Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02632/2020**

THE IMMIGRATION ACTS

Heard at Manchester (via Microsoft Teams) **Decision & Reasons Promulgated**
On 8 July 2021 **On 5 August 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AB
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik QC instructed by Mamoon Solicitors.
For the Respondent: Mr Tan, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Andrew Davies ('the Judge') promulgated on 15 December 2020, in which the Judge dismissed the appellant's appeal on protection and human rights grounds.
2. The appellant is a citizen of Afghanistan born on 18 March 1986.
3. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:

2. The grounds argue that the judges decision is, in effect, unsafe because the appellant speaks Afghani Pushtu, however, the court interpreters spoke Pakistani Pushtu. It is argued that interpretation problems were brought to the attention of the judge.

3. Unfortunately, the judges decision makes no mention of any issues with interpretation or that the matter had been brought to the judge's attention. If this matter had been brought to the attention of the judge, then it should have been dealt with in the decision. The judges made detailed findings in respect of the appellant's appeal, suggesting that there were no difficulties with the interpreter. Nevertheless, if the appellant did have such difficulties then a question mark arises in respect of the appellant's oral evidence. The matter must be explored further.

4. Certainly, procedurally, there is an arguable error of law.

4. The Secretary of State in her Rule 24 response dated 5 February 2021 submits 'there is no evidence of the appellant's representative having raised an issue of interpretation during the hearing. There is no statement from the representative who was in attendance at the hearing; no copy of the record of proceedings taken by the representative before the Judge. The Judge has not been approached for his comments regarding the issue. The appellant is put to proof on these issues, the respondent reserving the right to amend the response should the appellant adduce any evidence in relation to this ground'.
5. The author of the Rule 24 response continues that it will be submitted that the Judge has made a detailed and well reasoned consideration of the claim, referring to the evidence considered in making findings of fact and considered the claim in the round attaching relevant weight to the evidence, on the basis of which the claim failed.

Error of law

6. Although this is an Initial, error of law hearing, the appellant attended and gave oral evidence with the assistance of a confirmed Afghan Pushtu interpreter in relation to which no issues arose.
7. Additional documentation had been provided in the interim, which will be discussed further below.
8. Mr Malik QC confirmed he was placing reliance upon the decision of the Upper Tribunal in MM (Sudan) [2014] UKUT 105, the headnote of which reads:

    (1) Where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-Tier Tribunal (the "FtT") to be set aside.

    (2) *A successful appeal is not dependent on the demonstration of some failing on the part of the FtT. Thus an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the FtT, was not considered, with resulting unfairness (E & R v Secretary of State for the Home Department [2004] EWCA Civ 49).*

9. The appellant repeated in his oral evidence his claim that he had argued with the interpreter at the hearing before the Judge for about 15 minutes on at least one

occasion as a result of difficulties in interpretation that arose during the course of the hearing.

10. The Upper Tribunal and the parties now have available to them not only the Judges record of proceedings but also a statement written by Mr Jon Oborn, a caseworker with the Immigration Advice Service, the appellant's previous representatives, who represented him before the Judge.
11. The Judges Record of Proceedings does not record the Judge having been advised of any difficulties with the interpreter being encountered during the course of the hearing. It would have been standard practice for the Judge, as it is with all IAC judges hearing protection or immigration cases where an interpreter has been appointed to assist a party, to initially ask the appellant and interpreter to establish that they understood each other at the beginning of the hearing to enable any difficulties to be identified at that stage. The Judge's Record of Proceedings does not identify there were any difficulties raised at that or at any stage throughout the proceedings.
12. The Record of Proceedings was typed contemporaneously by the Judge on his laptop. There does appear to have been an issue of the appellant answering questions in English rather than Pushtu and being directed to use one language, which is a perfectly acceptable approach to avoid confusion between differing languages.
13. The Judge's recollection that the appellant's representative did not raise any translation issues either during the evidence or in his submissions, is a position wholly supported by reading the transcript taken by the Judge. There is no evidence that issues of interpretation or related problems relating to the same were brought to the Judge's attention.
14. In the appellant's own witness statement dated 23 December 2020 he asserts the Judge erred in law in not mentioning during the course of the proceedings that the appellant brought to the court's attention that the interpreter was not correctly interpreting for the appellant, which it is claimed the Judge did not address. The appellant claims that he did not receive a fair hearing as a result. The appellant claims the issues of interpretation affected his ability to put forward his case properly and that the Judge did not understand the case due to incorrect interpretation. The appellant also asserts the Pakistani Pushtu speaking interpreter was unable to convert the Afghan calendar dates into English calendar dates which were vital to his case.
15. The appellant in his statement makes various other criticisms which shall be looked at below.
16. The next document is a note provided by Mr Oborn the front sheet of which, dated 26 April 2021, states he can confirm there were issues with the interpreter provided for the appellant's appeal and that the appellant had to repeat himself several times while giving his evidence to ensure he was understood and that the interpreter could not convert the dates the appellant gave him into an English calendar format.
17. Mr Oborn's record of proceedings sets out the procedure at the hearing, referring to questions asked and replies given. There is within that record of proceedings, a reference to the appellant being asked the date he left Afghanistan in cross examination to which the correct date of 3 August 2019 was given to the Judge, and

reference to a date in 2013 in the Afghan calendar in which it is recorded by Mr Oban 'he gives dates but translator cannot convert". There is another reference to a question asked in cross examination of when the appellant provided services to a named person. Clarification of the question was given by the Presenting Officer as the appellant claimed he did not understand the question, after which he confirmed it was 1992 in the Afghan calendar. When the Judge asked what year this would be in the Gregorian calendar (that used in the UK) it was noted that the interpreter could not convert this date. The record of proceedings however records the Judge intervening to ask, "Can I ask this question another way, how many years before you left in 2019 were you transporting the oil?" To which the appellant is recorded to have answered "About eight years, since they signed the contract." It was clear that even if issues arose in relation to the actual dates of events, sufficient evidence was provided to enable the Judge to understand the point been made by the appellant and properly appreciate the chronology the appellant was seeking to rely upon. It is not made out that the issues recorded by Mr Oban give rise to a procedural unfairness on the basis that the inability of the interpreter to convert a date has meant the appellant's evidence not being properly understood or considered.

18. Another issue that arises, is whether it was appropriate in any event for the interpreter to convert the dates given by the appellant in the Afghan calendar in Pushtu to the Gregorian calendar, when to do so would be to give evidence. Whilst some interpreters have in the past been willing to assist no evidence has been provided to show that undertaking such conversion with is in the range of expected services of the court pointed interpreter. It is not. There is clearly evidence that the appellants evidence of a date given in the Afghan calendar was interpreted verbatim as required. There are two possible explanations for the statement the interpreter could not convert which is either because of a lack of understanding or because it is outside the range of tasks an interpreter is permitted to do. It is worthy of note that there is no record of either advocate asking the interpreter why she could not convert the date. The answer to this issue, and the more likely reason for such a conversion being outside the duties of an interpreter is to be found in the judgment in the case of Mohamed (role of an interpreter) [2011] UKUT 337, the headnote of which reads: "*The function of a court appointed interpreter is to interpret on behalf of the Tribunal what is said at the hearing, including the appellant's evidence. It is no part of the interpreter's function to be drawn into a position where he or she has to give "evidence" at a hearing of anything, including the language being spoken by a witness."*

19. Also of relevant is *TS (interpreters) Eritrea* [2019] UKUT 00352 (IAC), the Upper Tribunal held that weight will be given to the judge's own assessment of whether the interpreter and the appellant or witness understood each other and gave further guidance:

> *43. … an appellate tribunal will usually be slow to overturn a judge's decision on the basis of alleged errors in, or other problems with, interpretation at the hearing before that judge. Weight will be given to the judge's own assessment of whether the interpreter and the appellant or witness understood each other....*
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> *44. Such an assessment by the judge should normally be undertaken at the outset of the hearing by the judge (a) putting questions to the appellant/witness and (b) considering*

the replies. Although he or she may not be able to speak the language of the appellant/witness, an experienced judge will usually be able to detect difficulties; for example, an unexpected or vague reply to a specific question that lies within the area of knowledge of the appellant/witness (such as asking the person concerned as to how and by what route they travelled to the hearing centre); or a suspiciously terse translation of what has plainly been a much longer reply given to the interpreter by the appellant/witness. Non-verbal reactions may also be factored into the judge's overall assessment. It is difficult to be any more specific; we are, here, very much in the realm of judge craft.

45. Where an issue regarding interpretation arises at the hearing, including the situation where an interpreter appointed by the appellant's representatives, and present at that hearing, considers the Tribunal-appointed interpreter has 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. Even if the representatives do not do so, the judge should act on his or her own initiative, if satisfied that an issue concerning interpretation needs to be addressed.

46. In many cases, the issue will be capable of swift resolution, with the judge relying upon the duty of the parties under rule 2(4) of the Procedure Rules of both of the Immigration and Asylum Chambers to help the Tribunal to further the overriding objective of dealing with the case fairly and justly. For instance, it may be that clarification of a particular word or phrase, which is thought to be causing difficulties, will enable matters to proceed smoothly. In some cases, … breaking questions up into short component parts will be sufficient…

47. A challenge by a representative 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.

48. It will be for the judge to decide whether a challenge to the quality of interpretation necessitates a check being made with a member of the Tribunal's administrative staff who has responsibility for the booking of interpreters. …

49. Under the current arrangements, it may be possible for appropriate enquiries to be made by the administrative staff of the Language Shop as to whether the interpreter is on the register and whether there is any current disclosable issue regarding the interpreter. The initiation of any such enquiries during a hearing is, however, a matter for the judge. In practice, it is unlikely that it would be necessary or appropriate to take such action. In most cases, if the standard of interpretation is such as seriously to raise an issue that needs investigating, the point will probably already have been reached where the hearing will have to be adjourned and re-heard by a different judge (using a different interpreter).

50. On an appeal against a judge's decision, even if it is established that there was or may have been inadequate interpretation at the hearing before the judge, the appeal will be unlikely to succeed if there is nothing to suggest the outcome was adversely affected by inadequate interpretation. This will be the position where the judge has made adverse findings regarding the appellant, which do not depend on the oral evidence ....

51. 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.

20. There is no indication that during the course of the hearing any issues were brought to the Judges attention in relation to the standard interpretation. The Judge records no concerns in relation to the standard of interpretation, the ability of the appellant and interpreter to understand each other, or the Tribunals ability to receive 'best evidence'. There is a note recorded by Mr Oborn that during what he describes as a post hearing debrief with his client Mr Oborn confirmed that the appellant did well and that the answers given were consistent with his statement and interview record, indicating the required evidence was given to the Judge in an understandable and acceptable format. There is however a note made by Mr Oborn in the following terms:

> "Client complains about the interpreter, they she did not understand the words he was saying, and there were a few incidents when he seemed to repeat or re-clarify with the interpreter, but nothing major seemed to happen, as his answers were all consistent with what I know about his case.
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> NB - interpreter not been able to convert the Afghani calendar was a problem, but we will have to see if that is an issue in the judge's decision."

21. There is no reference in either record to the alleged 15 minute dispute between the appellant and the interpreter and the appellant's own legal advisers seems to be of the opinion, post hearing, that the appellant's answers given through the interpreter were consistent with what Mr Oborn knew about the appellant's case.
22. My primary finding is that there is no evidence to support the appellant's contention that he engaged in 15 minute dispute or even one in the region of 15 minutes with the Pushtu interpreter provided and that his claim in that respect is not made out.
23. Also, in relation to the inability to interpret dates, the appellant in reply to a question put in cross examination in the Upper Tribunal confirmed that the dates he gave to the interpreter was in Afghan Pushtu, which he confirmed was correct. The appellant was asked by Mr Tan whether the date recorded of 3 August 2019 by the Judge and the representative was the correct date that he left Afghanistan, which he confirmed it was.
24. The appellant in reply to questions put in re-examination by Mr Malik QC concerning his claim to have argued with the interpreter for approximately 15 minutes, and when asked whether it was a single period or cumulative, claimed it was every time when they asked a question. The interpreter had not given the correct interpretation and that there was one incident that lasted 15 minutes. I find such a claim is not made out on any basis on the available information.
25. Mr Malik QC in his submissions undertook a forensic analysis of the two records of proceedings claiming that that of the Judge was no more than a summary of the evidence, and that the Judge gave a rather less detailed account than that provided by the appellant's previous representatives. I find that even if the later document is more detailed than the former document, a reading of the same together does not establish the appellant's claim that he raised difficulties with translation for a

period of 15 minutes or otherwise during the course of the hearing, as no reference to this having occurred appears in either record of proceedings.

26. The submission by Mr Malik QC, that the "shorthand" nature of the Judges notes undermined their accuracy is without merit. For even if not recording verbatim each and every word said it is not made out they are an inaccurate or unreliable record of the evidence given to the Judge.
27. The terms 'Afghan Pushtu' and 'Pakistan Pushtu', if suggesting these are two different languages, is arguably misleading. Pushtu is a language that originated in Afghanistan with there being two main dialects "Pashto" and "Pukhto" which are the two main discernible phonetic variations of the language. The interpreter that was booked to assist the appellant is a Pushtu (also referred to as Pashtu) interpreter who would have been properly assessed by the interpreter services to be competent and capable of providing the required level of interpretation in this language against the terms of the Ministry of Justice's Language Services Contract which requires linguists to be sufficiently qualified to undertake face-to-face interpretation.
28. It is accepted there may be an influence of the individual's national language upon the use of Pushtu, if based in Pakistan possibly introducing more words from Urdu, whilst those from Afghanistan using more from Dari, but it was not established the interpreter was not capable of doing the job for which they were appointed before the Judge.
29. It is also the case that the appellant is able to speak and understand English, which he claims is the basis for his knowledge that the interpretation was not correct, in which case he would have been able to address any matters of concern to him. His confirmation of his ability to understand English, and to ensure that the court received the correct evidence he wished to rely upon, is supported by his own evidence at [3] of his witness statement of 8 March 2021.
30. I do not find the appellant's claim of interpreter issues arising to the extent he did not receive a fair hearing before the Judge to be made out on the evidence. No procedural irregularity has been shown to arise.
31. The appellant in his witness statement dated 8 March 2021 also raises a further issue where he writes at [5 – 6]:

> 5. My former representative submitted wrong translation of my supporting documents with the tribunals. I contacted the translation company recently who have not corrected the translation and the correct translation is also being provided with the appeal bundle. I would also like to mention that I even complaint at my home office asylum interview at the translation by supporting documents submitted with the Home Office by my former Representative was not correct. Relevant pages of my asylum interview have also been provided with my bundle.
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> 6. My former Representative did not submit my important documents with the appeal bundle. Therefore, they were not before the First-tier Tribunal Judge to consider. I provided them now with the evidence that I sent them to my former Representatives who unfortunately failed to lodge them with the tribunals.

32. The reasons for refusal letter is dated 2 March 2020 which was written following the appellant's asylum interview. Indeed, the chronology shows that the appellant's

screening interview was conducted on 4 August 2019, and his Statement of Evidence Form on 11 December 2019, with Screening Interview amendments being received from the Immigration Advice Service on 25 September 2019, together with a list of documents in support of the appellant's claim. Directions were given following the appellant's appeal against the refusal of his claim at a Pre-Hearing Review on 17 April 2020. The appellant was aware, as were his representatives, of the need to provide all the evidence upon which he intended to rely in support for his claim. It must be remembered the appellant speaks both Pushtu and English and no doubt would have highlighted any problems with the written interpretation of documents he was seeking to rely upon.

33. The transcript provided by Jon Oborn shows that during the prehearing meeting with his client it was confirmed that all his evidence, statements and arguments were in the bundle and that the original documents brought to the hearing by the appellant would not be needed. There was therefore no issue raised before the Judge of the appellant's documentary evidence being incomplete or of concerns arising in relation to the interpretation of the same. I do not find that any documents before the Judge give rise to issues undermining the fairness of the hearing the appellant received or infecting the fairness of the Judges assessment of the evidence. If documents were not provided to the Judge it is not an error for Judge not to take those into account.
34. I do not find it has been established that the Judge has committed a procedural error sufficient to amount to a material error of law on the basis of the fairness of the hearing and the way it was conducted before the First-tier Tribunal.
35. By reference to the decision in MM relied upon by Mr Malik QC, I do not find the appellant has established there is a defect or impropriety of a procedural nature in the proceedings sufficient to amount to a material error of law requiring the decision of the Judge to be set aside, even when taking into account that such an error may be found to have occurred in circumstances of which the Judge was not responsible.
36. A review of the record of proceedings and evidence provided, including answers given by the appellant, even without the finding that his claim to have argued with the interpreter for 15 minutes or thereabouts before the Judge has not been shown to claim to have any merit, shows that the Judges dismissal of the appeal, for which adequate reasons are given, is a finding within the range of those available to the Judge on the evidence.
37. I find the appellant has failed to establish arguable legal error material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in relation to this matter.

Decision

38. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

39. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.
40. I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated 21 July 2021