Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

The Role of Court Interpreters: Mohamed (Role of Interpreter) Somalia [2011] UKUT 337 (IAC)

Question(s) at stake:

Whether the first-tier judge erred in law when he declined to allow the interpreter to give "evidence" in court concerning the language spoken by the appellant.

Outcome of the ruling:

The first-tier judge did not err in law when he declined to allow the interpreter to give "evidence" in court concerning the language spoken by the appellant, as this is not part of the interpreter's role. Accordingly, the appeal was dismissed.

Topic(s):

- Immigration and Asylum

Keywords:

- Assessment
- Evidence
- Asylum procedures
- Asylum seeker
- Refusal of asylum
- Applicant's credibility

Tag(s):

- Intepreter

Author(s):

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Country:

United Kingdom

Official citation:

Mohamed (role of interpreter) Somalia [2011] UKUT 337 (IAC)

Link to the decision:

https://tribunalsdecisions.service.gov.uk/utiac/37558

ECLI:

No ECLI number / ECLI number unknown

Date:

21 July 2011

Jurisdiction / Court / Chamber:

Upper Tribunal (Immigration and Asylum Chamber)

Remedy / Procedural stage:

Appeal to the Upper Tribunal (Immigration and Asylum Chamber)

Previous stages:

- First-tier Tribunal, ordering reconsideration of the First-tier Immigration and Asylum Tribunal's decision (22 July 2009)
- First-tier Immigration and Asylum Tribunal (no date)
- Secretary of State (7 May 2009)

Subsequent stages:

No information found.

Branches / Areas of law:

Asylum law and human rights

Facts:

The appellant, a Somali citizen, appealed a decision of the Secretary of State taken on 7 May 2009 refusing to grant her refugee status and ordering her to be removed to Somalia. Following the First-tier Tribunal's dismissal of this appeal, the appellant lodged a further appeal against the First-tier's decision (para. 1).

The essence of the asylum claim was that the applicant feared persecution because she was a Bajun clan member (para. 2). The Secretary of State did not accept that the appellant belonged to the Bajun ethnic group, who primarily live in Somalia (others live in Kenya and Tanzania). The first-tier immigration judge upheld the decision, finding that the appellant did not establish her belonging to the Bajun.

In particular, whereas the appellant had been interviewed in Swahili, she had also been interviewed by a linguist from Sprakab on behalf of the Secretary of State (Sprakab is a private company hired by the Secretary of State to perform linguistic analysis). According to the Sprakab report, the appellant could speak 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'" (para. 2). This finding, along with the appellant's statement that she was transferring money to her family despite not knowing their whereabouts, brought the judge to find that she was not credible (para. 2).

"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" (para. 3).

The appellant's appeal grounds raised two main points:

1. The first-tier judge erred in law when he did not allow the interpreter at the hearing to state what language the appellant was speaking. In particular, the first-tier judge reasoned "that it was not part of the interpreter's role to do so and [that this] would 'compromise his independence and impartiality'" (para.

5). The first-tier judge explained that the interpreter's task was to translate and to inform the judge if there were any problems with understanding the appellant. The appellant argued that the first-tier judge had to take into account "'as a statement of fact' what the interpreter would have said" if he had been allowed to answer the appellant's question (para. 6).

2. The first-tier judge erred in law because he "failed to undertake an assessment of the evidence in the round" in light of the country guidance case of *KS (Majority Clans – Bajuni – Ability to Speak Kabajuni) Somalia CG* [2004] UKAIT 00271.

Ruling:

The Upper Tribunal dismissed the appeal and addressed the two main issues as follows:

1. The first-tier judge did not err in law when he did not allow the interpreter at the hearing to state what language the appellant was speaking (para. 7). First of all, it cannot be accepted that the interpreter's "statement of fact" had to be taken into consideration even though it was not evidence. The Upper Tribunal reasoned that, in deciding the result of an appeal, a judge is restricted to considering only the evidence presented, whether it be oral or documentary, that is relevant and "admissible". Additionally, the judge may only consider information that is subject to "judicial notice" and "cannot take into account any other material" that was not presented during the proceedings (ibid.). Second, it should be noted that the interpreter in question was appointed by the court. His primary role was to interpret the proceedings and the appellant's testimony "on behalf of the Tribunal" (para. 8). In some cases, a simple rephrasing of a question or request for the witness to rephrase their answer may suffice. In more complex situations, it may be necessary to determine the specific "dialect the witness" is using in order to make "appropriate arrangements" (ibid.). In such instances, the interpreter may inform the judge that the "appellant is speaking a language"

that falls outside their competence (ibid.). The role of a court interpreter does not involve providing “evidence” during a hearing, including identifying the language “spoken by a witness” (para. 9). Whereas it may be necessary to alert the judge to potential issues, caution is advised when the appellant’s fluency in a language is disputed in the case, as the interpreter’s statements may be improperly be considered as evidence (ibid.). There exists a simple “solution” when an appellant desires to utilize their spoken language to support their claim (para. 11). If an appellant wishes to dispute the expert or other evidence regarding their spoken language, this matter can be appropriately addressed through “direct evidence” provided by an expert on behalf of the appellant (ibid.). In the case under consideration, such evidence was not provided (paras. 11, 12). A similar approach was taken “by the Asylum and Immigration Tribunal in AA (Language diagnosis; use of interpreters) Somalia [2008] UKAIT 00029” (para. 13). In this case, also involving an asylum seeker claiming “to be at risk as a minority clan member from Somalia, the judge” declined to request the interpreter to specify “the dialect that the appellant was” using while “giving evidence” (para. 14). The claimant argued that this was a legal error, but the AIT dismissed the appeal, stating that it was not within the interpreter’s role or expertise to provide such information and that their duty was solely to interpret for the court (ibid.). Finally, also relying on *AA*, the Upper Tribunal reasoned that an appellant is free to “call as a witness his own interpreter” (para. 16). However, the interpreter’s credentials and expertise will have to the established in each case (ibid.). In the case under consideration, the Upper Tribunal concluded that, based on the evidence before him and in particular the Sprakab report, the First-tier Tribunal made a correct finding (para. 17).

2. The first-tier judge correctly applied the decision in *KS (Majority Clans – Bajuni – Ability to Speak Kabajuni) Somalia CG* [2004] UKAIT 00271, which in turn adopted the reasoning in *AJH (Minority Group – Swahili Speakers) Somalia CG* [2003] UKIAT 00094: in order to assess whether a person is a Bajuni, at least the following three factors shall be taken into consideration:

ability to speak Kibajuni; ability to speak Somali in light of the applicant's background; familiarity with "life in Somali for Bajuni (geography, customs, occupations, etc.)" (para. 18). However, none of these elements shall be considered as conclusive: although uncommon, it may be possible that a claimant is a Bajuni despite not speaking any Kibajuni or Somali (paras. 18, 19). Although the first-tier judge did not directly cite the decision in *KS*, he applied it while he assessed "all the evidence presented to him in the round" (para. 22). In addition, the first-tier judge pointed out a number of discrepancies in the applicant's testimony that made him reach the conclusion that she was not a credible witness (ibid.).

In light of all the above, therefore, the Upper Tribunal upheld the First-tier Tribunal's decision (para. 24).

Main quotations on cultural or religious diversity:

"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'." (para. 2)

"[A]s 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." (para. 8)

"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." (para. 11)

"[I]t 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." (para. 19)

Main legal texts quoted in the decision:

- Paragraphs 8–10A of Schedule 2 to the Immigration Act 1971

Cases cited in the decision:

- *AA (Language Diagnosis; Use of Interpreters) Somalia* [2008] UKAIT 00029
- *KS (Minority Clans – Bajuni – Ability to Speak Kibajuni) Somalia CG* [2004] UKAIT 00271

Commentary

The Role of Court Interpreters: Mohamed (Role of Interpreter) Somalia [2011] UKUT 337 (IAC)

Court interpreters play a fundamental role in asylum proceedings, as they allow communication among the asylum seeker, the judge, and the other actors present at the hearing. Interpretation can raise several issues, as it cannot be done mechanically: even if interpreters are asked to provide the literal translation

of each word said by an applicant, there might not always be an exact way to do so. Additionally, cultural differences may come into play and complicate the task. One frequent issue that arises for interpreters is when not to literally translate a word in order to clarify or explain its meaning to the judge (Mark and Moffatt 2024: paras. 34.4–34.5).

In the case under study, the interpreter was not presented with particularly complex interpretation issues, but was asked to go beyond the tasks that are usually expected from him, that is to state which variety of language the appellant was speaking – an issue at stake in the case. Therefore, the Upper Tribunal made clear that a court interpreter's primary role is that of facilitating communication. Court interpreters must avoid becoming engaged in contentious issues or turning into advocates for the asylum seeker. Interpreters' neutrality is fundamental to ensure trust in their translation and fairness during the procedures.

To reach its conclusions, the Upper Tribunal endorsed its former decisions and recognized that interpreters may, at the beginning of the hearing, inform the judge of the language or dialect spoken by the appellant in cases where there may be a problem and communication may be impossible. However, if the claimant's ability to speak a language is one of the issues to be assessed, caution must be exercised to avoid that the interpreter's statements are used as evidence – this is because, even if the interpreter's statements are not introduced as evidence, they may nevertheless indirectly influence the judge and have "damaging" effects (Mark and Moffatt 2024: para. 34.43).

The Upper Tribunal also clarified that a claimant can introduce evidence concerning the spoken language but only as long as the rules of evidence are being complied with. Basic rules of evidence require one to present a list of witnesses and their written statements in a timely manner to the judge and the other parties ahead of the hearing so as to allow for their proper consideration and possible cross-examination. Evidence on a spoken language could be provided by an expert or another qualified interpreter rather than the court interpreter.

Finally, it should be noted that court interpreters' impartiality is also required by the Tribunal's Handbook for Freelance Interpreters as well as the Ministry of Justice Terms and Conditions for interpreters (Mark and Moffatt 2024: para. 34.43).

Overall, this case is also symptomatic of the difficulties faced by judges when dealing with issues involving culture and diversity.

Literature related to the main issue(s) at stake:

Specific legal publications/comments addressing the case

- Henderson, Mark and Mohena Moffatt. 2023. "Interpretation at the Hearing". In *Best Practice Guide to Asylum and Human Rights Appeals*, Ch. 34. London: Electronic Immigration Network, available at <https://www.ein.org.uk/bpg/chapter/34#toc2> accessed 13 March 2024.

General legal literature on the topic that may not be directly connected with the case

- Cohen, Juliet. 2001. "Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers". *International Journal of Refugee Law* 13: 293–330.

General literature on the topic from other disciplines in the humanities and social sciences, in particular social and cultural anthropology

- Aliverti, Ana and Rachel Seoighe. 2017. "Lost in Translation? Examining the Role of Court Interpreters in Cases Involving Foreign National Defendants in England and Wales". *New Criminal Law Review* 20 (1): 130–156.
- Berk-Seligson, Susan. 2002. *The Bilingual Courtroom: Court Interpreters in the Judicial Process*. Chicago: University Press.
- Gibb, Robert and Anthony Good. 2014. "Interpretation, Translation and Intercultural Communication in Refugee Status Determination Procedures in the UK and France". *Language and Intercultural Communication* 14 (3):

385–399. [Reprinted in Phipps, Alison, and Rebecca Kay (eds). 2015. *Languages in Migratory Settings: Place, Politics, and Aesthetics*. London: Routledge]

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