

Appellate advocacy

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Barristers at work



Barristers not at work



Written
appellate advocacy

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Simplicity

“Simplicity is the ultimate sophistication”. (Leonardo da Vinci)



Clarity

“The great enemy of clear language is insincerity. When there is a gap between one’s real and one’s declared aims, one turns ... instinctively to long words and exhausted idioms, like a cuttlefish spurting out ink.” (George Orwell, *Politics and the English Language*)

Brevity

- “I would have written a shorter letter but I didn’t have the time.” (Blaise Pascal, *Lettres Provinciales*)



Tip no. 1

Use short
sentences.

An example

In particular, the Judge erred in finding that the effect of Primary Authority Advice given by the First Interested Party was not confined to the mere provision of advice and guidance regarding the construction of section 20 of the 1976 Act and the definition of “relevant place” but extended to and constituted an unlawful fetter on a local authority’s discretion whether or not to take enforcement action under section 20 of the 1976 Act.

What?

Better drafting

Ordinarily, a local authority has a discretion under s. 20 of the 1976 Act whether to take enforcement action. The Primary Authority scheme was intended to constrain that discretion. The judge should so have held.

Tip no. 2

Be direct.



An example from an asylum appeal

The Court is invited to place little weight on document no. 1, the arrest warrant. Forged documents of this nature are readily available in China.

Better

The Court should infer that document no. 1, the arrest warrant, is a forgery:

- Forged documents of this kind emanating from China are readily available.
- The document itself appears to be internally inconsistent.
- The applicant has provided no good explanation as to how he acquired the document.

Tip no. 3

Do not use Latin where
a vernacular expression
is just as clear.

Think: Martin Luther



Latin for Latin's sake

The argument in the present claim is *a fortiori*. It must fail *in limine* because the claim involves a direct impleading of the State, contrary to the maxim *par in parem non habet imperium*.

The vernacular

The argument in the present claim is ~~a~~ fortiori even clearer. It ~~must fail in limine~~ is unarguable because the claim involves a direct impleading of the State, contrary to the ~~maxim par in parem non habet imperium~~ rules of State immunity.

Tip no. 4

Structure

- Introduction:
In a nutshell, what is the case about?
- What are the issues?
- Relevant background to such extent as is necessary
- What do we say was done or not done?
- What consequences flow from that?

Tip no. 5

Encapsulate the legal
issue at the start

Example

This appeal concerns the question of the circumstances in which DNA profiles obtained by the police in exercise of their criminal law enforcement functions can, without the consent of the data subject, be put to uses which are remote from the field of criminal law enforcement.

Tip no. 6

Explain why the point matters.



Example

The question is whether the statutory requirements in s36 and 44 of the HFEA are met by the completion of internal consent forms.

**No, really.
That's very
interesting.**



Please go on.

This question matters to many couples who, as a result of admitted administrative failings by fertility clinics, have been devastated to learn that they may not be the legal parents of their child.

Tip no. 7

Summarise the essence
of your case at the beginning

Tip no. 8

Use lists and summaries
of propositions

Example:

Appeal on a point of law

- In summary it is submitted that:
 - a) The legal tests laid down in paragraph 398 and Article 8 are now clear;
 - b) The approaches are not inter-changeable as suggested by the Appellant; and
 - c) The lower tribunal demonstrably erred in law and the Upper Tribunal was correct to so hold.

Tip no. 9

Avoid rhetoric and rhetorical questions.

Example

“Also, when considering his depression, the court properly recognised that the homeless may well get depressed and that many people lead active lives when prescribed the level of medication taken by the Appellant. That’s all very well. But how about the effect of an adverse change of circumstances? Some may be able to cope with becoming homeless, others not. There is no analysis of why this applicant can cope beyond a reference to medication and the absence so far of any hospitalisation.”

Better Example

“The judge properly recognised that the homeless may well get depressed and many people lead active lives when prescribed medication. However, there is no analysis in the judgment of:

- a) why he concluded that this Appellant will be able to cope with depression whilst street homeless, nor
- b) why he would be one of the group who could deal with the depressive effects of street homelessness rather than one of the group who could not.”

Tip no. 10

- Use of authority:
 - State the proposition of law the authority demonstrates.
 - If more than one authority is cited in support of a given proposition, briefly state why.

- Rule against citation of more than one authority honoured more in the breach than in observance.
- Will also depend on effect of precedent.
- May need several authorities over time to show a consistent jurisprudential approach.

BUT in any event:

- Do not copy and paste long paragraphs from other judgments.

Example

Article 3 ECHR & Expulsion

1. In assessing the Applicant's claim that a return to his country of origin would expose him to a real risk of being subjected to treatment proscribed by Article 3, Contracting States may rely upon the existence of an internal flight alternative: *Salah Sheekh v. The Netherlands*, no.1948/04, §141, 23 May 2007.

2. “[S]ocio-economic and humanitarian considerations... do not necessarily have a bearing, and certainly not a decisive one, on the question of whether the persons concerned would face a real risk of ill-treatment within the meaning of Article 3 of the Convention in those areas”: *Salah Sheekh*, §141, *Husseini v. Sweden*, no.10611/09, §97, 8 March 2012.

3. However the person to be expelled must be able to travel to the area concerned, gain admittance and settle there: *Salah Sheekh*, §141, *Husseini*, §97

But if you only remember
one tip from today's talk
let it be this one:

Assume the Judge is
overworked and generally
grumpy

- So don't leave the judge in a maze.



- Make it easy for the judge to agree with you.



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