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The use of language analysis in asylum decision-making in the UK - a discussion

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**J.I.A.N.L.* 255 At a glance

This article explores how language analysis is used to assist decision-makers in reaching judgments about asylum applicants' claims regarding their country of origin. By tracing the process followed by the case of *RB (Somalia)*¹ through the UK's decision-making and appeals procedures, the article illustrates how language analysis has been used in the UK in recent years. It considers some of the contested issues surrounding language analysis, including its deployment in cases where there is doubt about the validity of claims related to specific nationalities, and the potential consequences for the consideration of claims in situations where language analysis combines with abbreviated or fast-track procedures. The article considers how the application of the rules on expert evidence have been modified in the case of *RB (Somalia)* to take account of language analysis, and it also attempts to place the UK experience within its wider context by exploring various methods used to conduct language analysis in different jurisdictions. The article concludes by reflecting on the role played by language analysis - whether formal or informal - in the asylum decision-making-process and by making some suggestions for the future.

Language analysis and asylum determination

Language analysis has played a role in the determination of asylum claims for many years. Guidelines issued by an international group of linguists in 2004 describe it as follows:

'Language Analysis is used by a number of governments around the world as part of the process of determining whether asylum seekers' cases are genuine. Such analysis usually involves consideration of a recording of the asylum seeker's speech in order to judge their country of origin'.²

Methods vary. A recording of the asylum seeker's speech may be made during an interview with an immigration official and then sent to an analyst, or the analyst may conduct the interview him or herself, in which case it may take place over the telephone rather than face **J.I.A.N.L.* 256 to face. The interview may include questions which test geographical or cultural knowledge. The analysis itself generally involves looking for linguistic features in the person's speech, and testing knowledge about the country. Language analysis is used to test whether the person is really from their claimed country of origin, and it is a technique which has proved popular in a range of jurisdictions, including the Netherlands, Switzerland, Sweden, Belgium, Germany, Australia, the UK and elsewhere. While the analysis of a piece of recorded speech appears to be a common feature, the question of who should conduct the analysis has been answered in different ways. The guidelines mentioned above require that the analyst be a qualified linguist,³ but an alternative view is that language analysis can be conducted by native speakers supervised by linguists.⁴ Although linguists may hold a range of views regarding the appropriateness of different methods, and many would question the reliability of language analysis as a means of establishing national origin, most linguists seem to agree that the way that a person speaks contains clues about their origin.⁵ The difficult task which decision-makers face is how to use the clues which language analysis can give them about an applicant's origins, including the uncertainties inherent in that information, and apply it in the context of a decision making process which requires binary 'yes' or 'no' answers to the question whether protection should be given.

Where language analysis is weighed in the balance alongside other evidence regarding an asylum

claim, it may be capable of improving the accuracy of decisions. For example, language analysis may help to confirm someone's nationality when an individual has no other means of establishing it. But where language analysis is being used to confirm doubts or suspicions already held by Government decision-makers that an applicant is making a false nationality claim, then it is appropriate to pause and ask some questions about it. Individual asylum applicants, who are otherwise generally credible, are entitled to be given the benefit of the doubt in the consideration of their claim, unless there are good reasons to the contrary,⁶ and, in that context, the debate about whether a doubtful approach stems from justifiable scepticism about an individual's claim, or is being adopted on a more routine basis by Governments for policy ends, to deter claims, is an important one. That debate is more fully engaged elsewhere,⁷ and therefore, rather than rehearse the arguments about the connection between policy approaches and a suspicious approach to asylum claims, the aim of this article is to trace how language analysis is used in the decision-making and appeals process in the UK, including how it interacts - or could interact- with procedures which abbreviate the consideration of claims. It takes as its theme an exploration of how the clues about origin contained in a person's speech are gathered, analysed, presented to decision-makers and applied by them, in order to reach some conclusions about the impact which the use of language analysis evidence has - or may have - on the decision-maker's task. With this theme in mind, we can now turn to explore how language analysis was used in the case of *RB (Somalia)*.

*J.I.A.N.L. 257 Language Analysis in the UK - *RB (Somalia)*

The Court of Appeal decision in *RB (Somalia) v SSHD*⁸ was handed down in March 2012. The appellant's claim in that case arose from her membership of the Bajuni minority clan in Somalia.⁹ She claimed asylum in June 2007, and SPRAKAB,¹⁰ the agency with which the UK Border Agency (UKBA) contracted its language analysis work at the time she applied for asylum, analysed her speech on behalf of the UKBA four days after her screening interview.

Most asylum applicants have a screening interview and it precedes the substantive interview at which the details of their narrative of persecution are given. UKBA's guidance says that screening procedures should be used to establish the applicant's background and identity, their reasons for applying for asylum and their route into the UK.¹¹ At screening, applicants can also be asked to undergo language analysis. The process, as practiced when the applicant in *RB(Somalia)* claimed asylum, is described in the UKBA's *Language Analysis Asylum Process Instruction*(API). It started with a telephone interview, which would take place between the asylum applicant and the SPRAKAB analyst.¹² The applicant would be asked questions relating to language and country of origin, and their speech would be recorded.¹³ According to the API, the full outcomes of the result would be framed as follows:

- a) Applicant speaks language X found **with certainty not** in the country/area they claim to be;
- b) Applicant speaks language X found **with certainty** in country area
- c) Applicant speaks language X found **most likely** in country/area
- d) Applicant speaks language X found **likely** in country/area
- e) Applicant speaks language X found **possibly** in country/area

Although the API told decision-makers to look at all evidence about nationality, and not just the language analysis result, they were also told that the combination of a finding that the applicant speaks a language found 'with certainty not' in the claimed country of origin¹⁴ and insufficient knowledge of the country of origin 'provides strong evidence that the applicant is not of the nationality they claim to be'.¹⁵ In *RB (Somalia)*, the preliminary result of the SPRAKAB analysis was that the applicant spoke a variety of Swahili with certainty not found in Somalia but with certainty found in Kenya.¹⁶

*J.I.A.N.L. 258 Language analysis, suspicion and consequences

It is not clear from the decision why the applicant in *RB (Somalia)* underwent language analysis, but it may simply have been because she claimed to be Somali. At the time, the relevant API told decision-makers that they should use language analysis when they were doubtful about whether an applicant was from their claimed country of origin,¹⁷ and the same API also permitted the routine use of language analysis for applicants who claimed to be Somali or Afghani.¹⁸ In other words, language

analysis could be used when the decision-maker suspected that the applicant was concealing their nationality, but it could also be used routinely for certain nationalities. Having already noted the decision maker's duty to give individual consideration to each asylum applicant's claim, it is obvious that the routine use of language analysis for particular nationalities contradicts that duty. It also indicates why applicants may have undergone language analysis simply because they claimed to be Somali, rather than because of doubts about them as individuals.

According to John Campbell,¹⁹ we do not have far to look before we discover the reasons why language analysis is associated with a doubtful approach to asylum claims. For him, the underlying premise of language analysis was to be found in the same *Language Analysis API*, where it stated:

'Intelligence and CID data reports indicate that there may be a significant percentage of asylum applicants claiming to be a nationality which is different to their true nationality, in order to further their asylum claim and/or to frustrate removal'.²⁰

The link between language analysis and a doubtful approach is also clear from one of the API's aims, which is 'to assist in identifying an applicant's nationality in cases of doubt and to deter fraudulent claims'.²¹

John Campbell argues that the premise underpinning the routine use of language analysis for Somalis and Afghanis - that a significant percentage of claims from these nationalities are false - is flawed.²² And for him, the UKBA's institutional response - the use of language analysis as practised by SPRAKAB - has demonstrably failed to meet the Government's own objective of reducing the number of applicants from those countries.²³ Others, such as Heaven Crawley, have also explored the policy objectives lying behind the introduction of measures aimed at reducing the number of asylum applications - including the introduction of accelerated procedures for clearly unfounded cases and restrictions on socioeconomic support - and have **J.I.A.N.L. 259* questioned their compatibility with an accessible asylum process as well as their effectiveness in deterring claims.²⁴

This article notes that policy objectives which seek to reduce the number of asylum applications are linked to the introduction of non-suspensive appeals and other such measures, and it does not attempt to revisit the arguments, made by others, as to whether such measures are justified or effective. However, where a doubtful approach to applicants combines with the use of language analysis, official guidance indicates that accelerated procedures may be used, and this can result in individual applicants having little opportunity to establish their claim. This aspect of the impact which language analysis can have on the asylum decision-making process is discussed next.

Language analysis and accelerated decision-making

Examination of the relevant APIs reveals how language analysis can lead to the consideration of claims being abbreviated or accelerated. If, following the screening interview, the UKBA decision-maker considers that the preliminary language analysis result provides strong evidence that the applicant is not of the nationality claimed, or if language analysis indicates that the person is a national of one of the countries listed in the relevant legislation as 'generally safe', then the API *Nationality Doubtful Disputed and Other Cases* tells decision-makers to consider whether the asylum application is clearly unfounded.²⁵ If the decision-maker certifies the claim as clearly unfounded, the applicant cannot appeal against the refusal of his asylum claim prior to removal.²⁶ The same API also shows that language analysis can lead to a claim being routed into the Detained Fast Track,²⁷ which means that the applicant will be detained throughout the decision-making process.

A note of caution should of course be struck before we conclude that a language analysis result can determine the outcome of an asylum claim in these circumstances. After all, almost any asylum application can be accelerated, whether language analysis is involved or not.²⁸ What the above account reveals, therefore, is the *potential* for non-suspensive appeals and detained processes to combine with language analysis, and not the extent to which it does happen. We can conclude, however, that when language analysis does lead to non-suspensive appeals, that combination can leave applicants with scant opportunity to challenge either the analysis itself or the refusal of their claim.²⁹ Equally, language analysis may be especially detrimental in the Detained Fast Track, since the prospects of an applicant having the wherewithal, from detention, to instruct an expert who can counter the linguistic analysis obtained by the UKBA must be very slim.³⁰

***J.I.A.N.L. 260 RB (Somalia) at the Upper Tribunal**

In *RB (Somalia)*'s case, the applicant's substantive interview was conducted through an interpreter who spoke Kibajuni, the language of the Somali clan on whose membership her claim was based. Her asylum claim was not accelerated and she appealed its refusal to the First-tier Tribunal. When this appeal - at which she was unrepresented - failed, she was then allowed to take her case to the Upper Tribunal on the basis that the Immigration Judge had not properly considered two main points. The first was that the SPRAKAB personnel, who had decided that she spoke Swahili, and not Kibajuni, were anonymous, and this did not comply with the usual rules requiring expert witnesses to be identified. The second was that while SPRAKAB had chosen to interview her in Swahili, she had given evidence at her appeal in Kibajuni, the language of the Bajuni clan. As already noted, her substantive interview - which had lasted over four hours - had also been conducted through a Bajuni interpreter.

The Upper Tribunal regarded *RB Somalia's* appeal as an appropriate one in which to look in general terms at linguistic evidence and the SPRAKAB approach.³¹ They considered oral evidence from the director of SPRAKAB, and written reports from a contra- expert who had unfortunately predeceased the hearing. They also had written material and reports on research carried out into the general treatment of Somali claims from Dr Derek Nurse, and country information reports. In their conclusions, the Upper Tribunal endorsed SPRAKAB's approach. The anonymity of SPRAKAB analysts, although contrary to the usual rules about expert witnesses, did not concern them, as long as their qualifications were clear. They were impressed with the fact that SPRAKAB used different analysts to check the piece of recorded speech,³² and they criticised the contra-expert for omitting to record her conversation with the appellant.³³ They did not consider the criticism that the analysis should have been conducted in the appellant's claimed first language to be a valid one, and they did not regard the fact that Bajuni interpreters had been used at interview and appeal as relevant.³⁴

Their general guidance was that where linguistic analysis evidence was being relied on, then the speech recordings should be made available to the opposing party.³⁵ In relation to the SPRAKAB approach, they acceded to their request for anonymity³⁶ and, although they noted the advice which said that a decision about a person's origin should not be based solely on linguistic analysis, their own guidance was that where there was clear and reasoned analysis leading to an opinion expressed in terms of certainty or near certainty, 'little more will be required to justify a conclusion on whether an applicant or appellant has the history claimed'.³⁷

Although they acknowledged the possibility that the kind of linguistic analysis used by SPRAKAB could be subject to more peer review in the future,³⁸ the Upper Tribunal concluded that 'little more' than SPRAKAB's 'with certainty' finding that the appellant was not Somali was required, and her claim failed.

***J.I.A.N.L. 261 Responses to *RB (Somalia)* at the Upper Tribunal**

Reactions to the Upper Tribunal decision relate to two aspects of linguistic analysis: the choice of language and the person who conducts the analysis.

Choice of language

The Upper Tribunal issued its decision in February 2010 and it sparked some debate about their endorsement of an approach which allowed analysis to be conducted in a language which was not the applicant's claimed first language. Writing in 2010, John Brick criticised that approach for lacking independence, on the basis that speaking to the applicant in a Kenyan language assumed the appellant not to be Bajuni before she had uttered a word.³⁹ When the manager of SPRAKAB, who gave oral evidence before the Upper Tribunal, had been asked why Swahili, in preference to Kibajuni, had been chosen as the language of the first interview, her response had been that the overwhelming majority of those claiming to be Bajuni turned out to be from Kenya.⁴⁰ While this might explain their approach, it appears to confirm a lack of impartiality and indicates prejudgement in SPRAKAB's approach to Somali claims. And it should also be noted that the extent to which fraudulent Somali claims feature in the UK's asylum process is disputed. Writing in the journal *Ethnic and Racial Studies*, John Campbell refers to UKBA's own data on the use of language analysis between 2007 and 2009.⁴¹ While that data indicated that some claims to be Somali could be false,⁴² it also revealed a much lower incidence of fraudulent claims than their own guidance, or SPRAKAB's evidence, suggested. It is also worth observing at this point that Bajuni claims are often associated with their membership of a minority ethnic group who speak a language or dialect originally spoken in Somalia but also associated with Kenya due to conflict-induced displacement.⁴³

In relation to the choice of language, the contra expert in *RB(Somalia)* had also considered that it was 'obvious' that the appellant would have avoided Kibajuni words, so that the Swahili speaking interpreter could understand her,⁴⁴ and according to John Brick this type of vocal adjustment can affect the validity of the resulting report.⁴⁵

Who should analyse? Native speaker versus linguist

Views also diverge on another aspect of the methods used in *RB Somalia*'s case and that is the question of who should conduct the analysis. SPRAKAB uses 'native speaker' analysts, rather than linguists, to perform this key role. This methodological question is of course crucial, and few analysts will meet the ideal standard, set by Maryns, of a person who combines linguistic **J.I.A.N.L. 262* expertise, the ability to express knowledge using standard systems for transcription and discourse representation, and detailed local knowledge - the 'man next door'.⁴⁶ In the absence of the ideal analyst, however, there does not seem to be consensus among linguists as to who should conduct the analysis.⁴⁷ But, leaving aside the question of how much linguistic expertise an analyst should have, and how 'native' a native speaker needs to be, on the basis that these are questions for linguists to address,⁴⁸ we are still left with questions about how a suitable analyst and the appropriate language of analysis should be identified in individual cases. Taking into account the divergence of views that exist on the methods that should be used to analyse speech, the Upper Tribunal's endorsement of SPRAKAB's methods of interview and analysis is discouraging, but it is the prominence which the Upper Tribunal itself has given to the case which gives the issues it raises added importance.

***RB (Somalia)* as general guidance**

The Upper Tribunal's statement that *RB (Somalia)* gives general guidance as regards the treatment of linguistic analysis evidence creates the expectation that the scope for individual cases to depart from it will be limited. This is similar to the approach taken to Country Guidance cases, which are treated as binding precedent by the First-tier and Upper Tribunals.⁴⁹ However, the case does not claim to set precedent in respect of appeals about Somalia, and so Country Guidance is the wrong description to give it. Although there is no formal indication that *RB (Somalia)* has been 'starred', its general guidance could be seen as similar to a 'starred' determination, which is a mechanism for treating cases dealing with particular matters as authoritative about that matter.⁵⁰

Two of the three matters on which the case is to be treated as general guidance are uncontroversial. They are firstly that sound recordings which form the basis of any linguistic evidence should be made available to the opposing party,⁵¹ and secondly that the appellant and the UKBA should each be able to have any linguistic evidence in a particular case expertly assessed, and that all such evidence should be taken into account.⁵² These matters reflect good practice, but the third matter, which is the Upper Tribunal's endorsement of the 'with certainty' opinions which SPRAKAB reach, has provoked disquiet. Three points are relevant here. Firstly, opinions expressed with certainty conceal disagreements among experts. While one expert may be certain about their conclusions, others may disagree that their methods are appropriate, and we have already seen that the decision in *RB (Somalia)* to analyse the appellant's **J.I.A.N.L. 263* speech in her claimed second language, not her first, and the reliability of the conclusions reached in these circumstances is one such area of disagreement.⁵³ Secondly, 'with certainty' conclusions can indicate certainty about uncertain things. For example, one issue on which the experts seem to agree is that language analysis does not determine nationality. Language analysis can - as Diana Eades puts it - be used to draw reasonable conclusions about the place where a speaker has learned to be a member of local societies,⁵⁴ but linguists should not be asked to make determinations about national origin.⁵⁵ At best, language analysis indicates the place(s) of socialisation of individuals, but not their nationality.⁵⁶ And yet, decision-makers are to treat a language analysis report which concludes that an applicant has insufficient knowledge of the country and speaks a language found 'with certainty not' in the claimed country of origin as strong evidence that they are not from that country. This is the third difficulty associated with the Upper Tribunal's endorsement of 'with certainty' conclusions. The Upper Tribunal appears to be endorsing an approach which can ultimately leave the task of determining national origin with the linguist.

***RB (Somalia)* at the Court of Appeal**

In March 2012, the Court of Appeal arrived at their decision on *RB (Somalia)*.⁵⁷ The Court endorsed the Upper Tribunal's approach to linguistic analysis evidence, with one reservation. They noted that

the UKBA official had expressed doubts about the applicant's claim to be Somali four days before the first SPRAKAB analysis was conducted, and the Court considered that these circumstances could breach the usual rules requiring experts to ensure that their independence was maintained and that their evidence was not influenced by the pressures of litigation.⁵⁸ As Tony Good has noted, it is difficult for any expert to remain objective when asked to give evidence for one side in adversarial litigation.⁵⁹ As regards the judicial task of assessing and determining the value and weight to be attached to expert evidence in asylum cases, the question of the proper approach to be taken has also exercised judges for a long time.⁶⁰ In order to address some of these issues, Practice Directions, setting out what is required of expert witnesses, have been introduced by the Tribunals.⁶¹ The expert's paramount duty is to help the Tribunal, and that duty overrides any obligation to the person instructing or paying the expert. The expert's opinions should be objective and unbiased, should consider those facts which detract from his opinion as well as those which support it and the expert should not assume the role of an advocate.⁶² Although the Upper Tribunal did not think that these rules should apply to SPRAKAB's reports since the rules related to the preparation of evidence for **J.I.A.N.L. 264* appeals while the reports were 'typically prepared for a decision-maker and not for an appeal',⁶³ the Court of Appeal disagreed:

'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'.⁶⁴

Having warned the Upper Tribunal that the fact that a report had been prepared for a first instance decision-maker, rather than for the Tribunal, left unaltered the requirement that expert evidence should be independent, the Court of Appeal's intervention in the case ended, and in their conclusions, the Court found no error of law in the Upper Tribunal's decision. Emphasising the powers of that tribunal to manage the conduct of the cases presented to the First-tier and Upper Tribunals, the Court pointed out that it was within the Upper Tribunal's broad discretion to control the evidence presented at both Tribunals, and to ensure that expert reports were objective. That discretion allowed them to waive the usual rules on expert evidence in relation to SPRAKAB reports.⁶⁵

It is disappointing, given the context of suspicion within which linguistic analysis evidence so often comes into play, that the Court of Appeal went no further than to express their concern that the usual rules, designed to avoid bias, were not being applied to this kind of evidence. The Court reminded the Upper Tribunal that they should ensure that linguistic analysis evidence is sufficiently independent, and this may comply with the restrained approach which has characterised the higher courts' relationship with tribunals in recent times, but it does not provide the guidance which might be expected to arise from its supervisory role in relation to tribunals.⁶⁶

Where next for language analysis?

As noted at the outset, the purpose of this article is to illustrate the use of language analysis in asylum decision-making in the UK through the medium of the decisions in *RB (Somalia)*, and to make suggestions for the future. Regarding the future, the Upper Tribunal has acknowledged that the reliability of language analysis has limits, that it is a potentially developing discipline, and that the methods used by SPRAKAB at the time *RB (Somalia)* was decided may become subject to more peer review.⁶⁷

Other methods and other approaches to linguistic analysis evidence exist, but the opportunities for these to be presented in asylum appeals, under current tribunal procedures, **J.I.A.N.L. 265* will depend on the extent to which the UKBA itself considers other forms of analysis, and also on the extent to which counter expertise is available and is used by appellants. Perhaps the Upper Tribunal, given the opportunity, will revisit linguistic analysis evidence themselves?

Experience from elsewhere

Discussions about the role played by language in the determination of asylum seekers' origins in a range of countries have taken place in different fora, as already noted,⁶⁸ and that work reveals a wealth of experience from which the UK's decision-making process can draw. While the extent of its use within any jurisdiction can be difficult to ascertain, other countries have longer histories of using

language analysis. In 2003, for example, Eades and others published research into the Australian authorities' use of language analysis,⁶⁹ by which time Maryns and Blommaert had also published research on the narratives of asylum seekers in Belgium, which touched on the same topic.⁷⁰ In Australia the interview between the applicant and the immigration department was recorded and the recording was then subjected to linguistic analysis by a private company,⁷¹ a method which is similar to that used in the UK. In Belgium, by contrast, language analysis took place inside a Government Department. The Belgian Documentation Centre (CEDOCA) established an independent language analysis desk in 2001 whose practice was to use language analysis at a late stage in the procedure when there was already considerable doubt about an applicant's origin.⁷² It only conducted analyses in respect of a few particular areas, and it based those analyses on a recorded interview between an applicant and an official which lasted at least thirty minutes. The report had to address specific issues about phonology, syntax and other linguistic and cultural matters. It was always emphasised that, where the result was negative, it could not be regarded as conclusive regarding an applicant's nationality, and should only form part of the evidential assessment. Only when the result was positive could it be decisive.⁷³ According to Maryns, the separate Belgian language analysis desk became a victim of its own adherence to high quality standards, as it took on very few cases and was eventually shut down.⁷⁴ Dirk Van Heule's observation of more recent data confirmed that language analysis was exceptional in the Belgian procedure, was only used in twenty cases in 2009, and then only in the late stages of the decision-making process.⁷⁵ In 2003, Australian researchers concluded that language analysis as practised there was not valid or reliable, in that it appeared to be based on 'folk views' about the relationship between language, nationality and ethnicity, and not on sound linguistic principles.⁷⁶ There is experience to draw on. As well as showing that language analysis can be used differently- by analysing fewer applicants' speech, by giving its results less ***J.I.A.N.L. 266** prominence in a decision, or by using it at a later stage in the process- international experience also reveals the areas of disagreement and consensus which remain.

Discussion and conclusions

Asylum decision-making is notoriously difficult. Decision-makers can gather relevant case law, guidance and information about the country of origin, and puzzle over it at length in their efforts to decide on a claim. In the end, the decision comes down to whether they believe the applicant or not. It is therefore not surprising, given the difficulties of deciding credibility, that decision-makers look for whatever help they can get. And quasi-scientific tools, like language analysis, can seem to help. Having explored its use on previous pages, and with the aim of suggesting ways of achieving more accurate decisions, some tentative conclusions can be drawn here about the correct approach to be taken to language analysis in the initial asylum decision, and at appeal.

In relation to the initial asylum decision, language analysis evidence is potentially relevant to some degree. It is relevant because questions about the link between the way a person speaks and their country of origin should not be left to the decision-maker. Such questions are matters of specialist expertise, just as questions about medical and psychological conditions are matters for experts. Already, this conclusion may be questioned on the basis that it over-emphasises the role of expert evidence in a field where, in order to ensure that otherwise generally credible applicants are given the benefit of the doubt,⁷⁷ there are circumstances where proof of all elements of a claim is not required,⁷⁸ and where, as already noted, it may be impracticable to expect applicants to instruct expert evidence.⁷⁹ But while there are attractions to an apparently simpler approach which does not require expert evidence, it has its drawbacks since it may lead to judgments - including those about the link between language and origin - being made in opaque and unaccountable ways.

If language analysis is to be used, then the method should comply with the experts' consensus about how it should be used.

There are risks of error both in using and in not using language analysis and therefore the role it plays in the decision-making process should be an appropriate one. The risk arising from reliance on a report which erroneously concludes that someone does not speak in the way that a person from their claimed country of origin would speak is that the decision-maker returns that person to persecution. When assessing the risks associated with language analysis, therefore, steps should be taken to reduce the risk of error and from the UKBA perspective, this would include issuing appropriate guidance to decision-makers. The risks of not using language analysis at all should also be assessed. If, in the absence of formal linguistic evidence, decision-makers - perhaps along with interpreters - would still make informal judgments about the language and origin of an applicant, but would do so covertly,⁸⁰ then open reliance on formal linguistic evidence is preferable.

We therefore need to consider what type of guidance to decision-makers would reduce the risk of error arising from its use. Such guidance could have four elements:

***J.I.A.N.L. 267** • It should start from the premise that each applicant is entitled to an individual determination of their claim and therefore language analysis should not be used automatically or routinely for any nationality.

- Analysts should have relevant expertise. Since there is an absence of consensus among the experts as to who should conduct the analysis, with some experts insisting that only qualified linguists will do, while others regard native speakers supervised by linguists as suitable, the question of what constitutes relevant expertise remains a matter of debate. However, some basic conclusions can be drawn: it is implausible that linguistic expertise would not be required, and simply speaking the language cannot be enough.

- Guidance should also address the form of the analyst's report, which should include sufficiently detailed narrative about the reasoning on which any conclusions are based.

- There should be detailed guidance to the decision-maker on how to use the report. As well as reminding them of their duty to consider the narrative and the opinion of the expert, this guidance must also emphasise that it is for the decision-maker, and not for the linguist, to decide the claim. However tempting the prospect of sharing the responsibility for a decision might be, the task of looking at all the evidence and giving each element its appropriate weight cannot be delegated to the expert since to do so would deny the applicant their right to an individual decision by the determining authority,⁸¹ which in the UK means that a UKBA decision-maker must take it.⁸²

We can now turn to consider how language analysis evidence should be tested on appeal. Here, the normal approach to expert evidence should be taken, as set out in the Practice Directions of the Immigration and Asylum Chamber of the First-tier and Upper Tribunals. Aspects of these Practice Directions have been discussed above⁸³ and they involve treating the analyst as a witness, including identifying them, cross-examining them and ensuring that, as far as possible they comply with the rules designed to ensure impartiality. Equally, the contra expert should give evidence and be examined on it.

Finally, were the Upper Tribunal and the Court of Appeal correct to approach the case of *RB (Somalia)* in the way that they did? The uncontroversial matters included in the Upper Tribunal's guidance have already been noted and they are firstly that, where linguistic analysis evidence is being relied on, then the speech recordings should be made available to the opposing party⁸⁴ and secondly that any linguistic evidence being relied on by one party should be expertly assessed, made available to the other and taken into account in any decision.⁸⁵ On the other hand, the Upper Tribunal should not have excused SPRAKAB witnesses from being identified in the same way as any other expert witnesses, and should not have endorsed SPRAKAB's 'with certainty' conclusions, since their statement that 'little more' than those conclusions was required runs the risk of encouraging over-reliance by decision-makers on such reports.

Although the First-tier and Upper Tribunal appeals structure has encouraged the higher courts to be restrained in their supervision of tribunal decision-making, the supervisory function still remains,⁸⁶ and therefore the Court of Appeal should have given clear guidance about the ***J.I.A.N.L. 268** use of this technique, including that linguistic analysis evidence should be treated like any other expert evidence.

As a postscript, something has to be said about the cost of linguistic analysis. Restrictions on public funding may put such expertise even further beyond the reach of individual appellants than it already is,⁸⁷ and austerity measures may also limit the UKBA's use of language analysis evidence. If that happens, it will then be the task of those involved in decision-making and appeals to think once more about how they can ensure that judgments about language and origin are made in fair and appropriate ways.

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1. *RB (Linguistic evidence -Sprakab) Somalia* [2010] UKUT 329 (IAC); *RB (Somalia)* [2012] EWCA Civ 277.

2. Guidelines for the Use of Language Analysis in Relation to Questions of National Origin in Refugee Cases, Language and National Origin Group, June 2004 in D Eades 'Applied Linguistics and Language Analysis in Asylum Seeker Cases' (2005) *Applied Linguistics* 26/4 503-526.
3. Guideline 3 and 7 (n 2 above). This approach has also been endorsed by the Language and Asylum Research Group, hosted by Prof Peter Patrick of Essex University <http://www.essex.ac.uk/larg/>
4. T Cambier-Langeveld 'The Validity of Language Analysis in the Netherlands' in K Zwaan et al (eds) *Language and Origin: The Role of Language in European Asylum Procedures: Linguistic and Legal Perspectives*, (Wolf, 2010) at p 21.
5. D Eades (n 2 above) p 503.
6. UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, January 1992, para 196: Directive 2011/95/EU of 13 December 2011 (recast EU Qualification Directive), art 4. Although the UK has opted out of the recast, it is still bound by the original Qualification Directive 2004/83/EC Article 4 of which is in similar terms. UK Immigration Rule 339L is in the same terms.
7. See (for example) Heaven Crawley *Chance or Choice? Understanding why asylum seekers come to the UK*, Refugee Council, January 2010.
8. [2012] EWCA Civ 277.
9. *AJH (Somalia)* [2003] UKIAT 00094: *KS (Somalia CG)* [2004] UKIAT 00271.
10. Skandinavisk Sprakanalys AB(Sprakab), Stockholm, Sweden.
11. Asylum Process Guidance *Registering an Asylum Application in the United Kingdom*, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/screening-and-routing/guidance/registering> accessed 11 July 2012. Some controversy surrounds whether UK screening procedures are used appropriately. See for example A Aynsley Green *Claiming Asylum at a Screening Unit as an Unaccompanied Child*, Children's Commissioner, England, March 2008.
12. The analyst should speak the language to be analysed 'at mother tongue level'. *Language Analysis API*, Part 4 How the Direct Analysis works updated 28 January 2009.
13. A full language analysis report would be sent to UKBA within 72 hours of the interview *Language Analysis API*, Part 4 How the Direct Analysis works updated 28 January 2009.
14. along with any other of the findings (b) to (e) (above).
15. *Language Analysis API*, Part 8 Language Analysis - Full Report updated 28 January 2009.
16. *RB (Linguistic evidence Sprakab) Somalia* [2010] UKUT 329 (IAC) at para 13.
17. *Language Analysis API* updated 28 January 2009.
18. N1 suitability criteria for direct language analysis part 3.
19. J Campbell 'Language Analysis in the United Kingdom's refugee status determination system: seeing through policy claims about "expert knowledge"' (2012) *Ethnic and Racial Studies*, pp 1-21.
20. *API Language Analysis* para 2.1, 29 January 2009. At the time of writing (June 2012) this instruction is no longer available on the UKBA website, but the more recent Asylum Process Instruction *Nationality: Doubtful, Disputed and other cases* deals with language analysis alongside other methods of identifying an individual's nationality.
21. *API Language Analysis* para 2.1, 29 January 2009. The first of these situations of doubt is where the individual decision maker suspects that an individual applicant is concealing their nationality, and uses language analysis to test their claim. The question of the extent to which language analysis can promote accurate decision-making has already been mentioned. The nature and reliability of language analysis evidence have also been touched on, and these issues are returned to below in the context of its treatment as a type of expert evidence. The impact which the use of language analysis has - as a means of testing claims - on the ability of the decision maker to retain an open mind as to the establishment of a claim will also be returned to below.
22. J Campbell 'Language Analysis in the United Kingdom's refugee status determination system: seeing through policy claims about "expert knowledge"' (2012) *Ethnic and Racial Studies* pp 1-21 at p 12.
23. *Ibid*, at p 12.
24. H Crawley *Chance or Choice? Understanding why asylum seekers come to the UK*, Refugee Council, January 2010 points to colonial links, social networks and the role of agents as influential in destination decisions of refugees.
25. Asylum Process Instruction *Nationality Doubtful Disputed and Other Cases* updated 5.10.10 Nationality Immigration and Asylum Act (NIAA) 2002 s 94. The decision-maker can also decide to certify the application as clearly unfounded if the language analysis indicates that the person is a national of one of the listed countries which are considered

- 'generally safe'. These include South Africa and Kenya (for men). NIAA 2002 s 94(4)(w) and (ee); *API Certification under Section 94(4) of the NIAA 2002*.
26. NIAA 2002 s 94. Judicial Review would be the only remedy available prior to removal.
 27. Language Analysis API, Part 5 Routing Following Preliminary Results, updated 28 January 2009.
 28. NIAA 2002 s 94 individual certification of claims as clearly unfounded.
 29. See S Craig and M Fletcher 'The Supervision of Immigration and Asylum Appeals in the UK; Taking Stock' (2012) Vol 24, No 1 *International Journal of Refugee Law* 60-84 for a discussion of the situations which may fail to meet effective remedy requirements under EU law. It is argued that the combination described here can be one of those,
 30. The rate of successful appeal in the detained processes is, overall, extremely low: Independent Chief Inspector of the UKBA *Asylum: A thematic inspection of the Detained Fast Track*, July - September 2011.
 31. *RB (Linguistic evidence - SPRAKAB) Somalia* [2010] UKUT 329(IAC) at para 7.
 32. *Ibid*, at paras 154-169.
 33. *Ibid*, at para 173.
 34. It was the way that the appellant spoke Kibajuni rather than how she understood it which was the issue in *RB (Linguistic evidence - SPRAKAB) Somalia* [2010] UKUT 329(IAC) at para 151. Also, the Tribunal are uneasy about interpreters being asked to give evidence about the language of an appellant as it requires the interpreter to switch roles from interpreting the appellant's evidence to giving evidence themselves. See for example *Mohamed (role of interpreter) Somalia* [2011] UKUT 337 (IAC).
 35. *RB (Linguistic evidence - SPRAKAB) Somalia* [2010] UKUT 329 (IAC) at paras 172 and 173.
 36. *Ibid*, subject to details of background and qualifications being given, see para 174.
 37. *Ibid*, at para 171.
 38. *Ibid*, at para 159.
 39. J Brick 'Language Analysis for the Determination of Origins, in light of the recent UK Upper Tribunal Decision' (2010) *The Researcher*, The Refugee Documentation Centre, Ireland, at p 6. Concerns about conducting language analysis in a language other than the applicant's claimed first language have been raised elsewhere, as discussed further below. S Symonds 'Case Comment *RB(Linguistic evidence - Sprakab) Somalia*' (2011) Vol 25, No 1 *IANL* 72-75.
 40. 97% *RB (Linguistic evidence - SPRAKAB) Somalia* [2010] UKUT 329 (IAC) at para 93.
 41. J Campbell 'Language Analysis in the United Kingdom's refugee status determination system: seeing through policy claims about "expert knowledge"' (2012) *Ethnic and Racial Studies*, pp 1-21 Table 4 Data source FOI requests to the UKBA.
 42. *Ibid*, at page 12: UKBA data indicated that about one fifth of the Somali applicants who underwent language analysis during that time were considered to be Kenyan.
 43. *Ibid*.
 44. *RB (Linguistic evidence - SPRAKAB) Somalia* [2010] UKUT 329(IAC) at para 107, referring to written report.
 45. J Brick *The Researcher*, (2010) The Refugee Documentation Centre, Ireland. John Campbell is also critical of the practice of interviewing applicants in Swahili when their first language is Kibajuni, on the basis that it does not follow official guidance, 'Language Analysis in the United Kingdom's refugee status determination system: seeing through policy claims about "expert knowledge"' (2012) *Ethnic and Racial Studies* at p 13.
 46. K Maryns 'Identifying the Asylum Speaker: Reflections on the Pitfalls of Language Analysis in the Determination of National Origin' in K Zwaan et al (eds) *Language and Origin: The Role of Language in European Asylum Procedures: Linguistic and Legal Perspectives*, (Wolf, 2010) at p 113.
 47. For the drafters of the Guidelines mentioned above, 'a judgment about whether the language spoken by the applicant is consistent with the claims being made about the applicant's origin cannot be made by anyone without relevant linguistic training, regardless of whether they are a native speaker of the relevant language variety' Guidelines from Linguists for LADO. Eades in K Zwaan et al op cit p 38; T Cambier-Langeveld regards native speaker competence as essential, and the linguist's role as supervisory, and therefore secondary to that of the native speaker analyst 'The Validity of Language Analysis in the Netherlands' in K Zwaan et al (eds) *Language and Origin: The Role of Language in European Asylum Procedures: Linguistic and Legal Perspectives*, (Wolf, 2010) at p 22.
 48. D Eades 'Guidelines from Linguists for LADO' in K Zwaan et al op cit p 38; S Moosmuller 'IAFPA Position on Language Analysis in Asylum Procedures' in K Zwaan et al op cit at p 43.

49. Practice Direction 12, Starred and Country Guidance Determinations, *Practice Directions, Immigration and Asylum Chamber of the First-Tier Tribunal and the Upper Tribunal*, Part 4, February 2010.
50. Practice Direction 12.1, Starred and Country Guidance Determinations, February 2010, *Practice Directions, Immigration and Asylum Chamber of the First-Tier Tribunal and the Upper Tribunal*, Part 4.
51. *RB (Linguistic evidence - SPRAKAB) Somalia* [2010] UKUT 329 (IAC) at para 173.
52. *Ibid*, at para 172.
53. K Zwaan et al (eds) *Language and Origin: The Role of Language in European Asylum Procedures: Linguistic and Legal Perspectives*, (Wolf, 2010) introduction.
54. D Eades Guidelines for Linguists in LADO in K Zwaan et al (*ibid*) p 36.
55. Guidelines for the Use of Language Analysis in Relation to Questions of National Origin in Refugee Cases, in Eades, n 2 above, Guideline No 2.
56. D Eades 'Testing the Claims of Asylum seekers: the Role of Language Analysis' (2009) Vol 6, No 1 *Language Assessment Quarterly* 30-40.
57. *RB (Somalia) v SSHD* [2012] EWCA Civ 277.
58. *Ibid*, at para 12.
59. The adversarial context, according to Good, can cause social scientists disquiet, since it tends to pressurise experts to profess greater certainty than they really feel: A Good *Anthropology and Expertise in the Asylum Courts* (Cavendish, 2007) p 130.
60. *Karanakaran v SSHD* [2000] 3 AllER 449 (CA).
61. Direction 10, *Practice Directions: Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, February 2010.
62. Practice Direction 10.1 to 10.4 (above).
63. *RB (Linguistic Evidence Sprakab) Somalia* [2010] UKUT 329 (IAC) para 167.
64. *RB (Somalia) v SSHD* [2012] EWCA Civ 277 at para 15.
65. *Ibid*, at para 16.
66. *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2011] 3 WLR 107; *Eba v Advocate General for Scotland* [2011] UKSC 28. S Craig 'Judicial Review: How much is too much? A view of *Cart Eba* and *MR Pakistan* from the Asylum and Immigration Perspective' (2012) Vol 16, No 2 *Edin LR* 210-223. Such restraint has not been embraced with equal enthusiasm in Scotland: on the non-application of the so called 'second appeal grounds' to statutory appeals in Scotland, see *KP and MRK v SSHD* [2012] CSIH 38.
67. *RB (Linguistic Evidence Sprakab) Somalia* [2010] UKUT 329 (IAC) at para 159.
68. See for example K Zwaan et al (eds) *Language and Origin: The Role of Language in European Asylum Procedures: Linguistic and Legal Perspectives* (Wolf, 2010) and the work of the Language and Asylum Research Group <http://www.essex.ac.uk/larg/>
69. D Eades, H Fraser, J Siegel, T Mcnamara and B Baker 'Linguistic Identification in the determination of nationality: a preliminary report *Language Policy* 2/2 179-99.
70. K Maryns and J Blommaert 'Stylistic and thematic shifting as a narrative resource; Assessing asylum seekers' repertoires' Vol 20 *Multilingua* 61-84.
71. D Eades *Applied Linguistics* (2005) 26/4 503-526, above, at p 506.
72. K Maryns 'Identifying the Asylum Speaker: Reflections on the Pitfalls of Language Analysis in the Determination of National Origin' in K Zwaan et al (eds) *Language and Origin: The Role of Language in European Asylum Procedures: Linguistic and Legal Perspectives* (Wolf, 2010) at p 113.
73. *Ibid*, at p 123-4.
74. *Ibid*, at p 113.
75. D Van Heule 'The Use of Language Analysis in Belgian Asylum Procedure' in K Zwaan et al (eds) *Language and Origin: The Role of Language in European Asylum Procedures: Linguistic and Legal Perspectives* (Wolf, 2010) at p 180.

- [76.](#) D Eades *Applied Linguistics* (2005) 26/4, 503-526 at p 512.
- [77.](#) UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, January 1992, para 196.
- [78.](#) UK Immigration Rule 339L.
- [79.](#) See Accelerated decision-making, above.
- [80.](#) Experience from elsewhere for example in S Morgades 'The Asylum Procedure in Spain' in K Zwaan et al (eds) *Language and Origin: The Role of Language in European Asylum Procedures: Linguistic and Legal Perspectives* (Wolf, 2010) p 158 and domestic case law; *Mohamed (role of interpreter) Somalia* [2011] UKUT 337 (IAC), indicate that they would.
- [81.](#) EC Asylum Procedures Directive (2005/85/EC) art 4(1).
- [82.](#) UK Immigration Rule 328.
- [83.](#) *RB (Somalia)* at the Court of Appeal.
- [84.](#) *RB (Linguistic Evidence Sprakab) Somalia* [2010] UKUT 329(IAC) at paras 172 and 173.
- [85.](#) *Ibid*, at para 172.
- [86.](#) *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2011] 3 WLR 107; *Eba v Advocate General for Scotland* [2011] UKSC 28. For a discussion of this function, see Craig and Fletcher 'The Supervision of Immigration and Asylum Appeals in the UK - Taking Stock' (2012) Vol 24, No 1 *IJRL* 60-84.
- [87.](#) S Symonds 'Case Comment, *RB (Linguistic Evidence- Sprakab) Somalia*' (2011) Vol 25, No 1 *IANL* 72-75.
- [88.](#) Thanks to the anonymous reviewer and to Tom Mullen, University of Glasgow, for comments on earlier drafts. Thanks are also due to the unnamed people with whom I have discussed the issues raised here. Errors and omissions are the author's.