNHCR) “Handbook on Protection of Statelessness Persons” (2014b) describes the definition in Article 1(1) of the convention as requiring “proof of a negative—that an individual is not considered as a national by any State under the operation of its law.” It notes, “This presents significant challenges to applicants” (UNHCR 2014b, ¶88).

The UNHCR guidance (¶89) observes that the “burden of proof” in statelessness determinations “is in principle shared, in that both the applicant and examiner must cooperate to obtain evidence and to establish the facts.” Determining authorities need to “take . . . into account” the difficulties applicants face in obtaining “documentary evidence” and, “where appropriate,” give “sympathetic consideration to testimonial evidence” (¶90). Stateless migrants must exhaust all processes before appealing administrative findings (UNHCR/Asylum Aid 2011, 77–79). Boubacar’s statelessness claim was thus deemed premature. Insofar as the determination procedure “is a collaborative one” (¶89), the IJ extrapolated from my expert testimony that Boubacar continued to bear a burden to undertake further cooperation. Examining case histories closely contributes to the understanding of the predicament that I describe as statelessness-in-question. The limitations on expert testimony are such that it cannot answer all questions or anticipate all hypotheticals. Any number of tests, such as the litany adumbrated by the IJ, may result in pertinent information. Expert reports narrating the theoretical application of nationality law may inadvertently provide grounds for a denial of a statelessness claim, even when the expert on balance discerned a record consistent with actual statelessness.

Expertise and the Evidentiary Burdens of Statelessness

There is no formal statelessness determination procedure in the United Kingdom, as there is in other countries, only “established caselaw” on “evidentiary requirements” (UNHCR/Asylum Aid 2011, 76). In rejecting Boubacar’s argument, the IJ’s determination cast important light on two interrelated evidentiary burdens. First, before asserting statelessness, Boubacar must take “all reasonable steps” to obtain documentation.⁶ This first evidentiary burden is anchored in British legislation domesticating the 1951 Refugee Convention, the 1954 Statelessness Convention, the 1967 Protocol, UK Immigration Rules, and related jurisprudence (see UNHCR/Asylum Aid 2011, 66–70).⁷ This first burden highlights the interpretative latitude granted to government authorities. It is for the executive (the UKHO) or the judiciary, not the claimant, to decide whether means have been exhausted.

Second, as an ostensibly Guinean subject, Boubacar can reasonably be expected to observe the Guinean nationality law, which places the burden entirely on the applicant: an especially difficult task if the migrant is in immigration detention with very limited access to legal counsel. This second evidentiary burden emerged from the Statelessness Convention and relates to the role of “competent authorities.” And yet the Guinean embassy in London was under no statutory obligation to assist Boubacar. This second burden draws attention to the disequilibrium between a citizen’s agency to request evidence and competent authorities’ capacity to deny or ignore it.

The first burden, of pursuing evidence of statelessness, resonates with the UNHCR’s description of “evidence relating to the individual’s personal circumstances” (UNHCR 2014b, ¶83). The UNHCR’s “non-exhaustive” catalog of evidence of personal circumstances lists personal testimony (e.g., a written application or formal interview); responses from foreign authorities to inquiries; identity documents (e.g., birth certificate, civil register extracts, national ID cards, voter registration); travel documents (including expired ones); applications to acquire nationality or obtain proof of nationality; naturalization certificates; nationality renunciation certificates; previous responses by states to nationality inquiries; marriage certificates; military service record/discharge certificates; school certificates; medical certificates/records (e.g., attestations from birth hospital, vaccination booklets); identity and travel documents of parents, spouse, or children; immigration documents; residence permits; other documents pertaining to residence (e.g., employment documents, property deeds, tenancy agreements, school records, baptismal certificates); or records of sworn oral testimony of neighbors and community members.

Physical documents are generally accorded greater weight than oral testimony in the United Kingdom (Thuen 2004, 275). Melanie Griffiths’s observation of UK asylum tribunals found that the UKHO and the Asylum and Immigration Tribunal (AIT) “clearly assigned greatest weight to documentary evidence, to the extent that at times documents seemed almost to be valorised” (2014, 270). Despite this, documents often give claimants a false sense of security. The UKHO may lose documents, reject them for unspecified administrative reasons, or contest specific details; “although [documentary] evidence is sometimes deemed sufficient, it is usually challenged as inadequate or false” (271), or even fraudulent. Even acquiring documentation opens the door to a basis for rejecting a claim. Griffiths observed an arrest warrant dismissed with the argument that court documents can “easily be forged” and are “readily available in the country” in question, and a party membership letter refuted on the basis that such a document is “easily obtainable” (271).

The UNHCR does not directly define the appropriate means of acquiring documents. Thus, UK practices and precedents are controlling. In 2009, the Lord Justice Elias outlined the burden an individual encumbers when disputing national origin or attempting to forestall return:

Where the essential issue . . . is whether someone will or will not be returned, the Tribunal should in the normal case require the applicant to act *bona fide* and take all reasonably practicable steps to seek to obtain the requisite documents to enable her to return. There may be cases where it would be unreasonable to require this, such as if disclosure of identity might put the applicant at risk, or perhaps third parties, such as relatives of the applicant who may be at risk in the home state if it is known that the applicant has claimed asylum. That is not this case, however. There is no reason why the appellant should not herself visit the embassy to seek to obtain the relevant papers.⁸

When an asylum seeker or refugee claims to be stateless, he or she must, *in good faith*, take “all reasonably practicable steps,” such as visiting an embassy and requesting documentation.⁹

This second evidentiary burden—following Guinean law—resonates with a second category of evidence the UNHCR describes as “concerning the laws and other circumstances in the country in question” (UNHCR 2014b, ¶83), or what is commonly referred to as Country of Origin Information (COI). This may consist of “evidence about the nationality and other relevant laws, their implementation and practices of relevant States, as well as the general legal environment in those jurisdictions in terms of respect by the executive branch for

judicial decisions. It can be obtained from a variety of sources, governmental and non-governmental.” The UNHCR cautions that, “to be treated as accurate,” COI “needs to be obtained from reliable and unbiased sources, preferably more than one,” “continuously updated,” and “contemporaneous with the nationality events that are under consideration in the case in question” (§86). And because nationality law and practice are complex, decision making “may justify recourse to expert evidence in some cases” (§85).

The research product colloquially referred to as COI is an empirical and methodological outcome of the “hermeneutics of suspicion” (Gadamer 1984; Kessler 2005; Ricœur 1965; Stewart 1989) that characterizes asylum and refugee proceedings wherein the global application of refugee status determination increasingly uses empirical research for credibility findings (CREDO 2013; UNHCR 2013). Country conditions information may demonstrate how the law operates (or does not), and expert evidence may provide insight into the “practicability” of acquiring other evidence. But the UNHCR and Asylum Aid noted, “It is not clear whether [UK] decision-makers systematically make use of this facility [COI research] or fully understand how to assess nationality laws when identifying statelessness” (UNHCR/Asylum Aid 2011, 81).

Thus, interwoven into the two burdens to prove statelessness borne by Boubacar (exhausting British law *and* exhausting Guinean law) are expectations of expert witnessing. In Boubacar’s case, the IJ required evidence of an attempt to find citizenship evidence, *and* evidence that he followed Guinean law, that is, that he had contacted all competent authorities. The Guinean embassy had provided a letter simply stating Boubacar was not a citizen, with no explanation for how he occupied the status of citizenship (and statelessness) in question. The IJ found this incomplete. The evidentiary burden is thus revealed to be remarkably specific and the criteria for evaluating the “reasonable effort” unstated.

Viewed together, these two burdens always produce extreme inequity and often mean impossibly high evidentiary requirements for the stateless. With adequate lead time and research capacity, an expert may be able to provide information about school or birth registration procedures, the capacity of the Red Cross in family contact and reunification, and a complete list of “competent authorities.” It can also, qualitatively and quantitatively, document levels of government transparency, cooperation, accessibility, corruption, and accountability in providing such documents. Expert evidence can indeed engage both of Boubacar’s evidentiary burdens. But the majority of migrants making such claims in the United Kingdom and elsewhere do not have legal representation, or if they do, they have trouble contacting the counselor while in detention, cannot afford application fees, and struggle with language and

translation. Without good legal counsel, however, little is possible, and even this cannot extract documents from nonresponsive state agents or negotiate the ambiguities of IJ criteria and determinations.

Documentary Encounters and Statelessness in Britain

Boubacar's experience can hardly be considered exceptional. A central contention articulated in Jacqueline Stevens's introduction and Polly Price's chapter is that, what many scholars, journalists, and governments describe as exceptional is revealed, upon closer scrutiny, to be disturbingly commonplace. Three case histories from individuals whose cases I reviewed and wrote about, and who have given permission for their stories to be used pseudonymously, parallel many aspects of Boubacar's case. The experiences of "Akossiwa," "Kofi," and "Ibrahim" highlight issues of identity, documentation, citizenship, and nationality in relation to Ghana, Togo, Sierra Leone, Guinea, and Côte d'Ivoire. When read together, they demonstrate the centrality of documentation to advancing statelessness, the role of state authorities throughout the process, and the complexities arising when expertise is introduced.

AKOSSIWA

"Akossiwa" was born in Portugal to a Portuguese father and a Togolese mother. According to the countries' respective citizenship laws, she is both Togolese and Portuguese. At the age of five, she left Lisbon with her parents, traveled to Togo, and crossed into Ghana without any registration. Her mother died, and her maternal aunt raised her. Akossiwa's father left her in Ghana but returned to collect her several years later, while she was still a young child. In an interview she said he was her father, and "he showed me a photo of my mum," and so she returned to Portugal.¹⁰ She entered the United Kingdom in 1998 as an adult with her father, on her own Portuguese passport. Her father soon left and has not been seen since. In 1999, she visited the Portuguese embassy to request a birth certificate copy to qualify for education assistance. After posing questions in Portuguese, which Akossiwa could not answer, an embassy agent seized her passport, claiming it had been tampered with. She retained counsel in London and Lisbon to investigate.

Over several years, efforts were made to ascertain her identity. In 2002, her lawyers requested she be recognized as "stateless." In 2003, she applied for a driver's license and submitted a photocopy of her seized passport. The license agency inaccurately informed the UKHO that she had submitted a fraudulent Portuguese national ID card, whereupon eight immigration officials visited her

home. In the meantime, the Ghanaian embassy correctly informed her there was no way she could acquire Ghanaian citizenship. Her Lisbon lawyer could not find her birth certificate. In 2009, her lawyers informed the UK Border Agency (UKBA, now UK Visas and Immigration) that they would force a decision by judicial action under Article 6 (excessive delay) and Article 8 (private/family life) of the European Convention on Human Rights (ECHR). In 2010 UKBA rejected her statelessness claim, concluding that she either did not know her identity or knew it and was deliberately withholding information.¹¹ It further contended that she was working illegally and threatened to inform her employer.

Before the First Tier Tribunal in August 2010, Akossiwa's barrister argued that the delayed determination, only provoked after a threat of judicial review, undermined a right to a private life and was grounds for stopping her removal, per Article 8's protections of privacy and family life. A narrow path might qualify her for Togolese nationality, but pursuing it was effectively impossible. (Again, there existed no basis for asserting Ghanaian nationality.) The UKHO did not send a barrister to court, nor could it produce the alleged (nonexistent) Portuguese ID card. Whereas Akossiwa conceded no government would likely ever affirm her Portuguese nationality, she continued to insist she is a Portuguese and European national. The judge, however, found that she was not a Portuguese national "even though she appears to have genuinely believed that she was." After resolving that Akossiwa did not submit an ID card as part of her driver's license application, thus reinforcing her credibility, the judge determined she was "stateless" and "without nationality."¹² Her appeal was granted on the basis that her removal would breach Article 8.

KOFI

"Kofi" was born in Togo in 1962 to Togolese parents, but as with so many children in Togo then and globally now—as Amanda Flaim, Jacqueline Bhabha, Rachel Rosenbloom, and Kamal Sadiq, in this volume, show—his birth was not registered. He became involved in opposition politics and was beaten and detained. In 2000, he was tortured in Sotoboua military camp. He escaped with fifteen detainees, fled to neighboring Benin, and registered as a refugee with the UNHCR. Because of close ties between the Benin and Togo governments, Kofi remained fearful. He acquired a fake passport and a visa for unimpeded travel within the Schengen treaty zone, and flew to France. From France he arrived in the United Kingdom in 2000.

Kofi claimed asylum on the basis of political and ethnic persecution, which the UKHO denied in 2000. An IJ denied his appeal, filed without expert evidence, in 2002. Asylees frequently use fraudulent documents (or legitimate

documents acquired fraudulently) to enter safe havens, but Kofi's use thereof was cited as evidence of lack of credibility. Over the next two years he filed several unsuccessful appeals. In 2005, he made a further request for indefinite leave to remain on the basis of having fathered two children with a legal UK resident. This was granted in August 2005. During this period, he remained on his own recognizance. In November 2006, Kofi was convicted of sexual assault and sentenced to four years in prison. A deportation order was served in 2008 pursuant to the UK Borders Act of 2007 requiring deportation of foreign criminals sentenced to at least twelve months. Immigration officers tried to deport him at that time but could not obtain travel documents from Togo.

Kofi served the balance of his sentence, but instead of being released, he was asked to assist in procuring documents that would allow his entry to Togo and signed papers submitted to Togo's embassy in Paris. During this time Kofi remained in immigration detention without any apparent lawful basis. Immigration agents subjected him to a language analysis and nationality test to demonstrate his Togo origins (uncooperative behavior may negatively affect credibility). He was provided a phone card and called the Togo embassy under the supervision of five immigration officers. In 2010, two years after his immigration detention began and six years after he entered prison, new lawyers filed a motion alleging illegal incarceration. A second filing provided psychiatric expertise and country conditions testimony. The submissions were refused. In January 2011, Kofi was finally released from detention. Kofi then appealed the deportation order, arguing that it was a violation of the ECHR's protection of the stateless. Accompanying this appeal was an "anonymity order," protecting his identity from disclosure, because a UK newspaper named him a pedophile in a case of mistaken identity and published his photograph and address.

Kofi's barrister argued that because the UK government had been unable to obtain travel documents, Kofi was "irremovable." He also argued that because of "his lack of documentation," Kofi would face significant difficulties.¹³ The government countered that Kofi posed a "high risk" to women and that his remaining in the United Kingdom would violate the domestic law under which his deportation was first sought. In 2011, an IJ granted Kofi temporary relief and suspended deportation. Kofi was not in detention, but he had no right to work and had to remain at a registered address. His statelessness claim was dismissed. The IJ noted the government's inaction indicated a lack of "urgency," but that citizenship inquiries were "still ongoing."¹⁴ Kofi sued for compensation and filed a fresh asylum claim; he still asserts statelessness. The suspended removal order was made indefinite in 2012, but Kofi's statelessness and citizenship remain in question.¹⁵

“Ibrahim” was born to a Guinean mother and Sierra Leonean father and raised in Abidjan, Côte d’Ivoire. By Guinean and Sierra Leonean law he is a citizen of both countries. He is ethnically Dioula and Muslim but has never had an Ivoirian ID card or citizenship because the country did not recognize him as a citizen. He has an Ivoirian birth certificate, as does his sister, who tried unsuccessfully to acquire an Ivoirian ID card. (For details on Ivoirian citizenship practices, see Alfred Babo, this volume.) Ibrahim has never been to Sierra Leone or Guinea. The violence and political upheaval in Côte d’Ivoire, described in Babo’s chapter, also ensnared Ibrahim. Ibrahim experienced discrimination based on his ancestry, his father’s occupation, and his family’s support for the opposition. In 1998, when Ibrahim was sixteen and after failing to produce an ID, he was arrested. As the violence increased from 1999, he was arrested with a larger group and put in a truck. The group was dumped in the field and forced to run as soldiers fired at them. He was hit three times in his chest and legs. Upon recovery he learned that his father had been murdered and soldiers had burned his home. His mother told him to flee. He journeyed to the Netherlands by boat, arriving in January 2000. He applied for asylum but was refused in 2003. He took the Eurostar to London with a fake French passport.

In the United Kingdom, Ibrahim was found naked and walking aimlessly; he was arrested for marijuana possession in September 2009. He was convicted and immediately served with removal papers for Côte d’Ivoire. After custodial release he tried to travel to the United States to live with his sister, but he was again arrested, charged with and convicted of using a fake passport, and sentenced to one year in prison. In 2010, in immigration detention, he attempted suicide. He then began regular psychotherapy and medication. As his condition stabilized, he visited the Ivoirian, Sierra Leonean, and Guinean embassies in London to establish his identity or lack thereof.

At the Ivoirian embassy, in the presence of a barrister, Ibrahim attempted to establish Ivoirian nationality. The embassy officer required documentation. The barrister mentioned Ibrahim’s birth certificate and asked if inquiries could be made with the local authorities to obtain a copy. The officer stated this would be time-consuming and likely to be unsuccessful, regardless of the birth certificate’s erstwhile existence. Moreover, in a parallel to Stevens’s apologies of citizenship (this volume), the official required a birth certificate before he would pursue further investigation of the existence of a birth certificate. A superior officer stated that Ibrahim was not an Ivoirian citizen “as he saw it” but possibly “a national of a different country either Sierra Leone or Guinea.”¹⁶ The officer stated that for an Ivoirian ETD, the embassy would first need to see an

Ivoirian passport or ID card. The barrister asked if there was any way to appeal to the Ivoirian Court of Justice but received no reply.

Visits to the Sierra Leonean and Guinean embassies were equally futile. Informed that Ibrahim's father was Sierra Leonean, the embassy officer stated that even though "he was not the decision maker," if he were "going to make the decision," he would state he "was not satisfied" that Ibrahim could return to Sierra Leone. According to "his understanding of Sierra Leone nationality law," Ibrahim "would not be entitled [to] citizenship." At the Guinean embassy, an officer stated "he could not decide" whether Ibrahim could reside in Guinea, but "he was sure that the Appellant was not Guinean because he does not possess any Guinean documents." Even though Ibrahim's mother was currently residing in Guinea, a consular official stated (incorrectly) that "Guinean nationality is derived through the father and not the mother."¹⁷

Ibrahim's ordeal in Côte d'Ivoire and his asylum claims have had a profound effect on his mental health and his capacity to access legal representation. After a series of trials and appeals, first to an IJ and then to a three-person panel of two IJs and a physician, Ibrahim was granted protection under Articles 3 and 8 of the ECHR, namely, the prohibition on torture, and the right to a family life. The suicide risk, caused by post-traumatic stress disorder stemming from political and deep-seated historical ethnic persecution, was compelling.

Nonetheless, in 2014, a British tribunal rejected Ibrahim's claim of statelessness. The tribunal held that the evidence "taken at its highest does not establish that he would not be able to return for a [statelessness] convention reason." Ibrahim as a minor could have applied for citizenship, but he did not. He was not "historically . . . deprived of nationality." The panel also stated that "it is not clear" that the officials of the three embassies were "qualified to give such advice relating to issues of nationality." It held that "we have not been presented with the best evidence."¹⁸ If an Ivoirian birth certificate were obtained, a path to return to Côte d'Ivoire would open: "It may be difficult for him to obtain citizenship or to return to Ivory Coast, but the evidence in our view establishes that it would be reasonably likely that the Appellant would be able to return there." Ibrahim can remain in the United Kingdom, but, like the others described herein, his citizenship and statelessness remain in question.

Expert Evidence and Statelessness in Practice

Expert evidence in UK immigration courts is a "relatively recent development" (Griffiths 2014, 262). Country conditions experts may level the playing field in a manner of speaking (Kerns 2000). Judges, for example, may call

upon experts when the documentary evidence is inadequate or an identity is in question (see Kam 2015). Anthony Good (2015) demonstrated how expert testimony addresses specific political, cultural, and social conditions, and the degree whereby returning a refugee or asylum seeker may cause peril. The panoply of tasks is expansive and the role “broadly defined” (Malphrus 2010, 8). A claimant’s legal counsel privately contracts an expert report and conveys instructions about specific questions. Reports are addressed to a court, not a claimant. Experts supply “objective unbiased opinion,” subject to established standards and regulations (see Good 2015), and unlike in the United States or elsewhere, may not advocate for specific remedies. Oral testimony and cross-examination are subject to additional tests (Good 2004a, 2008). Government-funded legal aid may be available, subject to increasingly complex and restrictive residency and means tests, as well as newer “probability of success” checks (Griffiths 2014).

Whereas experts theoretically provide specialist knowledge while remaining balanced and unbiased (Thomas 2011, 183), UK adjudicators frequently treat experts like professional liars (Good 2004a, 363). This may be because lawyers increasingly turn to experts to translate a narrative of “personal trauma into an act of political aggression” anchored to Refugee Convention articles (Shuman and Bohmer 2004, 396). Nonetheless, judges seem receptive to experts employing historical narrative or historicizing arguments (Lawrance et al. 2015, 30). And while UK judges may try to curtail the use of experts, often dismissing experts as advocates, expertise rarely has a neat linear relationship with the specific claims of migrants.

Expert evidence can raise as many questions as it answers. As Boubacar’s experience demonstrates, expert testimony facilitated the rejection of his statelessness claim. The IJ’s assertion that other competent authorities existed, and ought to be explored, emerged directly from my expert report. Boubacar’s misfortune confirms how expert testimony interweaves the very fabric of evidentiary burdens of statelessness in complex and unpredictable ways. Expert testimony has the potential to account for the paths to, or obstruction of, an individual’s capacity to document his or her relationship with a state, yet expertise is limited by its capacity to anticipate all hypotheticals. The final section of this chapter briefly reviews three content areas in statelessness—interpretation of law by judges and diplomats, analyses of documentation, and evaluation of claimants’ narratives—for which expertise may be either foundational or hazardous.

Experts interpret domestic statutes, such as nationality and citizenship laws, and apply them to statelessness claims. Interpreting how law may operate is a deeply problematic component of the expert's role because it inherently involves speculation or hypothesis. The IJ described my attempts to interpret the Guinean embassy's interactions with Boubacar as speculation, noting that I am "not a lawyer and cannot be regarded as an expert in that regard."¹⁹ Notwithstanding the risk of speculation, I often provide an extensive legal discussion and interpret how or under what conditions an individual may or may not be recognized as a citizen, scholarly evaluations of which are not obviously less reliable than those made by someone with a law degree. (Immigration judges must weigh opinions offered by one side in an adversarial setting as they see fit; but whether the witness holds an advanced law or academic degree seems less relevant than country condition and legal expertise per se.)

In Kofi's case, I evaluated Togo's 1961 and 1978 citizenship and nationality laws. Togolese nationality follows *jus sanguinis*, subject to Chapter II, Article 3, if one or both parents are Togolese nationals, or *jus soli*, subject to Article 2, if birth is in Togo. If Kofi was born in Togo, he is a Togolese national; but because his birth was not registered, any request framed along these lines would likely be subject to judicial review. Because both parents' identities and locations are unknown, and he has no record of their nationality or birth, any request may be denied. The UNHCR guidelines contemplate situations where individuals apply for passports and receive rejection notices; they do not anticipate a country having no diplomatic presence in a particular country, or being unable to travel to a third country for a passport because of a lack of papers.

For Ibrahim's lawyers, I applied the 1961 and 1972 Ivoirian nationality and citizenship laws to his predicament. Articles 6 through 8 describe *ivoirité* by birthright. In the absence of a birth certificate or passport, however, Ibrahim would have to seek a "décision de l'autorité publique." If Ibrahim were then to "prove" his citizenship, he would be subject to a "reintegration" procedure. Reintegration (governed by Chapter I, Section II, Articles 34–41, and 63–69) requires an in-country "inquest." Negative decisions may be appealed directly to the minister of justice (Art. 68), and civil courts are the sole "competent authority." Ivoirian law prohibits Ibrahim from entering the country to ascertain and reacquire his Ivoirian citizenship. It would thus be impossible for Ibrahim to be deported to Côte d'Ivoire prior to acquiring citizenship documents.

For Akossiwa I reviewed the Ghanaian laws and concluded that Ghanaian citizenship was unlikely. The Immigration Act of 2000 (Act 573) and the Citizenship Act of 2002 (Act 591) govern Ghanaian nationality. As neither parent was

Ghanaian, and Akossiwa claimed to be born in Portugal, very limited circumstances existed whereby she could apply for naturalization. She could conceivably obtain citizenship by “naturalisation,” but because she could not meet the subjective qualifications of minimum period and indigenous language (i.e., other than English) competency, it remained at the discretion of the Home Office minister and the president, whose decisions “in doubtful cases” (Art. 20) are final.

DOCUMENTATION

Experts are routinely asked to evaluate claimants’ documentation, a potentially perilous engagement. Experts are often the only people in court who have seen a real ID card for a particular political party, but first and foremost we are country conditions experts, not forensic document analysts, a caveat I provide before offering any testimony. Nonetheless, in appeal cases, I also inquire as to the comparative empirical information or scholarship that has been consulted—such as exemplars of real and fake ID cards—that permitted the UKHO findings of fraud.

In a second expert statement for Kofi, I reviewed a letter from Koffi Mawenya Guedze, clerk of the First Instance Tribunal of Aného’s Second Chamber. Because I am familiar with the court structure and I have personally visited Aného’s courts, I was able to state that nothing on the face of it suggested inauthenticity. After reviewing the contents of Guedze’s report, which made clear no individual, other than Kofi, could have a birth registered by a judge, I reaffirmed my earlier interpretation. Kofi could acquire neither travel documents nor a passport in the absence of a birth certificate or nationality certificate. Kofi could not acquire a birth certificate unless he presented in person before the court; but he could not enter the country, and hence the court, without the travel document. It was hard to avoid the conclusion that Kofi was being arbitrarily deprived of nationality and thus was stateless.

As these examples reveal, documentary deprivation poses extreme risks. Akossiwa’s passport was seized by the Portuguese embassy based on inaccurate inferences about her language skills. My report highlighted the dangers facing her and her children, were she returned to Togo or Ghana. Without citizenship or documentation, Ghana and Togo would provide no form of social welfare, accommodation, employment advice, or general economic support. She would be unable to open a bank account, secure credit, or rent accommodations without a loan guarantor. She could not enroll herself or her children in urgent health care or school. Without government support for pressing social and family needs, she would have become destitute, likely living on the streets like many impoverished stateless. These conclusions were fundamental to the statelessness claims under which she sought protection.

Immigration experts lack guidelines for weighting documents and their legal significance, and court rulings are not helpful. A 2015 determination for an Ivorian individual whom the UKHO maintains is Malian is illustrative. In this case, Aliou entered the United Kingdom in 2011 with a Malian passport and claimed asylum. The Malian passport was genuine but had been obtained fraudulently. After denying Aliou's asylum claim, the UK court decided to deport him to Mali, stating: "You have submitted copies of your claimed Ivorian identity [documents] and therefore no weight can be attached to these documents, especially considering that you have produced an original Malian passport which has been verified as genuine by the N[atational] D[ocumentary] F[orensics] U[nit]. It is reasonable to infer that you could obtain genuine documentation to attest your claimed identity."²⁰ The statement appears to suggest that the existence of a real passport from one country precludes the possibility of being a national of a second, which is not accurate. It also shows that our regime of asylum and citizenship laws is prone to bureaucrats and judges rewriting the very identities their jurisprudence suggests are given at birth.

As Melanie Griffiths notes, deportation policy is "a set of often incoherent, contradictory and multi-authored processes" (2014, 28). Regardless of the legitimacy of Aliou's asylum claim, the preceding narrative suggests a regime of government identification operations unable or unwilling to track biographical events, and content with fraudulent data and documents procured thereby, in this case Aliou's Malian passport. The uneven ability of countries to produce and evaluate identity documents is not a failure of bureaucratic capabilities but, as Stevens points out (in the introduction and chapter 12), a symptom of the possibilities and failures of citizenship narratives that rely on ascriptive elements, such as birth and ancestry. Such documentary conventions, without which nationality would not exist, at once secure these narratives for countries as well as individuals and also invite their undoing.

CLAIMANT NARRATIVES AND COUNTRY CONDITIONS

Less tied to notations internal to government databases and documents are the country condition reports. Stateless claims must be viewed in the context of prevailing country conditions, such as published scholarship or reports by non-governmental organizations, interviews with people on the ground, or publicly accessible COI. Political or ethnic violence, the availability and accessibility of documentary production, and the history of discriminatory application of nationality law are but three of innumerable country conditions issues pertinent to the consideration of statelessness claims.

The complex Ivoirian struggle over Ivoirian identity, as narrated in Babo's chapter, anchored Ibrahim's statelessness. My report contextualized Ibrahim's documentary problems accordingly. Ethnic discrimination operates at every level of Ivoirian society and affects social and economic relations. Scholarship demonstrates how the roots of ethnic conflict are tied to the prejudicial land tenancy arrangements emerging after colonialism that marginalized northern minorities and Islamic communities, depriving them of economic wealth and social mobility (Bassett 2004; Romani 2003; Woods 2003).

Kofi's experiences of political persecution changed him into someone unable to document his identity. Country conditions matter, including the events that occurred in the United Kingdom, as he struggled to verify his statelessness. Although his 2002 asylum application did not introduce expert evidence, my reports explained his predicament as a consequence of this ordeal. Furthermore, Kofi was convicted and served his sentence; neither British criminal law nor deportation law prescribes statelessness as the penalty.

And for Boubacar, as one possible path to Guinean citizenship included accessing his birth certificate in Guinea, COI data contextualize the hurdles. Birth registration in Guinea is managed locally and monitored nationally. In the event Boubacar is unable to find his original birth certificate, he could visit the site of initial registration.²¹ He claimed birth in Conakry, which increased the likelihood that records existed. But if there were no traceable certification, he would lack the critical documentation to vindicate his nationality, exposing him to considerable dangers.

Conclusion

Compared with Kofi, Ibrahim, and Akossiwa, it might appear that Boubacar was rightly denied affirmation of his claim for statelessness because he neglected the full extent of his evidentiary burdens under both UK law *and* Guinean law. But broadly speaking, are such evidentiary requirements rational, or even possible, in a climate so suspicious and hostile to migration? The stories narrated here demonstrate that statelessness appears as difficult to prove as citizenship. For these individuals and countless others, the documentary burdens must seem endless, even capricious.

Stateless individuals outside their countries of origin have a difficult enough time maintaining possession of their limited documentation, let alone acquiring new documents. Is it reasonable to expect them to navigate the domestic particularities of statelessness determination procedures alone, often from prison or immigration detention? All too few of them seek legal advice to assist

with their claims. Few have funding for legal counsel. And yet fewer still are able to source expert reports, and these may inadvertently open doors to new burdens and new tests.

Griffiths (2014, 30) observes that the UK asylum system operates as if identity were “innate and fixed,” a framework that is a legal fiction convenient for adjudicators and a legal attack on those for whom this means statelessness. The fiction of a fixed and self-evident legal identity provides adjudicators with a “relatively straightforward” (31) mechanism by which to allege fraud and mendacity and deny applications. Adjudicators demand new forms of evidence in the routine exercise of administrative duties. The devised tests and burdens of proof may appear to follow UNHCR guidance, but this is quite permissive, and closer scrutiny reveals that in so doing they are largely creating self-serving domestic techniques. The Philippines adopted the UNHCR’s suggestion of “established to a reasonable degree.”²² Hungarian law stipulates individuals shall “prove or substantiate.”²³

All states permit the consideration of expert testimony, but granting asylum is entirely discretionary. Expert evidence is advisory and may be relegated to only another possible explanation. In this light, expert testimony is only another data point, on a par with other state agents who insert themselves into the adjudicatory process, such as the Guinean embassy officer who incorrectly applied the law, or the Sierra Leonean who became a *de facto* decision maker. Ought there not to be clear boundaries to these tests and burdens, and clear rules about expert evidence? As Boubacar’s case illustrates, the evidentiary burdens borne by stateless individuals may seemingly follow UNHCR guidance in statelessness determination. But, importantly, domestic precedent provides expansive agency to adjudicators to set parameters and create new tests.

A 2015 ruling by the Hungarian Constitutional Court offers some hope that evidentiary burdens borne by stateless individuals may yet be contained. The court overturned a 2007 procedure, one that stipulated that only “lawfully” present persons may claim statelessness, as contrary to the Fundamental Law.²⁴ The ruling also enhanced the UNHCR’s role, all too often marginalized as advisory or mere guidance. Paragraph 18 asserted an expanded function, declaring that “while the Guidelines belong to the so-called non-binding international instruments, it is nevertheless indisputable that the UNHCR is the most authentic entity to interpret international legal questions and practice related to the Statelessness Convention.”²⁵ Perhaps emboldened by this ruling, the UNHCR will issue unequivocal guidance on evidentiary burdens, documentation, and expert evidence for statelessness.

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1. To protect the identities of the individuals, all names are pseudonyms, and other details have been changed.
2. See *Lazarevic v. SSHD* [1997] EWCA Civ 1007; [1997] Imm AR 251, Hutchison LJ at page 1126E.
3. *EB v. SSHD* [2007] EWCA Civ 809, at ¶59.
4. Appeal No. DA/01045/2014 [February 3, 2015] ¶12.
5. *MA [Ethiopia] v. Secretary of State for the Home Department* ([2009] EWCA Civ 289, [2010] INLR 1).
6. Appeal No. DA/01045/2014 [February 3, 2015] ¶23, compared with [2009] EWCA Civ 289 ¶50.
7. Key legislative instruments include the British Nationality Act (1981); the Nationality, Immigration and Asylum Act (2002); and the Immigration, Asylum and Nationality Act (2006). UK Immigration Rules Part 14 pertains to statelessness; see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279697/Immigration_Rules_-_Part_14.pdf.
8. [2009] EWCA Civ 289, [2010] INLR 1 at ¶50.
9. In rejecting Boubacar's claim, the 1J misquoted Lord Justice Elias. The 1J wrote that "all reasonable steps" were required (at ¶23), and "reasonableness" was stripped of practicality constraints. See note 6 above.
10. Interview with Akossiwa, London, December 2011.
11. Akossiwa, UKBA Reasons for Refusal Letter, 2010. See *Revenko v Secretary of State for the Home Department* [2000] EWCA Civ 500; [2001] QB 601 (July 31, 2000).
12. Akossiwa, First Tribunal determination, August 2010.
13. Kofi, First Tribunal determination, September 2011.
14. Including *MS (Ivory Coast) v. Secretary of State for the Home Department* [2007] EWCA Civ 133, United Kingdom: Court of Appeal (England and Wales), February 22, 2007. In weighing the "finely balanced" gravity of the interference encumbered by deportation, the judge turned to *R (Razgar) v SSHD (2004)* UKHL 27 for guidance.
15. *S. v. Secretary of State for the Home Department [2012]* EWHC 1939 (QB) at 192, Case No: CO/10777/2010.
16. Appeal No. DA/01045/2014 [February 3, 2015] ¶22.
17. Appeal No. DA/01045/2014 [February 3, 2015] ¶¶24–25.
18. Appeal No. DA/01045/2014 [February 3, 2015] ¶¶104, 110.
19. The widespread attacks to which judges have subjected experts over the years led to a letter in the *Guardian*. See Afua Hirsch, "Asylum Tribunal Apologises for Questioning Academic's Evidence," *Guardian*, October 26, 2008, <http://www.theguardian.com/education/2008/oct/27/alan-george-libel-case>.
20. Aliou, RFRL, February 20, 2015, pertaining to Claim C1237402.
21. Fewer than 50 percent of Guinean children were registered at birth in the 1990s; this has since risen to two-thirds ("Birth Registration," Plan International, accessed

June 1, 2015, <https://plan-international.org/birthregistration/resources/country-case-studies/guinea>). Swiss Refugee Council, *Identitätsdokumente in ausgewählten afrikanischen Flüchtlings-Herkunftsändern*, March 2005, <http://www.refworld.org/docid/4b30d3630.html>.

22. *Department Circular No. 058: Establishing the Refugees and Stateless Status Determination Procedure*, Department of Justice, October 18, 2012, section 9.

23. *Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals*, July 1, 2007, section 79 (1).

24. A harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény 76. § (1) bekezdés “jogszerű tartózkodás” szövegrésze elleni bírói kezdeményezés (hontalanság megállapításának feltétele), Budapest, February 23, 2015, <http://public.mkab.hu/dev/dontesek.nsf/o/28DDC0E14E5BC80BC1257D7100259A90?OpenDocument>.

25. Translation by Gábor Gyulai, a trustee and president of the European Network on Statelessness. See Gábor Gyulai, “Hungarian Constitutional Court Declares That Lawful Stay Requirement in Statelessness Determination Breaches International Law,” European Network on Statelessness, March 2, 2015, <http://www.statelessness.eu/blog/hungarian-constitutional-court-declares-lawful-stay-requirement-statelessness-determination#sthash.oFaBfBtv.dpuf>.