Working with interpreters: judicial perspectives

The following paper was delivered by the Hon Justice Melissa Perry[1] and Kristen Zornada[2] at the AIJA Cultural Diversity and the Law conference in Sydney on 13–14 March 2015.

Introduction

In the past year, over 300 interpreter bookings were made for cases before the Federal Court and the Federal Circuit Court. In the administrative arena, 85 per cent of hearings in the Refugee Review Tribunal, for example, involved an interpreter, and 57 per cent in the Migration Review Tribunal which together equate to over 11,000 hearings involving interpreters in 98 languages.[3]

The vast majority of cases in federal courts in which the services of an interpreter were used were migration matters where the litigants appeared in person without legal representation. From the perspective of these litigants, these were proceedings in a foreign court in a foreign land experienced through the conduit of an interpreter. The impression of justice in our courts that such litigants will take away with them will be affected in large part by the respect with which they are treated, and by how well they understand the proceedings and are understood. The same may be said of their impressions of administrative justice before tribunals. In each of these respects, the interpreter plays a vital role.

The interpreter also plays a vital role in ensuring that justice is in fact done. It is a cornerstone of the Australian judicial system that all who come before our courts are entitled to a fair hearing before a decision-maker who is, and is perceived to be, independent and impartial.[4] These principles of fairness and equality before the law are fundamental to a democratic society governed by the rule of law, and their observance is essential to the maintenance of public confidence in the judiciary.[5] For those with no or limited proficiency in the language of our courts and tribunals, interpreters make their participation possible and play an important role in ensuring that justice is done and can be seen to be done. And so, for example, where a person appearing unrepresented in the Federal Court cannot afford an interpreter, the court provides one upon request free of charge.

The questions on which this paper will focus are: how does a court or tribunal assess whether the person needs an interpreter; what is the standard of interpretation required at law; and, in the case of an administrative decision, when will a failure to meet that standard result in an invalid decision?

But first some background.

What is the current system in Australia for interpreters?

While fully acknowledging the invaluable assistance that interpreters provide to non-English speaking litigants and to the courts, there are deficiencies in the system that are not readily overcome. While there are 112 NAATI-accredited languages and varying accreditation standards within those languages, over 300 languages are spoken in Australia, including Indigenous languages. Furthermore, in general, the federal courts prefer NAATI-accredited interpreters of the 'professional interpreter' standard. However, interpreters are not always available at that level.

Indeed, even to speak of 300 languages is to mask the complexity of the issue given the prevalence of dialects within those broad language descriptions.[6] For native English speakers, it can be difficult to appreciate the extent of differences between dialects in other languages. When we think of differences between Australian English and American or British English, we usually point to a few different words but at the end of the day we know that a 'jumper' is the same as a 'sweater', and that 'fries' are 'chips'.

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In many other languages the differences occur not just in particular words or accents, but in grammatical structure and tense usage. For example, in Italian, while the remote past tense is used in written standard Italian to refer to events that occurred historically, speakers of some dialects native to the south of Italy employ it even when referring to events that may have just happened.[7] Conversely, use of the remote past tense in speech died out in many northern dialects hundreds of years ago.[8] Such differences occur in other languages and other dialects,[9] and it is not difficult to imagine the impact a misinterpretation of tense may have, for example, on applicants describing when relevant events took place.

How does a court assess whether the person needs an interpreter?

Normally courts and tribunals will accede to a request for an interpreter by a witness or litigant who has difficulty speaking English.[10] In migration proceedings, whether before a tribunal or a court, applicants are required to indicate whether they require an interpreter, and the language, and (if applicable) the

dialect, in which the interpreter should be competent.

But this requires a self-assessment, and it cannot be assumed a person necessarily appreciates his or her level of competency, especially in a specialised setting like a court or tribunal. The seriousness of the difficulties that interpreting in a legal context may pose can be illustrated by those cases in which the oft-used phrase 'execute a warrant' has been interpreted as 'execution' in the sense of carrying out a death sentence. Indeed, the specialised language of legal proceedings points to a need for education, and perhaps even a separate accreditation, for interpreters commonly interpreting in this context.

Applicants and witnesses may also be unwilling to accept that they require an interpreter. This is, for example, a particular issue in some Indigenous communities where there is a cultural tendency to agree with answers to questions by persons in authority, or so as not to upset the questioner. This issue has been sufficiently prevalent that the Kimberley Interpreting Service, the only Indigenous language interpreting service in Western Australia, has produced guidelines to determine if someone requires an interpreter. In addition to asking the person whether they understand, it involves, for example, laying word traps to reveal potential areas of miscommunication.

Applicants from other cultural backgrounds may also be reluctant to admit that they need an interpreter for a variety of different reasons. Further, in at least one somewhat unusual case, an interpreter was requested in a language that the applicant did not even speak. In that case, despite requesting a Portuguese interpreter before the Refugee Review Tribunal, it quickly became evident that the applicant did not speak Portuguese. Rather, it appeared that he had requested a Portuguese interpreter to effectively 'corroborate' his claims in support of a protection visa as a citizen of Angola where Portuguese is spoken.[11]

Cases such as this, however, appear rare and the risk that a person may seek to rely improperly upon an interpreter must be weighed against the serious injustice, and breach of fundamental human rights, if a reasonable request for an interpreter is denied. In this regard, it is important to bear in mind that competence in English in ordinary daily interactions will not necessarily adequately equip the individual to understand what is being said in the peculiar setting of a court proceeding.[12] It is not the point that a person can speak *some* English, but rather whether their English language skills are sufficient to enable them to understand the case against them, and to put their case or evidence before the court or tribunal. If that is not the case and no interpreter has been booked, the hearing must

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be adjourned until an appropriate interpreter can be found.[13] This occurred recently in a case in the Federal Court where an Indian couple challenging a visa decision found that they were having greater difficulties in following the proceedings than they had anticipated.

If an interpreter is required, what standard of interpretation is required at law?

NAATI sees the Professional Interpreter standard as the minimum level of competence for professional interpreting and minimum level recommended for work in most settings, including the law.[14] This is also the standard preferred by the Federal and Federal Circuit courts. However, while accreditation to the appropriate 'level' tends to suggest that the interpreter will provide an adequate interpretation,[15] from the perspective of tribunals and courts, the level to which the interpreter is qualified is not necessarily determinative. A hearing may still be fair even though an interpreter below the preferred level was used.[16] Indeed, any other approach would be impractical and not in the interests of justice, given the difficulties in engaging qualified interpreters to which reference has been made.[17]

So, focussing upon administrative decision-making, what then is the standard required?

Guidance can be found in the decision of the full court of the Federal Court in *SZRMQ v Minister for Immigration*[18] delivered last year. The full court explained that where the standard of interpretation fell, to be addressed from the perspective of procedural fairness the question was an evaluative one, namely:

> whether the applicant has had a real and fair opportunity to put what she or he wanted to put, to understand what was being said to him or her, and to participate in the hearing in a way from which it can be concluded that the hearing was fair, and thus that administrative justice was done.

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The assessment of whether jurisdictional error exists, therefore, when viewed through the prism of procedural fairness, is a '*fact sensitive*' inquiry – it turns on an assessment of the facts in the individual case.

Significantly, the full court also held that it suffices to establish a denial of procedural fairness if it is shown that the errors *could* have affected the outcome. It is not, therefore, necessary to establish a causal link between a failure to interpret the proceedings adequately, on the one hand, and an adverse finding made by a tribunal relevant to the outcome, on the other hand, to establish a denial of procedural fairness.[19] Indeed, in many cases that will not be possible, such as where a tribunal's decision is based in whole or in part on the witness' credibility in light of perceived inconsistencies and gaps in the witness' evidence. [20]

Cases where a direct causal link can be established between the mistranslation or non-translation of discrete words and an unfair outcome are unusual. After all, interpretation is not merely a 'mechanical exercise',[21] and there will be some words that may not translate directly. For example, it is difficult to translate the concept 'house arrest' into Farsi, but a full court of the Federal Court held that 'under control ... at ... home' effectively conveyed the substance of the concept.[22] The inquiry is ultimately one of fact and degree.

Where, however, the misinterpretation or non-interpretation is frequent or continuous, as opposed to intermittent, a court will more readily find a denial of procedural fairness because it can be seen that the process overall has miscarried. By contrast, where there are intermittent errors, it is necessary to assess not only the individual errors but their impact on the overall fairness of the hearing.[23] Viewed individually, it may be that intermittent mistranslation and non-translations are not significant,[24] but viewed together they may demonstrate a pattern that indicates a denial of procedural fairness.

An example of a case where such a pattern emerged from intermittent errors is found in the case of *SZOBN v Minister for Immigration*.[25] The applicant was a citizen of India, and claimed to fear persecution in her predominantly Hindu region because she was Christian. When questioned by the Refugee Review Tribunal through a Malayam interpreter as to what she knew about Christianity, her answers were that 'Jesus died for *poor people*', 'I was able to see my *father* at church' and that she goes to church to get '*Quarbana*', a Malayam word that was not interpreted. Given her apparent lack of knowledge of basic Christian beliefs, the Tribunal found that she was not credible and disbelieved her claims. However, evidence was led on judicial review of an interpretation by another Malayam interpreter of the recording of the Tribunal hearing. It was his evidence that she had in fact said that 'Jesus died for *our sins*', 'I was able to see the *Pope*' and 'I go to church to get the *Eucharist*'. These answers demonstrated knowledge of the meaning of Jesus' life, the Pope and the Eucharist, and not surprisingly the court found that the Tribunal may well have formed a different view or pursued more details by further questioning if her answers had been accurately interpreted.[26]

Relevance of inadequate interpreting to jurisdictional errors other than procedural fairness

Finally, the potential impact of inadequacies in interpreting upon the validity of an administrative decision is not limited to questions of procedural fairness. This is an important point as the *Migration Act 1958* (Cth) (Migration Act) essentially abrogates the natural justice hearing rule at common law and sets out an exhaustive code of what is required by a fair hearing.[27] While the standard required of an interpreter may differ according to the particular kind of jurisdictional error alleged, errors in interpreting may also give rise to other grounds of judicial review. An example is legal unreasonableness, such as, perhaps, where a decision-maker dismisses out of hand an applicant's contention that the translation of his or her evidence is affected by material errors.

Similarly, where the question is whether an administrative decision is vitiated by error of law (as was the case under an earlier iteration of the Migration Act), the focus has been on the minimum requirements of the content of the right to an interpreter and to a hearing. Justice Robertson described this as a '*blunter question*' in *SZRMQ*. This does not mean that there is a need to demonstrate that the applicant was prevented from giving *any* evidence *at all*, but rather that the applicant was unable to put her or his case in relation to matters of significance for the applicant's claims or the Tribunal's decision.

For example, in the decision of *Perera v Minister for Immigration and Multicultural Affairs*[28] in 1999, Kenny J found that the applicant had effectively been prevented from giving evidence on issues critical to his application for a protection visa, being: the basis for his belief that the government had adverse interest in him; the significance of the government's animosity; the legal status of a political group of which he claimed to be a supporter; and his status as a human rights lawyer.[29] Taken as a whole, her Honour found, the transcript indicated that the interpretation was of poor quality, and for the purposes of the appeal, incompetent.[30]

Conclusion

The services afforded by interpreters are integral to the capacity of courts and tribunals every day to dispense justice. One of the important aspects of this conference is to draw attention to the significance of that role, and to discuss ways in which interpreters and the courts can work better together.

The courts are continuing this important conversation through initiatives such as the Judicial Council on Cultural Diversity (JCCD).[31] It is only through continuing collaboration between the courts, interpreters and bodies such as the JCCD and the Australian Institute of Judicial Administration in the search for solutions to issues such as those raised here, that we can provide a judicial and administrative system that truly affords individuals from culturally and linguistically diverse backgrounds the procedural fairness to which they are entitled.

Endnotes

1. Federal Court of Australia: LLB (Hons) (Adel), LLM PhD (Cantab), FAAL.
2. Former associate to Perry J; LLB (Hons), BBus (Bond).
3. Migration Review Tribunal and Refugee Review Tribunal, Annual Report 2013–14, Australian Government, http://www.mrt-rrt.gov.au/AnnualReports/MRTRRTAR201314.pdf, 29.
4. The Hon. Justice Melissa Perry and Kristen Zornada, 'Unfairness in Practice: Recent decisions in migration' (2014) 88 *Australian Law Journal* 776.
5. See *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [2] (Allsop CJ).
6. See *Shu Uan Eao v Commissioner of Taxation (Cth)* [2009] FCA 992 [11]–[13] (Middleton J), summarising the difficulties involved with locating a speaker of the same dialect as the witness in that case, and the subsequent finding that the interpretation was so inadequate as to deny the witness the opportunity to put their evidence before the Administrative Appeals Tribunal.
7. See Patrizia Cordin, 'Tense, mood and aspect in the verb' in Martin Maiden and M. Mair Parry, *The Dialects of Italy* (1997) 88.
8. See Martin Maiden, *A Linguistic History of Italian* (2014) 139.
9. See generally, Rainer Dietrich, *The Acquisition of Temporality in a Second Language* (1995).
10. *Cucu v District Court of NSW* (1994) 73 A Crim R 240 at 250 (Sheller JA).
11. *Joam v Minister for Immigration & Multicultural Affairs* [2002] FCA 107 (Drummond, Mansfield and Emmett JJ).
12. *Cucu v District Court of NSW* (1994) 73 A Crim R 240 at 244 (Kirby P).
13. See *M D Sazzad Alam Khan v Minister for Immigration and Multicultural Affairs* [1998] FCA 1608 (Branson J).
14. NAATI, 'Outlines of NAATI Credentials' (October 2010) http://www.naati.com.au/PDF/Misc/Outliness%20of%20NAATI%20Credentials.pdf; see also *M175 of 2012 v Minister for Immigration and Citizenship* [2007] FCA 1212 [23]–[27] (Gray J).
15. *SZHEW v Minister for Immigration and Border Protection* [2009] FCA 783 [91] (Jagot J).
16. See *SZHEW v Minister for Immigration and Border Protection* [2009] FCA 783 [91] (Jagot J); c.f. *M175 of 2012 v Minister for Immigration and Citizenship* [2007] FCA 1212 [23]–[31] (Gray J).
17. See, for example, *SZQNC v Minister for Immigration and Citizenship* (2012) 131 ALD 257, 259; [2012] FCA 857 [16] (Kenny J); *WZARY v Minister for Immigration* [2013] FCCA 1516 [12].
18. *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212; [2013] FCAFC 142.
19. *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212; [2013] FCAFC 142 [24]–[25] (Allsop CJ), with whom Robertson J agreed at [67]–[69]; applied in *SZSEI v Minister for Immigration and Border Protection* [74],[76]–[77] [2014] FCA 465 (Griffiths J); see also *WACO v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 171 [58] (Lee, Hill and Carr JJ).
20. *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212; [2013] FCAFC 142.
21. *Perera v Minister for Immigration and Multicultural Affairs* [1999] FCA 507 [25]–[26].
22. *WACO v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 171 [68] (Lee, Hill and Carr JJ).
23. See *SZRMQ v Minister for Immigration and Border Protection* (2013) 2120 FCR 212, 229; [2013] FCAFC 142 [71]–[72] (Robertson J).
24. *SZSEI v Minister for Immigration and Border Protection* [2014] FCA 465 [97] (Griffiths J).
25. *SZOBN v Minister for Immigration and Citizenship* [2010] FCA 1280.
26. *SZOBN v Minister for Immigration and Citizenship* [2010] FCA 1280 [30].
27. Sections 51A, 97A, 118A, 127A, 357A and 422B, *Migration Act 1958* (Cth); *SAEED v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 at [40]–[42]; *Khan v Minister for Immigration and Citizenship* (2011) 192 FCR 173; [2011] FCAFC 21 at [40] (Buchanan J).
28. [1999] FCA 507.
29. *Perera v Minister for Immigration and Multicultural Affairs* [1999] FCA 507 [42].
30. *Perera v Minister for Immigration and Multicultural Affairs* [1999] FCA 507 [38].
31. http://www.jccd.org.au/