EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Eassie
Lord Menzies
Lord Marnoch

[2013] CSIH 68
XA24/11
& XA36/11

OPINION OF LORD EASSIE

in the appeals

by

(1) M. AB. N.
Appellant;

against

THE ADVOCATE GENERAL FOR SCOTLAND representing the SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent:

(2) K. A. S. Y.
Appellant;

against

THE ADVOCATE GENERAL FOR SCOTLAND representing the SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent:

_____

Appellant: Bovey QC, Byrne; Drummond Miller LLP (For McAuley McCarthy & Co, Glasgow) (First Appellant)
Appellant: Howlin QC, Bryce; Drummond Miller LLP (for Peter G Farrell, Glasgow) (Second Appellant)
Respondent: McIlvride; Solicitor to the Office of the Advocate General

12 July 2013

Introductory

[1] Each of these two appeals is brought with leave from this court under section 13 of the Tribunals, Courts and Enforcement Act 2007 from decisions of the Upper Tribunal (Asylum and Immigration Chamber). The Advocate General is convened as representing the Secretary of State for the Home Department. While the appeals are distinct, they were argued together since they involve the common feature that before the tribunal hearing at first instance and before the Upper Tribunal the Secretary of State for the Home Department relied upon the content of reports sent to the Home Office respecting each of the appellants respectively. The two reports were issued by a Swedish commercial company - Skandinavisk Språkanalys AB - based on a relatively brief telephone conversation between each of the appellants and an unnamed individual engaged by that company in Sweden. Each report is described as being a linguistic analysis. The central and common feature of each of the appeals is the evidential standing of those reports.

[2] While to that important extent the appeals have that common feature, it is necessary to describe, at least in summary, the circumstances of each appellant individually.

[3] In the first appeal, that of *M. Ab. N.*, the appellant entered the United Kingdom on 16 August 2009 and claimed asylum. His claim was rejected by the Secretary of State and he appealed to the Asylum and Immigration Tribunal. The appellant said that he was a national of Somalia and at the appeal hearing before an immigration judge he gave evidence that he was born in Mogadishu and belonged ethnically to a minority clan in Somalia, namely "clan Benadiri, sub clan Reer Hamar, and sub-clan Shanshi" (paragraph 13 of the immigration judge's decision). The appellant gave a history of events detailing persecution by militia from other clans and from members of Al-Shabaab, which, for the purposes of this appeal, it is unnecessary to rehearse in any detail. The immigration judge held that the view of the Home Secretary that this appellant was not a Somali national from Mogadishu was well founded. That view was, at least in part, based upon the report provided by the Swedish company. Although criticisms of that report were advanced on behalf of the appellant to the immigration judge, those were rejected by the judge. Counsel for the appellant M. Ab. N. accepted that there were aspects of the case other than the Swedish company's report - to which counsel for all parties were content to refer as the "Sprakab" report - which might be seen as impinging upon the credibility of this appellant's account. But it is evident from the judgment of the immigration judge in the Asylum and Immigration Tribunal that the Sprakab report played a material part in his decision that the appellant's account of being a Somali from Somalia was not to be believed.

[4] The appellant in the second appeal, *K. A. S. Y.*, arrived in the United Kingdom on 30 November 2008 and claimed asylum on the following day. She identified herself as a citizen of Somalia, born in February 1988 in Mogadishu, and as being ethnically of the Benadiri clan grouping, her sub clan being Ashraaf. When aged approximately three years she moved to Mahaday, Jowhar where she lived with an uncle. She had no schooling. On her claim for asylum being refused by the Secretary of State on 6 January 2009 she appealed to the Asylum and Immigration Tribunal and her appeal was heard by an immigration judge on 19 October 2010. She gave an account of the extensive problems which she and her family had encountered by way of persecution at the hands of various militias. Details of that account of persecution are set out in the decision of the immigration judge, which was promulgated on 20 February 2009. Again, it is unnecessary for the purposes of the issues raised in this appeal to rehearse those matters in any detail. Importantly, it was not in dispute that if her account were credible the appellant deserved international protection. Subject to what the immigration judge described as a "slight question mark" respecting an answer, in its interpreted form, to a question posed also in an interpreted form, that the currency in Somalia was "Somali money", rather than the giving of the particular name of that currency, which she plainly knew when that matter was being explored before the immigration judge, the immigration judge otherwise found the account given by the appellant to be entirely credible but for the Sprakab report. Before the immigration judge that report was the subject of various criticisms which heralded the criticisms advanced before us and at all intermediate stages in the appeal process. The immigration judge nonetheless concluded on the basis of the Sprakab report respecting this appellant that she was not from southern Somalia; and that as a consequence her otherwise credible account fell to be dismissed as a fabrication. The issue of the admissibility or evidential status of the Sprakab report therefore arises perhaps more sharply or clamantly in the appeal by the appellant in the second of the two appeals.

The Sprakab reports

[5] It is appropriate at this point to give some description of the Sprakab reports in question in these two appeals. Both are similar in their general format, possibly following a template devised by the Swedish company. Since the report respecting the appellant in the second appeal - *K. A. S. Y.* - precedes in time that of the report respecting the first appellant it is perhaps convenient to describe it first.

[6] It may be noted that the document opens with a note in the first person singular containing *inter alia* a statement to the effect that the reporter is an expert employed by "Scandinavian Language Analysis". After a centred heading in upper case "linguistic analysis report" and a statement that language analysis "..involves the assessment of regional and local linguistic traits within phonetics, morphology syntax and vocabulary.." one finds a box, or field, within which the document states that the person [the subject of the report] speaks:

> "...a variety of Somali found
>
> [x] with certainty not in: Somalia.
>
> [x] with certainty in: Kenya."

There then follows a statement to the effect that the basis for that expression of view is a recording of a telephone conversation of 18 minutes' duration on the same date as that upon which the report bears to have been supplied to the Home Office. The next section or field headed "Description of language(s) used" simply refers to one language, namely "Somali" (that is to say, without reference to any dialect or form of Somali used by the interviewer). The following two boxes or fields refer to the nature of the analysis but I do not think that the details in those fields

usefully call for repetition.

[7] Thereafter under the general, centred heading "Analysis" one finds the subhead "General comments" and the following text in the box or field relating to that subhead:

> "The person, who is a woman, speaks Somali on the recording. She speaks the language to the level of a mother tongue speaker. First she says she was born and raised in Mahaddaay in the Shabeellada-Dhexe province and that she also has lived in Jowhar in the same province. Later she states that she was born in Mogadishu in southern Somalia. The person does not speak a variety of Somali found in Somalia. She speaks a variety of Somali found with certainty in Kenya.
>
> The person is asked about what dialect she speaks on the recording. She says that she speaks the Reer-Hamar dialect. However, it can be ascertained that she does not speak the Reer-Hamar dialect.
>
> The person has deficient knowledge and deficient local knowledge of the area she says she is from. Her knowledge sounds rehearsed for the occasion since she does not give any detailed descriptions of the area she says she is from."

There then follow under the subheading "Specific findings", bearing throughout to be in accordance with the IPA system of transcription, some remarks respecting the interviewee's speech by reference to phonological characteristics, morphology and syntax, and lexicon and colloquialisms, exposition of which I do not see as being useful.

[8] Thereafter one finds a box or field headed "Knowledge of 'country and culture' of the person" which contains this text:

> "The person first says that she was born and raised in Mahaddaay in the Shabeellada-Dhexe province, in southern Somalia. After a while she changes her mind and says that she was born in Mogadishu. She also says that she moved to Jowhar in the Shabeellada-Dhexe province. The person has deficient knowledge and deficient local knowledge of the area she says she is from. Her knowledge sounds rehearsed for the occasion since she does not give any detailed descriptions of the area she says she is from. She often hesitates and gives short answers on the questions she is asked.
>
> She states that she has no knowledge of Mogadishu or Jowhar.
>
> The person speaks a little about Mahaddaay and the population in the area. She states that she belongs to the Ashraaf clan which inhabit various areas in southern Somalia."

One then finds a section headed "Summary of findings supporting the conclusion" -and I assume that the "conclusion" is that which is set out in the first box or field to which I have already referred. The text within that section is this:

> "In summary, it can be ascertained that the person speaks Somali to the level of a mother tongue speaker. The person does not speak a variety of Somali found in Somalia. She speaks a variety of Somali with certainty found in Kenya.
>
> She does not speak the Reer-Hamar dialect.
>
> The person has deficient knowledge and deficient local knowledge of the area she says she is from. Her knowledge sounds rehearsed for the occasion since she does not give any detailed descriptions of the area she says she is from. She often hesitates and give short answers on the questions she is asked."

The document contains thereafter this text:

> "This analysis was completed by the analyst in co-operation with a SPRAKAB linguist.
>
> I confirm insofar as the facts stated in my report are within my own knowledge and I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.
>
> Despatch date/Signature:"

It is not suggested on behalf of the respondent that that concluding confirmation and profession (common to both reports) were ever signed or acknowledged by anybody in either of the two cases before us.

[9] As already mentioned, the purported identity of the author of the unsigned document is not disclosed. But attached to it is a sheet containing this information:

> *"Analysis conducted by:*
>
> **ANALYST EA20**
> The analyst was born 12 October 1968 in Mogadishu, Somalia and came to Sweden 1990
> The analyst last visited Somalia in 1990
> The analyst analyses the Somali language and the Somali dialects May-May and Bravanese
> The analyst has performed 476 language analyses
> The analyst interprets for the Swedish authorities

EMPLOYMENT HISTORY
2006 to present - Analyst at Sprakab
1990 to present - Interpreter in Somali

EDUCATIONAL QUALIFICATIONS
Bachelors Degree in Law, Somalia
Sociological studies in Law, Stockholm University, Sweden

Results of analysis confirmed by:

EA17
The analyst was born 15 February 1962 in Mogadishu, Somalia and came to Sweden 2003
The analyst last visited Somalia in 2008
The analyst analyses the Somali language and the Somali dialect Reer-Hamar
The analyst is a native Reer-Hamar speaker .
The analyst has performed 80 language analyses

EMPLOYMENT HISTORY
2007 to present - Analyst at Sprakab

EDUCATIONAL QUALIFICATIONS
Bachelors Degree in Mathematics and Chemistry, Pune University, India Diploma in Computer Applications, Pune University, India

Analysis reviewed and approved by:

LINGUIST 04
830719

AREAS OF EXPERTISE
Linguistics
Discourse Analysis
Computational Linguistics

EMPLOYMENT HISTORY
2008 to present - Linguist at Sprakab

EDUCATIONAL QUALIFICATIONS
Masters Degree in Linguistics, Uppsala University
Academic Studies in Computational Linguistics, Uppsala University
Academic Studies in Psychology, Uppsala University
Academic Studies in Health studies, San Francisco State University"

[10] The Sprakab report in the case of *M. Ab. N.* follows a similar format. It likewise states that the person interviewed speaks "a variety of Somali found with certainty not in: Somalia" but "with certainty in: Kenya ". The duration of the telephone conversation is likewise noted as 18 minutes. The field for general comments contains the text:

> "The person, who is a man, speaks Somali on the recording. He speaks the language to the level of a mother tongue speaker. He states he was born and raised in Mogadishu in southern Somalia. He speaks a variety of Somali found with certainty not in Somalia. He speaks a variety of Somali found with certainty in Kenya.
>
> The person says he speaks a variety of Somali spoken by the Reer-Hamar ethnic group in the Mogadishu area in southern Somalia. However, it can be ascertained that he does not speak a variety of Somali spoken by this ethnic group, he speaks a variety of Somali spoken in Kenya.

The person has deficient knowledge of the area he says he comes from."

The "specific findings" follow the same template of mentioning a limited number of "phonological characteristics", "morphology" and "lexicon and colloquialisms". The report then proceeds to the field of "Knowledge assessment" which contains this text:

"The person has deficient knowledge of the Mogadishu area in southern Somalia where he says he was born and raised.

He says he lived in the Shibis city district; however, he cannot describe the area or mention any buildings and places. The only name he mentions is *(sic)* Beexaani, however, he cannot explain what it is.

He mentions several city districts in Mogadishu.

The person says he has been told not to speak of which clan he belongs to. When he is asked about what dialect he speaks he says he speaks the Reer-Hamar dialect. However, it can be ascertained that he speaks a variety of Somali spoken in Kenya."

The report ends with the same concluding text and is likewise without signature.

[11] There is similarly attached to the report respecting the appellant in the first appeal anonymised information respecting the persons apparently involved. That attachment is in these terms:

"

Analysis conducted by:

ANALYST EA20

The analysis was born 12 October 1968 in Mogadishu, Somalia and came to Sweden 1990

The analyst last visited Somalia in 1990

The analyst analyses the Somali language and the Somali dialects Reer-Hamar, May-May and Baraawe

The analyst has performed 1000 language analyses

The analyses interprets for the Swedish authorities

EMPLOYMENT HISTORY
2006 to present - Analyst at Sprakab

1990 to present - Interpreter in Somali

EDUCATIONAL QUALIFICATIONS

Bachelors Degree in Law, Somalia

Sociological studies in Law, Stockholm University, Sweden

EA17

The analyst was born 15 February 1962 in Mogadishu, Somalia and came to Sweden 2003

The analyst last visited Somalia in 2008

The analyst analyses the Somali language and the Somali dialect Reer-Hamar

The analyst is a native Reer-Hamar speaker

The analyst has performed 80 language analyses

EMPLOYMENT HISTORY
2007 to present - Analyst at Sprakab

EDUCATIONAL QUALIFICATIONS
Bachelors Degree in Mathematics and Chemistry, Pune University, India

Diploma in Computer Applications, Pune University, India

Analysis reviewed and approved by:

Linguist 01

Date of Birth: 720325

Stockholm University

Basic Course in Linguistics (1995-06-02)

Language and Communication

Linguistic Theory and Speech Communication

Intermediate Course in General Linguistics (1996-01-27)

Psycholinguistics

Sociolinguistics

General Language Theory and Grammar

Semantics

Phonology

Specialized Course in General Linguistics with Special Regard to Computational Linguistics (1996-12-18)

Computational Linguistics: Methods and Applications

Mathematical Linguistics II

Advanced Course in General Linguistics with Special Regard to Computational Linguistics (1999-06-16)

Computational Linguistics: Methods and Applications

Mathematical Linguistics

Programming

Essay

Basic Course in Practical Philosophy (2000-03-16)

Analysis of Argumentation - Method

Applied Ethics

Basic Course in Scandinavian Languages, Historical Profile (2001-06-12)

The Scandinavian Speech Community

Old Icelandic 1

Structure of the Scandinavian Languages

Swedish Language History

History of Texts and Style in Swedish

Intermediate Course in Scandinavian Languages, Historical Profile (2002-09-12)

The Computer as a Tool in Linguistic Research

Lexicography

Essay

Nordic Summer Course in Faeroese Language and Literature (2003-07-07)

Specialized Course in Scandinavian Languages, Historical Profile (2004-07-23)

Faeroese - Studies on the Faeroe Islands

Old Icelandic III

Danish - Language and literature for Aarhus University, Denmark

EMPLOYMENT HISTORY
Linguist, Telia Research (from 1997-01-13 to 1999-03-25)

Linguist; SPRAKAB (from 2004 to present)

Conference Attended

IAFPA 2008 Annual Conference, Presentation

Lausanne, Switzerland

21-23 July, 2008"

It may be noted that, assuming the coded identification to be references to the same person, both this analysis and that in the analysis in the second of the appeals to this court were conducted by the same analyst - EA20- and in the interval between 1 December 2008 and 1 September 2009 that analyst has purportedly increased his claimed field of competence to include knowledge of the Reer-Hamar dialect and has conducted some further 524 analyses in those nine months, compared with the 476 analyses claimed to have been conducted in the two years proceedings his or her participation in the interview with the appellant in the second appeal. By contrast, the confirming analyst, EA17, has apparently not conducted a single addition analysis since 1 December 2008. The linguist "approving and reviewing" the analyses does not have the same code number as in the first report on K. A.S. Y. Greater information is given respecting his or her career and it appears that his or her specialist area is Scandinavian languages. In the case of M. Ab. N. the report, dated 1 September 2009 is supplemented by a document dated 14 September 2009 which appears to be what is described as a "transliteration" of the interview completed by a different analyst and linguist. As counsel for the first appellant observed, the terms of that interpreted transcription of the interview at the very least arguably do not support the assertions made in the knowledge and assessment field of the Sprakab report.

Procedural history

(a) K. A. S. Y.

[12] Again, since the second appellant's case is earlier in the general chronology I find it convenient to recount its history first. Following the refusal of her appeal to the Asylum and Immigration Tribunal by the immigration judge (MacDonald) the second appellant exercised her right of appeal which, put shortly, resulted in what at that time was termed a "statutory application" to the Court of Session. That application for reconsideration was granted by the Court of Session on 22 July 2009. The judge granting that application, Lord Macphail, gave a detailed note of the reasons for granting the application and to those reasons I shall later return. But the outcome of his consideration of the application for reconsideration was that the appellant's appeal should be reconsidered with an express direction that the Sprakab report be entirely ignored.

[13] Following the order made by the Court of Session the appeal by K.A.S.Y returned to the Asylum and Immigration Tribunal. On 4 February 2010 a senior immigration judge (Deans) adjourned the appeal to await the issue of a decision in another case then pending before the Asylum and Immigration Tribunal. That decision was issued (following the assumption by the Upper Tribunal of the functions of the Asylum and Immigration Tribunal on 15 February 2010) by the Upper Tribunal on 15 September 2010 as *RB (Linguistic Analysis - Sprakab) Somalia* [2010] UKUT 329 (IAC). Although under the then prevailing régime the order granted by Lord Macphail in the Court of Session was for "reconsideration", the effect of that order was converted by the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (SI 2010/21) into an order granting permission to appeal under section 11 of the Tribunals, Court and Enforcement Act 2007. Consequently the appellant's appeal came to be heard before the Upper Tribunal as an appeal, rather than a "reconsideration", on 19 October 2010. The decision of the Upper Tribunal (MacLeman SIJ) was promulgated on 28 October 2010 and is the decision against which this appeal is taken.

[14] Summarising that decision, notwithstanding that Lord Macphail had directed in terms that in reconsidering the case the Sprakab report respecting K.A.S.Y should be entirely left out of account, MacLeman SIJ regarded himself as being bound by the views expressed by the Upper Tribunal in *RB (Linguistic Analysis- Sprakab) Somalia* respecting Sprakab reports as a generality; and in light of that judgment and the views expressed therein respecting the sufficiency of any expression by Sprakab in terms of certainty or near certainty, he concluded that this appellant was "caught by that judgment". As respects the direction which Lord Macphail had made, the Upper Tribunal Judge says in paragraph 15 of his

judgment:

> "Lord Macphail issued notes critical of SPRAKAB along similar lines in several cases. Representatives (not, I hasten to add, [the appellant's solicitor]) have sought to rely on such a note as an 'as yet unreported decision of the Court of Session'. That is misconceived, and is not what the Lord Ordinary intended. The note is ancillary to an order for reconsideration. It is not an authority or capable of becoming a reported decision. It is related to an interlocutor, based on an application by one party, without written or oral submission on the other side. Its points, of course, may be adopted by an appellant on her own merits, but they are not binding authority, nor conclusive in the case to which they apply."

The Upper Tribunal Judge therefore regarded the case as being ruled by the views expressed by the Upper Tribunal in *RB*; and, it would appear, Lord MacPhail's direction as having been implicitly countermanded by the Upper Tribunal.

M. Ab. N.

[15] As already mentioned, the appeal by M, Ab. N. to the Asylum and Immigration Tribunal against the Secretary of State's refusal of his application for asylum was refused by the immigration judge (McGavin) in that tribunal on 5 February 2010 - shortly before the transition date to the new tribunal arrangements. On 1 March 2010 leave to appeal was granted on the basis that the immigration judge was wrong to place reliance on the Sprakab report. On 16 November 2010 the Upper Tribunal gave this direction:

> "The parties shall prepare for the forthcoming hearing on the basis that it will be confined to whether the determination of the IJ should be set aside for legal error having regard (now) to **RB** (Linguistic Evidence - Sprakab) Somalia [2010] UKUT 329 (AIC)."

[16] The matter was argued before the Upper Tribunal (MacLeman SIJ) on 16 December 2010 when the solicitor for the appellant argued, notwithstanding *RB*, that the report from Sprakab in the case of the appellant M. Ab. N. was open to a number of serious criticisms. These are narrated in paragraph 10 of the decision of the Upper Tribunal. However the Upper Tribunal judge felt bound to reject those criticisms, invoking paragraphs 168 and 169 of the judgment of the Upper Tribunal in its *RB* judgment. In rejecting this appellant's appeal, the senior immigration judge in the Upper Tribunal concluded at paragraph 18:

> "18 [the solicitor's] criticisms of the Sprakab Report did not raise any point which has not been dealt with in principle in **RB**, which is binding for present purposes. The appellant fails to show either that this particular Sprakab Report was unreliable, or that Sprakab reports in general ought not to be relied upon in asylum and immigration appeals. In the light of **RB**, the IJ was entitled to give the Sprakab Report such weight as she did. Her determination therefore does not err in law and shall stand."

Lord Macphail's criticisms

[17] As I have already indicated, in issuing his order in the appeal by K. A.S.Y. that her appeal be reconsidered without any regard being paid to the Sprakab report, Lord Macphail attached to his interlocutor a full note of his reasons for reaching that view. Many of the criticisms there articulated by Lord Macphail were adopted and developed by counsel for the appellants before us. I therefore think it appropriate to set out those views in full. It should be noted that those views, expressed by a judge of a higher appellate court, were not placed before the Upper Tribunal in the *RB* case by those acting for the Secretary of State; nor were they placed before the Court of Appeal in England and Wales when the Upper Tribunal's decision in *RB* came to be considered by that court. While naturally no criticism is intended of him, counsel for the Advocate General in these appeals was not able to explain why that was not done; he did not suggest that the views expressed by Lord MacPhail were in any respect irrelevant to the matters at issue before either the Upper Tribunal or the Court of Appeal.

[18] Lord Macphail's interlocutor and appended note of reasons are in these terms:

> "Edinburgh, 22 July 2009 Lord Macphail
> The Lord Ordinary having considered the Petition and Productions, Grants the Prayer of the Petition; Orders that the Asylum and Immigration Tribunal reconsider its decision dated 10 March 2009 (conform to Note attached).
>
> **Note:**
> [1] The question the Immigration Judge ('the IJ') had to decide was whether the petitioner had a well-founded fear of persecution in Somalia by reason of her membership of a particular social group, namely a minority clan described as the Benadiri Ashraf clan. Before the IJ the parties were agreed that if the petitioner was a credible witness, she was deserving of international protection.
>
> [2] The IJ accepted a point made by the respondent about the petitioner's response at her screening interview to questions about the Somali currency and considered that her answers 'cast a slight question mark over her credibility' (paragraph 35). The IJ went on to say, 'Subject to the point mentioned about the Appellant not being able to say what the Somali currency was in her screening interview by far the most important evidence in this case is that the Appellant says she is from the Reer Hamar minority clan in Somalia and the linguistic analysis report negates this' (paragraph 37). The IJ considered the report and accepted its conclusion that the petitioner spoke a variety of Somali found with certainty not in Somalia but found with certainty in Kenya, and that she did not speak the Reer Hamar dialect.

[3] In my opinion the IJ was not entitled to rely upon the linguistic analysis report. The following paragraphs draw upon a Note in a recent case (P460/09) where I considered a similar report. In my view each report fails in several important respects to comply with good practice and with the rules in the Tribunal's Practice Directions relative to expert evidence to such an extent that no reliance should be placed on its contents.

[4] The report was produced by 'Sprakab'. In a document which is produced in case P460/09 but not in this case, entitled 'Sprakab Language Analysis Information', Sprakab is described as a privately owned company located in Stockholm. It appears from the same document that language analysis at Sprakab is 'a two-step process': the first step 'involves an analyst listening to the recording;' secondly, 'the analyst collaborates with a linguist and a written report is produced.' In a further important passage in the same document, under the heading '6.0 Degree of certainty for conclusions' it is said: 'In concluding a report, the analyst and linguist work together to ascertain a degree of certainty regarding where the language spoken by the claimant originates.' In the present case, where the report's critically important finding is, 'The person speaks a variety of Somali found with certainty not in: Somalia, with certainty in: Kenya', it is important that it should be possible for the IJ or the Tribunal to be able to assess whether that finding has been made by a person or persons competent to make it.

[5] In the present case the authorship of the report is not disclosed. Those who are said to have produced it remain anonymous. On another page it is stated: 'Analysis conducted by: Analyst EA20' and there follow details of what are said to be the analyst's personal details (but not the analyst's name), employment history and educational qualifications. The page goes on to say, 'Results of analysis confirmed by: EA17' and there follow similar details of this anonymous second person. Finally the page sets out, 'Analysis reviewed and approved by: Linguist 04' and bears to state that person's areas of expertise, employment history and educational qualifications, but not his or her identity. No attempt is made to justify the anonymity of those persons, which is both unacceptable at common law and a breach of rule 8A.9(e) of the Practice Directions which provides that an expert's report must 'say who carried out any examination, measurement or other procedure which the expert has used for the report.'

[6] Further, the report leaves room for doubt as to the state of analyst EA20's current knowledge of the Somali language and the varieties or dialects of that language. According to the 'Information', 'It is a must that analysts maintain their language, either through regular trips to their homelands or through the various language associations in Sweden.' The sheet of personal details etc discloses that analyst EA20 has not been in Somalia since he or she left that country in 1990; and there is no suggestion that over the succeeding years he or she has 'maintained' his or her language in any other way. It may be that it is for that reason that analyst EA20's analysis was "confirmed" by EA17, but the reason is not explained.

[7] The information given about the two analysts does not indicate that either of them has any appropriate qualifications in linguistic analysis. I refer to *Guidelines for the Use of Language Analysis in Relation to Questions of National Origin in Refugee Cases* which was produced in June 2004 by the Language and National Origin Group, an international group of linguists. No doubt the Guidelines are neither authoritative nor prescriptive, notwithstanding the number and academic standing of the signatories, but they appear to me to be in accordance with common sense. The third guideline is in these terms:

> '3) LANGUAGE ANALYSIS MUST BE DONE BY QUALIFIED LINGUISTS
> Judgements about the relationship between language and regional identity should be made only by qualified linguists with recognized and up-to-date expertise, both in linguistics and in the language in question, including how this language differs from neighboring language varieties. This expertise can be evidenced by holding of higher degrees in linguistics, peer reviewed publications, and membership of professional associations. Expertise is also evident from reports, which should use professional linguistic analysis, such as IPA (International Phonetic Association) transcription and other standard technical tools and terms, and which should provide broad coverage of background issues, citation of relevant academic publications, and appropriate caution with respect to conclusions reached.'

The sixth guideline reads in part:

> 'Linguists should provide specific evidence of their professional training and expertise, for example in a curriculum vitae, so that a court may have the opportunity to assess these matters.'

[8] Neither of the analysts in the present case is a qualified linguist. Neither of them has a degree in linguistics. EA20's educational qualifications are said to be, 'Bachelor's Degree in Law, Somalia; Sociological studies in Law, Stockholm University, Sweden', while EA17's are stated as, 'Bachelor's Degree in Mathematics and Chemistry, Pune University, India; Diploma in Computer Applications, Pune University, India.' Neither is said to have a degree in linguistics, or to have published in any peer-reviewed publication, or to be a member of a professional association. As to their claimed expertise in the language in question, EA20 is said to have been born in Mogadishu, Somalia and to have been an interpreter in Somali since 1990 and an analyst at Sprakab since 2006, and professes to analyse the Somali language and the Somali dialects May-May and Bravanese. EA17 is also said to have been born in Mogadishu and to have been an analyst at Sprakab since 2007 and professes to analyse the Somali language and the Somali dialect Reer-Hamar of which he or she is said to be a native speaker.

[9] The analysts' lack of any of the evidence of expertise described by the third guideline is not made good, in my opinion, by the fact that they are natives of Somalia. The seventh guideline states:

> '7) THE EXPERTISE OF NATIVE SPEAKERS IS NOT THE SAME AS THE EXPERTISE OF LINGUISTS
> There are a number of reasons why people without training and expertise in linguistic analysis should not be asked for such expertise, even if they are native speakers of the language, with expertise in translation and interpreting. Just as a person may be a highly accomplished tennis player without being able to analyze the particular muscle and joint movements involved, so too, skill in speaking a language is not the same as the ability to analyze a language and compare it to neighboring language varieties.'

To a similar effect is the following statement by the Asylum and Immigration Tribunal in *AA (Language Diagnosis: use of interpreters) Somalia* [2008] UKAIT 00029 at paragraph 10:

'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 [speaks] that language or dialect, or, if not, what dialect is being spoken.'

That dictum seems particularly apt in the present case, where the analysts are natives of Mogadishu, in the southern part of Somalia, and claim that the petitioner does not speak the variety of Somali found in Somalia but speaks a variety found in Kenya.

[10] In *LP (LTTE area - Tamils - Colombo -risk?) Sri Lanka* CG [2007] UKAIT 00076 the Asylum and Immigration Tribunal, discussing the rôle of country expert witnesses, said at paragraph 36:

'Whilst it is true that the rules of evidence do not apply in this jurisdiction, as they do in the civil courts, the Tribunal should be very slow to accept opinion evidence from a person who cannot demonstrate a sufficient expertise in the subject on which they are called to give evidence.'

That appears to me to be a consideration of general application. It follows from my assessment of the analysts' lack of expertise that their opinions should not have been accepted by the Tribunal.

[11] Next it is necessary to consider the qualifications and rôle of the linguist. He or she is identified only as Linguist 04. His or her areas of expertise are said to be 'Linguistics; Discourse Analysis; Computational Linguistics'; he or she has been employed as a linguist at Sprakab since 2008; and his or her educational qualifications are stated as 'Master's Degree in Linguistics, Uppsala University; Academic Studies in Computational Linguistics, Uppsala University; Academic Studies in Psychology, Uppsala University; Academic Studies in Health studies, San Francisco State University.' The general information from Sprakab accompanying the report says of the linguist, 'A command of several languages is desirable.' Nothing is said in the report about this linguist's knowledge of any languages. In particular, it is not said that he or she has any knowledge of or qualifications in the languages and dialects spoken in Somalia.

[12] As to the linguist's rôle, it has already been noted above that the information from Sprakab accompanying the report states that 'the analyst collaborates with the linguist and a written report is produced.' It also states, 'In concluding a report, the analyst and the linguist work together to ascertain a degree of certainty regarding where the language spoken by the claimant originates.' The report itself states, 'This analysis was completed by the analyst [it does not say which of the two analysts] in co-operation with a Sprakab linguist.' It is not possible to understand from this information how there can be useful collaboration between the analyst and the linguist, or how they can work together to ascertain that degree of certainty, when the linguist has no knowledge of the languages or dialects under consideration.

[13] The report is seriously defective in a number of other respects. It does not state that it relates to the petitioner. It does not state who instructed it. It does not state the source and substance of all material facts and instructions given to the authors (rule 8A.9(c)). It is therefore impossible to know whether whoever instructed the report provided 'clear and precise instructions to the expert, together with all relevant information concerning the nature of the appellant's case' (rule 8A(1)). It is not clear that the authors were aware that the report would be submitted to a judicial tribunal and that it was their duty to help that tribunal on the matters within his or their expertise; and that they have acted accordingly. Thus the report does not state what information, documents or other materials were submitted with the instructions. It refers to a tape recording of 1 December 2008, but one has to resort to the Home Office refusal letter of 6 January 2009 in order to infer that that may be a tape recording of the petitioner's screening interview of 1 December 2008 or of a 'direct analysis' of a recorded conversation between the petitioner and an unnamed interviewer in undisclosed circumstances on the same date to which I refer below. The report is not addressed to the Tribunal (rule 8A.8). It is not clear that the authors were aware that the report would be submitted to a judicial tribunal and that it was their paramount duty to help that tribunal on the matters within their expertise; and that they have acted accordingly (rules 8A.2, 8A.4, 8A.9(j)). The only indication of any awareness of the contents of the Practice Directions is the form of the Statement of Truth (rule 8A.11), which is unsigned.

[14] The methodology of the report is open to serious criticism. As noted above, it is not possible to discover whether it relates to the petitioner, who the authors were or what materials were submitted to them. On the first page of the report there is a box headed 'Direct Analysis'. It contains the words 'Direct analysis - analysis done during a direct conversation between the person and an interviewer.' Opposite these words appears '[X]'. It seems that it is to be inferred from the other boxes on the page that the insertion of an X between square brackets has a positive significance. Accordingly this box appears to signify that a direct conversation took place between the person and an interviewer. If that is so, it is necessary to know when and in what circumstances that conversation took place; the identity of the interviewer; whether the analyst was present at, or listened to a recording of, the interview; whether there was any discussion between the analyst and the anonymous interviewer; exactly what the person was asked and exactly what answers she gave; to what features, if any, of the person's speech at the interview the analyst attached importance; and his or her reasons for regarding them as of importance. Without access to the details of what was said, or without access to the recording itself, it is difficult to see how the petitioner could assess or challenge the statements in and conclusions of the report. As I have already noted, the rôle of the linguist is obscure: it is not suggested that the linguist has any knowledge of the languages spoken in Somalia, and it is therefore unclear on what basis the linguist could 'co-operate' with an analyst and could be able to conclude that the person under consideration spoke a variety of Somali not found in Somalia but found in Kenya.

[15] The authors appear to venture opinions on matters which are not within their expertise. In a box headed 'Type of analysis' the following appears:

'Linguistic analysis - this analysis characterises the person's language(s) and/or dialect(s) in terms of phonetics, morphology, syntax and lexica.

Knowledge assessment - this analysis examines the person's knowledge and experiences of culture and geography of his/her stated country/region of origin.'

The following sentence appears three times: 'The person has deficient knowledge and deficient local knowledge of the area she says she is

from. Her knowledge sounds rehearsed for the occasion since she does not give any detailed descriptions of the area she says she is from.' That is stated in three of the boxes in the report: in the box headed 'General comments', in that headed 'Knowledge of "country and culture" of the person' and in the final box headed 'Summary of findings supporting the conclusion.' The two latter boxes add, 'She often hesitates and gives short answers on the questions she is asked.' But Sprakab does not claim expertise in the assessment of a person's knowledge of 'country and culture': the document conveying language analysis information states that the company conducts linguistic analysis and forensic phonetics, and does not say anything about its having any ability to assess a speaker's knowledge of 'country and culture'. Nor does the company claim expertise in the assessment of a speaker's credibility, an expertise implied in the observation that the knowledge of the speaker under consideration 'sounds rehearsed for the occasion' and the comment on her hesitation and short answers. I observe incidentally that it is difficult to appreciate how the linguist in this case could have contributed usefully to any assessment of these matters. Notwithstanding these considerations, however, in paragraph 39 of his determination the IJ has taken into account, as weighing against the petitioner, the information in these boxes.

[16] I consider that for all these reasons the IJ should not have attached any weight to the report. The petition adds the criticism that neither the analysts nor the linguist were made available for cross-examination before the IJ. Since, however, the report in my view should not have been considered at all, the question whether they should have been available for cross-examination does not arise.

[17] I have accordingly concluded that reconsideration is necessary and should be undertaken without reference to the Sprakab report. As in the other case, P460/09, I hope it will be clear that I am not in any way saying that the IJ reached a decision that was necessarily incorrect; I am saying no more than that in my judgment the decision is not sufficiently supported by the reasons given."

The Upper Tribunal decision in *RB*

[19] I begin with a brief summary of the facts and procedure. The appellant, RB, arrived in the United Kingdom on 20 June 2007 and sought asylum stating that she was from Somalia. During the course of a Home Office interview on that date she was similarly put on the telephone to an employee or agent of Sprakab in Sweden. That resulted in a written report, date 24 June 2007 which was invoked in the refusal letter of 20 July 2007 and at the appeal hearing before the immigration judge (Pugh) on 31 August 2007. In respect of that report one finds in paragraph 10 of the Upper Tribunal's decision:

"...The analyst is 'EXP 249', who is said to originate from Kenya and to have completed the analysis 'in co-operation with Sprakab linguist 03'. The conclusion is that the appellant knows quite a bit about the Bajuni islands but speaks a variety of Swahili spoken in Kenya. Although she does use some Kibajuni words, her pronunciation, intonation and grammar are typical of Kenyan Swahili, indeed with a level of grammatical rectitude which shows her to be highly educated."

[20] The immigration judge rejected Ms RB's appeal on the ground that she was not credible, in particular about her origins. The appellant, RB, sought reconsideration which, while initially refused, was granted by the High Court in England and Wales on two matters, the first relating to the fact that the identity and expertise of the author of the report (of 24 June 2007) had not been established; the second being more particularly related to the particular circumstances of the case, namely whether the appellant's having given evidence in Kibajuni was consistent with the conclusions of the report[1].

[21] It is evident from the decision of the Upper Tribunal that thereafter a variety of further reports were commissioned on both sides and oral evidence was given by most, if not all, of the authors of those reports. The Upper Tribunal also had a report from the manageress of Sprakab, Pia Fernqvist, and heard oral evidence from her respecting the methods adopted by the company by which she was employed. The parts of her evidence which are potentially pertinent to these appeals are summarised by the Upper Tribunal at paragraphs 86-89 of its decision:

"86. The company has a pool of analysts, which it employs as and when necessary. In general they speak the language they are asked to analyse at the native level, and are taught at Sprakab to 'think critically and analytically regarding language'. They are required to keep their knowledge of their languages up to date.

87. Analysts are recruited within Sweden using what is apparently an informal network of education institutions and recommendations by existing analysts. They are subject to evaluation before they are appointed, and to regular evaluation during their work for Sprakab.

88. Linguistic analysis at Sprakab is a two-stage process. It starts with an analyst listening to a specimen of speech, which is recorded. Typically, the analyst converses with the person whose speech is to be analysed. Using his developed skills as a listener, the analyst notes features of the subject's speech which appear to be of interest. Those features may be phonological, that is to say related to precise sounds used in speaking, and to the intonation and stresses of both words and sentences, morphological, that is to say relating to inflection, grammar and syntax, or lexical, that is to say related to the speaker's choice of words.

89. The analyst then discusses the features that have been identified with a linguist. Together the analyst and the linguist decide whether the features are indeed diagnostic in the sense of assisting to decide the speaker's origin. A report is produced, giving a judgment, usually in one of the four following forms:

'The person speaks a variety of [language or dialect] found

- with certainty in (or certainty not in):
- most likely in:

- - likely in:
- - possibly in:'"

The involvement of a linguist is described in paragraph 92:

> "92. The contribution of the linguists is different. They may well not speak the language of the claimant, but will check that the analyst has identified linguistically significant features of the claimant's speech which enable a conclusion to be drawn with the requisite degree of certainty."

[22] The issue of principle upon which the High Court ordered reconsideration in the *RB* case was essentially the anonymity of the provider or providers of the report. The Upper Tribunal rejected the criticism based on the anonymity of the author, or authors, of any report from Sprakab. That matter is dealt with by the Upper Tribunal at paragraphs 23 and following of its judgment. Put shortly, Sprakab seeks anonymity for all of its individual agents on the basis that were an agent's identity to be known the agent's independence might be compromised and his or her personal safety might be in danger were it known that the agent was producing analyses, some of which might be adverse, for governmental authorities. But the company provided each employee or agent with a unique identifier number. With the exception of Fru Fernqvist (respecting whom no order for anonymity was sought), the Upper Tribunal granted anonymity as respect all of the witnesses appearing before it. Its conclusion is set out in the course of paragraph 27 of its decision:

> "...Given the information that is associated with the identifier, it seems to us to be virtually inconceivable that anybody is disadvantaged by not knowing the name or address of the individual concerned. It might perhaps be that in some particular case there will be a proper reason for enquiring whether a named individual had been involved in the analysis of a sample. If it was necessary to ask that question, it could be directed to Sprakab, and a Tribunal might in due course have to decide how to deal with whatever answer was given. But in the general case the reports are available on the authority of Sprakab itself, with full information about the qualifications of those who have contributed to them. That is sufficient."

[23] In paragraphs 170-174 of its determination the Upper Tribunal gave what it described as general guidance on three matters in relation to linguistic analysis in general and Sprakab reports in particular. The first matter is dealt with in paragraph 171:

> "First, we note that it is said that a decision as to a person's background or origin should not be based solely on linguistic analysis. We have heard and seen nothing enabling us either to endorse or doubt that advice. But where there is clear, detailed and reasoned linguistic analysis leading to an opinion expressed in terms of certainty or near-certainty it seems to us that little more will be required to justify a conclusion on whether an applicant or appellant has the history claimed."[2]

The second matter is dealt with in the succeeding paragraph:

> "172. Secondly, the conclusions we have reached about Sprakab's reports do not, of course, mean that Sprakab or any other linguistic analyst is infallible. A decision-maker or judge must be alive to the possibility of error, whether or not the particular level of certainty expressed by the report leads one to expect it. Where there is linguistic evidence in a particular case it is important that all parties have a proper opportunity to submit it for expert evidence, and it is equally important that all evidence be taken into account in deciding the questions in issue according to the appropriate standard of proof."

However, as counsel indicated, the opening sentence of paragraph 172 has to be read with the view expressed by the Upper Tribunal in paragraph 168 which reads:

> "168. It seems to us that we have been given no substantive reasons for distrusting Sprakab's reports either in this case or in general. In our judgement, because of Sprakab's underlying library of data and the process by which it produces its reports, Sprakab evidence is of high quality and its opinions are entitled to very considerable weight."

In paragraph 173 the Upper Tribunal goes on to say that a sound recording of any interview forming the basis of a Sprakab analysis should be made available to the applicant or appellant. The third matter of general guidance given by the Upper Tribunal relates to anonymity:

> "174. Thirdly, we have given our reasons above for acceding to Sprakab's request for anonymity for its linguists and analysts, subject to details being given of their background and their qualifications. Those reasons are of general applicability and we would expect the same decision as to anonymity to be made in any case in which Sprakab evidence was tendered, unless there was some very good reason for departing from this practice. "

The Court of Appeal's decision in *RB*

[24] The decision of the Upper Tribunal in *RB* was considered by the Court of Appeal in *RB (Somalia)* v *Secretary of State for the Home Department* [2012] EWCA Civ 277. The leading judgment was delivered by Moses LJ, the other members of the bench, namely Rix LJ and Briggs J, expressing agreement *simpliciter*. Having summarised the circumstances of the case and the decision of the Upper Tribunal including partial quotation of the

guidance set out by the Upper Tribunal in paragraphs 171-174 of its judgment, Moses LJ sets out at paragraphs 11 and 12 of his judgment the submission made to the Court of Appeal on behalf of Ms RB:

"11. The primary challenge to the approach of the Upper Tribunal rested upon the fact that reports such as the SPRAKAB reports in the instant appeal did not comply with the relevant Practice Direction. It was submitted that there were fundamental flaws which rendered the expert analysis of the appellant's speech worthless. Although the appellant and respondent did not refer to the same version of the Practice Directions there were no material differences. The relevant Practice Directions are those contained in Practice Direction 10 in the Practice Directions: Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, in force from 15 February 2010. The relevant directions were:-

'10.1 a party who instructs an expert must provide clear and precise instructions to the expert, together with all relevant information concerning the nature of the appellant's case, including the appellant's immigration history, the reasons why the appellant's claim or application has been refused by the respondent and copies of any relevant previous reports prepared in respect of the appellant.

10.2 It is the duty of an expert to help the tribunal on matters within the expert's own expertise. This duty is paramount and overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid.

10.3 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation .

10.4 An expert should assist the tribunal by providing objective, unbiased opinion on matters within his or her expertise, and should not assume the role of an advocate.

10.5 An expert should consider all material facts, including those which might detract from his or her opinion.

10.6 An expert should make it clear:-

(a) when a question or issue falls outside his or her expertise; and

(b) when the expert is not able to reach a definite opinion, for example because of insufficient information.

10.7 If, after producing a report, an expert changes his or her view on any material matter, that change of view should be communicated to the parties without delay, and when appropriate to the Tribunal.

10.8 An expert's report should be addressed to the Tribunal and not to the party from whom the expert has received instructions.

10.9 An expert's report must:-

(a) give details of the expert's qualifications;

(b) give details of any literature or other material which the expert has relied on in making the report;

(c) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;

(d) make clear which of the facts stated in the report are within the expert's own knowledge;

(e) say who carried out any examination, measurement or other procedure which the expert has used for the report, give the qualifications of that person, and say whether or not the procedure has been carried out under the expert's supervision;

(f) where there is a range of opinion on the matters dealt with in the report:

(i) summarise the range of opinion, so far as reasonably practicable, and

(ii) give reasons for the expert's own opinion;

(g) contain a summary of the conclusions reached;

(h) if the expert is not able to given an opinion without qualification, state the qualification; and

(j) contain a statement that the expert understands his or her duty to the Tribunal, and has complied and will continue to comply with that duty.

10.10 An expert's report must be verified by a Statement of Truth as well as containing the statements required in paragraph 10.9(h) and (j).

12. Mr Davison [counsel for Ms RB] contended that the various reports disclosed a number of breaches, in particular that no information was supplied regarding the instructions (10.1), since the analyst and linguists were anonymous and it was not possible to tell who had compiled particular aspects of the report, it was not possible to tell whether matters were outside their expertise (10.2), since

during the course of the initial screening interview the view was expressed that the appellant was not an island Bajuni four days before the report was prepared and thus the expert must have been influenced by the pressures of litigation (10.4). The report was not addressed to the tribunal (10.8), no qualifications were provided nor details of literature relied upon, nor was there any attribution to a particular individual (10.9) and there was no statement of truth (10.10)."

[25] Having thus set out the particular submission to the Court of Appeal, the judgment of Moses LJ continues in paragraph 13 to say:

"13. The Upper Tribunal rejected all these criticisms. The more recent SPRAKAB reports relied upon were not as defective as the appellant asserted in relation to the first report."

It is, I think, appropriate to interpose two comments at this point. First, as counsel for the appellant in the second of the appeals - K.A.S.Y.- observed, technically the only matter of non-conformity with the Practice Directions which was before the Upper Tribunal was anonymity and consequent non disclosure of expertise. Secondly, it appears from the Upper Tribunal's judgment that at least the third of the Sprakab reports provided in the *RB* case was a document of a rather different nature from the two reports with which one is respectively concerned in the present appeals. That third report is described, albeit briefly, at paragraph 14 of the Upper Tribunal decision:

"14. The recording of the appellant's half-hour interview on 20 June 2007 is the subject of yet a third Linguistic Analysis Report completed on 10 March 2009, and this time involving analysts EA19, 14, 249 and 20 and linguists 4 and 1. All of their credentials are listed in great detail, and the report itself is more detailed than the two previous ones..."

To that extent, some of the requirements of the Practice Direction may well have been met in *RB* in substance in that third report.

[26] However that may be, the judgment given by Moses LJ then proceeds in these terms before it turns to discuss the particular facts and circumstances of the *RB* case:

"14. I too, like the Upper Tribunal do not regard the criticisms as undermining the reliability of the reports. There was good reason for the anonymity and no basis advanced for thinking that disclosure of the names would have assisted the appellant in any respect whatever. In the light of the careful evidence given as to the process of analysis the appellant was not placed at a disadvantage by reason of the conclusion having been reached as a collective view. There will be expert evidence which requires identification of who among a number of experts discussing the conclusion reached a particular view. But Ms Fernqvist's evidence was such that it was perfectly fair, provided the process was patent, to give a collective conclusion. I would endorse the view of the Upper Tribunal that the fact that the reports do not comply with the Practice Directions relating to expert evidence is not of itself a reason to give such reports less weight. The validity of the reports derived from the characteristics and methods of the organisation rather than the particular individuals.

15. There was, however, one point as to which I disagree with the Upper Tribunal. The Tribunal pointed out that the reports are 'typically prepared for a decision-maker and not for an appeal and so it is not appropriate to impose on them rules relating to evidence prepared specifically for use in litigation.' Technically, at least the first report was prepared for a decision-maker and not for a tribunal. But nonetheless the Practice Directions relating to experts are of importance in safeguarding the subject of the report and in ensuring the integrity of the evidence. The mere fact that an initial report is obtained for the Secretary of State, for example, and not for a tribunal is no reason not to have well in mind the protection afforded by the Direction. For example, it remains of importance to know the nature of the instructions given to the expert and that the expert evidence should be an independent view uninfluenced by the source of the instructions or pressure of any sort. The expert is required to provide an objective, unbiased opinion on matters within the expert's expertise. An expert must not assume the role of an advocate. Such principles are vital whatever the circumstances in which the report was obtained.

16. But with that reservation I would endorse everything which fell from the Upper Tribunal. Both the First-Tier and the Upper Tribunal are peculiarly well placed to assess the quality of expert evidence and identify which forms and methods are most calculated to achieve a reliable and fair conclusion. The Upper Tribunal has a broad discretion with regard to the control of the evidence before it and has, within its case management powers, the power to waive non-compliance with a Practice Direction, or indeed, a Rule (Rules 5(1) and 7(2)(a) of the Tribunal Procedure (Upper Tribunal Rules 2008 as amended)). The Upper Tribunal's obligation is to ensure that any expert report represents a genuine, objective view by those qualified to express it with sufficient reasoning and clarity to enable it to be challenged and assessed. I would endorse the Tribunal's general guidance."

Submission of parties

[27] Understandably, while there were areas of overlap between the submissions advanced by Mr Bovey on behalf of M. Ab. N. and those of Mr Howlin for K. A. S. Y. there were yet differences, at least in emphasis.

M. Ab. N.

[28] In short summary, Mr Bovey began by stressing that the Sprakab report, which the immigration judge and the Upper Tribunal had treated as expert evidence, was anonymous. It was, he submitted, a fundamental principle of our law that a person was entitled to know the identity of any witness led on behalf of the opposing party. Reference was made to *R* v *Davis* [2008] UKHL 36; [2008] 1 AC 1128 and the long line of authority

there surveyed by Lord Bingham and to *Al Rawi and others* v *The Security Service and others* [2011] UKSC 34; [2012] 1 AC 531. The principle was not confined to criminal cases. While in particular circumstances some departure might be made from that principle of open justice, the court or tribunal in question required to be satisfied of the necessity for anonymity for the particular individual tendered as a witness. Anonymity disabled the person affected by the witness' testimony from making enquiry into the qualifications and background of the witness in question; or into other factors affecting the credibility or reliability of the witness. Knowledge by a witness preparing a report or giving evidence that he or she would enjoy anonymity tended to give the witness a sense of impregnability and, whether consciously or subconsciously, might tempt the witness to indulge in exaggeration or falsification.

[29] Rule 45(4)(i) of the Asylum and Immigration Tribunal Procedure Rules[3] enabled the tribunal to give anonymity to a witness. The test required that there be a finding of a risk of serious harm to the witness were his identity to be disclosed; and that the steps taken to grant anonymity should be "proportionate having regard to the interests of justice". The author of the Sprakab report in the first appellant's case was essentially a witness. But in any event a decision whether anonymous testimony should be received required to be taken on an individual basis having regard to the particular circumstances of the case.

[30] While the issue of anonymity was canvassed before the Upper Tribunal in *RB*, the authorities such as *Davis*, and those reviewed in the opinions delivered in the House of Lords in that case, and *Al Rawi* appeared not to have been brought to its attention - or indeed to the attention of the Court of Appeal when it subsequently came to consider the judgment of the Upper Tribunal in *RB*. The decisions of both the Upper Tribunal and the Court of Appeal therefore proceeded without any argument based upon those important authorities. But in any event, the granting of anonymity required to be exercised, only exceptionally, and in the circumstances of the particular case. The general grant of anonymity to the authors of any Sprakab report which the Upper Tribunal purported to give in *RB*, and which the Court of Appeal in England and Wales apparently approved, was thus contrary to fundamental principles.

[31] Counsel for the appellant in the first appeal next addressed the issue of compliance with the Practice Directions on expert evidence. He observed that, as is noted in the parenthesis in the first sentence of paragraph 167 of the decision of the Upper Tribunal in *RB*, the Upper Tribunal was not in fact addressed on any question of compliance with those Practice Directions. So what followed thereafter was *obiter*. In that which followed, the Upper Tribunal appeared to give a blanket dispensation from the requirements of the Practice Direction for expert evidence in the form of any report emanating from the Swedish company simply because such a report came from an "organisation" rather than an individual. That was fundamentally wrong. Expert evidence respecting an individual applicant for permission to be within the United Kingdom could not be subject to dispensation from the Practice Direction requirements simply because it was based on a report from an individual, or individuals, supposedly expert , within that commercial company; nor, it was submitted, was it proper to confer a general dispensation from the need to satisfy the Practice Direction requirements on one of the parties to the appeal in respect of a particular category of expert evidence.

[32] The failure to conform to the Practice Direction requirements was, more fundamentally, reflective of the absence from the report on the appellant in the first appeal of any indication of appropriate expertise. Neither of the analysts was stated to have any expert knowledge of Somali dialects and their geographical and societal distribution. Indeed, neither appeared ever to have visited any areas in Kenya in which Somali was spoken (or to have lived and worked in any Somali speaking area other than Mogadishu). Analyst EA20 had last been in Somalia some 20 years before the date of the interview. Moreover, the report did not purport to identify by name the particular dialect said to have been spoken by the appellant in the first appeal.

[33] Additionally, but importantly, even assuming some possible but undisclosed basis of expertise in the various dialects of the Somali language, it was clear that the supposed expert or experts - it being impossible to understand who took responsibility for the unsigned report - were anxious to go outwith their supposed expertise. The section or field headed "knowledge assessment" was plainly not a matter for the expertise of a linguist, or even an analyst of language. There was no claim, or even indication, that the author was personally acquainted with the area (transliterated in the report as "Beexaani", but in the transcript as "Bayhani") in Shibis in which the appellant (M.Ab.N.) had lived. Nor any claim that the appellant had made any identifiable topographical error in his discussion of places in Mogadishu. But the immigration judge accepted the assertion that the appellant displayed "deficient knowledge", which in its terms involved the unidentified author, or possibly authors, of the report forming a value judgment which would otherwise belong to the tribunal.

[34] Counsel next submitted that the Upper Tribunal decision from which this appeal proceeds was flawed by its thinking that the decision of the Upper Tribunal in *RB* was binding on it in relation to the Sprakab report. The *RB* decision was not a "country guidance" case (cf. *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982) nor was it a "starred" case (cf. Practice Direction 12). The Upper Tribunal in *RB*

was not entitled to lay down a factual precedent binding in the present appeal. Apart from anything else, *RB* involved a different minority grouping and the tribunal had been provided with oral and written evidence going far beyond the limited terms of the Sprakab report respecting the appellant in the first appeal.

[35] Moreover, it was submitted, the purported exercise by the Upper Tribunal in *RB* of giving *ab ante* approval of and sanction to any Sprakab report raised fundamental issues and concerns. Apart from the blanket sanction of anonymity, already criticised, what the Upper Tribunal purported to do was to give approval in its judgment to the reliability and probative worth of "evidence" to be issued in future by means of such anonymous reports from a commercial company. Fact-finding included the evaluation of expert evidence and it was plainly a matter for the actual fact-finding tribunal to assess the qualifications and expertise of the expert witness tendered by the party. It would be extraordinary were an appellate tribunal to say that having heard witness X with his claimed expertise, and being satisfied of both that and his credibility, any opinion to be issued in future by him should be accorded "very considerable weight" by any equivalent or inferior tribunal. That applied *a fortiori*, when what was in issue was not a given, named expert but some commercial organisation.

[36] As respects the decision of the Court of Appeal in England and Wales in the appeal to it from the Upper Tribunal in *RB*, counsel's submission was to the effect that if this court found force in the substantive case which he argued, it should recognise that force and differ from the Court of Appeal. The decision of the Court of Appeal was, on any view, open to the critical observation that it had been provided with very limited argument. Essentially the complaint of counsel for the appellant before the Court of Appeal had been based on procedural considerations, namely non-conformity with the Practice Direction. The authorities on the dangers of anonymity of witnesses had not been cited or considered by the Court of Appeal.

K. A. S. Y.

[37] In his submissions respecting the Sprakab report in the case of the appellant in the second appeal Mr Howlin observed that the failure of the report on the appellant to comply in any respects with the requirements of the Practice Direction on expert witness reports was perhaps understandable, since the document in question was seemingly not intended as such a report. It was sought by the Home Office in the course of the appellant's initial interview on 1 December 2008 for its administrative purposes and it bore to have been supplied on that date. However, it did not, by any means, follow that because it had been commissioned by the Home Office for its immediate administrative purpose of assisting in taking an administrative decision, it later fell to be treated, or could be taken, as an expert witness report. If, in resisting the appellant's appeal before the Asylum and Immigration Tribunal, the Secretary of State wished to rely on expert evidence from an employee or agent from the Swedish company, it was of course open to the Secretary of State to instruct a proper expert witness report from the expert engaged by that company which complied with the Practice Direction requirements; and to seek anonymity for the expert's testimony, if that could be justified in the particular circumstances.

[38] However, if one left aside any technical requirements of the Practice Direction and proceeded on the basis that the report of the appellant's 18 minute conversation was to be seen as purporting to be an expert witness' report, it was manifestly deficient in a plurality of respects. First, counsel adverted to the assertion that the appellant spoke a "variety" (unspecified) of Somali found "with certainty not in Somalia" and "with certainty in Kenya". Such an assertion cried out for expert explanation of the academic or scientific basis upon which the assertion was made. In much the same way that the boundary between the Netherlands and Belgium was drawn on political or confessional grounds and not linguistic or dialectal grounds, the boundary between Kenya and Somalia was a political boundary stemming from colonial times. It did not reflect or follow any previous, recognised linguistic or tribal divide. Accordingly, to assert than an unspecified variety of Somali was spoken "with certainty in Kenya" but also "with certainty" nowhere at all in Somalia was, on its face, not comprehensible. There was nothing to suggest that either of the analysts had any qualification to make such a statement which would, on any view, have required a detailed linguistic study of dialects in, at least, southern Somalia and the relevant north eastern areas of Kenya.

[39] Counsel for the appellant in the second appeal advanced further criticisms, which might be grouped under a general heading of methodology. The report on Ms K.A.S. Y. contained no exposition, which would be expected of an expert witness report, of the underlying nature of the science and its scientifically or academically accepted criteria. Assuming a basis proceeding on a proper study of the topographical distribution of dialects, one then had to consider what might properly be required, approaching matters as an expert, by way of the amount of speech from the subject before any judgment could be reached. The time (18 minutes) of the telephone conversation was no guide to that. There was likewise no indication of any minimum number of aspects of the subject's speech necessary or appropriate to indicate clear affinity with the target dialect group which,

in the expert world, would be seen as the proper touchstone; nor any exposition of how one treated inconsistent dialect features, which the report did not attempt to mention or address. It was also to be observed that while the report expressed "certainty" respecting the topographical or geographical distribution of the unspecified variety of Somali which it was said the appellant spoke, no degree of probability or accuracy was mentioned respecting the claimed analysis of the appellant's speech as being the unspecified variety (not identified even as a "dialect"). Counsel also intimated that while the Sprakab report purported to use the international phonetic alphabet, the professional linguistic advice which he had received was that it used symbols unknown in that alphabet.

[40] Counsel for the appellant in the second appeal also advanced the criticism that, if the document in question were to be treated as an expert witness report, then it plainly went outwith any proper field of linguistic expertise by advancing the purported opinions to be found in the box or field "knowledge of country and culture", including therein comments respecting the interviewee's manner of response.

[41] Counsel further pointed out that, in order to make such comments, and also importantly to express an opinion on linguistic matters, the author also required to have an understanding of the appellant's history and her upbringing. No such information was evidently given by the Home Office to the anonymous interviewer in Sweden. Background and upbringing, and the linguistic background of the speakers in that background, were material factors determining the child's linguistic usage. No consideration was given to that important aspect.

[42] For those reasons the immigration judge who considered K. A. S. Y,'s appeal to him was, submitted counsel, wrong to regard the document from Sprakab as expert evidence to which any weight might be attached. Moreover, the decision of the immigration judge disclosed further errors. Thus at paragraph 37 of his decision the immigration judge states:

> "...by far the most important evidence in this case is that the Appellant says she is from the Reer Hamar minority clan in Somalia and the linguistic analysis report negates this."

The report did not do that. At best the report could say that during the short telephone conversation with an unknown person in Sweden she did not use features of a Reer-Hamar dialect; but unless the interview were conducted using clear Reer-Hamar dialect and the interviewee was unable to comprehend it, it could not be said that the interviewee did not speak the dialect. It was a fallacy to think that language used in such an interview negated ethnic origins. Further, in paragraph 46 of his determination the immigration judge referred to a "high" number of examples given. But in the absence of any instruction from appropriate experts, the immigration judge had no possible means of deciding whether the examples mentioned approached or exceeded any recognised benchmark. The immigration judge further stated in paragraph 48 of his determination that the conclusion of the report was "...that, with certainty, this Appellant was not from southern Somalia but rather was from Kenya." That involved a plain misreading or misunderstanding of the report; the author of the report did not, and could not, state such a conclusion.

[43] These were errors of law which fell to be corrected by the Upper Tribunal. However the Upper Tribunal failed to do so, on the erroneous view that it was bound by the terms of another Upper Tribunal decision, namely that in *RB.* In procedural terms the latter was not a starred or country guidance decision. It was therefore not in a constitutional or hierarchical sense binding upon another Upper Tribunal in its decision in another case. It was apparent that *RB* was not concerned with a single report, not presented as a proper expert witness report, as was the position in the present case. In the proceedings in *RB* before the Upper Tribunal a number of supplementary reports were provided by persons within or engaged by the Swedish company in which fuller details of their qualifications were given: and those authors gave oral evidence. So - in contrast to the present appeal by K. A.S. Y. - there was at least some basis enabling the Upper Tribunal to judge the actual expertise of those speaking to the linguistic analysis. It was also a case in which, again in contrast to the circumstances of the present appeal, there was considerable material elsewhere which challenged the credibility of the applicant, Ms RB. At paragraph 126 of its determination the Upper Tribunal in *RB* acknowledged the authoritatively expressed importance of not relying on any linguistic analysis alone and while it declined, without any given reason, to endorse or disapprove that proposition, the Upper Tribunal in the present appeal by K. A.S. Y. proceeded on the basis that the Sprakab report alone was sufficient to refuse her appeal.

[44] Further, the issues argued before the Upper Tribunal in *RB* were limited. It did not have the assistance of the judicial views expressed, at a higher level, by Lord Macphail. The grounds upon which reconsideration had been ordered by the High Court in *RB* were two in number. The first related to the anonymity of the Sprakab personnel. The second was a matter peculiar to the particular hearing in *RB* before the immigration judge. The anonymity issue was dealt with in paragraphs 23 - 27. Thereafter the Upper Tribunal dealt essentially with the evidence and facts in the case. The other criticisms advanced appeared to have been that the Swedish company was not independent. In so far as the qualification of the individuals as experts was concerned, that appeared not to have been the subject of any specific submissions. The notion that lack of relevant

experience or qualification of the individual of the author of the report could be disregarded on the basis that the overall Swedish company might have within it some access to qualified persons could not for a moment obviate the need for the expertise of the particular authors of the report to be set out and explained. The decision in *RB* did not relieve the Upper Tribunal in the instant appeal of the need to examine the reliability of the claimed expert evidence relied upon by the Secretary of State.

[45] As respects the judgment in the Court of Appeal on *RB*, counsel for the appellant in the second appeal also pointed to the limited extent of the argument advanced to the Court of Appeal. However, it was important to note the reservation expressed by Moses LJ in paragraph 15 of his judgment respecting the need for any expert report from an organisation such as Sprakab to respect the requirements set out in the practice directions for expert witness reports. While expressed in procedural terms, those requirements in a large measure reflected the ordinary substantive requirements which had to be met before any court or tribunal could rely upon expert evidence and, in the context of a tribunal system, were plainly an invaluable mechanism for securing the integrity of that evidence.

The respondent

[46] In broad summary the approach adopted by counsel for the Advocate General on behalf of the Secretary of State for the Home Department was to the effect that all matters had been settled by the Upper Tribunal in its decision in *RB*; that decision had been largely approved by the Court of Appeal in England and Wales; and since immigration and asylum matters were the concern of a UK wide jurisdiction, a Scottish court could not reach any view conflicting with any view expressed by the Court of Appeal in England and Wales except for very compelling reasons.

[47] However, in the course of his oral submissions counsel for the Advocate General accepted that in so far as within the two Sprakab reports in the present appeals views were expressed by the author, or authors, of the reports in question respecting the "knowledge of country and culture", that expression of opinion was outwith the claimed field of expertise and should on that account be disregarded by any decision taker. He accepted that this was not a matter of any discussion before the Upper Tribunal or before the Court of Appeal.

[48] For the rest, and in support of his principal argument, counsel for the Secretary of State exhorted the court to bear in mind the recognised *dicta* that in an appeal from a specialist tribunal a degree of caution was necessary - cf. *AH* (*Sudan*) v *Secretary of State for the Home Department* [2008] 1 AC 678**,** per Baroness Hale at paragraph 30; *Eba* v *The Advocate General* 2012 SC (UKSC) 1. Counsel accepted that in considering an expert report it would be necessary that the tribunal in question consider factors such as those set out by Lord Macphail. However the general issues of language and dialect as a possible tool to the identification of origin had been earlier canvassed in cases before the immigration tribunals - see *AA(Language diagnosis: use of interpreters) Somalia* [2008] UKAIT 00029, which illustrated that the tribunal was cognisant of the difference between native speaker interpreting abilities and linguistic analysis. Given the identity of the chairman in that case and the chairman in the Upper Tribunal hearing in *RB*, that distinction would have been borne in mind by the tribunal in the latter hearing.

[49] It was well recognised that tribunals in immigration and asylum matters were not constrained by the normal rules of evidence in civil cases. Reference was made to the Asylum and Immigration Tribunal rules and *LP (LTTE area - Tamils - Columbo- risk?) Sri Lanka CG* [2007] UKAIT 00076[4]**.** Country information reports were regularly deployed in immigration and asylum cases; any invocation of the rules respecting expert evidence in ordinary civil litigation therefore had to be taken with that qualification.

[50] The Upper Tribunal in *RB* had heard evidence from persons within or related to the Swedish company and had reached the view that, on that evidence, a collective view by that organisation translated into a report issued by that organisation should be assumed to have been compiled by persons with all the appropriate expertise judged necessary by the Swedish company and that company should thus be treated as the expert witness. While counsel readily accepted that such an approach was a very novel approach to the admission of expert evidence, he submitted that it was one which the Upper Tribunal was entitled to adopt as part of its administrative jurisdiction. That novel approach of giving approval to any report issued by an organisation had not been expressly disapproved by the Court of Appeal in England and Wales. The Court of Session should not depart from any view expressed by the Court of Appeal in England and Wales except on compelling grounds - in that respect counsel referred to *Amery* v *Perth & Kinross Council* [2012] CSIH 11; 2012 SLT 395.

[51] As respects the first of the two appeals (M. Ab. N.) counsel for the Advocate General submitted that irrespective of the Sprakab report, there were sufficient other features adverse to the appellant's credibility (including the immigration judge's own analysis of the appellant's local knowledge) which were so compelling that she would have been bound in any event to reject the appellant's account. Even if the Upper Tribunal were in error in regarding itself as bound by *RB* (and counsel accepted that it was not a starred or a country guidance decision and hence technically not binding) that error was immaterial given the other circumstance adverse to the credibility of the appellant in the first of the appeals.

The appeal should therefore, on any view, be refused.

[52] While counsel also moved for outright refusal in the appeal by K. A. S. Y., he submitted that if the appeal were to be allowed, since the immigration judge in the Asylum and Immigration Tribunal had detected a "slight question mark" respecting the interpreted answer to the interpreted question respecting Somali money, the case should be remitted back.

Discussion

[53] In considering the competing submissions advanced both orally and in the written notes of argument I find it convenient to deal first with the criticism made by the appellants concerning the inclusion in the respective Sprakab reports of a section on country and culture in respect of which the report alleges a "deficient" knowledge and makes other comments respecting demeanour and the substantive responses to questions in that domain. This criticism may, I think, be treated relatively briefly since counsel for the Advocate General accepted that in what purported to be expert evidence of a linguistic analysis the author was stepping outside his proper field of expertise in expressing such views and comments. I consider that counsel was right to make that concession. I would add that in the case of M. Ab. N., while the analysts are said to have been born in Mogadishu, there is nothing to suggest that they had any knowledge of the particular *quartier* from which the interviewee said he came. Nor is it suggested that he gave any factually inaccurate answer. The statement that the appellant has a "deficient" knowledge is thus without any evident expert foundation. The same may be said with even greater force in the second appeal (K.A.S.Y.), since there is nothing to suggest that the analyst had ever been to Mahaddaay, where the appellant was brought up, or to Jowhar. Again there is no suggestion that she gave any demonstrably erroneous answer. What is being done appears to be nothing more than an expression of a view on credibility, which is outwith any expert witness' function. It may be added, as counsel for the second appellant observed, that there is a considerable limit to the extent to which knowledge and culture can ever be properly explored in a telephone conversation interview - in the case of his client a wholly novel experience - lasting only 18 minutes but devoted also to various other matters.

[54] This criticism of the reports issued by Sprakab in the present appeals, which counsel for the Advocate General accepted as valid, and which is not an unimportant criticism since it is plainly intended to influence the reader, was not a criticism advanced respecting the equivalent screening interview in the case of Ms RB and is not discussed in the judgments of either the Upper Tribunal of the Court of Appeal. (It was, of course, a criticism made by Lord Macphail - see his paragraph [15]). It may possibly be that in the report, or reports, respecting Ms RB there was no section or field matching that devoted to this aspect of the Sprakab expression of opinion in the present appeals. But, if not, Sprakab nonetheless allowed this to appear in the reports on the present appellants. The fact that the Swedish company thus issued reports containing such expressions of opinion for which, as counsel for the Advocate General properly accepted, there was no valid expert basis appears to me to call into question, to some extent, the faith which the Upper Tribunal in *RB* placed in the evidence of Fru Fernqvist as to the reliability and integrity of the company and which appears to have prompted that tribunal to give to any future or other Sprakab reports the badge of authority and validity which it did.

[55] Next, I think it appropriate to consider the failure of the reports from Sprakab upon which the Secretary of State founds in the two cases before this court to conform in many respects with the requirements of the Practice Direction on expert witness evidence. In my view counsel for the appellant in the second appeal (K.A.S.Y.) may well be correct in saying that it was understandable that the reports in both cases so failed for the very reason that they were intended simply as a report to the Secretary of State in taking an administrative decision on the application in question; neither report was actively intended for use as an expert witness report in any subsequent appeal. However, in the event, the reports were - and continue to be - deployed by the Secretary of State as being expert witness evidence in these appeals. Subject to the question of allowing anonymity for those preparing a linguistic analysis, I also consider that counsel for the appellant in the second appeal was correct in his observation that the fact that an initial report had been provided for the decision taker did not mean that, when that decision is appealed to a judicial tribunal, the decision taker should not obtemper the provisions of that tribunal's practice direction and lodge a proper expert witness report in conformity with those requirements. That observation by counsel appears to me to be consistent with the point of disagreement voiced by Moses LJ at paragraph 15 of his judgment in the *RB* case.

[56] In so saying I do not intend that punctilious adherence to every requirement of the practice direction should be a *conditio sine qua non* of the admission of any report from an expert witness. Plainly, as Moses LJ notes in paragraph 16 of his judgment, the First-tier Tribunal and the Upper Tribunal, as no doubt any other judicial tribunal, have power, on cause shown, to waive or excuse non-compliance with a practice direction in the individual case before the tribunal in question. But, in my view, that power does not mean that the Upper Tribunal may give a blanket waiver or excusal in all cases involving one party - in this area of its jurisdiction, the Secretary of State for the Home Department - respecting expert evidence

tendered by that party from any employee, agent or other subcontractor of a particular private company. For my part, as already indicated, I do not read the judgment of Moses LJ as endorsing the proposition that the Upper Tribunal has that power.

[57] The terms of the Practice Direction respecting expert witness reports and evidence are, as counsel for the appellants pointed out, largely reflective of the essential requirements respecting the admissibility and worth of expert evidence which have been developed by the courts. It appears to me that by making that Practice Direction it was hoped to achieve *ab ante*, as a kind of "gateway function", that any expert report tendered in tribunal proceedings will meet those basic requirements. But in the end one naturally has to consider whether, in substance, the tribunal in question has been provided in the case before it with expert evidence which the tribunal can be satisfied is based upon an appropriate and adequate expert knowledge, given with the neutrality required of the expert, unencumbered by views falling outwith his field of expertise.

[58] I therefore now endeavour to carry out that exercise in the circumstances of the present cases. I have already mentioned the accepted extravagance in the sections on country and culture regarding, among other matters, topographical knowledge. For the present, I again leave aside the question of the anonymity of the analysts EA20 and EA17 and the linguists 01 and 04. I also leave out of the exercise the criticism expressed by Lord Macphail at paragraph [13] of his note that the report does not state that it refers to the relevant appellant since counsel accepted that with a deal of detective work the report could be linked to the appellant by the common inclusion of the Home Office reference number. For the rest however I consider that the criticisms made by Lord Macphail are generally well-founded.

[59] I do not rehearse all of those criticisms in detail. To my mind, a fundamental criticism is that nothing is contained in either report to indicate that either analyst EA17 or EA20 had any expertise in the identification of Somali dialects or, importantly, their geographical and social distribution. Being a native speaker of a language does not confer expertise in the identification of dialects within that language, their particular features, or the geographical or social distribution of the dialect (cf. *AA (Language Diagnosis - Yussuf interpreters) Somali* [2008] UK AIT 00029). By way of illustration, simply because I am a native Scottish speaker of English, and have some awareness of how English and Scots are spoken in Scotland, does not confer on me any qualification to express an expert opinion on the dialect forms or the geographical limits of say, the broad dialect grouping of north east Scots - let alone any regional dialect in England and Wales. The identification in linguistic terms, and the plotting of the geographical distribution of dialects, is a matter for expert study. By way of example, mention might be made of the "Phonetic Description of Scottish Language and Dialects" conducted by William Grant and published in volume 1 of the Scottish National Dictionary; or the extensive efforts of German philologists and linguists, such as Georg Wenker, in the 19th century to study German dialects and to produce maps or atlases such as Wenker's "Sprachatlas des deutschen Reichs". While, of course, I do not mean to say that any linguistic analysis of spoken Somali must necessarily be backed by scholarship of that high level, there is nothing to indicate that EA17 or EA20 had themselves conducted any detailed study of the phonology, morphology, syntax or vocabulary of Somali dialects, including importantly, dialects spoken within Kenya and neighbouring south Somalia and their geographical and sociological distribution; or that they were qualified to do so. Nor is it in anyway suggested that their views were founded on any published study or examination of such dialects, which included an examination of their geographical and social distribution, by someone qualified to do so. It is, in my view, equally plain that there is nothing in the information provided respecting linguists 01 and 04 to suggest that they even begin to have such expert knowledge. While I recognise the description of the rôle of the linguist given to the Upper Tribunal in *RB* as being one simply of identifying phonological features in the recording of the telephone conversation, that cannot make good the absence of any exposition of relevant expertise possessed by the analyst or analysts. Putting matters shortly therefore, I consider that neither of the reports in the present appeals discloses any intelligible basis of expertise which might justify giving any value to either of their conclusions.

[60] The criticisms advanced by Lord Macphail of the exposition (or rather lack of exposition), of the methodology are in my view also merited. In an expert witness report in this area one would expect some reference to prevailing standards within the expert profession respecting the extent of the dialogue necessary to form a concluded opinion; the number of features peculiar to the dialect thought to be necessary to express the view that the speech of the appellant employed the dialect in question; and also consideration of the presence of inconsistent features and the extent to which those inconsistent features might dilute the degree of confidence which could be expressed by way of expert opinion. All of that is lacking. It is also to be borne in mind that one is not dealing with a well-established scientific discipline, but one which is in relative infancy and open to academic discussion.

[61] It may also be noted that while the reports baldly state that the appellant in question speaks a variety of Somali "found with certainty" not in Somalia but "with certainty in Kenya", what is being referred to is an unspecified variety. The dialect supposedly spoken with certainty is not identified or described in any way. Were the authors of the report to be so confident of that geographical description, one would have thought it a

minimum requirement that they identify the dialect of Somali spoken in Kenya which is in question and related that dialect to its geographical extent. Further, the expression of certainty is confined to the purported geographical extent of the "variety" of Somali. It says nothing respecting the reliability of the analysis of the speech in the brief telephone conversation under consideration. There is no indication of the confidence with which it might be said that the interviewee was using in the interview the "variety" of Somali said to be spoken "with certainty" in Kenya, but not in Somalia.

[62] The next question is whether these, to my mind, important deficiencies in the purported linguistic analyses are answered or removed by the judgment of the Upper Tribunal in *RB*, as McLeman SIJ, who dealt with both of the present appeals in the Upper Tribunal considered to be the case. In terms of chronology, he issued his decisions before the discussion and qualified approval of the *RB* decision in the Court of Appeal. I therefore consider first the decision of the Upper Tribunal in *RB* - though ultimately account should be taken of the extent to which it was qualified by the Court of Appeal.

[63] In my view there is force in the argument advanced by counsel for the appellants that, apart from the question of anonymity (to which I must return), it is not evident that the Upper Tribunal in *RB* was properly addressed, as respects a report essentially equivalent to those in the present appeals, on the concerns expressed by Lord Macphail. The scope of the reconsideration ordered by the High Court was limited. Possibly by reason of the limited extent of the High Court's reconsideration order, the views expressed by Lord Macphail - as an appellate judge - were not placed before the Upper Tribunal by counsel for the Secretary of State in *RB*. But, that apart, it is plain that in *RB* the Upper Tribunal was not only provided by the Swedish company with further, seemingly much more detailed, reports but also heard oral evidence from their authors. Accordingly, while as counsel for the appellants in the present appeals recognised, the ultimate decision in *RB* on the matters properly before it may not be open to exception, the evidence and materials before the Upper Tribunal in *RB* were wholly different from those in the present cases. It is not even clear that the first report on Ms RB was in essentially similar format to those in the present appeals.

[64] But counsel for the appellants understandably took issue with what was essentially *obiter*, but was couched in terms which read, and were taken by McLeman SIJ, as mandatory. The first passage to which this criticism was directed was paragraph 171 under the hearing "General Guidance on Linguistic Analysis Evidence" which, for convenience, I repeat:

> "First, we note that it is said that a decision as to a person's background or origin should not be based solely on linguistic analysis. We have heard and seen nothing enabling us either to endorse or doubt that advice. But where there is clear, detailed and reasoned linguistic analysis leading to an opinion expressed in terms of certainty or near-certainty it seems to us that little more will be required to justify a conclusion on whether an applicant or appellant has the history claimed."

But, it was said, in my view with justification, that paragraph 171 also had to be read along with paragraph 168, which again for convenience, I repeat:

> "168. It seems to us that we have been given no substantive reasons for distrusting Sprakab's reports either in this case or in general. In our judgement, because of Sprakab's underlying library of data and the process by which it produces its reports, Sprakab evidence is of high quality and its opinions are entitled to very considerable weight."

As just indicated, it is evident from the terms of the decisions given by McLeman SIJ in the Upper Tribunal that he took both passages together as being binding as to the weight to be given to any Sprakab report and, particularly the mandatory nature of the expression in such a report of a view couched in terms of certainty[5]. That then raises the question whether the Upper Tribunal in *RB* was entitled to embark upon the exercise which was so construed by McLeman SIJ and which appears to have been intended.

[65] It is, of course, the case that a tribunal dealing with immigration matters is not bound by all rules of evidence in ordinary civil cases. It is also the case that, of necessity, immigration tribunals have required to accept as appropriate evidential materials on matters prevailing as a generality in a given territory reports from an organisation, such as the Home Office country of origin information reports, or reports from the United Nations or the US State Department; and, likewise, the superior immigration tribunals developed a regime of "country guidance" cases and "starring" of decisions to provide a form of general factual precedent on generally prevailing conditions within a territory. While counsel for the Advocate General sought to equiparate a Sprakab report with such country information reports I, for my part, am not persuaded that such an equiparation is sound or that, in so far as the Upper Tribunal in *RB* sought to give to any Sprakab report *ab ante* approval as having very considerable evidential weight, the tribunal's doing so was a proper exercise of its power to depart from the ordinary rules of evidence. First, in any opinion giving a linguistic view about a person's speech based on an interview with that person one is not dealing with a generality such as the state of affairs prevailing in a particular territory but with an opinion on the characteristics of that particular person. The validity of any opinion given about the attributes of an individual's speech will obviously depend on the individual qualifications and abilities of the giver of the opinion. Those

qualifications will depend on the particular case - the particular language, the particular dialect study or studies required upon which to base a view and so forth - in addition to the ability, particularly on the remote communication of a telephone conversation, of the opinion giver to analyse and identify the appropriate features to a sufficient extent to give an opinion which has any value. It respectfully appears to me that the terms of the passages from the judgment of the Upper Tribunal in *RB* in particular contention may be seen as effectively delegating to the Swedish company the judicial function of assessing, in the particular case, the adequacy of the qualifications of the expert and the sufficiency of his opinion respecting an examination of the personal qualities of a given individual. Expressing an opinion about the particular attributes of an individual's speech on a given occasion is, to my mind, akin to giving an expert opinion of an individual's mental or medical health or the physical condition of his body. It would, in my view, be a very radical step for a superior tribunal to direct *ab ante* that the opinion on such a matter of any individual given by someone selected, in the future, by a commercial company should be treated as being of high quality and entitled to very considerable weight; and that any conclusion expressed by the person so selected by the company, respecting those aspects of the individual concerned, which is couched in terms of "certainty" or "near certainty" requires "little more" to negate the inference sought to be drawn. It is hard to see, while recognising the scope accorded to tribunals to regulate their procedures and their liberty to depart from the normal rules of evidence, that such an exercise could be seen as an appropriate exercise of those tribunal powers. The court, in my view, unquestionably has the duty to restrain the inappropriate exercise by a tribunal of its powers to depart from the normal rules of evidence.

[66] I would add this. The Upper Tribunal in *RB* appears to have thought that most, if not all, of the deficiencies in the presentation of any anonymous, purportedly expert, linguistic analysis evidence proffered by the Secretary of State at an appellate stage are fully addressed simply by the Secretary of State providing the appellant with a copy recording of the telephone conversation interview with the anonymous interviewer in Sweden, leaving it to the appellant to seek his or her own expert. In my opinion, that approach is erroneous. First, as a matter of principle, it is the Secretary of State who invokes the purported expert evidence for her purposes in order to impugn the honesty of the appellant. In accordance with all normal rules of procedure it must therefore be for her to establish, by active demonstration of the appropriate expert qualification, the worth of the evidence upon which she relies to counter the testimony of the appellant. Secondly, the Upper Tribunal assumes, without any evident factual basis, the existence of some pool of experts, including in that pool not only experts with ability to analyse speech but also experts having conducted research, or having knowledge of research, respecting the topographical or social distribution of dialects in the particular linguistic area in question. But it may often be that no study or examination of the dialects of the broader language involved, essential to any worthwhile expert opinion respecting the individual concerned, exists. And consequently, the individual concerned could not adduce any expert evidence - even assuming he or she has the resources to do so - to negate the assertion, unsupported by any proper exposition of a basis in expert evidence, advanced on behalf of the Secretary of State.

[67] While the general approach of counsel for the Advocate General in these two appeals was that all that had been said by the Upper Tribunal in *RB* had been endorsed by the Court of Appeal, which endorsation required to be followed by this court in the absence of "compelling reasons", I have difficulty in accepting the proposition, which appeared to me to be inherent in the argument for the Advocate General, that the Court of Appeal must be taken as having expressly endorsed all of the judgment of the Upper Tribunal in *RB*. I therefore turn to the decision of the Court of Appeal.

[68] It is to be noted, first, that in paragraph 15 of his judgment Moses LJ expresses partial disagreement. While that disagreement is expressed initially as being "on one point", namely as regards the Upper Tribunal's statement that the reports are "typically prepared for a decision-maker and not for an appeal and so it is not appropriate to impose on them rules relating to evidence prepared specifically for use in litigation", it respectfully appears to me that what follows later in the paragraph goes wider and underscores the need for those deciding an appeal from a decision of the Secretary of State to be able properly to evaluate purported expert evidence in, essentially, all the normal ways in which a judicial body requires to evaluate such evidence. The Lord Justice says:

> "The mere fact that an initial report is obtained for the Secretary of State, for example, and not for a tribunal is no reason not to have well in mind the protection afforded by the Direction. For example, it remains of importance to know the nature of the instructions given to the expert and that the expert evidence should be an independent view uninfluenced by the source of the instructions or pressure of any sort. The expert is required to provide an objective, unbiased opinion on matters within the expert's expertise. An expert must not assume the role of an advocate. Such principles are vital whatever the circumstances in which the report was obtained."

It respectfully appears to me that what is said there is inconsistent with the notion that any Sprakab report is, by the simple fact of its being a document from the Swedish company, an expert opinion respecting which the adequacy of the expert knowledge base, and all the other requirements for purportedly expert evidence to be seen as acceptable expert evidence, are to be taken as established; thereby entitling such an

opinion to very considerable weight. It is also to be noted that in the penultimate sentence of paragraph 16 Moses LJ says:

> "The Upper Tribunal's obligation is to ensure that any expert report represents a genuine, objective view by those qualified to express it with sufficient reasoning and clarity to enable it to be challenged and assessed."

[69] Secondly, as counsel for the appellants pointed out, the argument advanced to the Court of Appeal in *RB* appears to have been a relatively restricted one. As recorded in paragraph 11 of the judgment of Moses LJ, the primary challenge was that the several reports in that case did not comply with the Practice Direction. At paragraph 13 of his judgment the Lord Justice notes that the more recent reports were not as defective as the first report. There appears therefore to be some force in the observation of counsel that the Court of Appeal may not have been directed to the substantive arguments relating to the evident lack of qualifications and defective methodology identified by Lord Macphail in a report in equivalent terms to the reports tendered by the Secretary of State in the present cases.

[70] In the course of his submissions counsel for the Advocate General observed that the Upper Tribunal in *RB* appeared to have conceived of a novel form of expert evidence, namely expert evidence based on the view that the organisation - in this case the Swedish company - was itself the corporate, expert witness. I have to say that I do not read the judgment of the Court of Appeal as giving conscious endorsation to that proposition. While the final sentence of paragraph 14 of the judgment of Moses LJ might suggest some endorsation of the view that there might be a corporate, or organisational, expert witness, it appears to me that such an endorsation does not sit happily with the importance which his Lordship attaches in the succeeding paragraph of his judgment to the protection of the Practice Direction on expert evidence. Having regard to what is said earlier in paragraph 15 of the judgment, it may be that the focus was more on the collaboration between experts required in order to reach a conclusion. There are obviously many cases involving expert evidence in which the reaching of a conclusion useful to the judicial tribunal to which it is tendered requires the collaboration of two or more different experts. But the value of the conclusion will plainly depend upon each of those experts being appropriately qualified for the rôle which that expert assumes in the collaborative process. The court or tribunal assessing the validity of that collaborative conclusion must therefore be supplied with the appropriate material in order to judge the qualification and ability of the experts to carry out their respective expert rôles in the collaborative exercise.

[71] In these circumstances I have come to the conclusion that the judgment of the Upper Tribunal in *RB* - even before the qualifications of the Court of Appeal - does not provide an answer to the deficiencies in the terms of the Sprakab report in each of these two appeals which I discussed earlier.

[72] For the reasons which I have endeavoured to set forth, I have also come to the view that the judgment of the Court of Appeal does not give an all-embracing endorsement of what was said by the Upper Tribunal in *RB*. On my reading of the judgment, it respectfully appears to me that -for other cases- it contained important qualifications to the Upper Tribunal's pronouncements. If, contrary to my reading and understanding of the judgment in the Court of Appeal in *RB*, that judgment is to be taken as approving a dispensation for the need for an expert report (tendered by one party to the appeal, namely the Secretary of State) respecting the dialect employed in a sample of speech from an individual to provide an adequate account of the qualifications and expertise of its author or authors; the essential expert or scientific knowledge basis upon which the expert or experts proceed; and the methodology upon which their views proceed, then that is a view with which I must respectfully disagree.

[73] In so saying I am naturally very conscious of the undesirability, in a matter of United Kingdom wide jurisdiction, of the courts in its respective constituent parts of the United Kingdom reaching divergent decisions. But it respectfully seems to me that in a situation such as the present appeals, in which the Court of Appeal in England and Wales appears not to have been favoured with the very full and much wider ranging submissions with which we were favoured and in which the issues are relatively new and not the subject of well settled authority, there is good reason wherefor a judge in one of those constituent parts should state his differing conclusion.

[74] For all of these reasons, I consider that both appeals succeed. But before turning to disposal of the successful appeals, it is appropriate that I say something, albeit briefly, about anonymity; and thereafter "anxious scrutiny".

[75] While the anonymity of the analysts and linguists occupied an important place in the submissions advanced by Mr Bovey on behalf of the appellant in the first appeal, it appeared to be a matter of less concern to Mr Howlin on behalf of the appellant in the second appeal. As will be appreciated, I have until now left the anonymity issue aside in reaching the conclusion which I have just expressed that the appeals succeed. But, for what they may be worth, it is appropriate that I give some expression to my thoughts on this issue, which I have frankly found to be a difficult one.

[76] The authorities to which Mr Bovey referred vouched the well-established and longstanding principles of the common law which deprecates and does not allow anonymous testimony and there is nothing in those authorities suggesting any reason for treating expert witnesses, as a class, in

any different way. There are also sound grounds for not according anonymity to expert witnesses. The granting of anonymity deprives the party affected by the testimony of the expert witness of any opportunity of investigating the claimed expertise and all the other factors affecting his credibility and neutrality. The almost inevitable, insidious effect that even an expert witness, knowing in advance that he or she will remain anonymous, may consciously or subconsciously embellish or give over emphasis to the views expressed needs little elaboration. Against that, of course, one has to balance the fact that in a particular case a particular expert witness may face material risks to his or her safety if the identity of the witness were to be made public. The tribunal rules to which we were referred make provision for the granting of anonymity in a particular case. The rules do not however empower the blanket grant of anonymity to all agents or personnel of Sprakab which the *RB* case purports to do.

[77] I therefore have serious reservations both as to the competence and the appropriateness of the pronouncement of the Upper Tribunal in *RB* in its granting blanket anonymity to all agents of Sprakab, as respect all future - and indeed other reports in pending cases - reports, subject only to some very good reason advanced by the appellant. In that respect I note that the Sprakab request to the Upper Tribunal for anonymity for all its agents is not described as being based on any actual experience of difficulties or threats; it based only on "feeling" and "policy" - see paragraph 24 of the Upper Tribunal judgment. If that be the basis for the claim to general anonymity, in my view there is nothing in it which plainly demonstrates good grounds for a general reversal of the principle that a person is entitled to know the identity of the witness against him in judicial proceedings unless anonymity is justified by special and exceptional reasons. But, that said, of course there may often be cases in which, in tendering an expert report as evidence against the appellant in an asylum case the Secretary of State, on the basis of information peculiar to that case, may justify the tribunal's granting anonymity. I sense that some of the difficulty stems from the error identified by Moses LJ, in his particular point of disagreement in paragraph 15 of the Upper Tribunal's thinking, that because a report was provided for administrative purposes it was exempted from the requirements of the Practice Direction. While anonymity can clearly be justified in such an initial situation, when matters have proceeded to litigation in the form of an appeal to a judicial tribunal the situation changes. A judicial tribunal must be satisfied that anonymity of the witness in the judicial proceedings before it is, exceptionally, to be granted.

[78] Counsel did not expressly place before us the very well known authorities on the need for tribunals and courts to approach claims for asylum with anxious scrutiny. I can understand, and fully appreciate, that they did not do so on the obvious basis that those oft cited authorities were well known to the court. But it does respectfully appear to me that particularly in the case of the second appellant, whose fate hangs essentially on the Sprakab report, the need, recognised in the authorities, for anxious scrutiny applies in a very practical sense to a purported expert report which discloses no discernible basis of expertise open to evaluation by any tribunal or court charged with that responsibility.

[79] As already stated, for the reasons already given, I consider that the appeals succeed, and on that view, assuming it to be the view of at least one of your Lordships, it is necessary to consider the disposal of the successful appeals.

[80] In the case of the first appeal, that by M. Ab. N., the matter is, I think, relatively straightforward. Counsel for this appellant accepted that there was other material upon which the tribunal might reach a view adverse to the appellant and he agreed that the appropriate course was to remit to the Upper Tribunal for reconsideration.

[81] In the second appeal by K.A.S.Y., counsel for the Advocate General faintly argued for a remit on the basis that the immigration judge had found a "slight question mark". However, as was noted by the Upper Tribunal in this appeal, the determination of the immigration judge "makes it clear that the critical matter was the linguistic report". In my view that is plainly so. Since, for the reasons which I have set out, the reliance upon the linguistic analysis report as a single reason for dismissing the appellant's appeal to the Upper Tribunal was unwarranted, I consider that this appeal should be granted *simpliciter*.

[82] For all of these reasons I move your Lordships that we allow the appeals and dispose of them in the manner which I have just indicated.

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Eassie
Lord Menzies
Lord Marnoch

[2013] CSIH 68
XA24/11
& XA36/11

OPINION OF LORD MENZIES

in the appeals

by

(1) M. AB. N.
Appellant;

against

THE ADVOCATE GENERAL FOR SCOTLAND representing the SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent:

(2) K. A. S. Y.
Appellant;

against

THE ADVOCATE GENERAL FOR SCOTLAND representing the SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent:

_____

Appellant: Bovey QC, Byrne; Drummond Miller LLP (For McAuley McCarthy & Co, Glasgow) (First Appellant)
Appellant: Howlin QC, Bryce; Drummond Miller LLP (for Peter G Farrell, Glasgow) (Second Appellant)
Respondent: McIlvride; Solicitor to the Office of the Advocate General

12 July 2013

[83] I am in such complete agreement with the views expressed by your Lordship in the chair that any remarks of my own may appear otiose. However, I wish to add a few relatively short observations by way of emphasis.

[84] First, I accept that this court should give due recognition and respect to the expertise of a specialist tribunal, and should be slow to interfere with decisions that lie within that expertise. However, that does not give the specialist tribunal complete *carte blanche* to conduct its proceedings in any given case as it sees fit - there remains the right of appeal to this court with leave, and there remains (in appropriate circumstances) the right to apply to the supervisory jurisdiction of this court (*Eba* v *The Advocate General* 2012 SC (UKSC) 1). Moreover, the deficiencies in the two reports prepared by Sprakab with which we are concerned, and the approach which the Upper Tribunal has taken to them, are not matters which involve any specialist expertise. These reports were commissioned by the Secretary of State for the Home Department as a tool to assist in the assessment of the credibility of the two appellants. Thereafter the reports were used for broadly the same purpose by the immigration judges and the Upper Tribunal. The assessment of credibility is a routine judicial function, and does not depend on any particular technical expertise. This is not an area in which the court should be unduly restrained by respect for the expertise of the specialist tribunal. Assessment of the credibility of the appellant in cases such as this is of course generally a matter peculiarly for the tribunal of first instance (see eg the remarks of Lord Reed in *Singh* v *Secretary of State for the Home Department* 2000 SC 288 at 293/4). However, if it appears that that tribunal has based its findings on credibility to a material extent on a flawed, unfair or worthless report, then this court will intervene.

[85] Second, I recognise that these tribunals are not constrained by the same rules of evidence that apply and govern proceedings in the civil courts. It is correct (as your Lordship in the chair observes *supra* at paragraph [65]) that a tribunal dealing with asylum or immigration will

frequently have regard to reports such as Country of Origin Information Reports, US State Department and UN Reports, and other material (including "Country Guidance" cases and "Starred" decisions) to which, without agreement or some other evidential basis, a court of law would be likely to have no regard. However, these reports are concerned with the factual background as to circumstances prevailing in a country at a given time. They are useful, and important, tools in the assessment of issues such as whether an appellant will face a risk of persecution or death if returned to a particular country or region. They cannot, I think, be equiparated with the reports prepared by Sprakab with which we are concerned in these appeals. The Sprakab reports are not concerned with information which is essentially factual and relating to the political or security situation in a geographical location, but are rather concerned with the assessment of whether a particular appellant is to be believed when he (or she) asserts that he comes from a particular location. They involve the exercise of judgment, purportedly based on a phonetic and linguistic analysis of a telephone conversation with the appellant, in which a professional opinion is given in terms of certainty. This function, namely the assessment of the credibility of a party, is normally a judicial function, which one might expect to be exercised by the fact finding tribunal, rather than by an external company employing unnamed analysts whose assessment the tribunal is apparently constrained to accept. This is an unusual arrangement, and quite different from the use which is generally made in tribunals of Country of Origin Information Reports and the like.

[86] Third, I recognise that it is open to the Upper Tribunal to regulate its own procedures. These procedures may well differ (in important respects) from the procedures which are familiar to practitioners in the setting of a civil court. However, they must, I suggest, be such that they may be categorised in the broadest sense as being "fair" to both parties. For example, reference was made by Moses LJ in his leading judgment in the Court of Appeal in *RB* to Practice Direction 10 of the Practice Directions (as set out by your Lordship in the chair at paragraph [24] above); it surely could not be acceptable if the restrictions and requirements of this Practice Direction were routinely maintained and enforced in respect of one party, and routinely waived or ignored in respect of the other party. Yet in the present appeals, several important safeguards required by the Practice Direction are missing. The terms of Direction 10.1 were not complied with, as no details have been given as to the instructions given to Sprakab, nor is it clear that all the relevant required information was given to that company (and indeed, at the time that the reports were compiled, it appears that the appellants' claim or application had not yet been refused by the respondent). The reports appear to have been prepared in a very short timescale, perhaps during the course of the appellants' interviews, which is hardly consistent with Direction 10.3. The reports were not addressed to the tribunal, but rather to the respondent, contrary to the requirement of Direction 10.8. There was no statement such as required by Direction 10.9(j), and no verification by a statement of truth, as required by Direction 10.10.

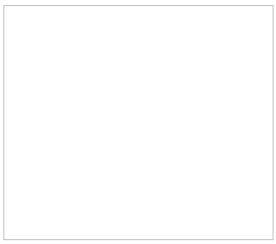
[87] The reason for these "failures" or "omissions" may perhaps be the explanation advanced by Mr Howlin QC for the second appellant - these reports were commissioned by the Secretary of State not for the purpose of being an expert report to the tribunal in the context of an appeal, but for the purpose of assisting the Secretary of State in taking an administrative decision. For that latter purpose, they may have been quite unexceptionable. *Non constat* they amounted to expert reports for the purpose of appeals, to which the Upper Tribunal was entitled - indeed, obliged - to attach very considerable weight.

[88] I share the concern expressed by each of your Lordships about the Upper Tribunal apparently giving its *imprimatur* of approval to all reports produced by Sprakab, and that all Sprakab's opinions are entitled to very considerable weight. As Lord Marnoch asks, how long should this approval be deemed to hold good? Management, personnel and characteristics may change over time. For my part, I cannot accept that it was within the powers of the Upper Tribunal to give a blanket direction (and particularly in an unstarred case) which has been construed as binding on other tribunals and which has the result that any tribunal must regard any Sprakab report as being of high quality and entitled to very considerable weight. I am in complete agreement with the views of your Lordship in the chair in paragraph [65] above.

[89] Finally, I agree that it would be preferable if the Inner House of the Court of Session and the Court of Appeal in England and Wales were to be of the same opinion on a question arising out of a statutory regime applicable to the United Kingdom as a whole. Moreover, whilst not binding on us, the decision of the Court of Appeal in England and Wales is clearly entitled to very considerable respect. I should have deliberated (even) longer on this matter if I thought that we were reaching a decision that was directly in conflict with the decision of the Court of Appeal in *RB*. However, for the reasons given by your Lordship in the chair, I do not consider that the two cases are exactly on all fours. First, (and, it seems to me, remarkably) counsel appearing on behalf of the Secretary of State in *RB* did not see fit to refer either the Upper Tribunal or the Court of Appeal to the views expressed by Lord Macphail. Moreover, the submissions on behalf of the appellant in *RB* were very much more restricted than the submissions advanced on behalf of each of the appellants before us, so the court's attention was not focused on the wider range of criticisms of the Sprakab reports which were made before us. The evidential material available to the Upper Tribunal (and so to the Court of Appeal) in *RB* was very much greater than was available in the present appeals, and included parole evidence and no fewer than three separate reports. And, as your

Lordship in the chair observes, the Court of Appeal did not go so far as to support all the reasoning and dicta of the Upper Tribunal, and appears to have distanced itself from the blanket *imprimatur* of acceptability which the Upper Tribunal conferred on Sprakab reports.

[90] For these reasons, and indeed for all the reasons given by your Lordship in the chair, I agree that these appeals should be allowed, and disposed of as indicated.



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Eassie **[2013] CSIH 68**
Lord Menzies **XA24/11**
Lord Marnoch **& XA36/11**

OPINION OF LORD MARNOCH

in the appeals

by

(1) M. AB. N.
Appellant;

against

THE ADVOCATE GENERAL FOR SCOTLAND representing the SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent:

(2) K. A. S. Y.
Appellant;

against

THE ADVOCATE GENERAL FOR SCOTLAND representing the SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent:

_____

Appellant: Bovey QC, Byrne; Drummond Miller LLP (For McAuley McCarthy & Co, Glasgow) (First Appellant)
Appellant: Howlin QC, Bryce; Drummond Miller LLP (for Peter G Farrell, Glasgow) (Second Appellant)
Respondent: McIlvride; Solicitor to the Office of the Advocate General

12 July 2013

[91] The outcome of these appeals depends on whether it was permissible for the Tribunals below to place weight on the respective SPRAKAB Reports founded on in each case and on that important matter I have the misfortune to differ from your Lordships. I shall attempt to state briefly my reasons for doing so.

[92] In the first place, I am in no doubt that in *RB Somalia* [2010] UKUT 329 (IAC) the Upper Tribunal, supported in due course by the Court of Appeal, purported in general to approve for purposes of receiving expert evidence of linguistic analysis the SPRAKAB form of Report, that is to say

a joint written report by one or more analysts working in "collaboration" with a qualified linguist, all as described in the "SPRAKAB Language Analysis Information" sheet which accompanies such reports. This *modus operandi* is, however, open to the criticism that, while the form of report does disclose certain basic qualifications of the authors, for the finer points one is left, as it were, dependent on the evidence accepted by the Upper Tribunal in *RB Somalia* at, for example, paragraphs 86 and 91. This means that tribunals are disabled from themselves assessing fully the qualifications of the experts in each particular case and, if that were not enough, it is said that that difficulty is compounded by the anonymity given to the experts.

[93] I fully understand the force of the criticism but in the context of a specialist jurisdiction with specialist knowledge of the practicalities involved I am not persuaded that it was outwith the powers of the Upper Tribunal in *RB Somalia* to do what it did. Certainly there is no suggestion to that effect in the Court of Appeal. In this connection it must, of course, be borne in mind that the Tribunals concerned are not constrained by the rules of evidence applicable in a court of law (rule 51 of The Asylum and Immigration Tribunal (Procedure) Rules 2005) and that they are well accustomed to receiving evidence taken from not only country of origin information reports but also miscellaneous reports compiled by a number of non-governmental organizations. In these instances the actual sources of information and their validity are often far from clear. By way of contrast, however, it might be said that the SPRAKAB source, at least as an organizational source of information or evidence, has been "vetted" by the Upper Tribunal itself. That said, one question which did arise in the course of the debate before us, and which did concern me, was for how long the imprimatur conferred by the Upper Tribunal in *RB Somalia* should be deemed to hold good. After all, even in large organisations management, personnel and characteristics can alter over time. The answer, I think, must lie in the quality of the reasoning. If over time the conclusions reached by SPRAKAB are shown to be wrong or unreliable, the Tribunals must clearly take note of that and cease to afford the reports the special status they presently enjoy. This depends, of course, on applicants having a proper opportunity to challenge the reports and I shall have more to say about that in what follows. At this point, however, I am content to endorse the submission advanced on behalf of the respondent in these applications, namely that, although unusual, it was within the power of the Upper Tribunal and, *a fortiori*, the Court of Appeal to endorse the SPRAKAB Report as a means of receiving expert evidence in the matter of linguistic analysis, albeit the qualifications of the individual experts are not capable of being fully assessed in each case. This, I think, must be seen as a distinct or stand-alone species of evidence applicable only, at least for the time being, to linguistic analysis.

[94] I would have been less inclined to reach the view above expressed were it not for what, in common with the Upper Tribunal in *RB Somalia*, I see as the main safeguard in all this, namely the right of the applicant to be told clearly of the reasoning of the SPRAKAB experts and to have the opportunity of challenging it. Thus, at paragraph 173 of the report, the Upper Tribunal in *RB Somalia* says this:

> "173. The parties must have an opportunity to challenge any linguistic assessment opposing them. That means that a sound recording of any interview of or discussion with an appellant that forms the basis of such analysis must be made available to the other party in good time before any substantive appeal hearing. In some of the early cases in which the Secretary of State relied on Sprakab reports the Tribunal had to direct that the CD be served on the appellant's representatives. We are glad to know that such service is now routine.....We would expect for the future that where linguistic analysis is in issue, no party should seek to rely on an analysis based on examples of the appellant's speech that all parties have not had the opportunity to analyse".

[95] In one of the cases before us the CD, but not a transcript, of the relevant telephone conversation was at some point made available to the applicant's legal advisers and, in the other, the transcript, but not the CD, was supplied. But I see no reason to doubt that in each case the missing items could have been obtained and/or that relevant queries about the SPRAKAB reports would have been answered had the applicants' legal advisers wished to take these courses of action. We were told that legal aid would have been available to the applicants for obtaining their own expert reports. As it was, however, the legal advisers in both cases before us contented themselves with the submission that the respective SPRAKAB reports should carry no weight at all because of the criticisms advanced to the immigration judge as these were later elaborated before the Upper Tribunal and this court.

[96] Your Lordship in the chair has with great care enumerated and evaluated these criticisms and, while borrowing much from Lord MacPhail, has further demonstrated the various respects in which the SPRAKAB reports lack the qualities normally to be expected of expert evidence. As I see it, however, with one exception these criticisms are not in either case materially different from those discounted in *RB Somalia* and some in any event fall away or are superseded if the broader principles of anonymity and organisational validity be once accepted.

[97] The exception to which I have referred concerns the references in both SPRAKAB reports to what is claimed to be deficient knowledge on the part of the applicant of local physical features and landmarks. It is true that in the application by Mr K.A.S.Y this is said to be co-incident with a certain manner in answering the relevant questions but, insofar as views are expressed about the substance of the alleged deficiencies, it seems to me, as it does to your Lordship in the chair, that there is force in the criticism that SPRAKAB is here departing from its claimed field of expertise.

In neither case, however, do I regard the deficiencies taken into account by the immigration judge as having been sufficiently material to vitiate their respective decisions. On the contrary, having regard to the emphasis placed on other parts of their reasoning, I am confident that, absent these considerations, their conclusions would have been precisely the same.

[98] For these reasons I would have been for dismissing these appeals.

---

[1] Upper tribunal judgment, paragraph 6.

[2] This is the passage upon which McLeman SIJ relied in the second appellant's case.

[3] Asylum and Immigration Tribunal (Procedure) Rules 2005: S.I. 2005/230

[4] Referred to by Lord Macphail

[5] As I have already observed in paragraph [61],the expression of certainty is, on the face of the reports, directed to the geographical extent of the "variety" of Somali; it is not directed to the degree of confidence or reliability with which the opinion on the interviewee's speech is attended.