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The 2007 Rejection of Anonymous Language Analysis by the Swedish Migration Court of Appeal: A Precedent?

Gregor Noll, Chair of International Law, Faculty of Law, Lund University

This is a case brief of the judgment rendered by the Migration Court of Appeal (*Migrationsöverdomstolen*) on 7 June 2007 in the case UM 583-06. The Migration Court of Appeal is the third and final instance in the Swedish asylum system. Its judgments command informal precedent authority. The present case is the only reported court case to date addressing the evidentiary value of language analysis.

The applicants (a mother and her daughter) claimed to originate from Burma, and more specifically from the area adjacent to the border to Bangladesh. They feared persecution on account of their Rohingya ethnicity upon return to Burma. The applicants did not submit documentary evidence of their Burmese origin.

The first instance Migration Board (*Migrationsverket*) ordered a language analysis. It took the form of a telephone conversation between the analyst and the applicant, in the course of which the applicant's local and regional knowledge was tested.¹ As emerged from the representations made by the Migration Board in the second-instance proceedings in the Migration Court (*Migrationsdomstolen*), this language analysis led the Board to believe that the applicants were citizens of Bangladesh rather than Burmese, and therefore not in need of protection.

The applicants appealed. The Stockholm Migration Court rejected the appeal.

The Migration Court found it to be probable that the applicants originated from Bangladesh, basing itself mainly on arguments related to language and local knowledge. It found it improbable that a 32-year old person who had moved to another language area would completely forget its original dialect (Arakanbengali). Also, the Court noted that the applicant could not speak any Burmese, and was unable to name any of the larger cities in her home region.

The applicant appealed to the Migration Court of Appeal (*Migrationsöverdomstolen*), which granted leave to hear the case. In proceedings at the Migration Court of Appeal, the applicants asserted that the judgment of the Migration Court was based to an excessive degree on the language analysis carried out at first instance. From their

¹ There are two types of analysis in Swedish practice. One is based on a recording (stated to last about 10 minutes), another, termed "direct analysis" (*direktanalys*) based on a telephone conversation between analyst and applicant, in the course of which the applicant's local knowledge might be tested as well. In the present case, the latter type was used.

point of view, this analysis cannot possess a high evidentiary value, as the analyst is anonymous. The applicants argued that anonymity impedes any assessment of his or hers competence. It also bars a proper assessment of questions and answers on local knowledge. Additionally, the applicants gave explanations relating to the mother's linguistic characteristics and to her lack of local knowledge and of the Burmese language. The applicants also stressed that the Migration Board itself no longer cooperates with the language analysis business which carried out her analysis as it does not identify its analysts, and that a Board report conceded that at least one in ten language analysis reports is wrong. Moreover, the applicants drew the attention of the Court to the fact that Court interpreters were required by law to undergo authorization by the Swedish Chamber of Commerce, in the course of which the knowledge of the interpreter is tested. Giving a language test evidentiary value would presuppose that the analyst be subjected to the same demands.

The Migration Board informed the Court that its current contract with its sole provider of language analysis services (Verified AB) stipulates that the identity of an analyst is to be made known to the Board if this information is needed as evidence in court proceedings or otherwise in order to affirm the correctness and/or quality of the language analysis. In the case under appeal, however, language analysis was provided by another company and the analyst is anonymous. However, it has been made known to the Board that the person in question has a higher education degree from Sweden and grew up both in Burma and in Bangladesh. Arakanbengali is his mother tongue and he has a good command of Burmese.

The Migration Court of Appeal held that it is for the applicant to render probable his statements on nationality or country of origin. It believes that the language analysis in question had a more than negligible impact on the assessment of the applicants' origin. The Court pronounced itself on its evidentiary value as follows:

It is the view of the Migration Court of Appeal that a language analysis of the kind at issue in the present case can only possess a marginal evidentiary value, as it has been carried out in a manner that does not fulfil reasonable demands on legal certainty. No quality control has been possible, because it was impossible to identify neither the analyst nor the qualifications and capabilities of that person for that assignment.²

The Migration Court of Appeal found however, that an assessment of all elements of the case and "mainly disregarding from the result of the language analysis" ("*med bortseende I huvudsak från resultatet av språkanalysen*") resulted in that the applicants had not made probable that they originated from Burma. It therefore rejected the claim.

Author's comment:

² Author's translation.

It is perfectly reasonable that the Migration Court of Appeal expresses great scepticism with regard to language analysis by anonymous analysts. Nonetheless, the significance of this judgment is diminished by shortcomings in its evidentiary reasoning.

To my mind, it is obvious that the Migration Court of Appeal has relied on the content of the language analysis to a great degree. Most of the claims presented in the judgments and related to language, dialect and local knowledge stem from the language analysis report. If the evidentiary value of these is reduced to a minimum, the Migration Court of Appeal can only have relied on two other sets of evidence. One is the set of statements made by the applicant. As the Court of Appeal chose to reject the appeal, this set obviously had an insufficient evidentiary value. The other are the interviews on local knowledge conducted by the Migration Board in its own interviews (which contained questions on regional cities in Burma and Burmese national holidays). While the interviewed applicant performed badly, her counsel gave reasonable explanations (denial of education and the right to travel to Rohingya in Burma and the fact that Hindu holidays were of no relevance to her ethnic group).

In order to consider the statements of the applicant as incredible, the Court of Appeal must have attached great importance to certain elements in the second set, i.e. the applicant's lacking knowledge of city names and holidays. Given that the Court of Appeal failed to comment on the explanations by the applicants' counsel, there are only two alternatives. One alternative is that the judgment was badly drafted and omitted an essential doubt the Court entertained on counsel's explanation of the applicant's inability to answer satisfactorily. This doubt would have diminished the evidentiary value of the counsel's explanation greatly. In fact, it would do no less than to decide the case. I cannot believe that the Migration Court of Appeal would omit mention of such a decisive doubt from its judgment. The second alternative is that the Migration Court of Appeal tacitly relied on the language analysis it had all but rejected. Most likely, the language analysis will have affected the Court's assessment of the applicants' credibility, an assessment which it claims to run throughout the whole procedure.³ As I do not believe in the first alternative, this is the only remaining explanation.

³ Elsewhere, Jennifer Beard and I have analysed the way the Migration Court of Appeal conceives of the asylum procedure: “[W]e may imagine RSD as consisting of two parallel procedures: one is explicit; it determines the refugee objectively on the basis of the evidence. It is shadowed by a second one, which is dedicated to the truthfulness of the refugee ... It is, however, the second, shadow procedure that is supervening the first, overt one, apparently due to the enigmatic rule of the ‘benefit of the doubt’.” [Reference omitted]. Jennifer Beard and Gregor Noll, “Parrhesia and Credibility. The Sovereign of Refugee Status Determination”. 18 *Social and Legal Studies* (2009), pp. 455-477, at p. 463.

I see myself compelled to conclude that the Swedish Migration Court of Appeal simply did not practice what it preached in the paragraph quoted above. This judgment is a performative self-contradiction.

Yet it is not without interest, although it will leave us at loss if we try to extract precedent value from it. It tells us that any “objective” assessment of the applicant’s origin by means of her language or her knowledge of what is “local” to her origin brings us straight back to the most subjective of all questions: what are the markers of truth, and how are we to read them? The Court did not wish to delegate this question to profit-seeking businesses employing anonymous “experts”. In that, it did well. But it actually substituted the shadowy language experts with its own shadowy and inarticulate finding.

Biographical Note

Professor Gregor Noll holds the Chair of International Law at the Faculty of Law, Lund University since 2006. His main fields of research are migration and refugee law, human rights law, the use of force and international humanitarian law. His most recent publication is “Why Human Rights Fail to Protect Undocumented Migrants” in a Special Issue on *The Laws of Undocumented Migration* of the *European Journal of Migration and Law* (Vol. 12, 2010) edited by him. Noll has authored a number of texts on evidentiary assessment and the asylum procedure.