Easter Term
[2014] UKSC 30
On appeal from: [2013] CSIH 68

JUDGMENT

Secretary of State for Home Department (Appellant) *v* MN and KY (Respondents) (Scotland)

before

Lord Neuberger, President
Lord Clarke
Lord Carnwath
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

21 May 2014

Heard on 5 and 6 March 2014

Appellant
Mark Lindsay QC
Rhoderick Mcilvride
(Instructed by Office of the Advocate General)

Respondent (MN)
Mungo Bovey QC
Dan Byrne
(Instructed by Drummond Miller LLP; McAuley, McCarthy and Co)

Respondent (KY)
Micahel Howlin QC
Joe Bryce
(Instructed by Drummond Miller LLP; Peter G Farrell Solicitors)

LORD CARNWATH (with whom Lord Neuberger, Lord Clarke, Lord Hughes and Lord Hodge agree)

Introduction

1. A crucial issue in many asylum appeals is whether the claimant's account of his or her provenance is truthful. So in the present cases it was central to each of the respondents' claims that they came from a particular region of Somalia, where they were at risk of persecution. In each case, in dismissing those claims, the Secretary of State relied on linguistic analysis to the effect that their mode of speaking was linked to Kenya not Somalia. That evidence came in the form of "linguistic analysis reports" provided by a Swedish commercial organisation called "Sprakab" (more fully, Skandinavisk Språkanalys AB). Those decisions were upheld on appeal to the Upper Tribunal, but reversed by the Inner House which made a number of criticisms of the form of the reports and the reliance placed on them by the tribunal.

2. In February 2010, following the original tribunal hearings in the present cases but before the appeals, a special three-judge panel of the Upper Tribunal (presided over by Judge Ockelton, Vice President) heard another case raising similar issues, and gave guidance on the use of such reports in the future. Their judgment, dated 15 September 2010 ([2010] UKUT 329 (IAC)), reviewed detailed evidence on Sprakab's operations and methodology, including oral evidence from their manager, Ms Fernquist. In the light of that consideration, they endorsed the use of the Sprakab reports, subject to certain safeguards. Their approach was generally supported by the Court of Appeal (*RB (Somalia) v Secretary of State for Home Department* [2012] EWCA Civ 277 ("RB")). Those decisions, at both levels, were in turn considered by the Inner House in the present case. Accordingly, although we are directly concerned only with the two appeals before us, it is appropriate for us to look at them also in the context of the wider discussion of the issues in ***RB.***

Sprakab's operation

3. For a general indication of Sprakab's operation and methods of work it is convenient to quote the description given by Moses LJ (who gave the only substantive judgment) in *RB*, which takes account of the more detailed evidence given before the Upper Tribunal in that case and their findings on it:

> "5. Sprakab's work is linguistic analysis. It works for the immigration services of a number of governments including Canada, Sweden,

Australia, the Netherlands and the United Kingdom. Since 2000 it has conducted over 40,000 linguistic analyses. The Upper Tribunal was given only one example of an individual seeking analysis from Sprakab. The company employs linguists with university qualifications and members of the relevant international association. They are subject to regular evaluation. It also employs a pool of analysts who, generally, speak the language they are asked to analyse and are taught to think critically and analytically.

6. Linguistic analysis at Sprakab is a two-stage process. First, the analyst listens to a recorded specimen of speech, typically an interview. The analyst notes features of the speech which appear to be of interest. Second, the analyst discusses those features with a linguist. The analyst and linguist decide whether the features are diagnostic of the speaker's origin and produce a report with four grades of likelihood: certainty (one way or the other), most likely, likely and possibly. The rationale for identification of the degree of certainty or otherwise is usually explained in the report. The analysts are given extensive training by the linguists so as to look for certain distinctive features of any particular language or dialect. The manager, Ms Fernqvist, agreed that linguistic analysis could not determine a nationality, although it is of assistance. Interviews would usually last some 20 to 30 minutes and the recording would be discussed by analyst and linguist before a draft report was produced.

7. Sprakab carry out around 4,000 analyses per year and Ms Fernqvist was of the opinion that it supported applicants in about 60% of the cases in which they were involved. Certainly, it supported applicants more often than it rejected their claims. Sprakab has developed a database of recordings which, though not available for peer review, was, she believed, accurate.

8. Sprakab's policy is not to make the names or personal details of its analysts or linguists public. It fears that their safety may be endangered if it is known that they are producing analyses for governmental authorities. But each member of staff is given a unique identifier and the language background training and other relevant experience associated with that identifier. Thus the qualifications and background of a particular analyst [or] linguist are disclosed and it is also possible to see whether the same or different analysts were involved. Those who reported in the instant case were identified only by letter and number. The tribunal was provided with the names of the witnesses but they were not disclosed to the appellant or her legal team. The number of those involved in the analysis in the instant case

was disclosed and Ms Fernqvist was able to give evidence as to their qualifications.

9. The Upper Tribunal made the following findings and conclusion. It accepted that Sprakab was a bona fide organisation which has devised and refined a system for analysing language requiring interaction between several employees. That process minimises the opportunities for the incompetence of one to lead to a false result. The tribunal accepted that anonymity could theoretically have an adverse impact on reliability. But the fact that no one person's opinion is decisive and that those opinions are reasoned, explained, and can be checked and criticised, reduces the risk of an incompetent or corrupt employee. The tribunal rejected the suggestion that Sprakab was not independent. The Upper Tribunal noted that Sprakab did not claim to be infallible."

The present appeals

Procedural changes

4. To understand the course of the present appeals, it is necessary to be aware of the changes which took place in February 2010 in the arrangements for hearing asylum appeals.

5. At the time of the original appeals in both cases, the relevant appellate body was the Asylum and Immigration Tribunal ("the AIT"). This was a single-tier appellate body, albeit with provision for reconsideration to be ordered where a possible error of law was identified by a senior tribunal judge or the relevant court. Procedure was governed by the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230) ("the AIT rules"). Although a new tribunal system (including a First-tier and Upper Tribunal) had been brought into operation in November 2008 under the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), the AIT continued for the time-being unchanged as a separate body.

6. As from 15 February 2010, the first-instance jurisdiction of the AIT was transferred to the new Immigration and Asylum Chamber of the First-tier Tribunal ("the FTTIAC"). At the same time there was established a right of appeal, with permission, to the Immigration Appeal Chamber of the Upper Tribunal ("the UTIAC"). There were transitional provisions to deal with pending cases. In the FTTIAC, the AIT rules continued to have effect subject to appropriate amendments to take account of the new two-tier system. In the UTIAC, procedure was governed by the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) ("the Upper

Tribunal rules"), which applied generally across the various chambers at that level, but subject again to appropriate amendments to take account of the new jurisdiction. At the same time a new set of Practice Directions, applying to the new immigration and asylum chambers at both levels, was issued in the name of the Senior President. They followed without material alteration (for present purposes, at least) the form of Practice Directions issued by the President of the former AIT.

7. It is worth adding that, although the present appeals were heard in Glasgow, and found their way on appeal in due course to the Court of Session, the jurisdictions of the former AIT and the new IAC Chambers were and are UK-wide. It is accepted that there is and should be no material difference between the principles applicable on either side of the border.

MN's appeal

8. The first appellant, MN, entered the United Kingdom on 16 August 2009 and claimed asylum. His claim was rejected by the Secretary of State and, on 5 February 2010, by the AIT (IJ McGavin). The appellant said that he was a national of Somalia and that he was born in Mogadishu and belonged ethnically to a minority clan in Somalia, namely "clan Benadiri, sub-clan Reer Hamar, and sub-sub-clan Shanshi" (AIT decision para 13). In rejecting the claim to asylum, the immigration judge, like the Secretary of State, relied on a Sprakab report, which identified his speech as being from Kenya rather than Somalia.

9. He appealed to the UTIAC, on grounds which included criticisms of the Sprakab reports. The appeal was heard in December 2010 (SIJ Macleman), following the promulgation of the decision and guidance in *RB.* Permission to appeal to the Court of Session was given by the court itself, which on 12 July 2013 by a majority of the Extra Division (Lords Eassie and Menzies, Lord Marnoch dissenting) allowed the appeal and remitted the case to the Upper Tribunal for reconsideration.

KY's appeal

10. The second appellant, KY, arrived in the United Kingdom on 30 November 2008 and claimed asylum. She claimed to be a citizen of Somalia, born in February 1988 in Mogadishu, and ethnically of the Benadiri clan (also known as the Reer Hamaar) sub-clan Sharif Omar. It was and is common ground that if she made good that contention she would be entitled to asylum. Her claim was refused by the Secretary of State, and on 20 February 2009 by the AIT (IJ MacDonald), both

relying on a Sprakab report, which identified her speech as being from Kenya rather than Somalia.

11. She applied successfully to the Court of Session under the procedure then applicable (section 103A(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), as inserted by section 26(6) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 ("the 2004 Act")) for an order for reconsideration of the decision. In a note attached to his order (dated 22 July 2009) the Lord Ordinary, Lord Macphail, made a number of criticisms of the Sprakab report (relying in particular on a 2004 report by an international group of linguists), and directed that reconsideration be undertaken without reference to the Sprakab report. The reconsideration not having taken place before 15 February 2010, the order fell to be treated under transitional provisions (paragraph 3 of Schedule 4 to the 2002 Act) as a grant of permission to appeal to the Upper Tribunal under the 2007 Act. The decision of the Upper Tribunal (in this case also, SIJ Macleman) was given on 22 October 2010, dismissing the appeal. Permission to appeal having been given by the Court of Session, the appeal was allowed by the same constitution as in *MN*. In this case, since there was agreed to be no other material supporting the refusal of her claim, the appeal was allowed without further remission.

The Sprakab reports in more detail

12. To understand the criticisms made by the Court of Session, and by the respondents before us, it is necessary to give a little more information about the form and content of the Sprakab reports. Since they are examined in detail in the judgment of Lord Eassie (paras [5] ff), to which reference can be made, I will focus on the principal points. I follow him also by concentrating on the first case in time (that is KY's case), the other being in similar form.

13. The report, which is entitled "linguistic analysis report", is not in narrative form, but consists of a series of boxes with a number of headings to be completed by the "language analyst". An attachment indicates that the analysis in this case was "conducted by" analyst EA20; "the results of analysis confirmed" by analyst EA17; and the "analysis reviewed and approved" by Linguist 04. None of the three is named, but their experience and qualifications are summarised. For example, in respect of analyst EA20 the following appears:

> "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"

14. Returning to the report itself, the first box gives the conclusion:

"The person speaks a variety of Somali found
[x] with certainty not in: Somalia.
[x] with certainty in: Kenya…."

The following boxes indicate that the basis is a tape recording of a telephone conversation lasting 18 minutes, that the language used was "Somali", and that the "type of analysis" included both "linguistic analysis" and "knowledge assessment", the latter involving examination of "the person's knowledge and experiences of culture and geography of his/her stated country/region of origin". The next section, headed "Analysis" begins with the following "General comments":

"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."

15. There then follow under the heading "Specific findings" more detailed observations relating to "phonological characteristics", "morphology", "syntax" and "lexicon and colloquialisms". A separate box headed "Knowledge of 'country and culture' of the person" includes the following:

> "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…."

16. This section ends with a "summary of findings supporting the conclusion"

> "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."

Although there is space for a signature, it appears that this was not completed, the identity of the author instead being indicated by codes given in the attachment to which I have already referred.

The Upper Tribunal's decision and guidance in RB

17. I have already referred to the findings made by the Upper Tribunal and the Court of Appeal in *RB* about the nature of the Sprakab operations. Although this is not an appeal from that decision, it is right to set their guidance in the context of the facts of the case and the material before the tribunal. The factual issue was in one respect similar to the present, in that the appellant claimed to be from Somalia, and was ultimately disbelieved on the basis partly of Sprakab reports which linked her to Kenya. However, of more particular importance was her claim to be from the Bajuni clan, and to be proficient in Kibajuni the mother tongue of that clan (paras

49-53). The tribunal accepted that if that link were established her appeal should succeed (para 143). It was in that context that a critical issue was "how well she understands Kibajuni, and the way she speaks it herself" (para 151). It was on that issue that the tribunal ultimately rejected her evidence, and in doing so placed "considerable weight" on the deficiencies in her knowledge of that language, disclosed not only by the Sprakab reports but also by her own answers in cross-examination (para 152).

18. It is not entirely clear from the judgment of the Upper Tribunal how the case came to be selected as a "guidance" case on the use of Sprakab reports, or what steps were taken to ensure that the tribunal had before it all the material and assistance necessary to reach an authoritative view. It seems surprising that (as far as appears from the judgment) the tribunal does not appear to have been referred to the criticisms of the Sprakab reports made by the Lord Ordinary in earlier cases, but they had before them the 2004 report on which he relied (see below).

19. The evidence ultimately before the tribunal was substantial and was carefully considered and analysed by them. They were assisted by experienced counsel on both sides. Apart from the evidence of the appellant herself, it included:

i) Four Sprakab reports, the last being "particularly detailed". They were supported by written and oral evidence by their manager, Ms Fernqvist, who was subject to cross-examination (paras 10-20). In accordance with Sprakab's practice, the authors of the reports were not identified by name. The tribunal noted that that "no reasoned objection" was taken by counsel for the appellant to this course (para 25). The tribunal heard oral evidence from three of the individuals directly responsible for the reports, analyst E19 and linguists 01 and 04, who also were subject to cross-examination.

ii) Two reports by an independent expert, Ms Margaret Kumbuka, instructed for the appellant (described as a "lector" in Swahili in the African Department of SOAS – para 100); and a response by Sprakab to those reports (para 11-19). Ms Kumbuka had been expected to give oral evidence, but unfortunately she died shortly before the hearing (para 99).

iii) Documentary evidence (para 120ff), including –

a) A 2004 report by an international group of linguists (the Language and National Origin Group) on the use of language analysis in refugee cases;

b) Information on the Bajuni people from the UNHCR website (complied in 2005 by the Immigration and Refugee Board of Canada);

c) A report on the Bajuni people published in 2010 by the Country of Origin Information Centre in Norway ("Landinfo").

iv) The tribunal referred also to three reports dated February 2010 by a Professor D Nurse (an emeritus professor of linguistics at St Johns's University Canada and said to be "a specialist in Swahili dialectology"). These included a critique of some 50 Sprakab reports between 2004 and 2010, a review of some 20 recordings of interviews, and a report of a fact-finding mission to Nairobi in September 2000. These had come to the attention of the tribunal after the hearing through a monthly mailing of the Immigration Law Practitioners Association. The tribunal summarised Professor Nurse's comments on "the fluidity of [the] Bajuni language and society amid the upheavals of recent years" and his criticisms of the Sprakab interview methods, leading to his view that it would be "unwise to use a Sprakab report as a basis for any legal decision on whether an applicant is or is not a Somali Bajuni" (para 137). Although the tribunal received submissions on these reports and made some comments on them (paras 165-166), they indicated that they could not treat Professor Nurse as "an expert witness in this appeal", because of "numerous points of factual dispute which would need to be addressed by way of live evidence and cross-examination" (para 141).

20. Having given their reasons for dismissing RB's appeal on its own facts, the tribunal concluded by setting out the following, by way of "General guidance on linguistic analysis evidence":

"170. We close this determination with three matters of general guidance in relation to appeals based on linguistic analysis in general and Sprakab reports in particular.

171. First, we note that it is said that the 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.

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 assessment and it is equally important that all the evidence be taken into account in deciding the questions in issue according to the appropriate standard of proof.

173. The parties must have an opportunity to challenge any linguistic assessment opposing them. That means 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…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.

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 qualifications. These reasons are of general applicability…unless there was some very good reason for departing from this practice."

The issues

21. The issues agreed between the parties for consideration by this court are (in summary):

i) Whether the immigration judges were entitled to attribute any weight to the Sprakab reports;

ii) In what circumstances should witnesses providing evidence in such appeals be granted anonymity;

iii) Whether there are any particular rules governing expert evidence tendered in the name of an organisation rather than an individual;

iv) To what extent can such evidence be accepted in a form not prescribed by the Practice Directions;

v) To what extent, and with what effect, can the Upper Tribunal give guidance as to the weight to be given to such reports, or the conclusions to be drawn from them.

General approach

22. Before looking at these issues in more detail, it may be helpful to make some general comments about the context in which they are to be considered. We are concerned with specialist tribunals, now forming part of the new system established by Parliament under the 2007 Act following the report of Sir Andrew Leggatt, *Tribunals for Users, One System, One Service* (2001). As Senior President of Tribunals, I discussed the background to those reforms and some of their practical implications in an article: *Tribunal Justice – a New Start* [2009] PL 48 (cited by me also in *Jones v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48, para 46). I referred for example to Lady Hale's description of the essential features of tribunals, as compared to courts, in *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, paras 36ff, including accessibility, freedom from technicality, and expertise.

23. These special qualities, including emphasis on the development of "innovative methods of resolving disputes that are of a type that may be brought before tribunals", are given statutory force in the duties of the Senior President under section 2 of the 2007 Act. They are also embodied in the "overriding objective" in the rules now applying across the new tribunal system, under which the objective of dealing with cases "fairly and justly" is defined as including "avoiding unnecessary formality and seeking flexibility in the proceedings" and "using any special expertise of the [tribunal] effectively" (see eg rule 2 of the Upper Tribunal Rules).

24. Although, as already noted, the FTTIAC rules still follow the old AIT format, with amendments, the "overriding objective" there stated (rule 4) does not differ in substance. In particular, it imposes on the members of the tribunal the responsibility for ensuring that proceedings are handled "as fairly, quickly and efficiently as possible". In the same spirit, rule 51(1) provides that the tribunal may receive oral, documentary or other evidence of any relevant fact, notwithstanding that it would be inadmissible in a court of law (see, to like effect, rule 15(2) of the Upper Tribunal rules). Generally, therefore, the area of legitimate debate is about relevance and weight, not admissibility.

25. Secondly, there is no presumption that the procedure will necessarily follow the adversarial model which (for the time-being at least) is the hallmark of civil court procedures. In a specialist tribunal, particularly where parties are not represented, there is more scope, and often more need, for the judges to adopt an inquisitorial

approach. This has long been accepted in respect of social security benefits (see *Kerr v Department for Social Development* [2004] 1WLR 1372, paras 61-63, where Lady Hale spoke of the process of benefits adjudication as "inquisitorial rather than adversarial… a co-operative process of investigation in which both the claimant and the department play their part"). However, there is no single approach suitable for all tribunals. For example, in a major case in the tax or lands tribunals, the sums may be as great, and the issues as complex, as in any case in the High Court, and the procedure will be modelled accordingly.

26. Thirdly, an important objective of the reforms, including the establishment of the Upper Tribunal, was to promote consistency across the tribunal system. An accepted means of so doing, established in previous case law, is the provision of guidance through judgments in suitable cases. (See the discussion in *R (Iran) v Secretary of State for the Home Department* [2005] Imm AR 535, paras 21ff per Brooke LJ; and by myself in *Jones v First-tier Tribunal* [2013] 2 AC 48, paras 42-43).

27. Such guidance need not be confined to points of law, to which rules of precedent may apply in the tribunals as in the courts, but may extend to issues of principle relating to factual, procedural or other matters of common application in a particular specialist field. An example from a very different area of specialisation was the guidance given by the Lands Tribunal on discount rates in the context of leasehold enfranchisement (see my comments in *Earl Cadogan v Sportelli* [2008] 1 WLR 2142, paras 91ff; on this aspect not questioned by the House of Lords at [2010] 1 AC 226).

28. Except so far as statute otherwise provides, statements on such issues by the Upper Tribunal are not binding on the FTTIAC judges, who retain their duty to decide their cases on the evidence before them. As Brooke LJ explained at para 26 of *R (Iran)*, (adopting comments of Ouseley J as President of the IAT in *NM (Lone women-Ashraf) Somalia CG* [2005] UKIAT 00076), such statements are to be taken into account as part of the "material considerations" to which the judges are required to have regard, but are not to treated as "factual precedents". Similarly, in *Januzi v Secretary of State for Home Department* [2006] 2 AC 426 [50], Lord Hope observed that, while it was desirable "in the interests of fairness and consistency" that country guidance should be followed:

> "…in the end of the day each case, whether or not such guidance is available, must depend on an objective and fair assessment of its own facts."

29. It is to be noted that, in the context of immigration appeals under the 2002 Act, the position has since 2005 been formalised to some extent by statutory provision. Under section 107(3) as added by section 48(3) of, and paragraph 22(1)(c) of Schedule 2 to, the 2004 Act, practice directions may require tribunals "to treat a specified decision of the [Upper Tribunal] as authoritative in respect of a particular matter". Paragraph 12 of the 2010 Practice Directions contains such provision for what are known as "starred and country guidance determinations"; subject to certain qualifications, decisions so designated are to be treated as "authoritative" in subsequent appeals. (The development and effect of those provisions are discussed in detail *Macdonald's Immigration Law and Practice* 8th ed (2010), para 19.105.) A recent guidance note issued by Blake J as Chamber President (Guidance Note 2011 No 2: "Reporting decisions of the Upper Tribunal Immigration and Asylum Chamber") explains the current practice. Having referred to the specific provisions in relation to Country Guidance cases, the note refers to the criteria for reporting other cases "where the factual findings may be of some general interest", noting that such decisions are "of persuasive value only on the facts" (para 13).

30. It is not suggested that the guidance in the present case falls within any special category within the practice direction, or that it is thereby entitled to be treated as other than merely persuasive.

31. There is another important aspect to cases such as the present. The higher courts have emphasised the special responsibility carried by the tribunals in the context of asylum appeals. It is customary in this context to speak of the need for "anxious scrutiny" (following *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 531 per Lord Bridge of Harwich). As a concept this is not without its difficulties, but I repeat what I said in *R (YH) v Secretary of State for the Home Department* [2010] 4 All ER 448, para 24:

> "… the expression [anxious scrutiny] in itself is uninformative. Read literally, the words are descriptive not of a legal principle but of a state of mind: indeed, one which might be thought an 'axiomatic' part of any judicial process, whether or not involving asylum or human rights. However, it has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account. I would add, however, echoing Lord Hope [in *R (BA Nigeria) v Secretary of State for the Home Department* [2010] 1 AC 444, para 32], that there is a balance to be struck. Anxious scrutiny may work both ways. The cause of genuine asylum seekers will not be helped by undue credulity towards those advancing stories which are manifestly contrived or riddled with inconsistencies."

32. Similar considerations in my view impose a special responsibility on the Secretary of State and those representing her to ensure that the evidence presented to the tribunal is adequately supported. So in this case Lord Eassie rejected the suggestion that it was enough for the Secretary of State to provide the interview tapes to the appellants, leaving them to obtain their own expert advice. He said, at para 66:

> "… 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."

For the Secretary of State Mr Lindsay QC, as I understood him, did not challenge this statement of principle. In my view, he was right not to do so.

The agreed issues

33. The issues (para 21 above) fall into two categories: first, relating to the admissibility in principle of the Sprakab reports (issues (i) – (iv)); secondly, as to the nature and extent of the guidance which it is appropriate for the Upper Tribunal to give (issue (v)). It is convenient first to consider these issues in general terms by reference to the decision and guidance given in *RB*, before turning to the implications of those points for the cases before us.

34. In principle, as I think counsel for the respondents accept, there was nothing wrong in the Upper Tribunal seeking to give guidance on a matter of general concern to the First-tier, such as the use of Sprakab reports. The practice directions contain valuable guidance on the general principles applying to expert evidence. To a large extent they follow the principles applicable in civil courts, designed (inter alia) to ensure that the expert provides truly independent assistance to the tribunal, does not assume the role of advocate, and sets out the facts and other material on which an opinion is based. However, the absence of any specific provision in the practice directions for evidence in the form of the Sprakab reports was not in itself a bar to their admission. On the contrary, where the tribunals were faced with a new form of evidence, of potential value in resolving issues of common occurrence, it was entirely appropriate for the Upper Tribunal to select a suitable case with a view to giving general guidance. As Lord Eassie acknowledged, the practice directions did not have to be rigidly applied.

35. In the civil courts, flexibility on such matters is routinely accepted under modern practice. For example, in *Rogers v Hoyle (Secretary of State for Transport and International Air Transport Association intervening)* [2014] EWCA Civ 257, the Court of Appeal confirmed the admission of a report by a body known as Air Accident Investigation Branch, one objection having been that it failed to comply with mandatory rules (CPR Pt 35) relating to expert evidence. In support of a flexible approach to the rules, Christopher Clarke LJ cited (inter alia) *Sunley v White (Surveyors & Estate Agents) Ltd* [2003] EWCA Civ 240, in which:

> "…this court regarded as admissible a draft soil report issued by a company although the report was unsigned, provisional and did not carry the name or qualifications of the author. These were matters which Clarke LJ, with whom Longmore LJ agreed, treated as 'essentially going to weight'" (para 44).

36. Such considerations apply with equal or greater force before tribunals. Thus the Court of Appeal has warned tribunals against rejecting expert evidence merely because a witness is not available for cross-examination. In *Singh (Tarlochan) v Secretary of State for the Home Department* [2000] Imm AR 36 Buxton LJ said, at para 43:

> "… In the way in which this sort of inquiry is necessarily conducted in front of a Tribunal, it is only rarely going to be the case that evidence is given by persons actually appearing in front of a Tribunal rather than by reference to the reports of persons of greater or lesser weight - Amnesty International, the United Nations Commission on Refugees and the Canadian body used in this case…"

37. So here, it is inappropriate for general questions relating to Sprakab, its methodology and the presentation of its reports to be re-litigated constantly in separate FTT hearings, with inevitable inconsistency of outcome. The Upper Tribunal were right in *RB* to address those issues. Subject to appropriate safeguards, they were entitled in my view to find no objection of principle to the admission of the Sprakab reports, whether because they were in the name of an organisation rather than an individual, or in general for failure in other respects to comply with the practice directions. This discussion makes it unnecessary to consider in more detail issues (i), (iii), (iv); the short answer is that none of them points to any overriding objection to evidence in this form. As Lord Eassie said, in a passage to which Mr Lindsay took no objection:

> "… 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." (para [57])

38. It is necessary to deal in a little more detail with issue (ii) (anonymity of witnesses), which proved more contentious.

Anonymity

39. In *RB* the Secretary of State asked for anonymity for the individual analysts and linguists (other than by reference to an identifier code) on the grounds that their independence might otherwise be compromised and their personal safety might be at risk. It was said that it was not Sprakab's policy to disclose the identity of its analysts "because of threats which have been directed at analysts in the past by disgruntled claimants". One analyst was said to have stopped working for Sprakab because of such threats (Upper Tribunal decision, para 22).

40. The tribunal accepted this submission. They accepted that it was exceptional for witnesses to give evidence anonymously, but thought that course "appropriate" and "proportionate" in view of the potential of threats to Sprakab personnel, and in the absence of any "reasoned objection" from counsel for the appellant. They said:

> "...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 inquiring 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." (paras 24-27)

That approach was endorsed by the Court of Appeal. Moses LJ said:

> "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…" (para 14)

41. In view of his other reasons for allowing the appeal, Lord Eassie found it unnecessary to reach a final view on this issue, but expressed "serious reservations" as to the approach of the Upper Tribunal, which departed from "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" (para 77). That approach has been supported by the respondents in their submissions in this court. They rely on statements of high authority referring to the "fundamental principle" of judicial process that, other than in exceptional circumstances, witnesses are identified whether in criminal or civil proceedings (see *R v Davis* [2008] AC 1128, para 40 per Lord Rodger; *Al Rawi v Security Service (Justice intervening)* [2012] 1 AC 531).

42. There is no doubt about the power of the tribunal to make such a direction. Rule 45 of the AIT rules, which gives the tribunal power to give directions relating to the conduct of appeals, includes an unqualified power in such directions to "make provision to secure the anonymity of a party or a witness" (r 45(4)(i)). That was not the power in terms relied on by the Upper Tribunal. They referred instead (para 25) to rule 14 ("Use of documents and information"), which gives the Upper Tribunal power to make orders prohibiting disclosure of information (1) likely to lead to identification of "any person whom the Upper Tribunal considers should not be identified", or (2) likely to cause "serious harm" to the person to whom it is disclosed or "some other person". Since the Upper Tribunal were retaking the decision of the First-tier Tribunal on both fact and law (see section 12(4) of the 2007 Act), it would have seemed more appropriate for them to rely on the power in the AIT rules, directed specifically to anonymity of witnesses, rather than rule 14 which is concerned with disclosure of information more generally. On the other hand, rule 14 is helpful as emphasising that, in the tribunals as in the courts, openness is the norm, and that there needs to be special reason for departing from it, risk of serious personal harm being an obvious example.

43. Although the AIT's power is expressed in unqualified terms, I agree that in respect of an individual expert witness its exercise requires special justification. Sprakab's policy of anonymity clearly would not absolve the tribunal of its duty to examine of itself the evidence said to justify a departure from the normal rule. However, in my view there were valid reasons for taking a less strict view in the present context. This was not anonymous evidence in the ordinary sense. The evidence was advanced, and the expertise claimed, on behalf of an organisation, based on the collaborative work of individuals with different skills within it. There was no doubt about the identity of the organisation, its working methods or the qualifications and experience of those involved in preparing its report. The names of the individuals were available to the tribunal, and could have been made known

to the parties if it became necessary to do so, for example to pursue a particular line of cross-examination. Subject to appropriate safeguards, and to satisfying themselves that in the circumstances of the particular case no prejudice was caused, the Upper Tribunal were entitled to determine that there was no objection in principle to the course adopted.

The guidance

44. As has been seen, the Upper Tribunal ended its judgment by giving "general guidance" on the use of evidence of this kind. For the most part this was helpful and appropriate. In particular it was right to emphasise that Sprakab were not infallible, that tribunal judges must be alive to the possibility of error, and that parties must be provided with the opportunity and materials necessary to enable them to challenge their evidence (paras 172-173).

45. However, with respect to this experienced tribunal, I have concerns that on two aspects the guidance appears unduly prescriptive and potentially misleading.

46. The first is as to the weight to be given to such evidence in future cases. Tribunals are advised that, where there is a "clear, detailed and reasoned linguistic analysis" leading to "an opinion expressed in terms of certainty or near certainty", then "little more" is required to support a conclusion. This seems to me to underplay the importance in any case of the tribunal itself examining such a report critically in the light of all the evidence, and of the reasoning supporting its conclusion (not necessarily limited by the scope of any criticisms or evidence that may be presented by the appellant). The language of the guidance gives rise to a real risk of being interpreted as prejudging issues which are for the individual tribunal to determine. As will be seen, the present appeals are illustrative of that risk.

47. Also problematic to my mind is the special weight given to reports expressed "in terms of certainty or near certainty". As has been seen, it is a feature of the Sprakab reports in the present case that the conclusions are so expressed, both positively and negatively. In *RB* itself, two of the Sprakab reports were expressed in similar terms but not it seems the final most detailed report (paras 13-15). The reasons for the discrepancy were not further discussed. It is unfortunate that, through circumstances beyond their control, the Upper Tribunal did not have the benefit of oral evidence from experts critical of Sprakab's methods. That was another reason for caution.

48. In any event, as one would expect, the Upper Tribunal's subsequent discussion and conclusion did not turn on the degree of "certainty or near-certainty"

expressed by Sprakab, but on an evaluation of all the evidence of which theirs was one part. That would be the duty of any future tribunal, regardless of the "certainty" of Sprakab's own views. What matters is not the confidence with which they are expressed, but the strength of the reasoning and expertise used to support them.

49. The other concern is similar, relating to the guidance on anonymity (para 174). The Upper Tribunal were entitled on the evidence they had heard to indicate, as they did, that were no objections in principle to the form of the Sprakab reports, to the methodology used to produce them, or in general to the contributors not being identified by name in the reports. However, they went further, describing their reasons on this aspect as of "general applicability" and requiring "some very good reason" for a departure (para 174).

50. Again that seems with respect unduly prescriptive on an issue which must depend on the circumstances of each case. As already noted, in *RB* itself, counsel for the appellant had made "no reasoned objection… in the circumstances of [that] case" (para 25). This no doubt was because he was satisfied that the procedure adopted (including cross-examination) and the information available to him enabled him properly to present his client's case. That concession could not be regarded as transferable to other cases. It was important in any guidance to emphasise that it would remain the duty of the tribunal in any future case to determine what justice requires, in the light of the evidence and submissions made to them. That could not be predetermined by general guidance given by the Upper Tribunal.

51. More generally, there is a case for updating the guidance, which is now more than four years old. As I have explained, the Upper Tribunal in 2010 had limited direct evidence from those critical of the methodology. The conclusion of the present appeals provides an opportunity to review the guidance, in the light of this judgment and of experience in the cases, and any other relevant evidence both for and against Sprakab's methodology. It will be for the President of UTIAC to determine what form that review should take. While it is not for this court to take over that role, some pointers may be helpful:

i) On the basis of the material we have seen, I see no reason in principle why Sprakab should not be able to report on both (a) language as evidence of place of origin and (b) familiarity with claimed place of origin provided, in both cases, their expertise is properly demonstrated and their reasoning adequately explained. (As will be seen below, the problem in relation to (b) was not the nature of the evidence, but the lack of demonstrated expertise.)

ii) As to (a), language:

a) The findings (on evidence) in *RB* are to my mind sufficient to demonstrate acceptable expertise and method, which can properly be accepted unless the evidence in a particular case shows otherwise;

b) The Upper Tribunal ought to give further consideration to how the basis for the geographical attribution of particular dialects or usages can be better explained and not (as it often currently seems to be) left implicit. The tribunal needs to be able to satisfy itself as to the data by reference to which analysts make judgements on the geographical range of a particular dialect or usage.

c) The *RB* safeguard requiring the Secretary of State to make the recording available to any expert instructed for the claimant is not only sensible, but essential.

iii) As to (b), familiarity:

a) The report needs to explain the source and nature of the knowledge of the analyst on which the comments are based, and identify the error or lack of expected knowledge found in the interview material;

b) Sprakab reporters should limit themselves to identifying such lack of knowledge, rather than offering opinions on the general question of whether the claimant speaks convincingly. (It is not the function of an expert in language use to offer an opinion on general credibility.)

iv) On the issue of "anonymity", since the approach in *RB* was a departure from the norm, it would be appropriate for the tribunal to satisfy itself both that the departure remains justified in the interests of security of Sprakab personnel or otherwise, and, if it does, as to the safeguards necessary to ensure that the evidence is reliable and that no prejudice arises in individual cases. Consideration for example could be given to requiring assurances that the identifying numbers remain with an individual throughout his work with Sprakab, and requiring disclosure of other work done in any related field by the individual (eg advice to Governments, interpretation, translation), and of any occasion on which his conclusions have been rejected by courts or tribunals.

The present appeals

52. I turn to the application of these principles to the present cases. Regardless of the general discussion, there are in my view clear reasons for dismissing the present appeals on their own facts. They relate, first, to the use made by the AIT in each case of the Sprakab evidence relating to "knowledge of country and culture"; secondly the use by the Upper Tribunal of the guidance in *RB* in response to criticisms of the Sprakab reports.

Knowledge of country and culture

53. As noted by Lord Eassie, this is an issue on which there is a degree of common ground. It was not in dispute before them that the comments in the reports on the claimant's knowledge of country and culture were inadequately supported by any demonstrated expertise of the authors. Of this Lord Eassie said, at para 53):

> "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….
> What is being done appears to be nothing more than an expression of a view on credibility, which is outwith any expert witness' function."

He added that in neither case was there anything to indicate the extent (if any) of the particular areas from which the interviewees were said to come, and that in any event it was doubtful to what extent such issues could be properly explored in a telephone conversation lasting only 18 minutes and dealing also with other matters.

54. Before us, Mr Lindsay QCdid not seek to withdraw the concession that this aspect of the Sprakab evidence was unsupported by demonstrated expertise in the relevant field. However, he submitted that Lord Eassie erred in treating this as a defect which deprived the linguistic analyses of any validity, or undermined the conclusions of the respective immigration judges. In this submission he gained support from the dissenting judgment of Lord Marnoch (para 97).

55. I am unable to accept those submissions. Not only do I agree that the concession was rightly made, but I also agree with Lord Eassie's criticism that in some respects the evidence went beyond the proper role of a witness. Indeed, the observation that KY's knowledge "sounds rehearsed for the occasion" reads as that of an advocate rather than an independent expert witness, and was wholly inappropriate even if the relevant expertise had been established. Expert witnesses should never act or appear to act as advocates.

56. Furthermore, on a fair reading of the careful judgments of the immigration judges in each case, I find it impossible to treat this aspect of their reasoning as severable from the remainder. In the first place this aspect formed an intrinsic part of Sprakab's overall assessment in each case, on which the judges relied. In *KY* the judge refers in terms to "the two experts' comment on her knowledge of country and culture", and in the absence of any "contradictor in terms of the expert views given" adopts them as part of the conclusions, without distinguishing the different aspects (paras 39-49). The position in *MN* is perhaps less clear, in that the judge undertook her own commendably detailed examination of the evidence relating to the claimant's knowledge of his area, but I am unable to say that the supposedly "expert" views on this aspect expressed in the Sprakab report played no significant part in the overall reasoning.

57. In my view, this point on its own is sufficient to undermine the decisions of the AIT in each case, and to this extent at least to require us to uphold the decision of the Court of Session. [I should add that, as Lord Eassie noted, it was not an issue which had arisen in in RB. We were told that this aspect of the Sprakab forms had been altered or deleted in later versions. The current form states (in capitals) that "knowledge assessment is separate and forms no part of the language analysis".]

Use of Guidance in RB

58. In each appeal an important part of the appellant's case, both before the first tribunal and in their grounds of appeal to the Upper Tribunal, was an attack on the use by the Secretary of State of the Sprakab reports. In each case the tribunal judge made a detailed analysis of the reports and the criticisms made of them, before accepting them. In *KY* as already noted Lord Macphail, when directing reconsideration under the old procedure, had made strong criticism of the Sprakab report in that case, partly by reference to the guidelines in the 2004 Language and National Origin Report, and had gone as far as to direct that reconsideration should take place without reference to it. (Whether he had power to do that is not now material.) Similarly, in *MN* SIJ Storey, when granting permission to appeal under the new procedure, noted the challenge to the reliance placed on the Sprakab report again by reference to the 2004 guidelines.

59. By the time of the hearings in each case, in October and December 2010 respectively (as it happened, before the same Senior Immigration Judge), the decision and guidance in *RB* had become available. It is clear from the language used in each judgment, that the judge regarded that as effectively precluding further argument on the Sprakab reports. In *KY* he fairly criticised other advocates for treating Lord Macphail's note as equivalent to a decision of the Court of Session; but made no other reference to his specific criticisms, other than to record the lack of suggestion of "any possible error indicated in the Lord Ordinary's note that *RB*

leaves unresolved". He treated *RB* as establishing that "a linguistic analysis in terms of certainty or near certainty" was such that "little more would be required to justify a conclusion on whether the appellant had the history claimed", observing that "this appellant is *caught* by that judgment". Similarly in *MN* he concluded that the appellant'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" (emphasis added in each case).

60. In my view he was clearly wrong to take that approach. I have some sympathy for his position in dealing with these cases so soon after the judgment in *RB*. As I have explained, he was entitled to regard the guidance in *RB* as persuasive on the procedural matters covered by it (subject to the reservations expressed above). However, it was no substitute for a critical analysis of the particular reports relied on in the instant cases, and of the reasoning of the First-tier tribunal on them.

61. It may be said that such an error by the Upper Tribunal is not in itself a reason for refusing the appeal if the first tribunal's decision is otherwise supportable. However, this would be to give no weight to the special appellate role of the Upper Tribunal in the new system, which is not fully replicated by onward appeal on law to the higher courts. Also, there were significant differences between the facts of the present cases, and those considered in *RB*. For example, the particular dialect in issue in each case (that of the Reer Hamar clan) was not the same as in *RB*. Further, as Lord Eassie points out (paras 59-60), there were serious questions about the basis on which the Sprakab analysts felt able to establish with such certainty the geographical allocation of the appellants' modes of speech. These were issues which, having been properly raised in their grounds of appeal, the appellants were entitled to have considered and answered at the appeal level.

Conclusions

62. For the reasons given above, I would dismiss the present appeals. In the result, the case of *MN* will be remitted to the Upper Tribunal as ordered by the Inner House. In the case of *KY*, before the Inner House, (para 81) it was accepted for the Secretary of State that if the appeal succeeded it should be allowed simpliciter and no remission would be necessary. I did not understand Mr Lindsay to depart from that position in this court. Accordingly I would uphold that order.