

Interpreting as a human right - institutional responses: the Australian Refugee Review Tribunal

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Abstract

The paper explores the issue of translation and interpreting as a human right and traces an example of concrete actions by an institution, namely, the Refugee Review Tribunal in Australia, to give effect to the rights which are both explicit and implicit: the institutional response.

On one level, interpreting has nothing to do with human rights! It is axiomatic that an interpreter interprets not what he or she wishes to communicate but what the two clients wish to communicate – end of story? No, not really; fundamentally because of two elements: the first is the relationship between interpreters and language rights, where these have been articulated, and the second is human rights as the context of operations of the interpreter combined with the profile of the people who inevitably interpret in that context.

Speak to any interpreter and not only will they want to tell you how their language combinations are special, particular and peculiar such that incredibly high levels of skill are required to do the job properly; they will also want to tell you about contexts, areas of specialisation, particular domains and they will go to great lengths to indicate how history, politics and culture, among many other things, have produced such intricacies which makes their job difficult.

Indeed this view is reinforced by the structure of the profession and reflected in the teaching and research about the profession worldwide. We have conference

interpreters, community interpreters, legal interpreters, business interpreters, interpreters who work with law enforcement, interpreters who work in hospitals and interpreters who work in refugee camps and in refugee determination situations, including tribunals, to name but a few.

In each of these areas there is serious work afoot to establish how and why they are different from a generalised model of interpreting. So there must be something in this! There have been arguments in the literature about techniques applicable to each of the fields named above; some of the discussions have also argued that the ethics applying to some of these fields are different to the mainstream. The discussion about human rights falls squarely into this kind of debate.

I wish to look at it firstly from a formal perspective in terms of where the idea of a “right” intersects with the discussion about interpreters.

International instruments have devoted considerable attention to the concept of language rights. Language rights can be what I call “primary” as, for example, the right to speak a certain language in dealing with officialdom or the declaration of a language as an official language with its attendant benefits. Language rights can also be considered “derivative”, and this inevitably brings interpreters into the argument. This occurs where there exists a right to use a certain language, more often than not, a first language, in a situation where that language is not the hegemonic or the official language of the specific country or situation. The work of the interpreter is then connected with the right of access to the structures of the “host” country – I say that with some trepidation, and also with the right to participate fully in the society in which one lives. The access to structures and systems is not restricted to those living in a country and typically involves other categories such as tourists, asylum seekers, short-term residents and anyone else who happens to be in that country and requires access to its structures and whose language happens to be one not used there.

Some examples of the concept of language rights in a number of instruments are as follows. The Universal Declaration of Human Rights done on 10 December 1948 states at Art. 2:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The International Covenant on Civil and Political Rights done on 16 December 1966 and which came into force on 23 March 1976 at Article 14 para 3 (a) and (f) states:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; [...]
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

In addition, an example from a domestic law, the Charter of Human Rights and Responsibilities Act, 2006, of the State of Victoria, in Australia, provides, in its Section 25, paragraph (1)(h)(i), in relation to rights in criminal proceedings:

to have the free assistance of an interpreter if he or she cannot understand or speak English;

The recognition of language (which of course includes sign language) as a human right is the prerequisite for the consideration of interpreting as the implementation phase or the means by which this human right is respected. The underlying assumption and one which international or domestic instruments have not made explicit, is that of the *quality* of the interpreter. If this sounds familiar it is because of the paradox that quality is assumed but not much is done to assure it.

One international body, UNESCO, with the prompting of FIT did, in fact, tackle this issue in what is known as the Nairobi Recommendation done in Nairobi at the nineteenth session of the General Conference of UNESCO on 22 November 1976. The title of it, *Recommendation on the legal protection of translators and translations and the practical means to improve the status of translators*, does not do justice to the comprehensive, somewhat understated and useful consideration of the professional figure of the translator and how it should be treated by member states. It goes to some detail about translation contracts, copyright, professional associations and it even states, at paragraph 14 (d):

a translator should, as far as possible, translate into his own mother tongue or into a language of which he or she has a mastery equal to that of his or her mother tongue.

If the right to employ one's own language, at least in dealing with officialdom, is considered to be a human right, it follows that the denial of it is the denial of a human right and less than adequate interpretation is also a denial of a human right.

Embedded in this notion is an issue which is central to the work of interpreters, even though in many ways it is being challenged from a number of quarters, and that is the notion of the importance or the supremacy, if you will, of the source language message. The phenomenon of linguistic expression can only be construed as a right if it is taken as axiomatic that, by privileging the native language, there is a freedom for the person to express himself or herself in a manner and with such nuance, intent, style or force which would be diminished or absent, were they to express themselves in a language other than their native language and that therefore they would be deprived of that right and a wrong would be done to them. Furthermore, the casting of language as a right to be exercised by the person – note: not by the interpreter – is a salutary affirmation that the responsibility for the communication rests with the same person and with no one else. This concept is accepted at law in Australia where the portion of proceedings in a court produced by an interpreter is not subject to the “hearsay rule”. In other words, when the interpreter speaks it is taken as if the original speaker were speaking.

The foregoing casts the interpreter as the person through whom a human right is exercised. This gives food for thought – it invites reflection about whether this

right exists only in the rarefied atmosphere of international instruments and applies to matters legal only. In my view it applies any time interpreting takes place.

How is this human right in theory “translated”, if you will forgive the pun, into the practicalities which confront institutions? What is the response and what responses can be expected from institutions?

I would like to illustrate, as an example, one such response, by the Refugee Review Tribunal in Australia.

The role of the Refugee Review Tribunal (RRT) is to conduct independent, final merits review of protection visa decisions made by delegates of the Minister for Immigration and Citizenship.

In conducting reviews, the tribunal must have careful regard to the procedural provisions in the act [the *Migration Act 1958* as amended], particularly:

- the requirement to put certain adverse information to the review applicant, and to provide the review applicant with an opportunity to comment on any such information (s. 424a);
- the requirement to provide the review applicant with an opportunity to appear before the tribunal to give evidence and present arguments (s. 425);
- the entitlement (subject to some exceptions) for the review applicant to have access to documents before the tribunals (s. 11 of FOI Act 1982); and
- the requirement that the tribunals produce written statements of decision and reasons (s. 430).

The RRT decisions are subject to judicial review by the courts. There are two avenues of judicial review available to applicants who consider that the tribunal has made an error. One is to the Federal Magistrates Court for review under subsection 476(1) of the Migration Act, the other is to the High Court pursuant to paragraph 75(v) of the Commonwealth constitution. Both the applicant and the Minister for Immigration and Citizenship may seek judicial review of a tribunal decision.

The process is illustrated in Fig. 1 (below).

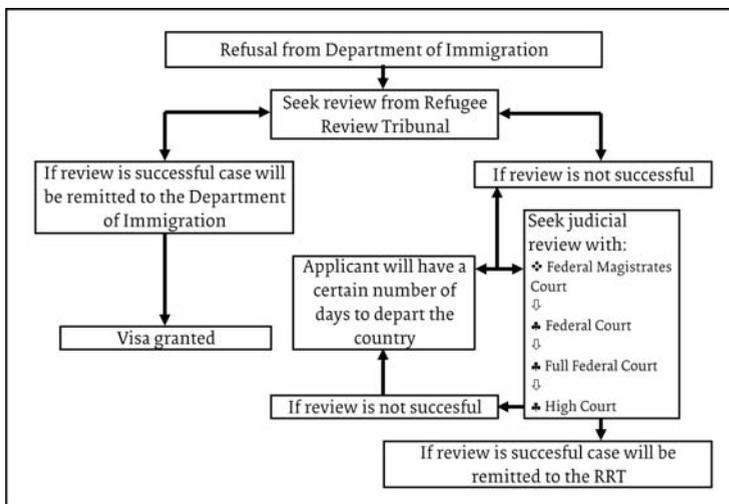


Fig.1

Proceedings before the tribunal are inquisitorial rather than adversarial in nature and do not take the form of litigation between parties. Tribunal members are not judges. The informality is indeed enshrined in our legislation which provides that the tribunal, in reviewing decisions:

- (a) is not bound by technicalities, legal forms or rules of evidence; and
- (b) must act according to substantial justice and the merits of the case (s. 420).

The tribunal is not bound by the rules of evidence which apply in the courts and is therefore able to have regard to documentary evidence which would not be admissible in any court of law. If the RRT is unable to make a decision favourable to the applicant “on the papers”, that is on the written evidence available, except in limited circumstances, the member must offer the applicant the opportunity to attend a personal hearing.

The inquisitorial process is a component of a system that aims, as far as practicable, to be informal (“informal” in the sense that the tribunals are not bound by formal rules of procedure and not “informal” in the sense of the attire or dress of the member) and to be economical in nature.

Markers of the tribunal’s inquisitorial nature include the power to initiate investigations or inquiries of its own motion in order to supplement the evidence provided by the applicant and the department; and the power of the tribunal to ensure that procedural momentum is maintained.

Questioning of the applicant by the member is not only an integral part of eliciting all relevant information, but also allows an applicant to have direct and immediate knowledge of the key issues for determination in his or her case and any concerns the decision maker may have with his or her claims.

Hearings are kept as informal as possible though there does need to be some degree of formality associated with the swearing in of persons giving evidence, recording proceedings and so on.

In a common law system such as ours in Australia, the supremacy of the judiciary in the interpretation of law is not up for discussion. Thus every instance, that is, every case, decided by the courts has precedential value in relation to lower courts and the tribunal and so it is for matters to do with interpreters.

The introduction of the interpreter in the refugee determination process arises for the concepts of “procedural fairness” and “natural justice” rather than any statutory provision about interpreters.

The fundamental issue is whether the applicant is “able to give evidence” in his case (s. 425 of the *Migration Act*):

- (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.

There being no right to an interpreter enshrined in law, the courts have considered that if a person cannot make himself or herself understood in English, he or she is not deemed to have been provided with the opportunity to give evidence at a hearing thus the proceedings are affected by jurisdictional error. As a consequence, an *optimal* model of “competence” adequate for the task at hand seems to be the model which has developed over the years and which appears to be accepted (see *Perera v MIMA* (1999) FCR 6 (Kenny J, 28 April 1999)).

With the enunciation of this model the court is not concerned with quality as an absolute but only with a means of fulfilling its obligations to provide *adequate* opportunity for the applicant (in this case) to give evidence – and also an opportunity to understand what is being said about him/her.

In *Perera v MIMA*, the Court addressed the issue of standard of interpretation required at a Tribunal hearing. It was acknowledged that interpretation was not expected to be perfect before it became acceptable for the Tribunal's purposes. Rather, the Court considered how bad an interpretation must be to render reliance on it a reviewable error. The Court referred with apparent approval to the Canadian case of *R v Tran* (*R v Tran* [1994] 2 SCR 951 (25 February 1994) at [19]) where the standard of interpretation was sought to be defined by reference to the criteria of continuity, precision, impartiality, competency and contemporaneousness. The criteria with which the Court in *Perera* was most concerned were precision or accuracy and competence.

The “competency” of the interpreter can be considered at the outset. It has been noted that the Tribunal must ordinarily rely on extrinsic considerations such as the interpreter's oath, the interpreter's qualifications and any statement by the interpreter as to her or his capacity or experience when forming a view on this issue [*Perera* at 21]. However, these matters are not conclusive. For example, while relevant to the issue of competency, the Tribunal would not be required to adjourn a hearing simply because no interpreter of NAATI Interpreter level (the professional level) was available.

What is of more relevance is the course of the hearing. The member should be advising the applicant at the beginning of the hearing that if they experience problems with the interpreter they should advise the Member immediately. Nevertheless, the Tribunal cannot solely rely on the applicant making a complaint during the course of the hearing to alert it to actual difficulties with the interpretation. Expecting a person who is not sufficiently proficient in English to give evidence alone to make an immediate complaint at the hearing about the quality of interpretation may not be reasonable [*Perera* at 21].

In the same case, the Court considered the matters that would indicate to a reviewing court that the interpreting has been incompetent. These factors would also alert a Tribunal in the course of a hearing that there is something wrong with the interpretation:

- the requirement to put certain adverse information to the review applicant, and to provide the review applicant with an opportunity to comment on any such information (s. 424a);
- the responsiveness of the interpreted answers to the questions asked;
- the coherence of those answers;
- the consistency of one answer with another and the rest of the case sought to be made; and
- any evident confusion in exchanges between the Tribunal and the interpreter.

I wish now to give some examples of cases that have been considered by the courts in appeals against decisions of the RRT and which are relevant to the issue of interpreting. This is simply a selection and a fuller list (itself not exhaustive) is given at the end of this paper with an indication of the issue deliberated upon (I

am indebted to the staff of the Tribunal for some of the summaries appearing below).

NAKK v MIMIA (*NAKK v MIMIA* [2004] FMCA 43, Raphael FM, 10 February 2004)

In the applicant's review application he stated that he required a Bengali interpreter. However, when the hearing before the Tribunal commenced the applicant advised the Tribunal that he would only use the interpreter when necessary. The hearing would otherwise proceed in English. The Tribunal advised the applicant to alert it if he had any difficulty at any time understanding the proceedings.

The applicant had some difficulty understanding the Tribunal and used the interpreting services from time to time. The Tribunal then became frustrated with the adequacy of the interpreting services, began arguing with the interpreter, and then dismissed the interpreter from the hearing. The Tribunal gave the applicant the option of proceeding in English or attending on another day with an interpreter. The applicant stated that he would proceed in English and the Tribunal again stated that he should advise if he had difficulty understanding so the hearing could be adjourned. The hearing proceeded in English, however the hearing tapes indicated that the applicant became confused and his failure to understand many questions would have been apparent to the Tribunal.

The applicant claimed that he was under the misapprehension that the hearing day was his "last chance" to provide evidence as the Tribunal had stated "this is almost certainly the last chance that you will have to tell me about your case..." and was not aware of his ability to seek an adjournment so that interpreting services could be obtained.

Raphael FM held that looking at the hearing as a whole, the appellant was denied procedural fairness when the Tribunal did not, of its own motion, adjourn the hearing so that an interpreter could be made available. The failure to provide an interpreter prevented the applicant from obtaining an effective hearing and was a failure to comply with the requirements of Part 7 of the Migration Act.

Once the Tribunal had accepted the necessity of an interpreter and that necessity had been established by the early confusion then the fair hearing rule required that the whole hearing be undertaken in the presence of an interpreter. The Court found that "[d]espite the Tribunal's well meaning efforts to ensure what was said was understood, she appears to have abrogated her responsibility to ensure the applicant was given a fair hearing by requiring him to inform her when he did not understand a question. Asking someone to tell you when they do not understand a question ignores the possibility that an applicant could believe that he understood the question when he clearly did not. It also leaves out of the equation the possibility that he does not understand the reason why the question is being asked. In this regard I point particularly to the questions concerning inconsistencies and the failure of the Tribunal to explain to an applicant who did not have an interpreter and whose English was obviously limited, that what was required from him was not so much an explanation of the new information but

an explanation of why it was only now being brought to the attention of the Tribunal”.

Furthermore, Raphael FM held that the applicant was influenced not to ask the Tribunal to abort the hearing by its initial comments that the hearing was the “last chance” to present his case. It is therefore the Tribunal that must decide whether an interpreter is called for and whether reliable interpretation is being made. It is not appropriate to rely solely on the applicant’s advice.

WAIZ v MIMIA (*WAIZ v MIMIA* [2002] FCA 1375, Carr J, 6 November 2002)

This decision demonstrates that unavoidable errors in interpreting, which could not have been known to the Tribunal during or following the course of the hearing, will still give rise to jurisdiction error if they are significant or material to the applicant’s claims and subsequently the Tribunal’s findings. It also demonstrates the caution that must be taken when using a telephone conferencing facility for interpreting services.

In *WAIZ v MIMIA*, the applicant’s hearing before the Tribunal took place while he was being held in detention and the services of the interpreter were provided via a telephone conferencing facility. The telephone connection contained static and there was a break in transmission at a critical point while the applicant was providing his evidence. The Tribunal had asked: “You have not been made to join the army up till now and there’s been a civil war for three years and you were never made to join the army. Why would you be made to join it now?”.

After this question was put the telephone connection cut out and the applicant’s answer was not fully received. Upon resuming the hearing, the Tribunal asked the applicant the question again and requested that he re-state his answer. A fresh transcript of the hearing tapes (obtained by Carr J) indicated that the question re-put was not accurately translated and the detailed answer initially provided by the applicant was not provided again when the hearing resumed. As a result, important evidence regarding his previous experiences of being forced to join the army and fear of persecution was not conveyed to the Tribunal.

In the Tribunal’s findings it placed significant weight on its understanding that the applicant had never been forced to join the army. Carr J found that “[i]f the relevant question had been properly translated, the applicant would have had an opportunity to state that he had been conscripted twice and had deserted on each occasion, that this might cause him to be imputed with anti-government opinion, and might lead to persecution”. The applicant had claimed in his submissions to the Tribunal and the delegate that he feared persecution by reason of conscription and perceived anti-government opinions.

Carr J concluded that “the failure properly to translate the relevant question and the breakdown in transmission at this critical point effectively prevented the applicant from giving his evidence in relation to a matter of considerable significance for his claim and, in turn, for the Tribunal’s decision. On resumption of the transmission, the Tribunal gave the applicant an opportunity to revisit his answer. But, on my findings, the damage had been done and, unbeknown to the

Tribunal, the situation could not be retrieved. The Tribunal was deprived the opportunity to take into account a relevant factor”.

Carr J found that the Tribunal had therefore unwittingly made a jurisdictional error.

WABZ v MIMIA (WABZ v MIMIA [2004] FCAFC 30, French, Lee and Hill JJ, 18 February 2004)

The Tribunal requested a female interpreter in response to the applicant’s request for same. It received notification that a person named “Val” would be provided and assumed that “Val” was female. Val was in fact male and the applicant claimed that the failure to provide a female interpreter gave rise to a failure to accord procedural fairness in all the circumstances.

The Court held that the Tribunal did all it reasonably could to accede to the appellant’s request for a female interpreter. There was no evidence to support an inference that the use of the male interpreter gave rise to substantive prejudice in this case arising from his gender.

The Court was also satisfied that while there were some errors in interpretation, the errors were merely incidental to the reasons for decision and did not amount to procedural fairness.

P119/2002 v MIMIA (P119/2002 v MIMIA [2003] FCAFC 230, Mansfield, Emmett, Selway JJ, 16 October 2003)

The applicant submitted that the interpretation services in the hearing before the Tribunal were inadequate and that the Tribunal erred in relying upon an incorrect translation of the initial interview in finding there were inconsistencies in the various accounts given by the appellant.

Despite the interpreter clearly experiencing difficulties in understanding the applicant’s evidence – for example, he stated that the appellant “was all over the place and I cannot interpret that way... I have to have a sentence, something I understand and can interpret. Now if someone is just giving bits, bits and it is not a proper sentence it is all over the place...” – Mansfield and Selway JJ were satisfied that the interpreter fully and accurately interpreted the substance of the applicant’s evidence. The only error their Honours could identify was that the interpreter stated that an event occurred “the fourth night” whereas the correct translation was “the fourth day”. The Tribunal was satisfied however that the Tribunal had attached no significance to the issue of the fourth day or the fourth night. “Consequently, the translation of the hearing before the Tribunal was not so inadequate that it could be said that the appellant was effectively prevented from giving evidence at the Tribunal hearing. In fact, the converse is the more accurate view of the interpretation of the hearing. Nor can it be said that the single error that was identified was material to the conclusions reached by the Tribunal” at [22].

The Tribunal was also satisfied that the matters giving rise to credibility findings were not related to any matters about which there were translation errors in the first interview.

SZADQ v MIMIA (SZADQ v MIMIA[2003] FCA 1223, Stone J, 3 November 2003)

The applicant of the Hindu religion appealed to the Federal Court against the decision of Federal Magistrate Driver who had affirmed the Tribunal's decision. The applicant claimed that his hearing before Federal Magistrate Driver had been prejudiced as he had been provided with a Muslim interpreter.

The Federal found that "[in] his reasons for judgment Driver FM commented that he did not consider that the religion of the interpreter had any bearing on the interpreter's capacity 'to interpret faithfully and his understanding of his obligations'. I respectfully agree with his Honour and do not accept that the religion of the interpreter has any potential to prejudice the appellant" at [8].

WACO v MIMIA (WACO v MIMIA[2003] FCAFC 171 (Lee, Hill and Carr JJ, 16 August 2003)

The Iranian applicant submitted that the interpretation of the concept of "house arrest" was faulty as there was no direct Farsi translation of the term and no suitable substitute for the term was found by the interpreter to allow the Tribunal and the appellant to communicate in regard to the concept.

The Court recognised that while "house arrest" may be an example of a term for which there is no perfect translation, "the requirement is not that there be a perfect translation, it suffices that the translation is sufficiently accurate as to permit the idea or concept being translated to be communicated" at [66].

The Court considered that "house arrest" means that the person under arrest is under control and observation in his home. The Court was satisfied that this meaning was adequately conveyed by the words "controlled" and "observed at home" as used by the interpreter and that no breach of s. 425 was apparent.

MZWKN v MIMA [2006] (FMCA 413 Federal Magistrates Court of Australia, McInnis FM, MLG 640 of 2004, 24 March 2006)

The applicant, a national of Georgia, sought judicial review of an RRT decision that he was not a person to whom Australia owed protection obligations. The applicant claimed to fear persecution on the basis that he would be persecuted by Georgian law enforcement agencies because he was trying to establish a political party.

The application for a protection visa was refused and on 21 May 2002 the RRT affirmed the delegates decision (the first Tribunal decision). The applicant then applied to the Federal Magistrates Court for judicial review of that decision. The central issue before the Courts was the quality of the Georgian interpreter that had been provided by the first Tribunal, and a transcript of the first hearing was

provided to the Federal Court by a translator. The matter was remitted for reconsideration.

The second Tribunal went to considerable efforts to locate another, accredited, Georgian translator, but was unsuccessful. An accredited Russian translator was supplied by the Tribunal on the understanding that the applicant spoke Russian to some degree, although it was a second language, as he could not read or write it. The second Tribunal went to some lengths to ensure that when the applicant appeared to have difficulty, there was further discussion of the questions put and answers.

The second Tribunal found that the applicant had not provided sufficient details of the political party he was allegedly involved with, and in particular did not appear to know which part of the political spectrum the party was located on. The Tribunal also found that the applicant's role in the political party was minor and insufficient to bring him to the attention of the authorities, and that the general country information suggested the Georgian authorities were tolerant of political parties. The second Tribunal affirmed the decision of the delegate.

The applicant contended that the Tribunal had erred by placing weight on his lack of clarity in answering questions on the political party. The applicant submitted that this was due to the difficulties he had communicating in the Russian language.

Held: RRT decision set aside and remitted for reconsideration

- (1) There was a departure from the relevant standards of interpretation which related to matters significant to the applicant's case before the Tribunal. The discussion of the philosophy of the political party was central to the application and by failing to provide a relevant standard of interpretation, and not seeking further written submissions, the Tribunal denied the applicant procedural fairness and made a jurisdictional error.
- (2) The Tribunal's reasoning that the applicant did not display "any real awareness of the idea of a political party", or of the political spectrum, was difficult to extricate from the other adverse findings of the Tribunal, and was determinative of the application.
- (3) The error was not cured by the applicant continuing with the hearing and not objecting.

SZIME v MIAC [2007] (FCAFC 10, Federal Court of Australia, Allsop, Lander & Middleton JJ, NSD1755 of 2006, 13 February 2007)

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a Refugee Review Tribunal ("the Tribunal") decision that the appellant, a Nepali national, was not a person to whom Australia had protection obligations.

The issue before the court was whether the Federal Magistrate had erred in concluding that the Tribunal did not breach s. 429 of the *Migration Act 1958* ("the Act"), which states that "[t]he hearing of an application for review by the Tribunal

must be in private”. An interpreter was present at the Tribunal hearing and had taken an oath of confidentiality. During the hearing the appellant’s migration agent had raised a number of difficulties with the interpreting and the interpreter had said that she did not feel well, did not have much experience and that the applicant might need a better interpreter. The Tribunal adjourned the hearing and resumed with a new interpreter, but invited the first interpreter to remain as an observer, to help her familiarise herself with Tribunal proceedings. No consent was sought; however, neither the appellant nor his agent objected, and the agent had displayed no hesitation in speaking in his client’s interests up to that point. The appellant submitted that the hearing was not in private. It was submitted that the presence of the first interpreter was akin to the presence of any member of the public, that her presence was not necessary for the performance of the Tribunal’s functions, was not desired by the appellant and was not of any advantage to him.

Held: Appeal dismissed

- (1) The interpreter was not to be taken as a member of the public and the hearing was “in private” for the purposes of s. 429 of the Act.
- (2) The question as to whether persons present at a Tribunal hearing deny the quality of privacy of the hearing will be a question of fact in each case recognising that the phrase “in private” is an ordinary English expression and that the purpose of s. 429 is to protect the applicant in the respects identified by the High Court in *SZAYW v MIMIA* (2006) ALR 423. That is, that an applicant may make allegations that could expose the applicant to a risk of reprisals if they were made public, and applicants should feel uninhibited in presenting their cases to the Tribunal.
- (3) The first interpreter was not a stranger. Whilst her role had ceased, she remained clearly bound by the oath of confidence. The hearing was not open to the public. The purpose of the interpreter remaining as identified by the Tribunal was one reasonably required in connection with the Tribunal’s functions generally. It is plainly in the interests of the due administration of the Tribunal’s function that there be competent interpreters available to it. The opportunity for some further exposure to the processes of the Tribunal and its procedures was a legitimate connection with the performance of the Tribunal’s functions.
- (4) Whilst a request for consent would have been both appropriate and courteous, a lack of such request did not convert the first interpreter into a stranger or interloper.
- (5) Having regard to the purpose of s. 429 as identified by the High Court, the functions of the Tribunal, how the interpreter came to be there, the events that happened and the expressed reason for retaining the presence of the first interpreter, the interpreter was not to be taken as a member of the public and the hearing was “in private”.

The inherent value of human rights and their protection goes and must go unquestioned. In thousands of interpreting assignments each day of the week this aspect does not loom large in the interpreter's mind although it is a factor in every assignment. Just as the concept of impartiality is one which is focused upon in discussions of the role of the interpreter in a business meeting, so is the concept of human rights focused upon when we talk about asylum seeker interviews and interpreting in conflict zones or in camps for displaced persons.

A considerable amount of research has been done in this area, notably by Barsky (1994), Inghilleri (2007), Baker (2005, 2006) and others where the idea of the role is not construed as the immediate behaviour of the interpreter, nor is there an analysis of the transfer of meaning in the interactions to assess whether this is accurate, rather the interpreter's role is examined from the standpoint of the macro-contextual factors influencing the social interaction which characterises the situations, in this instance, the refugee determination process. These factors stem from the narrative and narrative theory is utilised to analyse the social function and the political import of the interaction.

The concept of narrative has been utilised by a number of disciplines such as literature, social theory and politics. It is not appropriate or possible to do justice to this concept in a presentation like this one; I shall therefore simply attempt to illustrate its application to interpreters using examples from some of these authors.

Mona Baker (2005) gives an example of a narrative about translators themselves; the narrative portrays the translator as an honest intermediary, translation as a force for good; utilising the metaphor of the translator as a bridge, she gives the example of a programme on Iraq televised in Britain in October 2003 which showed a US army officer standing at the bedside of a wounded Iraqi civilian and speaking to him through an interpreter. The interpreter was enabling communication between the two parties and the officer was explaining to the wounded Iraqi that he had only two choices, cooperate with the US army and live or fail to cooperate and be left to die. She states that it is difficult to see how this "enabling" role of the interpreter can be reconciled with the narrative of the translator as a force for good.

Moira Inghilleri in *Social Semiotics* (2007), in an article titled "National Sovereignty versus Universal Rights: Interpreting Justice in a Global Context", discusses the concepts of insider/outsider, national/transnational and looks at them in the instance of the process of refugee status determination in the UK. In describing the players in the process she states:

The asylum process is the roughest of rough games. Beneath some of the interactional surface each participant in an official hearing can be in bad faith. Discussions within the solicitor's office between an asylum seeker, a legal representative and an interpreter involve the joint production of a narrative that will achieve the objective of winning the right to remain in the United Kingdom. The underlying motive of the Home Office's counter-narrative against a claimant's credibility is to return the applicant to his/her country of origin or an alternative "safe" country. The particular discursive moves of any or all of the participants in evidence in interpreted interactions are directly informed by both the local communicative and global political processes described above.

The interpreters involved in this process do not come from nowhere. They too are socially and politically situated. They are therefore operating at the grinding edge of the macro-political realities. Given that asylum cases are won or lost based on the competing “ontological” narratives of applicants and “public” narratives of the receiving countries both sides have a stake in believing in and seeking to ensure that their case for or against persecution is relayed as comprehensively and “objectively” as possible. (2007: 207)

These two examples are illustrative of the phenomena which we as interpreters have perhaps identified and struggled with, but the above approaches place the issues in a much more holistic and universal frame utilising the concept of narrative.

I often meet interpreters who have interpreted at the Refugee Review Tribunal who tell me that they no longer wish to do this kind of work. When I ask for a reason, it is not couched in the terms which I have just quoted above but it is said that they find the experience too difficult as they fear the consequences of inaccuracies on the process and see the impossibility of achieving that bridging role which Mona Baker talks of. The existence of two narratives one belonging to the applicant for asylum and one which is the institutional narrative of the system, and the distance between them, provide a degree of discomfort for the interpreter and often they do not wish to participate in this social interaction.

The problems embedded in the last paragraph are major ones. The poignancy of this area of operation is created by the following factors: the first is what used to be called the “world view” of the actors which includes the concept of narrative. In this area the most likely scenario involves persons whose world is far removed from the Australia of 2010 for example; this is not referring to economic well-being but to the underlying assumptions in our society, including but not limited to the attitudes of officials, the reliance on the rule of law, the concern with process, the formality of the encounter and many others *versus* the assumptions about the same issues on the part of the asylum seeker. These are not matters that can be “cured” for either interlocutor by more information or more study, these are matters in the socio-political environment which are part of the fabric and makeup of the persons who constitute a society, absorbed over decades and changing with the times in accord with the efforts of parents, the media, politics etc. – the creation of new and different narratives both private and public. As an example the narrative of the *war on terror* is a recently created narrative which is moulded and reinforced at every turn and at every opportunity not only for those trying to exploit its political ramifications but also for ordinary citizens.

Enter the interpreter. In this area a large proportion of interpreters, by virtue of the languages involved, are inexperienced, untrained and not professionally socialised – sometimes all of the above. The context is human rights, the underlying assumptions are that the stakes are extremely high and the rewards are also perceived as considerable. In order for communication to take place in fairly structured communication situations such as a lawyer’s consultation or a tribunal hearing, the interpreting needs to be impeccable.

Often however, even impeccable interpreting does not bridge the communication gap because of the fact that the two narratives cannot be successfully integrated during the interaction. The reasons, in my view, are to be

found in complex human feelings. In a high percentage of asylum cases the interpreter is of the same ethnic and cultural background as the applicant and often was himself/herself a refugee. It thus occurs that there is a tendency to normalise the narratives – for the English speaker to receive interpretation conforming to the, in this case, Australian narrative and for the other client to receive interpretation conforming to their narrative. I hasten to add that this does not mean that the interpreter is being inaccurate on purpose in order to alter the outcome of the interaction. What I am saying is that in such a situation more subtle forces are at play. What I have called the “normalising” of the narratives occurs at a level that the interpreter himself or herself is not necessarily aware of and it entails, for example, the way that the implicit and explicit aspects of language are handled, the manner in which non-corresponding concepts in either language are represented in the other language, highlighting one aspect over another. This is something which happens in any interpreted situation, except that, in the case of those involving human rights, this element comes to the fore because of the nature of the players. This phenomenon reaches the “unacceptable” in interpreting performance terms when the interpreter overtly intervenes in the situation as happens in my hearings every other day. These interventions are justified by those who advocate them on the grounds that the interpreter should be “more than” an interpreter and is some kind of cultural broker, as if any act of interpreting did not entail a cultural transfer component.

An analogous line of argument has been pursued in business interpreting for decades, in this instance the “particular” and “special” licence to the interpreter to intervene is discussed in terms of the concept of “he who pays the piper calls the tune”.

To bring together the threads of the above discussion, it is apparent that where the subject matter and context of the interaction involves human rights there is a point where the interpreter cannot easily attempt to separate the personal from the professional and the toll on the interpreter is sometimes overwhelming. In my view this is due to the multiple functions of interactions in this field where language as a human right becomes the means by which other human rights are achieved, for example the right to asylum. This is the reason why some people talk about the role of interpreters in human rights but I believe that to place such a burden on interpreters is unrealistic and counter-productive. I return to my appeal that we as interpreters should not take away the responsibility of the message from the interlocutors.

References

- Baker M. (2005) “Narratives in and of translation”, *SKASE Journal of Translation and Interpretation* 1/1, 4-13.
- Baker M. (2006) *Translation and Conflict: A Narrative Account*, London, Routledge.
- Barsky R.F. (1994) *Constructing a Productive Other*, Amsterdam/Philadelphia, John Benjamins.
- Inghilleri M. (2007) “National sovereignty versus universal rights: interpreting justice in a global context”, *Social Semiotics* 17/2, 195-212.

Case law

- NAKK v MIMIA (*NAKK v MIMIA* [2004] FMCA 43, Raphael FM, 10 February 2004): Part use of the interpreter during the hearing.
- WAIZ v MIMIA (*WAIZ v MIMIA* [2002] FCA 1375, Carr J, 6 November 2002): Errors in interpreting.
- NAIF v MIMIA (*NAIF v MIMIA* [2003] FMCA 458, Barnes FM, 22 October 2003): Language/dialect.
- WABZ v MIMIA (*WABZ v MIMIA*[2004] FCAFC 30, French, Lee and Hill JJ, 18 February 2004): Gender of interpreter.
- P119/2002 v MIMIA (*P119/2002 v MIMIA* [2003] FCAFC 230, Mansfield, Emmett, Selway JJ, 16 October 2003): Quality of the interpretation.
- SZAAJ v MIMIA (*SZAAJ v MIMIA* [2004] FCA 312, Hill J, 26 March 2004): Timeliness of complaint against the interpreter.
- SZADQ v MIMIA (*SZADQ v MIMIA*[2003] FCA 1223, Stone J, 3 November 2003): Religion of the interpreter.
- WACO v MIMIA (*WACO v MIMIA*[2003] FCAFC 171, Lee, Hill and Carr JJ, 16 August 2003): Interpretation of specific concept “house arrest”.
- SZGWM v MIMA & Anor [2006] (FMCA 1161, Lloyd-Jones FM, SYG2035 of 2005, 13 October 2006); MZWKN v MIMA [2006] (FMCA 413, McInnis FM, MLG 640 of 2004, 24 March 2006): Getting the correct language – Fujian/Fuqing/Madarin; Georgian/Russian.
- SZIME v MIAC [2007] (FCAFC 10, Federal Court of Australia, Allsop, Lander & Middleton JJ, NSD1755 of 2006, 13 February 2007): hearing in “private”.