Upper Tribunal
(Immigration and Asylum Chamber)

Mohamed (role of interpreter) Somalia [2011] UKUT 00337(IAC)

THE IMMIGRATION ACTS

Heard at North Shields **Determination Promulgated**

On 5 May 2011

21 July 2011

Before

MR C M G OCKELTON, VICE PRESIDENT

SENIOR IMMIGRATION JUDGE GRUBB

IMMIGRATION JUDGE HOLMES

Between

HAMIDA ABDULKARIM MOHAMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr S Selway of Halliday Reeves, Solicitors

For the Respondent: Ms R Petterson, Home Office Presenting Officer

1. The function of a court appointed interpreter is to interpret on behalf of the Tribunal what is said at the hearing, including the appellant's evidence. It is no part of the interpreter's function to be drawn into a position where he or she has to give "evidence" at a hearing of anything, including the language being spoken by a witness. The AIT's decision in AA (Language diagnosis; use of interpreters) Somalia [2008] UKAIT 00029 approved and applied.

2. Consequently, in a case where the language spoken by an appellant was relevant to establish his origins (and so to the claim), the judge had not erred in law when he had declined, when requested by the appellant's representative, to ask the interpreter at the hearing what language the appellant was speaking.

DETERMINATION AND REASONS

1.

The appellant appeals against a decision of Immigration Judge Zucker dismissing her appeal against a decision of the Secretary of State taken on 7 May 2009 to refuse to grant her asylum under paragraph 336 of the Immigration Rules HC 395 (as amended) and to remove her as an illegal entrant from the United Kingdom to Somalia by way of directions pursuant to paragraphs 8-10A of Schedule 2 to the Immigration Act 1971.

2.
Before the First-tier Tribunal, the appellant claimed to be at risk on return to Somalia as a member of the minority Bajuni clan. The respondent disputed her clan membership. Immigration Judge Zucker found that she had not established it and accordingly dismissed her appeal. The Appellant had been interviewed by the respondent in Swahili, but in addition she had been interviewed on behalf of the respondent by Sprakab on 22 November 2008. The judge considered the evidence before him in detail, including the Sprakab report. That report considered the appellant's knowledge both of Somalia in general and Kismayo and the island of Fumayo in particular. The report assessed that the appellant was speaking Swahili, but not a variety of Swahili spoken in Somalia. The report stated that her accent and intonation was typical of Tanzanian and Kenyan Swahili as opposed to that spoken in Somalia. In addition, the report drew attention to a number of aspects of the appellant's knowledge about Somalia which was described as "limited". On the basis of this evidence, taken together with other unsatisfactory aspects of her evidence, such as her claim that she would send money home to her family in Somalia despite the fact that she had no contact with them and did not know where they lived, the judge found her not to be a truthful witness.

3.
On 22 July 2009, Senior Immigration Judge Waumsley ordered reconsideration of that decision. On 15 February 2010 that order took effect as a grant of permission to appeal to the Upper Tribunal by virtue of Schedule 2 to the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (SI 2010/21). Thus the appeal came before us.

4.
The grounds upon which reconsideration was sought raise two principal issues that Mr Selway pursued before us in his submissions on behalf of the appellant.

Ground 1

5.
First, Mr Selway submitted that the judge had erred in law when he had declined, when requested by the appellant's representative, to ask the interpreter at the hearing what language the appellant was speaking. The appellant in her evidence claimed that she was speaking Kibajuni. The judge refused on the basis that it was not part of the interpreter's role to do so and which would "compromise his independence and impartiality" (para 41 of the determination). At paras 40 and 41, the judge reasoned that the interpreter's duty was to interpret and to tell the Tribunal if there were language difficulties if he could not understand the appellant. As the determination makes clear there were no interpretation difficulties at the hearing.

6.
Mr Selway submitted that the judge erred in law because he should have taken into account as a "statement of fact" what the interpreter would have said which, Mr Selway's submission pre-supposes, would have been that that the appellant was speaking Kibajuni. In our judgment, there is no basis in law for Mr Selway's submission.

7.
First, it is based upon a wholly erroneous premise. As we understood it, Mr Selway's submission was that the interpreter's "statement of fact" would be relevant to the judge's assessment of the appellant's appeal despite the fact that what he said would not be evidence in the case. That cannot be right. A judge may only act on the evidence before him in determining the outcome of an appeal. That will include the oral and documentary evidence properly admissible on the basis of relevancy and any other matter of which the judge may properly take judicial notice. A judge simply cannot take into account any other material not before him or which, on Mr Selway's submission, is not evidence in the case. If what the interpreter would say was not evidence, then it was irrelevant to the judge's determination of the appeal.

8.
Secondly, in any event the interpreter was a court appointed interpreter. His function was to interpret on behalf of the Tribunal what was said at the hearing, including the appellant's evidence. Of course, as part of his duty to the court, the interpreter had to be satisfied that he understood the appellant and, if he did not, to indicate that to the judge. In some circumstances all that will be required is for a question to be rephrased or for a witness to be asked to rephrase their answer. In other, more extreme, circumstances there may then need to be some enquiry as to what dialect the witness claims to be speaking so that appropriate arrangements can be made to ensure that at the hearing (or a future hearing) the interpretative difficulties are removed. To that extent, an interpreter might indicate that an appellant is speaking a language different from the one that the interpreter is competent and authorised to interpret.

9.
It is however, no part of the function of a court interpreter to be drawn into a position where he or she has to give "evidence" at a hearing of anything, including the language being spoken by a witness. It is within the collective knowledge of the members of this panel that interpreters frequently do indicate what language is being spoken by a witness at the beginning of his or her evidence. Some find it necessary, later, to indicate that a witness has changed language or dialect. We are reluctant to suggest that they should never do so because it may be that such an indication will alert the judge to the possibility that there is a problem that requires his intervention. On the other hand, in cases where the appellant's fluency in a language is in dispute or the ability to speak a particular language may be relevant to the appellant's claim, there needs to be a degree of caution because it might (wrongly) be thought to be evidence, and as a result something that is relevant to the judge's function of deciding the case upon the evidence before him, which it is not.

10.
Also, if the course proposed by Mr Selway were correct, it could, in our judgment, create considerable (perhaps insuperable) practical and fairness difficulties during the course of any hearing. Suppose an interpreter were to 'give evidence' about what language the appellant was speaking. Who should interpret that exchange with the judge for the benefit of the appellant? Which of the parties should be seen to be calling the interpreter to give that evidence and would the interpreter be subject to cross-examination and by whom if he did so? These, amongst other difficulties, show how undesirable it would be for an interpreter to give "evidence" of the kind proposed by Mr Selway at a hearing.

11.
There is a straight-forward solution where an appellant wishes to rely upon the language he speaks to assist in making good his claim. Where an appellant wishes to challenge expert or other evidence concerning the language spoken by the appellant that is a matter that can properly be dealt with by

direct evidence called on behalf of the appellant from one expert or another. We were told by Mr Selway that there were difficulties in this case of finding an expert to counter the Sprakab Report (see, for example, para 9 of the grounds). We have no reason to doubt what is said in this case but it is within the collective experience of the members of this panel that expert evidence of precisely this type is available, and frequently relied upon before the Tribunal. In any event, the ability of an appellant to obtain expert evidence in relation to a particular issue by a particular date cannot undermine the principle.

12.
In this case it was at least open to the appellant to call any interpreter used by the appellant's representatives to give evidence of the language used by the appellant (in the opinion of the interpreter) outside court, although we observe that, of course, it should not be assumed that an interpreter is an expert in linguistic analysis or in the subtleties of accent and dialect and, as such, his evidence may carry little weight in a case like this one. In this appeal, Mr Selway acknowledged that he was not in a position to call any interpreter used by his firm when dealing with the appellant. Indeed, Mr Selway acknowledged that he did not know how his firm had communicated with the appellant: this was despite the fact that he had been the appellant's representative at the hearing before the judge. He also accepted that he had no idea what was on the CD which had been sent to Sprakab for analysis.

13.
As we have said, we see no basis upon which it could be said that the judge erred in law in refusing to ask (or allow) the court interpreter to indicate what language he believed the appellant to be speaking at the hearing. The correct approach, which we have endeavoured to set out above, was in fact identified by the Asylum and Immigration Tribunal in AA (Language diagnosis; use of interpreters) Somalia [2008] UKAIT 00029. For reasons of which we were not apprised, Mr Selway did not refer us to this decision despite its obvious relevance. Ms Petterson, who represented the respondent, did refer us to AA and relied upon it.

14.
In AA , which also concerned a claim by an individual to be at risk as a minority clan member from Somalia, the judge had refused to require the court interpreter to indicate the dialect that the appellant was speaking when giving evidence. It was argued on behalf of the claimant in that case that the judge had thereby erred in law. The AIT rejected the challenge on the basis that what was being asked of the interpreter was not consistent with his function and expertise as an interpreter and further his role as a court official was limited to interpreting on behalf of the court. At paragraphs [7]-[11] the Tribunal set out its reasoning as follows:

"7. ... we are ... certain that nobody should have assumed that it was part of the function of the Court Interpreter to resolve an issue of this sort. We come to that conclusion for two separate reasons. The first relates to the function and expertise of an interpreter. An interpreter's function is to comprehend and communicate, not to assess or analyse. A person's skills in interpretation lie in his ability to understand what is being said to him in one language (or dialect) and communicate it accurately in another language (or dialect). It is simply wrong to say that the abilities of an interpreter necessarily import an ability to distinguish accurately between different dialects and to be able to attribute dialects to different sources. A person whose first language is French may attain standards of near perfection in English interpretation, without being able to say with accuracy whether he is dealing with a person from Ipswich or Indiana, or even with a person whose own first language was not English. As an interpreter he may widen his vocabulary base and his understanding of different

accents and dialects so that he can cope with whatever version of English is used by the person for whom he is interpreting, without needing or wanting or being required to consider or work out what the dialect is, but merely to do his own job of understanding and communicating. Of course an interpreter may know (or think he knows) something about the type of language or dialect the person for whom he is interpreting is using: but that is quite a different matter. It is not part of his function as interpreter.

8. An interpreter may find that he cannot interpret, because he cannot understand what is being said to him. That may be because it is a language that he does not understand, or may be because it is a dialect that he does not understand. But, so far as his function as an interpreter is concerned, the only thing one can say is that in present circumstances he cannot interpret. It is still not part of his function as an interpreter to identify the language (or dialect) that he cannot understand. It is sufficient that he cannot understand it. An interpreter who speaks and understands more than one language or dialect may be able to say with precision which he is working in, or he may not. No doubt he is more likely to be able to distinguish between two languages than between two dialects, but the boundary between the notions of different languages and different dialects is a rather fluid one. In KS ((Minority Clans – Bajuni – Ability to speak Kibajuni) Somalia CG [2004] UKAIT 00271) it appears that the interpreters used were able to distinguish clearly between Swahili and Kibajuni and did so. It does not follow from that, and it could not [properly] be taken to follow from that, that every interpreter ought to be able to distinguish every language or dialect.

9. That leads us to the second reason. It is in our view in the highest degree undesirable for the interpreter as a Court official to be asked to contribute in any way to the determination of a contested issue. In his task of comprehension and communication, the interpreter needs to have and maintain the confidence of all those with whom he deals, including the witness [whose evidence] is being interpreted, the representatives of both parties and the judge. He cannot maintain that confidence if there is the slightest suspicion that he is, in addition, taking some part in assessing the evidence, on which he will in due course report to the Court. …. The Court Interpreter is a vital part of the immigration appellate process. It is very important that the interpreter's position should not be compromised in any way. The interpreter is not himself a witness and should not be invited to become one. If it happens that the interpreter cannot understand the language or dialect being used, he will of course have to say so. At that point it may be necessary to check that the language requested by the person whose evidence is to be interpreted is indeed a language that falls within the interpreter's portfolio. But it is unlikely that any more detailed information from the interpreter could properly form the basis of the Tribunal's findings of fact.

10. We see no reason to dissent from the Tribunal's observation in SA and others that an expert who speaks a particular language or dialect is more likely to be able to provide evidence of whether another person speaks that language or dialect than is a person who does not have that linguistic competence. But it does not follow from that (and we venture to suggest that nobody could think it followed from that) that every person who speaks a particular language or dialect is to be regarded as an expert, able to assess whether some other person that language or dialect, or, if not, what dialect is being spoken.

11. For these reasons we reject [counsel for the appellant's] submissions that the interpreter ought to have been regarded as an expert, able to give evidence as an expert, and ought to have been required to give his view on the language or dialect being spoken by the appellant. We also reject his submission that what occurred at the hearing was unexpected or unfair. There as no proper reason to assume that the Court Interpreter would become an expert witness in the case."

15.
We see no reason to differ from the AIT. The Tribunal's views accord entirely with our own as set out above.

16.
There is one final point on this issue. We referred earlier to the possibility that an appellant may wish to call as a witness his own interpreter. That is, of course, a matter entirely for the appellant and his representatives in any appeal. At paragraph [12] the Tribunal in AA acknowledged this possibility but also recognised that such an interpreter would not necessarily be properly regarded as an expert because "there is no reason at all to suppose that he has the additional expertise necessary to identify accurately the language or dialect being used". Of course, the credentials of a particular interpreter may be otherwise. The point being made by the Tribunal in AA , with which we agree, is that in the usual case an interpreter will not have the relevant expertise and most certainly cannot be assumed to have such expertise merely because he is an interpreter. That is properly a matter to be taken into account by a judge in determining what weight to give to any such evidence called on behalf of an appellant.

17.
In this appeal, the judge had before him a Sprakab report which was unchallenged by any expert evidence. This report stated that the appellant spoke Swahili and not Kibajuni at the interview. The report further stated that the appellant spoke with the intonation of someone typically from Tanzania and Kenya when the appellant's account of her life offered no obvious explanation as to how she could have learnt such an intonation. The judge took into account the appellant's evidence that she was speaking Kibajuni (see paragraphs 22, 28 and 39 et seq of the determination) and found that she had not established that she was speaking that language. We see no basis upon which it can be said that the judge erred in law in reaching his finding that on the evidence that was before him the appellant had failed to show that she was a Kibajuni speaker. Indeed, we venture to say that on the evidence the judge's finding was inevitable. For these reasons, we reject Mr Selway's first ground upon which he challenged the judge's decision.

Ground 2

18.
We now turn to consider the second ground upon which he relied both in the grounds for reconsideration and before us in Mr Selway's oral submissions. He relied upon the case of KS (Minority clans – Bajuni – ability to speak Kibajuni) Somalia CG [2004] UKAIT 00271 and in particular paragraph [43] of the Tribunal's decision in that case. There, the Tribunal adopted what had been said in the earlier decision of the Immigration Appeal Tribunal in AJH (Minority group – Swahili speakers) Somalia CG [2003] UKIAT 00094. The Tribunal said this:

"43. In AJH when dealing with an assessment of whether a Claimant is Bajuni, the Tribunal wrote in paragraph 33 as follows:

'What is needed therefore in cases in which claims to be Somali nationals and Bajuni clan identity are made is first of all:

(i) an assessment which examines at least three different factors:

(a) knowledge of Kibajuni;

(b) knowledge of Somali depending on the person's personal history;

(c) knowledge of matters to do with life in Somali for Bajuni (geography, customs, occupations, etc.).

But what is also needed is

(ii) an assessment which does not treat any one of these three factors as decisive: as the Tribunal noted in Omar …It is even possible albeit unusual that a person who does not speak Kibajuni or Somali could be a Bajuni.'"

19.
As this makes clear, and Mr Selway relied upon this, it is not a necessary condition for an individual to establish that he or she is Bajuni that they should speak Kibajuni. It is possible, albeit unusual, that a person who does not speak Kibajuni is in fact Bajuni. The Tribunal in KS makes clear that a judge should make an assessment in the round having regard at least to the individual's knowledge of Kibajuni, knowledge of Somalia and knowledge of matters relating to life as a Bajuni in Somalia. Mr Selway submitted that the judge had failed to undertake an assessment of the evidence in the round on this basis. He submitted that the judge had failed to apply the country guidance case of KS and had thereby erred in law.

20.
In our judgment, there are two insurmountable problems which prevent Mr Selway making good his submission.

21.
First, the way in which Mr Selway now seeks to criticise the judge's approach to the appeal was not the basis on which the appellant (through Mr Selway) put her claim before the judge. Her claim was that she spoke Kibajuni and was Bajuni. She did not say, 'I do not speak Kibajuni', or, 'If you disbelieve me that I speak Kibajuni, I am nevertheless Bajuni'. We do not see how the judge could have erred in law if he had failed to approach the evidence on a basis that was not relied upon by the appellant at the hearing given her evidence that she spoke Kibajuni.

22.
Secondly, in any event, although the judge did not directly refer to the decision in KS , he clearly did consider all the evidence presented to him in the round. He did not focus exclusively upon the language spoken by the appellant. He identified a number of aspects of the evidence that led him at paragraph 36 to conclude that he "did not believe the appellant was a truthful witness". The judge referred to the appellant's limited knowledge of Somalia including matters in relation to currency and clans (see paragraph 38). The judge also found it difficult to understand how the appellant had claimed in her interview that she had attended her brother's funeral when she also claimed she was in hiding (see paragraph 30). There was also confusion over when she had left Fumayo, giving two dates in 2008 one of which was after she claimed her brother had been killed and she had attended the funeral (see paragraph 39). In addition, the judge noted that the appellant's evidence was that she did not know where her husband was and was not able to contact him (see paragraph 34). The judge noted that the appellant was unable, in her evidence-in-chief, to explain how she could send money back to her relatives when she did not know where they were (see paragraph 36).

23.
Mr Selway did not challenge the judge's assessment of this evidence. When we enquired, he indicated that if we were minded to remake the decision he had no further evidence to rely upon. In our judgment, it is clear that the judge did consider all the evidence. He simply did not believe the appellant for the detailed reasons he gave and which we have summarised. He considered all the

evidence consistently with KS . We have no doubt that the judge was entitled to reach the adverse view of the appellant's evidence that he did and to find that she had not established that she was Bajuni and as a consequence that she would not be at risk on return to Somalia.

Decision

24.
For these reasons, the judge did not err in law in dismissing the appeal and his decision stands.

25.
This appeal to the Upper Tribunal is dismissed.

Signed

Senior Immigration Judge Grubb

Judge of the Upper Tribunal