IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2024-001525
First-tier Tribunal No: HU/55201/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MM (SALVADOR)
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Sophie Panagiotopoulou, Counsel
For the Respondent: Ms Julie Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 24 June 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge I. A. Lewis promulgated on 5 November 2024 ("the Decision"). By the

Decision, Judge Lewis dismissed the appellant's appeal against the decision of the respondent made on 8 November 2022 to refuse his claim for protection.

Relevant Background

2. The appellant is a national of El Salvador, whose date of birth is 3 January 2000. The appellant left El Salvador by air on 29 May 2021, transiting in Madrid, Spain, before landing at Heathrow Airport on 30 May 2021. The appellant claimed asylum on arrival based on a claimed fear of a particular gang in El Salvador known as Barrio-18 or M-18, such fear arising in the first instance from an encounter which he said he had had with the gang on 15 May 2021.

3. As summarised in the Decision, the appellant's claim was that his father - in order to supplement his income from employment - was involved in importing second-hand cars to fix them and sell on. At the time of the incident on 15 May 2021, the appellant was driving one of these cars. The appellant's claim was that two gang members entered the car he was driving, stating that they had been observing him for some time, and stole his telephone and cash. They also commented that the appellant was always in different cars. The gang members accused the appellant of thinking that he was better than them, and said that they didn't want to see him again, otherwise they would kill him. They claimed that they knew where he lived, and if they saw him around, they would kill him. After the men left his car, he returned home and told his parents what had happened. His father was very concerned and began to make arrangements for him to leave El Salvador for the UK. The following day, the appellant went to a police station to report the incident, and thereafter the appellant left El Salvador.

4. Since making his application for asylum, the appellant claimed that he had learned that the gang had made enquiries of a friend as to his whereabouts, and had visited his parents' house on 2 November 2021 when his father was shown a gun and told that the gang did not want to see the appellant there again.

5. The respondent did not accept the appellant's account was credible. It was not accepted that he had ever been the recipient of threats by gang members in El Salvador. The respondent also invoked section 8(4) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, on the basis of the appellant's failure to claim asylum in Spain.

The Hearing Before, and the Decision of, the First-Tier Tribunal

6. The appellant's appeal came before Judge Lewis sitting at Hatton Cross on 9 August 2023. Both parties were legally represented.

7. In the Decision at para [37], the Judge said that the credibility of the appellant's account was the key point of difference between the parties.

The Judge went on to address the appellant's account in chronological order.

8. With regard to the incident of 15 May 2021, the Judge noted the submission of appellant's Counsel that the appellant's credibility was boosted by the consistency of his account. The Judge observed that consistency was not inevitably a reliable indicator of credibility, especially where (as here) the claimed narrative was relatively straightforward with few disparate elements. But he held that the submission was undermined because of what was, in his judgment, a very significant discrepancy in the narrative of the incident of 15 May 2021.

9. In his initial witness statement, the appellant stated that a boy had stepped in front of his car to force him to stop. In contrast, during the asylum interview on 24 October 2022, the appellant said that a car stopped in front of him so he had to stop (Q 89). The Judge noted that in written representations dated 28 October 2022, after the interview, the appellant sought to clarify his answer. He wished to clarify that it was not a car that stopped in front of him, that made him stop, but it was a boy who stepped in front of his car that forced him to stop. The Judge continued:

> This is, of course, in no meaningful sense a clarification; it is an alteration - an attempt to simply change what was said. Moreover, nothing is offered as to why the appellant made such a fundamental mistake.

10. The Judge concluded at para [46] that at the interview the appellant had temporarily departed from the script. If he had been recalling an actual experience, such a fundamental mistake would not have occurred.

11. At para [47] the Judge said that although this was only one detail of the narrative of the incident of 15 May 2021, if the appellant could not give a consistently reliable account of how the incident began, in his judgment it materially undermined his account of the whole incident. The Judge continued:

> Again, for all the reasons herein, and considering all matters in the round, I conclude that the incident never took place.

12. The Judge went on to give additional reasons for disbelieving that the alleged incident had taken place. At para [57] he said that he struggled to reconcile the apparent targeting of the appellant in circumstances where his father had operated a business for a substantial period of time without any difficulty from the gang - and he was not (on the appellant's evidence) directly targeted by the gang until January 2022. It was essentially unexplained why the appellant was threatened and targeted rather than the appellant's father.

13. The Judge considered the police report. He found at para [70] that the appellant and his father decided to obtain a police report for the sole reason of providing supporting evidence for an asylum claim. He found

that both the appellant and his father had deliberately hidden this motivation, because it was recognised that it might undermine the reliability of such evidence. At para [71] he said that the claim that the report was made because it was "*the right thing to do*" was a lie.

14. At para [72] the Judge held that the appellant's father had obtained a report from the police station by means of corruption. While he accepted that a report was genuinely issued by the police station, he did not accept that its contents were reliable evidence of the events described. In his judgment, the appellant's father obtained a report of an invented incident which served as a script for the appellant's false asylum claim. As discussed above, the appellant had in his judgment deviated from that script during the course of the interview in one very significant material respect.

The Grounds of Appeal

15. The grounds of appeal were purportedly settled by the appellant as a litigant in person. He submitted that the decision of the first instance Judge had been based upon blunt errors that had been unfairly attributed to him. The errors started with the event that happened to him on 15 May 2021. In his account, he had always stated that the reason why he stopped his car was a man. This could be confirmed in the police report, and also in his witness statement. However, during his asylum interview at Question 89 an error was attributed to him that he did not make. He noted that the Judge had taken into consideration the clarification that was made about the answer to Question 89. However, the Judge was not aware that the error was due to a poor translation by the translator at the time of the interview. In fact, he did state that it was a man who made him stop, and the person translating at the time of the interview changed the word 'man' to 'car'. This could be verified by listening to the audiotape of the interview. The appellant went on to assert additional errors on the part of the Judge.

The Reasons for the Eventual Grant of Permission to Appeal

16. Permission to appeal was refused by the First-tier Tribunal, but on a renewed application for permission to appeal to the Upper Tribunal, Upper Tribunal Judge Fiona Lindsley granted permission on all grounds raised on 13 May 2024.

17. She said that it was arguable that the First-tier Tribunal had found it fundamental that the appellant had firstly said he was made to stop by the gang by the actions of a boy/man, but at interview had said it was by the actions of a car. It was arguable from the grounds that this was due to an error of fact which was not the fault of the appellant, which amounted to an error of law.

18. She directed that the appellant must now produce a certified translation of the relevant question and answer from a qualified Spanish Interpreter,

which must be filed with the Upper Tribunal and served on the respondent 10 days prior to the Error of Law hearing.

The Hearing in the Upper Tribunal

19. At the hearing before me to determine whether an error of law was made out, Ms Panagiotopoulou, who had not appeared for the appellant below, relied upon a certified translation in support of the claim that the Home Office Spanish Interpreter had misinterpreted the appellant's answer to Question 89. Whereas the Home Office Spanish Interpreter translated the appellant's answer as being that a car stopped in front of him, according to the certified translation, the correct translation of what the appellant said was, '*when a man stepped in front of my car, so I had to stop the car and then two men got into the back of the car…".*

20. Ms Panagiotopoulou proceeded to develop all five grounds of appeal that she had identified in her skeleton argument dated 7 June 2024.

21. On behalf of the respondent, Ms Isherwood, who had taken on the case for the respondent at short notice, did not dispute the accuracy of the certified translation, but she submitted that nonetheless, Ground 1, the main ground of appeal, was not made out. This was because there was a lack of reasonable diligence on the part of the appellant's representatives in getting the relevant part of the interview correctly translated for the purposes of the hearing in the First-tier Tribunal. It was contrary to principle for the appellant to be able to raise a mistranslation error by way of appeal. Also, it was apparent that there was still an internal inconsistency, as the appellant had referred to a man, whereas elsewhere he had referred to a boy stepping in front of the car. As to the remaining grounds of appeal, she submitted that they were no more than an expression of disagreement with findings of fact that were reasonably open to the Judge for the reasons which he gave.

22. After briefly hearing from Ms Panagiotopoulou in reply, I reserved my decision.

Discussion and Conclusions

29. Before turning to my analysis of this case, I remind myself of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years, including in *Volpi & another v Volpi* [2022] EWCA Civ 464 at [2].

30. I also keep in mind that the outcome of the analysis conducted in *E & R* [2004] EWCA Civ 49 was summarised by Carnwath LJ at para [66] as follows:

> In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in a statutory context where the parties share an interest in

> cooperating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.

31. I consider that Grounds 2 to 5 are, in isolation, no more than an expression of disagreement with findings that were reasonably open to the Judge for the reasons which he gave. The outcome of this appeal pivots entirely on Ground 1, which is the ground that was singled out by Upper Tribunal Judge Lindsley when granting permission to appeal.

32. In light of the evidence that has been produced pursuant to Judge Lindsley's direction, it is satisfactorily established that Judge Lewis made a mistake of fact. He assumed that the account of the incident which the appellant gave in interview had been accurately translated by the Home Office Spanish Interpreter, when in fact the Spanish Interpreter had mistakenly translated what the appellant had said.

33. The discussion at the error of law hearing primarily centred on the question of whether the appellant or his legal representative were to blame for the fact that the mistranslation was not corrected before the hearing in the First-tier Tribunal. Despite Ms Isherwood's submission to the contrary, I am persuaded that neither the appellant nor his advisers were responsible for the mistake made by the Judge.

34. After receiving the transcript of the asylum interview, the appellant's representatives reviewed it with the appellant, and made written representations to the Home Office in which they clarified various answers that the appellant was recorded as having given in the asylum interview. With reference to Question 89, the appellant's representatives said: "*Further our client wished to clarify that it was not a car that stopped in front of him that made him stop, however that it was a boy that stepped in front of his car that forced him to stop, as our client explained in paragraph 23 of his witness statement of 31/11/2021. Additionally, our client wished to clarify that he did not lift his hands but he put them on the driving wheel.*"

35. In the Home Office reasons for refusal letter dated 8 November 2022, the appellant's account of the incident on 15 May 2021 was summarised as follows: "*On the 15th May 2021, you were driving back from the shopping centre … when two gang members entered your car from the back and began to threaten you. They told you they had been observing you for a while and they stole your phone and 80 dollars from you (AIR Q89).*"

36. The respondent then went on to give reasons for rejecting the appellant's claim of receiving threats from the gang due to asserted internal inconsistencies. But the respondent did not assert that the appellant had given an internally inconsistent account of what he claimed to have happened on 15 May 2021.

37. In the circumstances, I consider that the appellant and his legal representatives reasonably inferred that the clarification to the answer which the appellant had given at Question 89 had been accepted, and no further action was required.

38. It does not appear that the appellant was cross-examined about the inconsistency between what was recorded in the asylum interview and the clarification. It does not appear that it was put to him that what he had said in interview had been correctly translated, and that he had thereby deviated from the account that he had given in his witness statement.

39. While the Judge was not obliged to limit his adverse credibility findings to matters that had been specifically raised by the respondent, and while the clarification given by the appellant's legal representatives was reasonably susceptible to the adverse construction that the Judge gave it, as his adverse construction was wrong, through no fault of the appellant or his legal representatives, Ground 1 is made out.

40. Although the Judge gave other sustainable reasons for finding the appellant not credible, it cannot be said that, absent the mistake, the outcome was bound to have to been the same.

41. For the above reasons, I am persuaded that the proceedings before the First-tier Tribunal were vitiated by material unfairness, and accordingly the Decision is unsafe and should be set aside.

42. I have carefully considered the venue of any rehearing, taking into account the submissions of the representatives. Applying *AEB* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC), I have considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statement.

43. I consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and I therefore remit the appeal to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law, and accordingly the decision is set aside in its entirety, with none of the findings of fact being preserved.

This appeal is remitted to the First-tier Tribunal at Hatton Cross for a fresh hearing before any Judge apart from Judge Lewis.

Anonymity

The First-tier Tribunal made an anonymity order in favour of the appellant, and I consider that it is appropriate that the appellant continues to be protected by anonymity for the purposes of these proceedings in the Upper Tribunal.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 July 2024