AA (Language diagnosis: use of interpreters) Somalia [2008] UKAIT 00029

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Manchester Date of Hearing: 5 October 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Immigration Judge P J G White

Between

AA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr. M. Schwenk, instructed by Clifford Johnston & Co
For the Respondent: Miss A O'Conner, Home Office Presenting Officer

It is no part of an interpreter's function to report on the language or dialect used. The expertise needed to identify a language or dialect is not typically the expertise of an interpreter. In any event, an interpreter should not be in the position of giving, or being asked to give, evidence on a contested issue.

DETERMINATION AND REASONS

1. The appellant is a citizen of Somalia. Having been granted leave to remain in the United Kingdom as an unaccompanied minor she applied for variation of her leave on asylum grounds. The respondent refused her application. The appellant appealed and in a determination sent out on 25 May 2007 an Immigration Judge dismissed her appeal. The appellant sought and obtained and order for reconsideration. Thus the matter comes before us.

2. The appellant's claim is that she is a member of a minority clan, and there is no real doubt that if she is able to establish that, then her appeal should succeed. She says

that her clan is Reer Hamar, sub-clan Morshe. Reer Hamar is one of the Benadiri group of clans. The respondent has consistently challenged her claim to clan membership. The Immigration Judge considered the evidence before him in some detail. He rejected her account of her history in Somalia, describing it as "so riddled with inconsistencies, both subjectively and objectively, that there is no reasonable likelihood of her claim being true". In relationship to her clan membership, he took the view that her not telling her truth about her own history cast doubt on her assertions about her clan membership, and he rejected other evidence before him which, if accepted, might have supported her claimed clan membership.

3. The ground for reconsideration raises a number of issues. They point out that the language or dialect spoken by the appellant is regarded as an important diagnostic factor in relation to clan membership, as is apparent both from the respondent's Operational Guidance Note of April 2007 and the decision of the Tribunal in AJH [2003] UKIAT 00094. The grounds then challenge the Immigration Judge's approach to the assessment of the language or dialect spoken by the appellant. The grounds go on to aver that the Immigration Judge failed to consider all the evidence in the round and that he paid too little attention to oral evidence from witnesses other than the appellant herself.

4. Despite the importance of the issue of whether the evidence was considered in the round, we must look first at matters going to the language or dialect spoken by the appellant.

5. We are content to take the following account from the grounds for reconsideration:

> "The Appellant submits that it has long been custom and practice within the Asylum and Immigration Tribunal (and its forerunner, the Immigration Appeal Tribunal) that the language and/or dialect an Appellant is speaking can be established by arranging the appropriate interpreter for the Appeal Hearing and establishing, at the hearing, whether the Appellant can speak the language/dialect they claim to be able to speak. Thus, for example, it is clear that in KS (Minority Clans – Bajuni – Ability to speak Kabjuni) Somalia CG [2004] UKAIT 00271, the Tribunal relied on information from the Court Interpreter to establish the extent of the Appellant's ability to speak Kibajuni (see paragraphs 8 and 45 of KS).
>
> At the case management review hearing in this appeal, which was held on 11 April 2007, a Somali interpreter who spoke the Reer Hamar dialect was specifically requested in order that the Appellant be able to establish her fluency of this dialect at the substantive hearing.
>
> At the beginning of the Substantive Appeal on 23rd April 2007 the Appellant's counsel raised the issue of the dialect spoken by the Appellant and requested that the Court Interpreter be asked to confirm that the Appellant was speaking the Reer Hamar dialect. The Court Interpreter refused point blank to either confirm or deny the dialect spoken by the Appellant. The Court Interpreter's position was that this was not part of his job. The Appellant's representative asked the Immigration Judge

to intervene and to require the Court Interpreter to confirm or deny whether or not the Appellant was speaking the Reer Hamar dialect. The Immigration Judge refused to do this.

The Court Interpreter had been booked in order to speak the Reer Hamar dialect. He confirmed at the start of the hearing that he did indeed speak this dialect. The Appellant respectfully submits that his refusal (it is difficult to see how it could have been an inability) to confirm or deny whether the Appellant was speaking in the Reer Hamar dialect was wrong. The Appellant submits that the Immigration Judge erred by upholding the Court Interpreter's refusal. This constituted an error which led to unfairness to the Appellant.

As a consequence of the interpreter's refusal to confirm the Appellant's dialect and of the Immigration Judge's refusal to ask him to do so, the Appellant's representative requested that the interpreter supplied by the Appellant's solicitors, who was in attendance at Court, be called to comment on the Appellant's dialect. The interpreter was called Mr. Cali and his evidence is dealt with by the Immigration Judge at Paragraph 33 of his Determination, where he states:

> 'Turning now to the evidence of Mr Cali; he attended the hearing in his capacity as a freelance Somali interpreter employed by the Appellant's solicitors to assist their counsel in taking instructions from the Appellant prior to the hearing. To that extent I find that Mr. Cali is hardly an independent witness. Furthermore his evidence was limited to expressing an opinion that the Appellant spoke the Reer Hamar dialect of Somali which he stated is only spoken by members of minority clans from the Mogadishu area. Having regard to the fact that Mr Cali is not an independent witness, the fact that there was no evidence whatsoever before me as to his expertise as a linguist, then I find that I cannot place any weight upon Mr Cali's evidence.'

The Appellant respectfully submits that the Immigration Judge's treatment of Mr Cali's evidence is unfair. Clearly, there was no evidence of Mr Cali's [expertise] as a linguist available because he was called at the lat minute following the surprising position taken by the Court Interpreter. Furthermore, it was wrong of the Immigration Judge to consider that Mr Cali was not independent. As the Immigration Judge notes, Mr Cali was a freelance interpreter employed by the Appellant's solicitors on this basis. The Immigration Judge has failed to explain how this means that he is not independent and his evidence cannot be trusted. Most interpreters employed by the Asylum and Immigration Tribunal are freelance operatives engaged by the AIT on a similar basis as Mr Cali was engaged by the Appellant's solicitors. It would be wrong to suggest that interpreters employed by the Court are not independent. It is consequently unfair to reject the evidence of Mr Cali largely on the unsubstantiated basis that he lacks independence. It is clear from Paragraph 33, quoted above, that the only two reasons the Immigration Judge rejected Mr Cali were because of his perceived lack of independence and because there was no evidence before the Immigration Judge as to his expertise as a linguist. Both of these allegations are unfair for the reasons given above.

The fact that there was no evidence before the Immigration Judge as to Mr Cali's [expertise] as a linguist and the fact that he was employed by the Appellant's solicitors as described by the Immigration Judge would have been clear to the

Immigration Judge before Mr Cali was called to give evidence. The Immigration Judge does not rely on anything Mr Cali said in his evidence to undermine his credibility. Consequently, the Immigration Judge would have been aware of these defects in Mr Cali's evidence before he heard it. In these circumstances it is respectfully submitted that, particularly in view of what transpired previously at the hearing, it was unfair of the Immigration Judge not to bring this to the attention of the Appellant's representative who could have considered whether or not to seek an adjournment to obtain further or better evidence of the Appellant's linguistic abilities or to have requested that the case be reconvened with a different Court Interpreter.

Further, or alternatively, the Appellant submits that the Immigration Judge has given insufficient reasons for rejecting the evidence of Mr Cali. The Appellant submits that Mr Cali gave detailed evidence of the dialect spoken in Somalia, and Mogadishu in particular, and that this evidence was in accordance with the objective evidence, particularly the Somali Minorities Report of 2000.

The question of the dialect spoken by the Appellant is, according to case law and confirmed by the Home Office Operational Guidance Note, very important to the determination of ethnicity in Somali cases, if not determinative. The Immigration Judge has failed to make a finding on this key issue, despite the Appellant's strenuous attempts to establish that she speaks the Reer Hamar dialect. The Appellant submits that the Immigration Judge's failure to make a finding on this key issue renders his conclusions unsafe."

6. In his oral submissions, Mr. Schwenk took us to KS. In that case the interpreter who appeared at an earlier hearing, had reported to the adjudicator that although he was putting questions to the appellant in Kibajuni, the appellant was consistently replying in Swahili. On appeal the Tribunal asked to be informed if the appellant spoke Swahili. The interpreter on this occasion was able to report that the appellant was speaking Kibajuni save on one occasion. The Tribunal clearly took that matter into account in concluding that the appellant had the clan membership she claimed. Mr. Schwenk also referred us to the case to which reference was made in the Operational Guidance Note, which despite the way it is dealt with in that note and by the e.i.n. database (which in our experience is often inaccurate) is called SA and others. In that case it appears that the grants to leave to appeal were accompanied by comments by the Vice President who granted leave that the appellant would be expected to show that he spoke Kibajuni or, if not, to explain why not; and that the Court Interpreter would be of assistance in determining that question. Further on in the same determination, in its assessment of the expert evidence before it, the Tribunal notes that an expert who speaks the language or dialect in question is more likely to be able to give persuasive evidence about the language spoken by an individual then an expert who does not speak the language or dialect in question. Mr. Schwenk relied on these two cases as evidence of a practice by the Tribunal in having such matters assessed by the Court Interpreter.

7. It is difficult to make specific comment on the detailed issues arising in KS and SA, without fuller information than appears in the determinations themselves. In fact

the Vice President whose comments are reported in SA was the same person who ordered reconsideration in the present case; and the Chairman of the Tribunal in SA was the same as the Chairman of the Tribunal in KS. It may be, therefore, that any such practice as alleged by Mr. Schwenk is not in fact widespread in the Tribunal. Whether or not it is widespread, we are quite clear that in circumstances such as in the present case it ought not to be adopted, and we are also 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 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 probably 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 evidence whose 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. For that reason we have the gravest of doubts about whether the course of action recommended by the person who gave leave to appeal in the SA cases and apparently in part, at any rate, adopted by the Tribunal in both and SA and others and KS, should ever be followed. 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 Mr. Schwenk'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 was no proper reason to assume that the Court Interpreter would become an expert witness in the case.

12. So far as concerns the evidence of Mr. Cali, the position appears to be that because of the unrealistic expectations about the Court Interpreter, Mr. Cali, who was present at the hearing, was asked to give his opinion on the language or dialect being spoken being spoken by the appellant. Mr. Cali is also an interpreter. He was not the Court Interpreter, so there is no reason why he should not have been a witness and have given evidence. But, however undoubted or unchallenged his competence as an interpreter, there is no reason at all to suppose that he has the additional expertise necessary to identity accurately the language or dialect being used. The Immigration Judge may have been wrong to over-emphasise what he described as Mr. Cali's lack of independence, but he was undoubtedly right to find, as he did, that there was no evidence at all of Mr. Cali's expertise to give evidence

on the matter in question, which is a matter that the Court itself is incapable of assessing, save with the assistance of a properly qualified expert.

13. There has been no doubt that the appellant's claim to specific clan membership is at the heart of this appeal. As Mr. Schwenk very properly asserts, such a claim inherently involves a claim about language. There was not before the Immigration Judge any evidence properly capable of resolving questions relating the language being used by the appellant in the appellant's favour. It was therefore not a matter on which the Immigration Judge could be expected to make a finding in her favour. His failure to record any finding at all on the issue, if it constitutes an error, which we doubt, is not material. The appellant has not established that she speaks the language or dialect appropriate to her claimed clan membership.

14. We turn then to the other principal allegation in the grounds, that the Immigration Judge did not look at the evidence in the round. In his submissions, Mr. Schwenk made specific reference to the Immigration Judge's analysis of the appellant's evidence about the striped cloth particular to the Benadiri, and to his treatment of his evidence of a third witness who gave evidence supporting the appellant's claim. So far as concerns the evidence of the cloth, it is possible, taking it in isolation, to show that by itself it might not have supported the Immigration Judge's conclusions. But to analyse it in that way would be to commit the very error of which Mr. Schwenk complains. The burden of the Immigration Judge's conclusions on the appellant's own evidence of her clan membership was that the appellant's knowledge was very limited and very vague. At each stage it is possible to show that the answers given by the appellant are consistent with, or not terribly inconsistent with, her claimed clan membership: the Immigration Judge's view was that they were nevertheless not answers of the details and fullness that he would have expected of a person who had the clan membership claimed by the appellant. We have read his determination with care, with the benefit of Mr. Schwenk's submissions, and it does not appear to us that the Immigration Judge's treatment of the evidence before him discloses any error of approach that could amount to an error of law.

15. We must say something separately about the Immigration Judge's treatment of the third witness before him, who it was said could endorse the appellant's claims. That was a witness who asserted that she had met the appellant in the United Kingdom, having been introduced by a mutual friend and that, from what the appellant told her, she "realised" that the appellant was someone she had known in Somalia, having last seen her when she was three years old, and that the witness was thus able to confirm the appellant's clan membership. The Immigration Judge did not believe this witness. He said that she had made up a story in order to assist the appellant.

16. It is of course right to say that evidence is to be considered as a whole, and that in many circumstances it is impossible to reach a view on contested matters without looking at all the evidence relating to those matters. The position here, however,

was that the Immigration Judge considered that the appellant's account of her own history was entirely unreliable. The witness gave an account of meeting the appellant which was perhaps in itself barely credible, but which in particular showed that the witness' assessment of the appellant must have been based on the material which the Immigration Judge rejected, and did not therefore add to it. In the circumstances it is very difficult indeed to see that the Immigration Judge's perhaps cursory treatment of the third witness' evidence constituted a material error of law.

17. For the reasons we have given we conclude that the Immigration Judge made no material error of law and we order that his determination, dismissing this appeal, shall stand.

C M G OCKELTON
DEPUTY PRESIDENT