Breaking down Barriers, part II

In the second of two articles on interpreters, *Kerena Marchant* looks at the role of the tribunal in relation to foreign language interpretation.

The moral and legal right to a fair hearing for those involved in legal proceedings is contained in Article 6 of the European Convention on Human Rights. However, the automatic right to foreign language interpretation contained in Article 6(3)(a) exists only in criminal proceedings; foreign language users do not have an automatic right to an interpreter in tribunal and civil proceedings. Thus, they do not share the broader rights of deaf parties – themselves minority language users – and those with language impairments who, under disability discrimination law, can request a British Sign Language interpreter or alternative form of language facilitation.

Obligation?

The terms 'the interests of justice' and 'a fair hearing' used by Article 6(1) set a powerful standard for a diverse and multicultural society in safeguarding full access to all forms of justice. There are at least three million speakers of other languages in the United Kingdom today, and that number is steadily growing. Some of those do not have a sufficient use of English to access fully legal proceedings. For these people, it would be impossible to have a fair hearing without a foreign language interpreter or translator.

Several tribunals, such as SENDIST, SENTW and the Asylum and Immigration Tribunal, include the right to an interpreter for oral hearings in their regulations. Others advertise that right in their 'how to appeal' information and appeal registration paperwork. The question is how far do tribunals morally have to go to ensure a fair hearing for foreign language users and at what stage of the appeal process should interpretation be provided?

The role of the interpreter

Language is a living thing, interwoven into a user's sense of identity, culture and, in many cases, religion. Language is also complex, and it is doubtful that a simple translation of any criminal proceedings would satisfy Article 6(3)(a). A simple translation, anyway, may not be possible. Even when it is, much of the ethos and original meaning of the words will be lost. Many languages have different dialects, and speakers within 10 miles of each other can use the same language differently. Frequently, an interpreter will have to work hard to overcome the problems of such dialects. Most court interpreters use the word 'interpret' because they do more than just 'translate' proceedings and, in many cases, can act as a cultural go-between, translating cultural and legal concepts.

The role of the tribunal

But to what extent should an interpreter act as a cultural go-between? Is their role rather as a translating facilitator, to be used by a knowledgeable tribunal working to ensure fair treatment by making justice jargon-free and accessible to all?

The *Equal Treatment Bench Book* states: 'Ignorance of the cultures, beliefs and disadvantages of others encourages prejudice. It is best dispelled by greater awareness. To achieve justice, judicial office-holders must be informed and aware. They should at the very least make necessary enquiries.' This observation highlights the responsibility of tribunals to appoint people with an ongoing commitment to learn and be trained about the needs of all tribunal users, including those with minority language needs.

Putting that knowledge into practice in tribunal proceedings is another matter. Recently, on a disability living allowance appeal, I asked an appellant via a Kurdish interpreter a simple question intended to assess his ability to self-care. The question was: 'Are you able to make a drink, such as a cup of tea for yourself?' The interpreter translated this by asking in Kurdish if the appellant was able to fill and operate the family samovar. There is a difference between making a cup of tea from a kettle filled with enough water for one person and a large samovar! Should I have anticipated that a Kurdish family would most probably use a samovar, and asked a different kind of question, such as: 'If I asked you to fill a kettle with enough water for a cup of tea and make that cup, would you be able to do that?' Or should the interpreter have asked for clarification from the panel before going ahead and 'interpreting' my question? In this case, I believe I should have been crystal clear that I was asking about the ability to fill a cup with boiling water from a kettle partially filled. But the interpreter should also have checked before he made a cross-cultural translation from 'kettle' to 'samovar'. In this instance, it was fortunate that the fact that I come from the same part of the world as the appellant enabled me to realise what had happened – the other panel members had not.

Whose responsibility is it to ensure that appellants have access to the paperwork in their own language?

When should language access begin?

The need for an interpreter is usually only identified at the hearing, which is generally then adjourned. This is despite the fact that many tribunals advertise a user's right to use an interpreter in their 'how to appeal' literature and web pages (although those are most often in English). Why then do so many appellants fail to identify their need for an interpreter prior to the hearing? Is it because they think they can get by? Or don't realise they can request one? Or distrust the system to provide an impartial interpreter? The solution is probably for tribunals to make such issues apparent at an early stage of the process, in a manner that is clearly understood by appellants, in their own language. A lot more work also needs to be done with linguistic and cultural minority groups through user and community groups to ensure that the tribunal system is understood at grass roots level.

Papers

The deeper question is whether compliance with Article 6(1) requires courts and tribunals to ensure that all parts of the legal process are translated, including the initial appeal forms, case statements, bundle of evidence, the oral hearing itself and the decision? Whose responsibility is it to ensure that appellants have access to the paperwork in their own language? The *Equal Treatment Bench Book* advocates: 'Unless all parties to proceedings accurately understand the material put before them, and the meaning of the questions asked and answers given during the course of the proceedings, the process of law is at best seriously impeded and at worst thrown seriously off course.'

In my experience, few appellants who need interpreters have actually read and understood the complex paperwork (legal and otherwise) in tribunal bundles, or even their own claim forms. This greatly impedes their chance of a fair hearing, even if they have an interpreter or representative on the day. In many cases, especially with benefits, the appeal itself is due to the fact that the appellant has not understood the forms and filled them in incorrectly, or has sought help from a well-meaning but unqualified friend, who has filled them in incorrectly and failed to read them back to the appellant. I always ask how forms came to be filled in, and whether the appellant has read and understood the papers I am referring to. The answers are varied and disturbingly revealing. Often, at the expense of tribunal time, there is a need to revisit

the paperwork and written evidence to get an accurate understanding of the facts.

The fact that appellants have not had access in their own language to legal documents can present tribunals with dilemmas. How far should tribunals go to ensure this in order to comply with Article 6, and the recommendations of the *Equal Treatment Bench Book*? Is the onus on the appellant to ensure that they have had access to the documents prior to the hearing, or for the tribunal to ensure that? I remember an Urdu-speaking mother in a SENDIST hearing appealing against the special school to which her child had been allocated. The initial hearing had been adjourned, as the need for an interpreter had been identified. At the reconvened hearing, the mother told the panel she really wanted a mainstream school, not a special school at all. It was apparent that she was unaware of her right to request one, because she had not had access to the relevant code of practice in Urdu. Should the panel have explained the law and her rights to her via the interpreter? Or granted a further adjournment to give her opportunity to read the lengthy document with an interpreter? And if so, who would pay? Or was the onus on her to research her grounds of appeal? This is an area where tribunal chairs and members have different views. We are not there to explain and teach the law to people, or to act as substitute for a representative. Every user has the chance to seek representation and advice. If they fail to do this, we can not provide it. However, if the reason that advice is not there is because of a language barrier, how far should the tribunal go to ensure a level playing field?

Panel members should ensure that everything from introductions to legal arguments are interpreted, and this means speaking in bite-sized chunks that the interpreter can retain and translate.

Finding the right interpreter

Adjournments can be avoided if tribunal chairs and members read the papers before the day of the hearing, and alert the tribunal administration if they suspect that the need for an interpreter has been missed.

Having identified the appellant's reasonable need for an interpreter, the question for the tribunal is where to go to find one. A tribunal should steer away from asking a tribunal user to provide their own interpreter which, in many cases, leads to an untrained family member or friend coming along, or a representative having to play a double role, and cannot be justified, even if it avoids an adjournment. The *Equal Treatment Bench Book* strongly recommends that interpreters are able to cope with the language of legal proceedings. This means a trained, professional interpreter.

There are many agencies that can provide impartial interpreters, experienced in working in legal situations – indeed, some of the larger tribunals now use the same one. The tribunal should also ensure that that person knows the particular dialect used by the appellant and that it is culturally acceptable to them – many foreign language users come from parts of the world where there is conflict, and the language or dialect they use may be indicative of where they stand in that conflict.

The hearing

Hearings that involve interpreters will take longer and additional time should be allowed. A foreign language interpreter will translate and repeat absolutely everything that is said during the hearing – not just the panel's questions to the appellant or what is said by the appellant. Panel members should ensure that everything from introductions to legal arguments are interpreted, and this means speaking in bite-sized chunks that the interpreter can retain and translate. Some interpreters note key points, which is perfectly acceptable, as long as the interpretation itself is

not condensed. It is good practice to check that the pace is acceptable to both the interpreter and the appellant. It should also be borne in mind that interpreters are not legally qualified, and chairs need to monitor that they fully understand and translate accurately any key legal concepts.

While panel members may not understand the interpretation, it is possible to monitor the interpreter's body language and the way in which they are translating. If it looks as if the interpreter is giving more or less information, or even entering into long discussions with the appellant, chairs should not hesitate to check what is being translated. There may be a reason why the interpreter is giving more explanation; translation is not always a simple matter of replacing one word with another. The semantic syntax of the two languages or the appellant's ability to understand are two good reasons for further explanation – but the interpreter may have crossed the line between interpretation and help.

Support

It is critical that interpreters feel able to raise any problems that arise during the proceedings, and important that the tribunal makes it clear that asking for clarification of legal jargon will not be frowned upon, and that they are not expected to explain the law or to struggle to make cross-cultural leaps unsupported. Courts, users and interpreters need to understand, identify and work around cultural differences. Chairs and panel members are not expected to be knowledgeable about all aspects of the cultural plurality of their users, but to be alert and sensitive to their needs, and to be able to identify difficulties and assist the interpreter when needed.

The technical language, or jargon, from a particular tribunal jurisdiction often does not translate easily with its implicit meaning intact. For example, in disability living allowance appeals, entitlement turns on claimants of the care component of that benefit having needs that are 'reasonably required'. The fact that they are not getting or refusing the care does not make them ineligible for benefit. I once heard an appeal against the failure to award the care component to a Muslim man whose disability made the panel suspect that he might have intimate care needs. His English was not good, and he had asked the community worker at the mosque to fill in the form for him, so that these needs were not mentioned. The problem was that the intimate care needs he may have 'reasonably required' were not acceptable to a man with his cultural beliefs, and the words and legal meaning of 'reasonably required' would not cross cultures and translate. It was clear that even the interpreter did not understand the legal meaning. In the end, we decided to call a break to discuss our handling of the issue to ensure there was a fair hearing. The chair needed to explain what was meant by 'reasonably required' and discuss with the interpreter how to handle the 'interpretation'.

Conclusion

There is no doubt that the ethos of Article 6 calls upon all members of the judiciary to ensure that those who use different languages have full access to justice. The question is how far do tribunals have to go to ensure that the need of minority language users is met in the context of the fair trial provisions of Article 6? And how do they meet the dilemmas and complexities that interpretation from one language to another involves during legal proceedings? At what stage of the appeal should appellants be granted interpretation? Does the need for language access go much further than the simple provision of an interpreter for oral proceedings? It is clear that the presence of an interpreter alone cannot ensure the access of minority language users to a fair hearing. This will only happen when all members of the judiciary understand the increasing cultural plurality of the UK, and have the commitment, flexibility and sensitivity needed to ensure a fair hearing for all.

Kerena Marchant is a member of the JSB's Equal Treatment Advisory Committee.