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

General Principles at Hearings with Court Interpreters: TS (Interpreters) Eritrea [2019] UKUT 00352 (IAC)

Question(s) at stake:

Whether the First-tier Tribunal's decision was affected by procedural unfairness as a result of (1) refusing to adjourn the hearing due to issues with the accuracy of the interpretation at the hearing and (2) failing to take into account post-hearing evidence; and (3) whether the First-tier Tribunal's decision was affected by an error of law as far as the assessment of the appellant's evidence was concerned.

Outcome of the ruling:

The First-tier Tribunal's decision was affected by procedural unfairness as a result of (1) refusing to adjourn the hearing due to issues with the accuracy of the interpretation at the hearing and (2) failing to take into account post-hearing evidence. The issue of whether the First-tier Tribunal's decision was affected by an error of law concerning the assessment of the appellant's evidence was remitted to the First-tier Tribunal before a different judge and a different interpreter.

The Upper Tribunal also gave guidance by providing some general principles that must always be taken into consideration when court interpreters are involved.

Topic(s):

- Immigration and Asylum

Keywords:

- Asylum seeker
- Asylum procedures
- Refusal of asylum

- Applicant's credibility

Tag(s):

- Interpreter

Author(s):

- Bianchini, Katia (Max Planck Institute for Social Anthropology, Department Law and Anthropology, Germany)

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United Kingdom

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TS (interpreters) Eritrea [2019] UKUT 00352 (IAC)

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https://tribunalsdecisions.service.gov.uk/utiac/2019-ukut-352

ECLI:

No ECLI number / ECLI number unknown

Date:

20 August 2019

Jurisdiction / Court / Chamber:

Upper Tribunal (Immigration and Asylum Chamber)

Remedy / Procedural stage:

Appeal to the Upper Tribunal (Immigration and Asylum Chamber)

Previous stages:

- First-tier Tribunal, ordering reconsideration of the First-tier Immigration and Asylum Tribunal's decision (no date);

- First-tier Immigration and Asylum Tribunal (2 October 2018);
- Secretary of State (no date)

Subsequent stages:

- First-tier Tribunal (no information available)

Branches / Areas of law:

Asylum law and human rights

Facts:

The appellant, an Eritrean citizen, arrived in the United Kingdom in 2016 and applied for asylum, claiming that she fled her country due to fear of persecution due to her Pentecostal religious beliefs. The Secretary of State refused her application, and she lodged an appeal against this decision with the First-tier Tribunal (para. 2).

At the hearing before the First-tier Tribunal, an Amharic interpreter was appointed to the appellant (see commentary on the languages spoken in Eritrea). In addition, the appellant brought her own interpreter in order to double check the accuracy of the interpretation and inform her lawyer of any problem. During the hearing, at the prompting of the appellant's own interpreter, the appellant's lawyer raised the issue with the judge that the court interpreter had misinterpreted or not fully translated some of the appellant's statements (para. 3). The appellant's lawyer asked for an adjournment of the hearing and a different interpreter, arguing that it was procedurally unfair to proceed in such a situation (para. 4). However, the judge refused to allow an adjournment, reasoning that the appellant's cross-examination was already almost completed (para. 5). In addition, according to the first-tier judge, he was not in the position to act as a referee between the court interpreter and the appellant's interpreter (para. 3). Finally, the issues with the interpretation did not affect the core of the applicant's testimony and credibility (para. 6). The appellant's credibility was questioned for other reasons, namely inconsistences between witness statements previously

submitted and the record of her interview before the Secretary of State (ibid.).

Following the hearing, at the bus stop outside the Tribunal, the appellant's lawyer was confronted by the court interpreter in a challenging manner. In particular, the court interpreter questioned the appellant's credibility with respect to the accuracy of the interpretation as well as the potential risks she would face in Eritrea (para. 14). The lawyer did not engage in a conversation but was worried about the impartiality of the court interpreter and submitted a witness statement detailing the post-hearing events to the Tribunal, requesting that it be reviewed by the judge prior to a decision on the appeal (ibid.). Unfortunately, the statement was not presented in time to the first-tier judge, leading to the dismissal of the appeal (para. 65).

Accordingly, the appeal grounds presented to the Upper Tribunal raised the question of whether the first-tier judge made a procedural error when he declined to readjourn the hearing due to problems with the accuracy of the interpretation of the court interpreter. In addition, the post-hearing events had to be taken into consideration. Finally, the first-tier judge allegedly made an error of law concerning the assessment of the appellant's evidence.

Ruling:

The Upper Tribunal allowed the appeal, holding that the first-tier judge made a procedural error when he declined to readjourn the hearing due to problems with the accuracy of the interpretation of the court interpreter. The Upper Tribunal provided the following guidance to be followed when problems arise concerning the accuracy of the translation at the hearing:

(1) The ability and competence of the interpreter should be checked at the beginning of the hearing, which should normally be done at the judge's initiative (para. 44).

(2) When "an interpreter appointed by the appellant's representatives, and present at that hearing, considers the Tribunal-appointed interpreter to have inadequately translated a question or answer, the matter should be raised with the judge at the hearing so that it can be addressed there and then" (para. 45).

(3) Any challenge by a party or lawyer to the "competence of a Tribunal-appointed interpreter must not be made lightly. If made, it is a matter for the judge to address, as an aspect of the judge's overall duty to ensure a fair hearing. Amongst the matters to be considered will be whether the challenge appears to be motivated by a desire to have the hearing aborted, rather than by any genuine material concern over the standard of interpretation" (para. 47).

(4) In cases where the competence of the interpreter is at stake, the judge can bring the matter to the attention of the Tribunal administrative office in charge of booking court interpreters (paras. 48, 49).

(5) Challenging a decision on the grounds of "inadequate interpretation" during the hearing may not result in a successful appeal if the "outcome" was not "affected" by the interpretation issue. This is especially true if the judge's findings were not based on "oral evidence" provided by the appellant (para. 50). This is in line with the case of *Perera v Secretary of State for the Home Department* [2004] EWCA Civ 1002.

(6) Court interpreters must be able to fulfil their duties effectively. It is the responsibility of the judicial system to ensure that interpreters are not subjected to intimidation or oppression by any "party or representative". Additionally, both "the Tribunal and the parties" involved have the right to expect accurate interpretation from the interpreter, despite their personal opinions on the evidence being presented (para. 51).

Concerning the specific facts of the case at stake, the Upper Tribunal noted that the first-tier judge's ruling could indicate that he considered the presence of an additional interpreter provided by the appellant's representative as a source of concern and an avoidable cost to legal aid. This perception seemed to influence the judge's approach to the issues raised by the appellant's counsel, who relied on feedback from the appellant's interpreter regarding the accuracy of the Tribunal-appointed interpreter's translations of the oral evidence (para. 53). Moreover, the judge also failed to consider that concerns about the accuracy of the interpretation were raised by the appellant herself, as she also spoke some

English (para. 54). In this context, it was crucial that the complaints originated "from two distinct sources" -- "the appellant and the interpreter" hired by the appellant's representative (para. 54).

However, following the case of *Pereira*, the Upper Tribunal reasoned that the judge's adverse credibility findings were primarily influenced by inconsistencies and deficiencies found in the written evidence, rather than the oral evidence presented during the hearing (para. 58). Therefore, the Upper Tribunal pointed out that they were inclined not to interfere with the First-tier Tribunal's conclusions.

Nevertheless, the Upper Tribunal reasoned that the case should be seen from a different perspective in light of the events that unfolded subsequent to the hearing and which were not taken into consideration by the first-tier judge (para. 62). The Upper Tribunal acknowledged that there was no basis to question the accuracy of the statement provided by counsel, which was submitted within 72 hours of the hearing, and which could not reach the first-tier judge in time (para. 63). The statement highlighted concerns about the interpreter's lack of "independence and impartiality" due to her unsolicited remarks to counsel (para. 64). The Upper Tribunal added: "That in turn raises serious questions as to whether the interpreter was doing her best to translate what the appellant was saying to the judge" (ibid.). With this in mind, the Upper Tribunal concluded that had the first-tier judge the opportunity to read counsel's statement, he would have reached a different decision and adjourned the hearing (para. 65). In light of all this, the Upper Tribunal found it unnecessary to discuss the other arguments that challenged the judge's credibility findings regarding witness statements and other non-verbal evidence (para. 66).

In conclusion, therefore, the Upper Tribunal reversed the decision of the First-tier Tribunal on appeal, sending it back for a fresh hearing with a different judge and interpreter (p. 18).

Main quotations on cultural or religious diversity:

- "Court and Tribunal-appointed interpreters perform a vital role in our justice system. They provide the means of communication between the judge and the other parties and participants in proceedings where a litigant or witness cannot satisfactorily communicate in the language of the court or tribunal (usually English)." (para. 1)
- "It is important that Tribunal-appointed interpreters are able to discharge their functions, to the best of their abilities. It is part of the judicial function to enable an interpreter to do this by, for instance, preventing a party or representative from behaving in an intimidating or oppressive way towards the interpreter. By the same token, the Tribunal and the parties are entitled to expect that the interpreter will interpret accurately, regardless of what he or she personally thinks of the evidence they are being required to translate." (para. 51)
- "As we have seen, the grounds also complained that the judge indicated that some of the 'problem' encountered by the appellant with the interpreter might have arisen from the fact that the appellant speaks Tigrinyan and that the judge said during the hearing that 'this is not good for your case as your client is meant to understand Amharic'." (para. 55)

Main legal texts quoted in the decision:

None

Cases cited in the decision:

- *J in Nwaigwe (Adjournment: Fairness)* [2014] UKUT 00418 (IAC)
- *Perera v Secretary of State for the Home Department* [2004] EWCA Civ 1002
- *SJ (Hearing Interpreters) Iran* [2004] UKIAT 00131

Commentary

General Principles at Hearings with Court Interpreters: TS (Interpreters) Eritrea [2019] UKUT 00352 (IAC)

TS (Interpreters) Eritrea [2019] illustrates the key role of court interpreters in legal proceedings and their impact on the outcome of cases and, as such, the need to ensure their qualifications, independence, and impartiality. Whereas generally there is no ground to believe that court interpreters do not have the ability or skills to carry out their tasks, there have been cases where their performance has been called into question, such as in *TS*. In part this is because interpretation is not "a mechanical process", and it may be impossible to literally translate a sentence or a word. Furthermore, culture may also play an important role in how words or concepts are translated. An essential concern revolves around the interpreter's ability to move away from word-for-word translation in order to accurately convey the intended meaning without compromising the integrity of the process (Mark and Moffatt 2024: para. 34.4). Moreover, there might also be situations where a court interpreter is politically opposed to the asylum seeker's views, which may impact the task of translating (Mark and Moffatt 2024: para. 34.42). This latter problem seemed to emerge in *TS*, where issues concerning the court interpreter during the hearing found confirmation when the court interpreter approached and threatened the appellant's counsel at the bus stop, raising serious doubts about her independence and impartiality.

In *TS (Interpreters) Eritrea* [2019], the Upper Tribunal relied on judicial precedents as well as a number of non-binding publications, including the Chief Adjudicator's Guidance Note No. 3 (May 2002) and the Asylum and Immigration Tribunal Bench Book (2005), and provided some useful general guidance in cases where court interpreters are relied upon. The Upper Tribunal clarified that, usually, checking the court interpreters' qualifications and the accuracy of their translation is the task of the judge at the outset of the hearing. If a party raises concerns about it, the judge shall address them immediately. In many cases, the problem can be quickly resolved by asking for a sentence or word to be clarified, or for the questions to be broken down into smaller parts (para. 46). Only if there are fundamental problems should one expect the hearing to be adjourned and continued with a different interpreter. In any case, an appellate judge has to exercise caution when reviewing a lower judge's assessment of claimed issues

with an interpreter's accuracy or qualifications -- such an assessment, according to the Upper Tribunal, is "very much in the realm of judge craft" (para. 44). As such, it is not easy to challenge interpretation issues on appeal, unless there is evidence of serious problems which have affected the outcome of the case. In this case, the Upper Tribunal appeared to accept that there were serious problems with the interpretation because of the post-hearing facts, which clearly indicated a lack of independence and impartiality of the court interpreter -- otherwise, most likely, the Upper Tribunal would not have questioned the assessment of the lower judge.

It should also be noted that although in *TS* the first-tier judge did not seem open to accepting the presence of the appellant's own interpreter, there are no legal grounds to prevent it -- quite the opposite, in the author's view such a scenario only reinforces accurate communication and confidence in the proceedings, besides facilitating the ability of counsel to take instructions from the appellant. In this regard, section 6 of the Chief Adjudicator's Guidance Note No. 3 (May 2002) clarifies that an appellant may bring his/her interpreter, but the latter shall only communicate through the appellant's counsel. One case where the appellant complained about the accuracy of the interpreter's interpretation at the hearing through the support of his own interpreter and where such a complaint became a ground of appeal was *SJ (Hearing Interpreters) Iran* [2004] UKIAT 00131. The Immigration Appeal Tribunal found that although the adjudicator made efforts during the hearing to ensure that the case could continue, the interpreter lowered "her voice so that interpretation could not be heard" (para. 3). Thus, the Immigration Appeal Tribunal allowed the appeal and found that the adjudicator had erred in law because he let the court interpreter speak too quietly (para. 4). The Immigration Appeal Tribunal reasoned that the "interpreter responded to criticism by lowering her voice so that her interpretation could not be heard. Whilst we have a great deal of sympathy for the interpreter taking this course it was wrong. Hearings in the Appellate Authority are almost always conducted in public and that means they have to be conducted in a way that members of the public and people with a particular interest in the case can understand what is

happening" (para. 4). In light of this, therefore, the Immigration Appeal Tribunal remitted the case to a different adjudicator and interpreter (para. 6).

It should be noted that in *TS* the Upper Tribunal did not address the other evidentiary problems and remitted the decision to a new judge with the assistance of a different court interpreter. The first-tier judge did not elaborate on his comment that the fact that the appellant spoke Tigrinyan harmed his case, and therefore it is difficult to understand why he said so. This was probably an issue that was further discussed before the court to which the case was remitted. It is worth noting that Tigrinyan is the most spoken language in Eritrea, and Amharic, "a legacy of Ethiopian administration in the latter half of the 20th century", is spoken by a minority of people (The Permanent Committee on Geographical Names 2021).

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

Specific legal publications/comments addressing the case

- Henderson, Mark and Mohena Moffatt. 2023. "Interpretation at the Hearing". In *Best Practice Guide to Asylum and Human Rights Appeals*, Ch. 34. London: Electronic Immigration Network, available at <https://www.ein.org.uk/bpg/chapter/34#toc2> accessed 25 March 2024.

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

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

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

- Aliverti, Ana and Rachel Seoighe. 2017. "Lost in Translation? Examining the Role of Court Interpreters in Cases Involving Foreign National Defendants in

England and Wales". *New Criminal Law Review* 20 (1): 130--156.

- Berk-Seligson, Susan. 2002. *The Bilingual Courtroom: Court Interpreters in the Judicial Process*. Chicago: University Press.
- Gibb, Robert and Anthony Good. 2014. "Interpretation, Translation and Intercultural Communication in Refugee Status Determination Procedures in the UK and France". *Language and Intercultural Communication* 14 (3): 385--399. [Reprinted in Phipps, Alison and Rebecca Kay (eds). 2015. *Languages in Migratory Settings: Place, Politics, and Aesthetics*. London: Routledge.]
- The Permanent Committee on Geographical Names. 2021. "Toponymic Factfile. Eritrea", available at <https://assets.publishing.service.gov.uk/media/6012c2978fa8f5654fcfedbc/Eritrea_fa accessed 10 June 2024.

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