Questions on Notice for MRT- RRT

Questions from Senator Payne are:

1. The committee received evidence during its hearing on 31 January 2007 from Ms Michaela Byers in relation to difficulties she had experienced with interpreters used by the tribunals. In particular, Ms Byers stated that in response to complaints she had made about particular interpreters and a request that those interpreters not be used for her clients, the tribunals had effectively banned these interpreters from engagement for hearings involving her clients but continued to be used in other matters before the tribunals. What is the response of the tribunals to this evidence?

Answer

The Tribunals do not wish to make specific comments in respect of any matters involving interpreters against whom Ms Byers may have made complaints or expressed concerns but wish to provide the following explanation of Tribunal policy regarding the use of competent interpreters and of Tribunal practices and procedures where complaints are made or concerns expressed.

Tribunal Members are aware of the essential need for effective communication between all parties in the conduct of hearings. Members are aware of the obligation to provide a competent interpreter if an applicant is not proficient in English in order to fulfil their obligation to conduct a fair hearing.

All Members are trained and experienced in the use of interpreters. Members receive ongoing professional development in the use of interpreters. A number of materials and resources are made available to Members on the effective and lawful use of interpreters. For example, see the attached Tribunals' Legal Issues Paper entitled *Current Legal Issues Arising out of the Tribunals' Use of Interpreters* and extract from the Members' Procedural Guide entitled *The Role of the Interpreter at the Hearing*.

Members are conscious of the difficulties of communicating through an interpreter. Many Members are from non-English speaking backgrounds and are familiar with language barrier issues. All Members are very mindful of the range of difficulties that can be experienced in the use of interpreters by the diverse group of applicants, representatives and witnesses that appear before them.

It is the responsibility of the Member to determine if an individual interpreter is sufficiently skilled and competent to assist in any particular case. Members make the judgment themselves as to the capacity of an interpreter to communicate effectively with an applicant but also ask applicants and representatives to tell them if they are experiencing any difficulties. Members also seek the views of interpreters as to whether they consider the applicant understands them and whether they can understand the applicant sufficiently well.

During 2005-06 the MRT decided 6,532 reviews. A hearing was held in 4,577 (70%) of these cases and in 66% of these latter cases an interpreter was employed. In the same period the RRT decided 3,287 reviews. A hearing was held in 2,199 (67%) of these cases and in 90% of these latter cases an interpreter was employed.

The Tribunals have a current contract with ONCALL INTERPRETERS & TRANSLATORS AGENCY (OnCall) to supply, where possible, interpreters accredited at the Professional Interpreter level by the National Accreditation Authority for Translators and Interpreters (NAATI). It is not always possible to find a qualified interpreter, perhaps because NAATI accreditation does not exist for the language in question (e.g. Tamil) or because the pool of

professional interpreters in that language in Australia is very small and highly sought after by other users (e.g courts and tribunals). There is only one professional level Khmer interpreter in NSW and only two in Australia, however there are twenty Tribunal hearings requiring Khmer interpreters scheduled for February and March 2007.

Where OnCall cannot supply a qualified interpreter or accreditation does not exist for the language the Tribunals may seek the services of an interpreter from another supplier, including suppliers from overseas.

The Tribunals' requirements in relation to interpreters and information about the use of interpreters are set out in the Tribunals' *Interpreter's Handbooks*. A revised *Interpreter's Handbook* for both the MRT and RRT is under advanced development and was referred to migration industry practitioners during January this year for their views.

Tribunal application forms and hearing invitation letters encourage applicants and their representatives to provide specific information regarding their interpreter requirements at hearings (such as language, dialect, or gender). The Tribunals aim to meet any requests from applicants and their representatives regarding an interpreter they consider will meet their needs.

Many languages are not tested by NAATI with the result that there is no standard to measure the expertise of interpreters speaking these languages. In cases where it is not possible to obtain a NAATI Professional Level Interpreter, Tribunal staff document the reasons for this (eg language not accredited, interpreter not available on the date etc.) and provide this information to the Member so that he or she can decide whether they wish to proceed with the hearing at the scheduled time and if they do, they are able to provide this information to the applicant and representative.

The number of people in some communities is so small that it is sometimes impossible to find an interpreter (professional or otherwise) who is not already known to the applicant and/or their representative. In these instances, discussions are held with the applicant and/or their representative to ensure that all issues are satisfactorily resolved.

On occasions, a representative has requested that a particular interpreter not be used for his or her clients. A particular representative may, for example, have limited confidence in the competence or integrity of an interpreter (or may have personal issues) in respect of whom other practitioners and Members may be satisfied. In such cases, the Tribunals may accommodate the representative's request and not allocate the interpreter in question to any case involving that particular representative but may not necessarily exclude the interpreter from other work in the Tribunals. The Tribunals have generally had regard to such requests in booking interpreters for particular representatives, even though the Tribunals may, in some cases, otherwise consider that the interpreter continues to meet the high standards expected of interpreters.

2. What processes do the tribunals have in place to deal with complaints made in relation to interpreters?

Answer

The Tribunals' *Interpreter's Handbooks* set out what is expected of interpreters. Included is a requirement that interpreters abide by the Australian Institute of Interpreters and Translators' (AUSIT) Code of Ethics.

The Tribunals seek to use the most suitable accredited interpreter for each case, taking into account what is known about any requirements or preferences in relation to language, dialects, ethnic or religious background and gender. In some circumstances, it is not possible to find an interpreter who meets all requirements and preferences, or these only become clear at the hearing.

At the commencement of hearings applicants and their representatives are asked to advise Members of any problems experienced with interpreters, and Members also monitor the quality of interpreting. Where it becomes apparent during a hearing that there is an issue with the suitability of a particular interpreter or the quality of interpreting, Members will, as a matter of practice, adjourn the hearing until such time as a suitable interpreter is available.

The Tribunals obtain feedback on the performance of interpreters from the applicant and their representatives as well as from the Tribunal Members. There is a discrete procedure for Members to follow to report to relevant staff on an interpreter's performance. Such reports are recorded and where appropriate are conveyed to the service provider. These feedback arrangements are seen as important in maintaining and improving the standard of interpreting. For example, Members recently provided feedback that some Mandarin interpreters were having difficulty with Christian religious terms. The interpreter agency addressed this as a training issue by providing all Mandarin interpreters with a glossary of Christian religious terms.

Any remedial action taken will be dependent on the seriousness of the concern or complaint. More serious concerns relating to the competency or professionalism of the interpreter will be referred immediately to a senior officer at the interpreter agency by a senior officer of the Tribunals and an immediate course of action will be agreed upon. Depending on the circumstances, the Tribunal may refer hearing tapes to an independent agency and seek their opinion on the competency of an interpreter. Members will consider whether the evidence obtained in the hearing should be relied upon.

In cases where there is found to be a clear concern in relation to a particular interpreter's standard of interpreting or professionalism, the Tribunals will advise the service provider that the interpreter is no longer to be used for any Tribunal hearings.

The Tribunals maintain a file of the types of interpreter complaints and convene regular meetings with the interpreting agency to discuss those complaints and agree to courses of action. Outcomes from those meetings are followed up and progressed.

3. In response to comments from the RRT/MRT regarding extended waiting times for review applicants in detention, Senator Payne requested information regarding the average lengths of time that review applicants are in detention and whether this is extended by virtue of the administrative process of review.

Could the tribunals provide statistics on the average length of time that a review applicant in detention waits from the lodgement of the appeal till when a decision is made?

Could the tribunal expand on the proposed benefit to review applicants in detention of this amended bill?

Answer

The Migration Act 1958 ('the Act') and Migration Regulations 1994 ('the Regulations') contain express provisions which promote expeditious reviews relating to persons in immigration detention. These include:

- prescribed periods to comment or give additional information;
- prescribed periods relating to the period of notice that must be given if the applicant is invited to appear before the Tribunal;
- prescribed periods for deciding the review of bridging visa (detention) cases.

Sections 414A of the Act, which came into operation on 12 December 2005, establishes a 90 day period (from receipt of the Department's file to decision) for the RRT to review applications for review of RRT-reviewable decisions. This 90 day period applies to both detention and non-detention cases.

Principal Member Direction 1/2006 - *Caseload and Constitution Policy 2006-07* requires the Tribunals to give the highest priority to the conduct of reviews involving persons being held in immigration detention. On 31 January 2007 the Principal Member issued a Principal Member Direction PMD1/2007 entitled *Management of Detention Cases* (copy attached) reminding Members and staff of the need to expedite such cases. This PMD requires expeditious handling by Members and staff of all cases concerning applicants in detention.

Under the Act, the MRT is required to decide bridging visa reviews involving persons in detention within 7 working days. In the six months to 31 December 2006, 83% of MRT reviews involving a person in detention were decided within 7 working days of lodgement. The average time taken by the MRT was 10 calendar days.

For RRT reviews involving persons in detention 80% were decided within 90 working days in the period 1 July 2006 to 31 December 2006. The average time taken was 65 days. This compares to an average time for RRT detention cases in 2005-06 of 59 days.

For the reasons set out in the Tribunals' evidence before the Committee and in the written submission to the Committee dated 24 January 2007, the Tribunals consider that the amendments contained in the Bill will benefit applicants by reducing the time spent in detention awaiting decisions in cases where a comprehensive hearing has fully traversed all relevant information.

The Bill will provide the Tribunals with a degree of flexibility in the conduct of reviews which will enable, without any reduction in procedural fairness, the earlier conclusion of reviews following hearings without unnecessary duplication of effort and process on the part of applicants or representatives.

The RRT conducted a hearing in 98% of the detention cases decided in the period 1 July 2006 to 31 December 2006. Where the RRT invites an applicant in detention to comment in writing under section 424A, the Tribunal is required to provide 7 calendar days for the applicant to respond. Where the MRT invites a bridging visa applicant to comment in writing under section 359A, the MRT is required to provide 2 working days for the applicant to respond. It should be noted that the preparation of section 424A/359A letters, following hearings, takes additional time leading to further delays in determining reviews.

Following the High Court decision in *SAAP* and the Full Federal Court decision in *SZEEU*, Members have very closely observed the current requirements to reduce to writing relevant information that was fairly and fully discussed at hearing. There have been no formal complaints from applicants or their advisers about the duplication involved in many cases but anecdotal evidence suggests that the current process is stressful, frustrating and costly to applicants as decisions are not being made as early as possible.

Australian Government

Migration Review Tribunal · Refugee Review Tribunal

LEGAL ISSUES PAPER

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Disclaimer: Changes to legislation, case law or policy may have occurred since this Issues Paper was prepared. If in doubt about the currency of this Paper, please consult Legal Services.

CURRENT LEGAL ISSUES ARISING OUT OF THE TRIBUNALS' USE OF INTERPRETERS

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CONTENTS

INTRODUCTION

The Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT) have different obligations under the *Migration Act* 1958 (the Act) to provide interpreting services to applicants and witnesses appearing before them. It is widely accepted that both Tribunals are equally obliged to provide interpreting services that are adequate and competent to ensure that an applicant is given the opportunity to give evidence and be heard.[1] Whether the interpreting services engaged by the Tribunal are adequate and competent, in the circumstances of each case, is ultimately a matter for determination by the Member conducting the review.[2] However, the case law establishes that an insufficiently interpreted hearing is not a proper hearing within the terms of Part 5 or Part 7 and also constitutes a breach of common law procedural fairness requirements, to the extent that they still apply.[3]

DISCUSSION

1. The Tribunals' Statutory Obligations.

In the MRT, there is an obligation under s.366C of the Act to provide an interpreter to a person appearing before the Tribunal in certain circumstances. A person appearing before the Tribunal to give evidence may request the Tribunal to appoint an interpreter for the purpose of communication between the Tribunal and that person.[4] The Tribunal must comply with that request unless it considers that the person is sufficiently proficient in English.[5] Even in circumstances where a person has not made a specific request for an interpreter, the Tribunal must appoint one if it considers that the person is not sufficiently proficient in English.[6]

In the RRT, there is no express obligation under the Act for the Tribunal to provide the applicant or any witness appearing before the Tribunal with an interpreter. However, pursuant to s. 427(7), if a person appearing before the Tribunal to give evidence is not proficient in English, the Tribunal may direct that communication with that person during their appearance proceed through an interpreter.[7] In addition, it is evident that s.427(7) must be considered in the context of the applicant's right to appear and give evidence under s.425(1) [s.360(1) for the MRT] of the Act.[8] If the applicant can comprehend and articulate English sufficiently well to enable him or her, in a real sense, to give evidence and present arguments in English, the statutory requirements

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1 s.360 [MRT] / s.425 [RRT]; *Perera v MIMA* (1999) 92 FCR 6 (Kenny J, 28 April 1999).

2 *NAKK v MIMIA* [2004] FMCA 43 (10 February 2004, Raphael FM) (extract attached at Attachment 1); *VWPT v MIMIA* [2005] FMCA 753 (O'Dwyer FM, 13 October 2005) (extract attached at Attachment 4)

3 *Perera* v *MIMA* (1999) 92 FCR 6 (Kenny J, 28 April 1999), *Long v Minister for Immigration* (2000) 106 FCR 183 (Mansfield J, 23 August 2000), *Liu v Minister of Immigration* (2001) 113 FCR 541 (Black CJ, Hill and Weinberg JJ, 21 November 2001)

4 s.366C(1).

5 s.366C(2).

6 s.366C(3). To date, no decision of the MRT has been set aside on judicial review for breach of s.366C.

7 In *VWFY v MIMIA* [2005] FCA 1723 (Finkelstein J, 2 December 2005) at [7] – [9], the Court held that the use of the term "may" in s.427 of the Act does not suggest that the Tribunal has a discretion to appoint an interpreter but should be understood as the grant of authority to appoint an interpreter. Furthermore, the requirement that there be an interpreter under s.427(7) of the Act imposes an obligation on the Tribunal to appoint an interpreter with sufficient skills to fulfil the function (extract attached in Attachment 1).

8 In *Darshan Singh v MIMA* [2001] FCA 1376 (Black CJ, Hill and Weinberg JJ, 21 November 2001) at [27], the Court stated that a clear relationship exists between ss.425(1) and 427(7).

will have been satisfied. However, if the applicant is unable to give evidence and present arguments in English, the effect of s.425(1) and s.427(7) is that communication should proceed through an interpreter to ensure 'real compliance' with the Act.[9]

The provision of interpreting services for an applicant is an aspect of the hearing process which the Court considers is under the control of the Tribunals and is therefore also directly linked to the obligation to invite the applicant to give evidence and present arguments.[10] This means that where the MRT or RRT recognise that an interpreter is required, the obligation to extend an invitation will not be satisfied if the Tribunal provides an interpreter whose interpretation is such that the applicant is unable to adequately give evidence and present arguments.[11]

It is clear that the standard of interpreting affects the Court's view of whether the invitation is a "hollow shell" or "empty gesture".[12] The Court in *Mazhar v MIMA*[13] applied the observation of Wilcox J in *Xiao v MIMA*[14] that events subsequent to the invitation were not necessarily immaterial when considering the substance of the invitation.[15] In effect, by failing to provide an adequate interpreter which allows the applicant to put forward her or his case, the Tribunal is perceived to have failed to leave the invitation "open" and to have acted in breach of s.360(1) / s. 425(1).

This approach has again been approved in the RRT case of *W284 v MIMA*,[16] where the Court, referring to *Perera v MIMA*,[17] and approving *Mazhar v MIMA*[18] and *Xiao v MIMA*,[19] stated that the provision of inadequate interpreting "constitute[d] a failure on the part of the Tribunal to comply with the requirements of s.425(1)."[20]

In addition to the Tribunals' statutory obligations, the failure to provide adequate interpreting services has been found to constitute a failure to accord common law procedural fairness.[21]

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9 *ibid at* [26] & [27].

10 s.360(1) [MRT] / s.425(1) [RRT].

11 *Mazhar v MIMA* (2001) 183 ALR 188 (Goldberg J, 6 December 2000) at [195].

12 *ibid* at [31], Goldberg J held that the invitation to hearing must not be a "hollow shell" or "empty gesture".

13 *ibid.*

14 [2000] FCA 1472 (Wilcox J, 20 October 2000)

15 *ibid*, citing *Xiao v MIMA* [2000] FCA 1472 (Wilcox J, 20 October 2000) at [36].

16 [2001] FCA 1788 (French J, 12 December 2001).

17 *Perera v MIMA* (1999) 92 FCR 6 (Kenny J, 28 April 1999). This case was decided under the old form of s.425(1) but the reasoning of Kenny J in that case has been held to be applicable, notwithstanding the change in terminology: see *Long v MIMA* (2000) 106 FCR 183 (Mansfield J, 23 August 2000) at [190], *Singh v MIMA* [2001] FCA 1376 (Tamberlin, Mansfield, Emmett JJ, 28 September 2001), at [27]. In *Mazhar v MIMA* (2001) 183 ALR 188 (Goldberg J, 6 December 2000) and *W284 v MIMA* [2001] FCA 1788 (French J, 12 December 2001), it is not clear whether the Courts accepted that *Perera* should be distinguished: no specific findings were made on this point.

18 (2001) 183 ALR 188 (Goldberg J, 6 December 2000).

19 [2000] FCA 1472 (Wilcox J, 20 October 2000).

20 *W284 v MIMA* [2001] FCA 1788 (French J, 12 December 2001) at [35].

21 See for example *MZWKN v MIMIA* [2006] FMCA 413 (McInnis FM, 24 March 2006) (extract attached at Attachment 1). *MZWKN v MIMIA* was not a decision to which s.357A/422B applied. It remains unclear whether common law procedural fairness obligations arise where s.357A/422B apply, that is to applications for review lodged on or after 4 July 2002. Compare *Lat Lay v MIMIA* [2006] FCAFC 61 (Heerey, Conti and Jacobson JJ, 12 May 2006), Antipova v MIMA [2006] FCA 584 (Gray J, 19 May 2006) and *WAJR v MIMIA* (2004) 204 ALR 624 (French J, 18 February 2004).

2. The Interpreting Service Must Be Adequate & Competent.

The Tribunals' statutory obligations will only be met if the interpreting service provided by the Tribunal is adequate and competent in all of the circumstances.

In *Perera v MIMA*[22], the Court explored the standard of interpretation required at Tribunal hearings. 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*[23] where the standard of interpretation was sought to be defined by reference to the criteria of continuity, precision, impartiality, competency and contemporaneousness.[24] The criteria with which the Court in *Perera* was most concerned were precision or accuracy and competence.

There are a number of issues of which the Tribunal needs to be aware when considering the adequacy of the interpretation. The "competency" of the interpreter can be considered at the outset. The Tribunal will 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.[25] 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 Level 3 was available.[26]

What is of more relevance is the course of the hearing. In *Perera v MIMA* the Court identified the following matters that would indicate to a reviewing court that the interpreting service provided was inadequate or incompetent. These factors should also alert a Tribunal in the course of a hearing that the interpretation may not be adequate or competent:

- 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.[27]

The Member should also be advising the applicant at the beginning of the hearing that if they experience problems with the interpreter they should advise the Member immediately.

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22 (1999) 92 FCR 6 (Kenny J, 28 April 1999) at [18] – [20]. While *Perera* was decided under the old form of s.425, the reasoning of the Court has been approved and stated to be applicable to s.425 as it now stands.

23 [1994] 2 SCR 951 (25 February 1994).

24 *ibid* at [19].

25 *Perera v MIMA* (1999) 92 FCR 6 (Kenny J, 28 April 1999) at [21].

26 See *VWPT v MIMIA* [2005] FMCA 753 (O'Dwyer FM, 13 October 2005) at [22] – [24] (extracted and attached at Attachment 4); *Long v MIMA* (2000) 106 FCR 183 (Mansfield J, 23 August 2000) at [199] and *Mazhar v MIMA* [2000] FCA 1759 (Goldberg J, 6 December 2000).

27 *Perera v MIMIA* (1999) 92 FCR 6 (Kenny J, 28 April 1999) at [23]. See also *STPB v MIMIA [2004] FCA 818* (Finn J, 25 June 2004), (extract attached at Attachment 1), where the Court observed that while non-responsive or erroneous answers given to questions primarily directed to credibility may reflect attempted evasion or ignorance, depending upon the circumstances of the case it may also put the Tribunal on notice that the applicant is experiencing difficulties with the interpreter.

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.[28] In *NAKK v MIMIA*[29], the Court confirmed that it is for the Tribunal to determine whether an interpreter is necessary and whether a reliable interpreting service is being provided. It is not appropriate for the Tribunal to rely solely on the applicant to advise if he/she is experiencing difficulties.

3. When will inadequate or incompetent interpreting services amount to jurisdictional error?

It is clear that not every error or problem with interpretation will amount to a breach of the Tribunals' statutory obligations or a denial of procedural fairness. Interpretation may be less than perfect but not amount to jurisdictional error.[30] It suffices that the translation is sufficiently accurate as to permit the idea or concept being translated to be communicated.[31] Jurisdictional error will arise for breach of procedural fairness where the errors in interpretation relate to matters of significance for the applicant's claim or the Tribunal's decision.[32] In addition, the Tribunal will only breach its obligations under s.360/s.425(1) if the standard of interpretation is so inadequate that it could be said that the applicant was effectively prevented from giving his or her evidence and being heard.[33]

In *Perera v MIMIA*[34], the Court held that the Tribunal had breached s.425(1) and s.427(7) because there was a material departure from the acceptable standard of interpretation. It was evident from the transcript of the hearing that the applicant was repeatedly unresponsive to questions asked through the interpreter and at times incoherent and inexplicably inconsistent. The court held that these departures from the appropriate standard of interpretation related to matters significant to the applicant's case and equally, by resting its findings as to credit on answers that were poorly interpreted, the Tribunal was said to have failed to take advantage of its opportunity to see and hear the witness.[35] The Court held that whilst the interpretation at a hearing need not be at the very highest standard, the interpreter must, nonetheless, express in one language, as accurately as that language and other circumstances permit, the idea or concept as it has been expressed in the other language.[36]

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28 *Perera v MIMA* (1999) 92 FCR 6 (Kenny J, 28 April 1999) at [21], *NAKK v MIMIA* [2004] FMCA 43 (Raphael FM, 10 February 2004) (extract attached at Attachment 1).

29 [2004] FMCA 43 (10 February 2004, Raphael FM) (extract attached at Attachment 1).

30 *NAOV v MIMIA* [2003] FMCA 70 (Barnes FM, 16 April 2003) at [35] (extract attached at Attachment 3).

31 *WACO v MIMIA* [2003] FCAFC 171 (Lee, Hill, Carr JJ, 15 August 2003) at [66] (extract attached at Attachment 4).

32 *Perera v MIMA* (1999) 92 FCR 6 (Kenny J, 28 April 1999) at [45]-[46].

33 *Appellant P119/2002 v MIMIA* [2003] FCAFC 230 (Mansfield, Emmett, Selway JJ, 16 October 2003) (extract attached at Attachment 3), accepting the formulation put by the respondent, referring to *Perera v MIMA* (1999) 92 FCR 6 at [38]-[41]. Following *SAAP v MIMIA* (2005) 215 ALR 162 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ, 18 May 2005), any inadequacy amounting to a breach of s.360/s.425 will amount to jurisdictional error.

34 *Perera v MIMIA* (1999) 92 FCR 6 (Kenny J, 28 April 1999).

35 *ibid* at [24] – [25].

36 *ibid* at [29].

More recently, the court has found the interpreting service engaged by the Tribunal to be so inadequate as to amount to a breach of s.425(1) and/or a breach of procedural fairness amounting to jurisdictional error, in the following matters:

- In *MZWKN v MIMIA*[37], the applicant had advised the Tribunal that he may have difficulty expressing himself with respect to political matters through the Russian interpreter (a Georgian interpreter, as requested by the applicant, was not available). Nevertheless, in reaching its findings, the court drew significant adverse inferences from the applicant's lack of apparent awareness of the political party and very general description of the party's philosophy. The Court held that "to make significant adverse findings against the applicant in the circumstances of this case having regard to the difficulties in interpretation is sufficient in my view to constitute jurisdictional error as it constitutes a denial of procedural fairness".[38]

- In *VWFY v MIMIA*[39], the court held that a combination of failures to translate certain exchanges between the adviser and Tribunal as well as clear factual errors on the part of the interpreter suggested that the applicant had no real opportunity to express himself and fully answer questions. While no one error or deficiency was so severe to show that the applicant was effectively deprived of his right to appear, when looking at the hearing as a whole, the applicant had not received a fair hearing. Accordingly the Tribunal had breached its s.425(1) and s.427(7) obligations.

- In *MZWRJ v MIMIA*[40], the court found that inadequate interpreting caused the Tribunal to base its findings, that the applicant was not a genuine Falun Gong practitioner, upon inadequate information. The court held that it was "the cumulative effect of the inadequacies, in the context of the issue in the mind of the Tribunal as to the genuineness of the applicant, that infected the Tribunal's capacity to properly understand what the applicant actually said and what he was actually postulating".[41] Accordingly, the Tribunal acted in breach of s.425(1).

- In *STPB v MIMIA*[42], the Tribunal made adverse credibility findings against the applicant due to his apparent ignorance of military matters (the applicant had claimed to be an officer in the army). A Hindi interpreter was engaged for the hearing and was utilised until the applicant objected and requested a Punjabi interpreter, the hearing then proceeded in Punjabi. The Court agreed that there had not been effective communication between the applicant and the Tribunal whilst the Hindi language was employed and that the Tribunal's questioning regarding military matters had taken place while the Hindi interpreter was engaged. These matters went directly to the conclusion on credibility and therefore rendered unreliable the basis of the Tribunal's

37 [2006] FMCA 413 (McInnis FM, 24 March 2006) (extract attached at Attachment 1).
38 *ibid* at [64].
39 [2005] FCA 1723 (Finkelstein J, 2 December 2005) (extract attached at Attachment 1).
40 [2005] FMCA 752 (O'Dwyer FM, 7 October 2005) (extract attached at Attachment 1).
41 *ibid* at [40].
42 [2004] FCA 818 (Finn J, 25 June 2004) (extract attached at Attachment 1).

findings. Accordingly, the Tribunal acted in breach of procedural fairness amounting to jurisdictional error.[43]

In contrast, the courts have generally held that departures from the standard of interpreting appropriate to Tribunal hearings will not amount to a breach of S.360(1) / s.425(1) or common law procedural fairness where the inadequacy was not significant or material to the Tribunal's decision or did not result in the Tribunal's failure to pursue relevant matters. For example, in *Long v MIMA*[44], the interpretation at the hearing provided stilted and abridged answers to questions, rather than the fluent answers which the later translation demonstrated were actually given. The Court held that whilst there was a departure from the standard of interpreting appropriate for a Tribunal hearing, the departure did not amount to a breach of s.425(1) and s.427(6). It was satisfied that the applicant's apparent unresponsive or incoherent answers did not play a part in the Tribunal's decision as its reasons for rejecting the applicant's claims were based upon matters which both the translation at hearing and the additional transcription provided to the Court gave a consistent picture. The Court was also satisfied that the standard of interpreting did not result in the Tribunal failing to pursue matters which a more accurate interpretation might have provided.[45]

Should an applicant contend in the Tribunal hearing, or in a post hearing submission, that the interpreting services provided by the Tribunal were inadequate and the Tribunal does not agree with those contentions, it should record its impression of the interpreter and view that the applicant was not prevented from giving evidence and being heard in its Decision Record. Furthermore, if a particular inaccuracy is identified but that inaccuracy is considered not to be significant or material to the Tribunal's reasons for decision, the Tribunal should state this in its reasons for decision.

4. What is the effect of errors in interpreting which could not have been known to the Tribunal at any time prior to handing down its decision?

There may be circumstances where the error in interpreting could not have been known to the Tribunal during or even following the course of the hearing. In these circumstances, the Tribunal may still be found to have breached its statutory obligations and/or common law obligations if the insufficiencies are found to be material to the applicant's claims and subsequently, the Tribunal's findings.

In *WAIZ v MIMIA*[46], the Tribunal hearing took place while the applicant was in detention and the services of the interpreter were provided via a telephone conference facility. The telephone connection contained static and there was a break in transmission immediately after the Tribunal had asked the applicant a question critical to his claims. Due to the failure in transmission, the Tribunal did not fully receive the applicant's answer. Upon resuming the hearing, the Tribunal

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43 See Attachment 2 for recent examples of matters remitted by consent for reason of inadequate interpreting services: *VEAR v MIMIA*; *VMAN v MIMIA*; *SZFTT v MIMIA*; and *SXSB v MIMIA.*

44 [2000] FCA 1172 (Mansfield J, 23 August 2000).

45 See Attachment 1 for examples of recent cases where the Court has found no breach of the Tribunal's statutory or common law procedural fairness obligations, despite the existence of inadequate interpreting services.

46 [2002] FCA 1375 (Carr J, 6 November 2002) (extract attached in Attachment 1).

asked the applicant the question again and requested that he re-state his answer. A fresh transcript of the hearing tapes 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, critical evidence was not conveyed to the Tribunal. The Court held that the Tribunal had unwittingly made a jurisdictional error as unbeknown to it, it had deprived itself of the opportunity to take into account a relevant factor and prevented the applicant from giving his evidence in relation to a matter of considerable significance for his claim and, in turn, the Tribunal's decision.

In the matter of *SZFTT v MIMIA*[47], remitted by consent, the Tribunal hearing tapes were reviewed by two NAATI accredited interpreters after the Tribunal's decision had been handed down. This review demonstrated that, unbeknownst to the Tribunal, the interpreter engaged at hearing had misinterpreted a significant aspect of the applicant's evidence. Counsel was of the view that the misinterpretation amounted to a breach of s.425(1) of the Act. Similarly, in *SXSB v MIMIA*[48], the applicant had difficulty understanding the interpreter but this difficulty was not reported to the Tribunal. A review of the hearing tape, undertaken after handing down, demonstrated that the interpreting provided at the hearing constituted such a serious departure from the proper standard of interpretation that it would amount to a breach of s.425(1).

Fortunately, circumstances which may cause a Tribunal to be unaware of interpreting problems will be rare. In most cases it should be apparent from the answers given, or concerns expressed during the hearing, that the interpreting services are not sufficient.

5. Improper Use of Interpreters by the Tribunal

The Full Federal Court has observed that s.427(7) does not impliedly constrain the use that might be made of an interpreter. Nevertheless, there will be significant concerns with the use by the Tribunal of an interpreter in a manner that affects the interpreter's perceived impartiality.[49]

For example, in *Sook Rye Son v MIMA*[50] it was held to be inappropriate for a Tribunal member to ask an interpreter to comment on the accent of the applicant, when this issue could affect the applicant's credibility.[51] The most significant concern regarding the Tribunal's use of the interpreter was the fact that the applicant was not made aware, other than in general terms, what the interpreter's views on the applicant's accent and language were. This use of the interpreter was said to amount to a "fundamental unfairness" to the applicant. Similarly, in V544 of 2003[52], at the completion of the applicant's interview with the DIMIA delegate, the interpreter made comments regarding the applicant's credibility. In light of these comments the Minister withdrew from the Federal Court appeal. DIMIA's solicitors were of the view that the delegate's decision

47 Federal Magistrates Court, 24 November 2005 (R & H Litigation – Fortnightly Report as at 9 December 2005 - extract attached in Attachment 2).

48 Federal Magistrates Court, Lander J, 5 July 2005 (R & H Litigation – Fortnightly Report as at 8 July 2005 - extract attached at Attachment 2).

49 *Sook Rye Son v MIMA* (1999) 86 FCR 584 (23 March 1999) per Moore J at [602]. Burchett and Katz JJ agreed.

50 *ibid.*

51 *ibid*.

52 Federal Court of Australia, Marshall J, 13 October 2003 (R & H Litigation – Fortnightly Report as at 17 October 2003 - extract attached at Attachment 2).

contained breaches of procedural fairness as the applicant was not accorded an opportunity to respond.

The role of the interpreter is to interpret and do nothing more. He or she is merely the medium for interchange between the Tribunal and the person appearing before it.[53] If the interpreter is called upon to offer opinions about what is being said in a foreign language it can quite unfairly put the applicant and witness in a position of not knowing whether the role of the interpreter is entirely neutral or is, in some respects, a partisan one.[54] This could lead the applicant to lose confidence in the interpreter, give poor responses and be confused. The unfairness is compounded if the applicant is not informed of the interpreter's evidence and the Tribunal has used the comments as probative material.[55]

6. How may the Tribunal proceed if an accredited interpreter in the applicant's language/dialect is unavailable?

While the Tribunal is under no obligation to provide a NAATI accredited interpreter, where an applicant requests an interpreter in a particular language or dialect, every effort should be made to locate a NAATI accredited interpreter through the usual interpreting services utilised by the Tribunals.[56] Similarly, where a concern is raised by the applicant during the hearing or the Tribunal has doubts about the quality of interpreting services, the hearing should be adjourned until adequate services have been obtained.[57]

However, where it becomes apparent, following a thorough search, that no interpreter in the applicant's language or dialect is available, the Tribunal may find that it is unable to give the applicant an opportunity to give oral evidence and be heard. The Tribunals' obligations when this situation arises are currently unclear. Initially, it would be appropriate to advise the applicant of the Tribunal's inability to locate an interpreter. While the Tribunal cannot be expected to adjourn a matter indefinitely where an interpreter is unavailable, it must give due consideration to any request by the applicant to adjourn the hearing while he or she seeks to locate an interpreter.[58]

In *VWPT v MIMIA*[59], as the Tribunal was unable to book a Punjabi NAATI accredited "interpreter" for the hearing (the only person accredited to the "interpreter" standard was residing overseas) it decided to proceed with a NAATI "paraprofessional interpreter". The applicant objected to the interpreter and requested an indefinite adjournment until a suitably accredited interpreter became available. The Tribunal determined to proceed with the hearing and the applicant, on the advice of his migration agent, did not attend. Confirming that the Tribunal was under no obligation to engage interpreters at a particular NAATI accreditation, the Court held that the Tribunal took all possible steps to arrange for the best available Punjabi

53 *Toscano v MIMA* [2002] FCA 941 (Whitlam J, 30 July 2002), at [13].
54 *Sook Rye Son v MIMA* (1999) 86 FCR 584 (23 March 1999), per Moore J at [602]. Burchett and Katz JJ agreed.
55 *ibid*.
56 See *Principle Member Direction* 3/2005, issued on 5 October 2005 at [56].
57 *NAKK v MIMIA* [2004] FMCA 43 (Raphael FM, 10 February 2004) (extract attached at Attachment 1).
58 See *MZXAX & MXZAY v MIMIA*, Federal Magistrates Court, O'Dwyer FM, 22 December 2005 (R & H Litigation – Fortnightly Report as at 30 December 2005 - extract attached at Attachment 2).
59 [2005] FMCA 753 (O'Dwyer FM, 13 October 2005) (extract attached at Attachment 4).

interpreter. The Court was of the view that the competence of the interpreter was a matter for the Tribunal, not the applicant or his adviser, to be assessed by the indicia set out in *Perera*, once he or she had been given an opportunity to interpret at the hearing. It stated that an indefinite adjournment would be inconsistent with the Tribunal's statutory objective of providing a mechanism of review that is fair, just, economical, informal and quick for the purpose of s.420(1) of the Act.

Generally, where it is agreed that no interpreter in the applicant's language or dialect is available, it would be appropriate to write to the applicant seeking written submissions. Alternatively, where possible, the Tribunal may conduct an oral hearing using an interpreter in another dialect or language. However, when proceeding in this manner, the Tribunal should make sure to assess the adequacy and competency of the interpretation against the indicia set out in *Perera*, and ensure the decision statement and any findings made reflect that assessment. The Tribunal is at risk of breaching its statutory procedural fairness obligations if any adverse credibility findings are based on unclear claims which may have been properly or more thoroughly explained to the Tribunal were the applicant given an adequate opportunity to present evidence through an interpreter in their language or dialect. In *MZWKN v MIMIA*[60], the Tribunal was unable to locate a Georgian interpreter. No accreditation for interpreters in the Georgian language existed in Australia and the Tribunal had been unable to find a Georgian interpreter of any standard even through it went beyond the Tribunal's normal agencies used for engaging interpreters. At the hearing, the applicant agreed to use a Russian interpreter but noted that he may have difficulty expressing himself clearly, especially in relation to political matters. The Tribunal took care to ensure everything was understood during the hearing and at the end asked the applicant whether he felt he had been able to convey everything he wished. The applicant confirmed that he had. Nevertheless, citing *Perera v MIMA*[61], the Court held that in the circumstances of the case, having regard to the difficulties in interpreting, it was procedurally unfair to make significant adverse findings against the applicant because of his lack of apparent awareness of relevant political matters.

It follows that while the Tribunal cannot be expected to adjourn a hearing indefinitely, it must treat the applicant with fairness and ensure that any lost opportunity to give evidence and be heard at a Tribunal hearing does not become a reason for affirming a decision.

Whether it may be appropriate for a family member to act as an interpreter in these circumstances is also unclear. In *Ahmed v MIMIA*[62] , Hill J recognised that it is preferable to engage an interpreter uninvolved in the matter to ensure that the translator's views do not contaminate the views of the applicant. However, Hill J held that this did not mean that such a person could never be appointed an interpreter in the MRT under s.366C. After reading the transcript of hearing, Hill J was satisfied that there was no suggestion of difficulty of communication and, in the circumstances, the applicant had never suggested that the applicant's daughter was other than a competent translator. Accordingly, the Tribunal did not breach its obligations under s.366C.

60 [2006] FMCA 413 (McInnis FM, 24 March 2006) (extract attached at Attachment 1).
61 (1999) 92 FCR 6 (Kenny J, 28 April 1999).
62 [2001] FCA 1101 (Hill J, 20 July 2001)

Similarly, it is arguable that there is nothing in s.360(1) / s.425(1) or s.427(7) to prevent a family member or friend being appointed to interpret and as discussed above, case law would suggest that the only obligation of the Tribunal is to provide an adequate and competent interpreter.[63] Whether the family member or friend was able to provide adequate and competent interpreting would be a matter for the Member to assess in the circumstances of the particular case. It would seem appropriate for a Member to refuse a friend or family member permission to interpret where (a) that person is not sufficiently competent in English and the other language, (b) applying the indicia in *Perera*, the interpreting appears inadequate or incompetent (arguably a person untrained in the skills of interpreting may experience difficulty interpreting to the standard required in a Tribunal hearing), or (c) the Tribunal has some reason, other than the existence of a relationship between the interpreter and the person appearing before the Tribunal, to believe the family member or friend will not interpret accurately (e.g. information about the character of the family member or friend).

7. Accommodating specific requests for interpreters, i.e. particular race or sex.

The Tribunal should make a reasonable attempt to accommodate any specific preferences such as ethnicity or sex of an interpreter, however the Tribunal is not obliged to accede to an applicant's demands in this regard unless the failure to do so would prevent the applicant giving evidence and being heard in relation to material claims.[64]

In *Toscana v MIMIA*[65], the applicant, a Bangladeshi national, requested a Bangladeshi and non-Muslim interpreter on the "response to hearing form" and at the hearing, objected to the Muslim interpreter provided. The Tribunal refused to adjourn the matter further and the applicant declined to give evidence. Whitlam J held that there was no error in the Tribunal's approach. The interpreter was merely the medium for the interchange between the Tribunal and the person appearing before it. The Tribunal was under no obligation to accommodate the prejudices of an individual, although in some cases it might be prudent to take them into account. In this case, there was no argument as to the technical competence of the interpreter and no suggestion that the applicant objected on any rational basis.[66]

In *SZAIX v MIMIA*[67], although the applicant requested a female interpreter because she did not feel comfortable presenting her evidence regarding an assault through a male interpreter, the Tribunal engaged a male interpreter. The court was satisfied however, upon reading the transcript, that the

63 While s.427(7) states that communication may proceed through an interpreter, the term interpreter is not defined and there is no requirement that the interpreter be accredited. In *Perera v MIMIA* (1999) 92 FCR 6 (Kenny J. 28 April 1999) at [31], Kenny J observed that an interpreter without qualifications, accreditation or experience may nevertheless provide a competent interpretation

64 *Toscana v MIMA* [2002] FCA 941 (Whitlam J, 30 July 2002); *SZADQ v MIMIA* [2003] FCA 1223 (Stone J, 3 November 2003) (extract attached at Attachment 4); *WABZ v MIMIA* [2004] FCAFC 30 (French, Lee and Hill JJ, 19 February 2003) (extract attached at Attachment 4).

65 [2004] FCA 941 (Whitlam J, 20 July 2002).

66 Similarly, in *SZADQ v MIMIA* [2003] FCA 1223 (Stone J, 3 November 2003) (extract attached at Attachment 4), the Hindu applicant claimed that his hearing before Federal Magistrate Driver had been prejudiced as he had been provided with a Muslim interpreter. At [8] Stone J held that "[in] his reasons for judgment Driver FM commented that he did not consider 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".

67 [2004] FMCA 104 (Raphael FM, 15 March 2004) (extract attached at Attachment 4).

Tribunal was sensitive to the applicant's concerns. It accepted the evidence she gave relating to the assault and no adverse credibility findings were made. Accordingly, any discomfort she may have had with the male interpreter did not affect the outcome of her application. Simararly, in *WABZ v MIMIA*[68] the applicant requested a female interpreter and despite the Tribunals request for a female, a male interpreter was sent by the interpreting service. In the circumstances of this case, the Court was satisfied that the Tribunal did all it reasonably could to accede to the applicant's request for a female interpreter. There was no evidence to suggest the use of the male interpreter gave rise to a substantive prejudice in the circumstances of the case.

In circumstances where the failure to accommodate a specific preference is shown to have substantially prejudiced the outcome of the case, it may be arguable that the Tribunal acted in breach of its s.360/s.425 obligations. For example, a female applicant may request a female interpreter because for personal and/or cultural reasons she is unwilling to talk about sexual assault through a male interpreter. In this circumstance, if a male interpreter was subsequently engaged and the applicant refrained from giving evidence significant and material to her claims, it could be argued that the applicant was unable to give evidence and be heard in breach of s.360/s.425.[69]

8. Translation of documents.

The Tribunal is not under any general obligation to translate documents given by the applicant and it is generally the responsibility of the applicant to supply a translation of any documents they wish to give to the Tribunal.[70] However, documents should not be excluded from consideration merely because they are not translated into English.[71] Instead, the Tribunal should seek to identify those parts of the material that are directly relevant to the applicant's claims and seek clarification from the applicant in this regard. It may also ask the applicant for a summary of the contents of the untranslated documents at the hearing.

If the relevance of the document is identified and a translation has not been provided, the Member may be under an obligation to have it translated. In *NAQV v MIMIA*[72], while Barnes FM was not satisfied that the Tribunal was obliged to accept untranslated documents in the circumstances of the case, he noted that there may be cases where the RRT would be obliged to

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68 [2004] FCAFC 30 (French, Lee and Hill JJ, 18 February 2004) (extract attached at Attachment 4).

69 Compare *Applicant M16 of 2004 v MIMIA* [2005] FCA 1641 (Gray J, 24 November 2005) where the Court held that the applicant was prevented from giving sensitive evidence due to the presence of a males in the hearing room. The court held that the Tribunal is obliged to have regard to the Department's *Guidelines on Gender Issues for Decision Makers* dated July 1996 (the Guidelines). At paragraph 3.16 the Guidelines state "….if an applicant has made claims of a sensitive or traumatic nature every effort should be made to ensure an interpreter and interviewing officer of the same sex". At paragraph 3.17 they state, "Where an officer suspects, as a result of researching country information relating to the case, that gender-related claims may be raised or discussed, every effort should be made to engage an interpreter of the same sex, with regard to any cultural or religious sensitivities, wherever possible." Note that although the Guidelines do not bind the Tribunals to a particular course of action, they should be read consistently with paragraph 22 of *Principle Member Direction* 3/2005.

70 *Cabal v MIMIA* [2001] FCA 546 (Wilcox, Whitlam, Marshall JJ, 10 May 2001) at [25], per curium, the Full Federal Court held, " There may be occasions in which the RRT is under an obligation to obtain a translation of a particular document which is in a foreign language and whose relevance has been explained to the RRT. However, the primary judge was correct when he said, as a general proposition, at [48] that the RRT "is not required to translate material in a foreign language" or "consider large volumes of material whose evidence is not explained".]. See also *MZWKU v MIMIA* [2006] FMCA 255; *WAMB v MIMIA* [2006] FMCA 506 (Walters FM, 28 April 2006).

71 *X v MIMA* (2002) 67 ALD 355 (Gray, O'Laughlin and Moore JJ, 7 February 2002).

72 [2004] FMCA 535 (Barnes FM, 7 September 2004) at [19].

ensure that untranslated material critical to an applicant's case (particularly personal information) was taken into account.[73]

Occasionally the Member may request an interpreter who is also an accredited translator to translate a minor detail, such as a date or a name on the document. Interpreters, however, are not required to translate documents for Members at the hearing.[74] As stated above, if the information appears or is explained to be relevant, the Member may be under an obligation to have it translated.

There is no general obligation on the Tribunals to accept and translate untranslated country information.[75]

SUMMARY & CONCLUSIONS

The Migration and Refugee Review Tribunals have statutory obligations to provide adequate and competent interpreting services so that an applicant is given the opportunity to give evidence and be heard: ss. 360, 366C, 425, 427(7) of the Act. Ultimately, the Tribunal has control of the hearing and review process and is obliged to be satisfied that the applicant has been able to give evidence and be heard.

Errors that affect matters of significance for an applicant's claims or a standard of interpretation that is so inadequate as to effectively prevent the applicant from giving evidence and being heard will amount to jurisdictional error.

Should any difficulties arise in relation to the interpreting service engaged by the Tribunal, it is for the Member to determine whether, having regard to the *Perera* indicia, the interpreting service was adequate and competent. Where the Member determines that the service was sufficient, the Member should identify these difficulties and how they were dealt with during the hearing and/or afterwards in his or her Decision Record. It should also state how these deficiencies or issues affected the applicant's opportunity to give evidence and be heard and the Tribunal's ability to obtain evidence from the applicant. Findings made by the Tribunal should reflect the difficulties or deficiencies encountered. In particular, care should be taken to not

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73 See also In *SZEUU v MIMIA* [2005] FMCA 947, Mowbray FM at [44] stated that there may be circumstances in which an expectation could have been raised with the applicant that the Tribunal would have particular documents translated. Similarly, in *SZFIV v MIMIA* [2005] FMCA 1811 (9 December 2005, Barnes FM) at [73], Barnes FM stated "I recognise that translation costs may be inhibiting for an applicant who wishes to provide evidence to the Tribunal. However of itself this does not establish jurisdictional error. It may well be that in a particular case the Tribunal could be obliged to ensure that untranslated material which was critical to a particular applicant's case was translated, particularly if such material was personal to an applicant and addressed issues critical to the decision. However I am not satisfied that this is such a case or that there is a general obligation on the Tribunal to accept and translate information. I have borne in mind that its statutory objective is to provide a mechanism of review that is "fair, just, economical, informal and quick" (s.420(1) *Migration Act 1958*). These cases would suggest that the MRT should also be aware that there may be circumstances in which it may have the same obligation to ensure untranslated material critical to an applicant's case was taken into account.

74 See *Principle Member Direction* 3/2005 at [40]: A review applicant may provide documents containing evidence or submissions during the review. All documents that are not in English should be translated into English by a translator with a 'Translator' level accreditation from the National Accreditation Authority for Translators and Interpreters (NAATI). Both the documents and the translations should be provided.

75 *NAQV v MIMIA* [2004] FMCA 535 (Barnes FM, 7 September 2004) at [19].

unfairly make adverse findings against an applicant on the basis of evidence given at the hearing that may be attributable to difficulties with interpretation.

The Tribunal should make a reasonable attempt to accommodate specific preferences such as ethnicity or sex, but is under no obligation to accede to an applicant's demands unless failure to do so would prevent the applicant from giving evidence or being heard. The Tribunal's obligations in respect of the interpretation service must be balanced against the Tribunal's obligation to provide a mechanism of review that is fair, just, economical, informal and quick, and this may affect the Tribunal's decision to proceed in circumstances where a specific request or an interpreter of a particular accreditation level or dialect is unavailable.

ATTACHMENT 1 – Recent matters remitted by judgment due to the Tribunal's use of inadequate interpreting services.

MZWKN v MIMIA[76]

The applicant, a citizen of Georgia, claimed to fear persecution by reason of his political opinion. He feared returning to Georgia because of his belief that he would be persecuted by the law enforcement agencies as a result of his attempts to establish a political party. At the hearing, the applicant, who could speak Russian, was provided with a Russian interpreter because there was no accreditation for interpreters in Georgian in Australia and the Tribunal had not been able to even find anybody to even attempt to have a Georgian interpreter, the Member noted he went beyond the Tribunal's normal agencies used for interpreters. The applicant agreed to this course but noted that "there will be certain words where my vocabulary doesn't extend, especially in the political sense. So there will be times when I won't be able to express myself clearly, because I practically learnt Russian here conversing with Russian people over here". During the Tribunal the applicant demonstrated some difficulties with the interpreter but the Member took care to care to go over things and ensure everything was understood. At the end of the hearing, the Member asked the applicant whether he felt that he had been able to convey everything he wished to through the interpreter. The applicant confirmed that he had.

Citing *Perera*, the Court held that there had been a relevant departure from the required standard of interpretation. The questioning process clearly directed to an essential integer of the case lead to a conclusion by the Tribunal that the applicant did not display "any real awareness of the idea of a political party". The Tribunal drew significant adverse inferences from the applicant's lack of apparent awareness of the political party and his describing of the party's philosophy in a very general way. The court held that "to make significant adverse findings against the applicant in the circumstances of this case having regard to the difficulties of interpretation is sufficient in my view to constitute jurisdictional error as it constitutes a denial or procedural fairness".[77]

VWFY v MIMIA[78]

The appellant, a citizen of Burma, claimed to fear persecution on account of his religious and political beliefs. The Tribunal found difficulty with the appellant's evidence and it largely rejected his account of events. The Tribunal's findings followed a hearing at which the appellant had given extensive evidence with the assistance of an interpreter who had been retained by the Tribunal. The interpreter was not NAATI accredited but had some experience with Tribunal hearings.

Before the FMC the appellant contended, amongst other things, that he had been denied procedural fairness because of the inadequate interpretation of the proceedings by the interpreter. The FMC rejected this argument on the basis that there was no evidence that the appellant had difficulty in understanding the interpreter or that his answers, as interpreted, were incorrect.

However, upon appeal to the Federal Court the appellant was successful. The court held that a combination of failures to translate certain exchanges between the adviser and Tribunal as well as clear factual errors on the part of the interpreter suggested that the applicant had no real opportunity to express himself and fully answer questions put to him. No one error or deficiency was so severe as to show that the interpreter or the interpretation was of such poor quality that the applicant was effectively deprived of

[76] [2006] FMCA 413 (McInnis FM, 24 March 2006).
[77] *ibid* at [64].
[78] [2005] FCA 1723 (Finkelstein J, 2 December 2005).

his right to appear but when looking at the hearing as a whole, the applicant did not receive a fair hearing.[79]

The court stated that when the Tribunal has before it a putative refugee who does not speak English it is required to ensure that an interpreter is present. Without an interpreter an applicant would effectively be stripped of his or her rights to appear and give evidence. It held that the use of the term "may" in s.427(7) of the Act does not suggest that the Tribunal has a discretion to appoint an interpreter but should be understood as the grant of authority to appoint an interpreter. Furthermore, the requirement that there be an interpreter under s.427(7) of the Act imposes an obligation of the Tribunal to appoint an interpreter with sufficient skills to fulfil the function.[80]

MZWRJ v MIMIA[81]

The Tribunal was not satisfied that the applicant, a national of China, engaged in Falun Gong activities in Australia otherwise than for the purposes of strengthening his claim to be a refugee, s.91R(3). Finding that the applicant was not a genuine Falun Gong practitioner, the Tribunal concluded that he would not engage in practice on his return and would not suffer persecution.

Before the Court, the applicant contended that the Tribunal's recitation of the evidence given at the hearing, at which he was unrepresented, did not adequately reflect the evidence actually given. The applicant claimed that although he did join Falun Gong in Australia with the clear intention of assisting his application for refugee status, his involvement led to a genuine conversion to Falun Gong. He contended that through the poor interpretation, his admission about his initial motivation lost the context in which it was made and infected the Tribunal's reasoning and ultimate findings.

The court agreed and found the evidence clearly identified significant shortcomings in the interpretation of the proceedings before the Tribunal which amounted to a denial of the applicant's right to be properly heard. The interpretation available to the Tribunal did not explain what the applicant was saying and, as a consequence, the Tribunal's decision was based only upon the inadequate information it had before it.[82] It was the cumulative effect of these inadequacies, in the context of the issue in the mind of the Tribunal as to the genuineness of the applicant that infected the Tribunal's capacity to properly understand what the applicant actually said and what he was actually postulating.

STPB v MIMIA[83]

The Tribunal rejected the applicant's claims to have been an officer in the Indian army on the basis of his apparent ignorance of military matters. The Tribunal also found that even if it did accept his evidence that he faced punishment for conduct engaged in while an officer, any punishment would be the result of a law of general application, and not persecution for a Convention reason. The first part of the hearing had proceeded with a Hindi interpreter. At the request of the applicant, the remainder of the hearing was conducted in Punjabi. The applicant contended that mistranslations on the issues relating to his knowledge of army matters occurred whilst the hearing was conducted in Hindi.

The Court agreed that there had not been effective communication between the applicant and the Tribunal whilst the Hindi language was employed. That occurred during a period of questioning which was related

79 *ibid* at [27].
80 *Ibid* at [7] – [9].
81 [2005] FMCA 752 (O'Dwyer FM, 7 October 2005).
82 *ibid* at [40].
83 [2004] FCA 818 (Finn J, 25 June 2004).

directly to the conclusion on credibility and rendered unreliable the basis of the Tribunal's findings. The court noted that non-responsive or erroneous answers may reflect attempted evasion or ignorance. But in a setting such as the present, they could be attributable to misunderstanding or to mistranslation. When non-responsive or erroneous answers are given to questions that are directed primarily to credibility, the need to consider the possibility that the answers given were the product of misunderstanding or mistranslation can arise if the Tribunal is put on notice that such could possibly be the case.[84] In this matter the Tribunal was put on notice when the applicant indicated he did not think he had been asked certain questions which had in fact been asked through the Hindi interpreter. Accordingly, there was a breach of procedural fairness.

NAKK v MIMIA[85]

In his review application, the applicant 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.[86]

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. "Despite 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".[87] Raphael FM also 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.

84 *ibid* at [22].
85 [2004] FMCA 43 (10 February 2004, Raphael FM).
86 *ibid* at [8].
87 *ibid* at [16].

WAIZ V MIMIA[88]

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?"*.[89]

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".[90] 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, in the Court's view, the damage had been done and, unbeknown to the Tribunal, the situation could not be retrieved. The Tribunal was deprived of the opportunity to take into account a relevant factor."[91] Carr J found that the Tribunal had therefore unwittingly made a jurisdictional error.

88 [2002] FCA 1375 (Carr J, 6 November 2002).
89 *ibid* at [15]
90 *ibid* at [72]
91 *ibid* at [73]

ATTACHMENT 2 – Examples of recent matters remitted by consent due to the Tribunal's use of inadequate interpreting services

MZXAX & MXZAY v MIMIA[92]

The applicant claimed to fear persecution on the basis of her religion. From the outset, the Tribunal was informed that the applicant only understood the speech dialect from Fuqing, Fujian Province, China and did not understand Fujian or the Mandarin dialects. A Tribunal hearing was aborted because the applicant did not understand the interpreter that had been provided. Subsequently, the Tribunal wrote to advise the applicant that it was unable to find an interpreter who spoke her dialect despite a thorough search throughout Australia. The Tribunal also advised her to provide written submissions and that a decision would be made on the written information before it. The Tribunal then proceeded to make a decision despite a request for an extension of time, by her representative, to search for an interpreter.

Counsel advised that the Tribunal had potentially made two counts of jurisdictional error, (1) in light of *Lui v MIMIA* and *Perera v MIMIA*, the RRT failed to comply with s.425 when it did not allow the applicant the opportunity to participate in a hearing, and (2) the Tribunal's refusal to extend the time limit to find an interpreter in the circumstances was arguably arbitrary and capricious and amounted to jurisdictional error as per *SCAR v MIMIA* (2002) FCA 1377.

SZFTT v MIMIA[93]

The applicant, a national of China, claimed to suffer persecution on the basis that he was a Falun Gong practitioner. The RRT did not accept that the applicant was a Falun Gong practitioner in China and that he suffered persecution for his Falun Gong activities, and disregarded his Falun Gong activities in Australia because it believed that he participated in those activities to merely bolster his application to the Tribunal.

Review of the Tribunal hearing tapes by two NAATI accredited interpreters revealed that the interpreter engaged for the RRT hearing had misinterpreted the applicant's evidence. The Tribunal understood the applicant's evidence to be that he was involved in Falun Gong activities in Australia to bolster his Protection Visa application when he in fact gave evidence that this was not the case. Counsel advised that the misinterpretation resulted in the applicant being denied the opportunity to give evidence and present arguments to help his case, and a breach of s425 therefore arose, which amounted to jurisdictional error.

SYNB v MIMIA[94]

Review of the Tribunal hearing tapes by an accredited interpreter in the Swahili language revealed that the interpreter before the Tribunal was not fluent in Swahili, had confused the applicant and failed to inform the Tribunal that the applicant was confused. Counsel advised that the standard of interpreting was so poor in this case that the Court would likely conclude that there was a breach of s.425 of the Act and/or a denial of procedural fairness, resulting in jurisdictional error.

SXSB v MIMIA[95]

92 Federal Magistrates Court, O'Dwyer FM, 22 December 2005 (R & H Litigation – Fortnightly Report as at 30 December 2005).

93 Federal Magistrates Court, 24 November 2005 (R & H Litigation – Fortnightly Report as at 9 December 2005).

94 Federal Court, Mansfield J, 31 August 2005 (R & H Litigation – Fortnightly Report as at 2 September 2005).

95 Federal Court, Lander J, 5 July 2005 (R & H Litigation – Fortnightly Report as at 8 July 2005)

The applicant, a citizen of Tanzania, claimed to fear persecution on the basis of his ethnicity and political opinion. He had advised the Tribunal prior to the hearing that the Tanzanian Swahili dialect is different to the Kenyan Swahili dialect. A review of the hearing tape found a number of problems. The interpreter, who in reality was from Kenya, attempted to put on a Tanzanian accent. The applicant had difficulty understanding this interpreter but the difficulty was not reported to the Tribunal. The interpretation was subsequently found to be poor and inadequate.

Counsel advised that the interpretation was so deficient that it would meet any test of deficient interpretation. This deficiency would be sufficient for the Court to find that this serious departure from the proper standard interpretation and would amount to a breach of s.425.

VMAN v MIMIA[96]

The applicant was a Turkish citizen of Kurdish ethnicity who only spoke Turkish. The applicant requested a Turkish speaking interpreter of Kurdish ethnicity however this was mistakenly construed by the Tribunal as a request for a Kurdish interpreter. Although the Kurdish interpreter could speak Turkish, he was neither accredited nor recognised as an interpreter in the Turkish language.

In an affidavit the applicant highlighted the deficiencies between what he said and what was interpreted to the Tribunal. It was apparent that the interpreting was so lacking as to prevent the applicant and the Tribunal adequately understanding on another. Counsel advice considered that these errors in interpreting were so fundamental as to constitute a breach of procedural fairness and therefore a jurisdictional error.

V544 of 2003[97]

At the completion of the applicant's interview with the DIMIA delegate, the interpreter made comments regarding the applicant's credibility. In light of these comments, DIMIA's solicitors advised the Minister that the delegate's decision contained breaches of procedural fairness as the applicant was not accorded an opportunity to respond.

VEAR v MIMIA[98]

The Tribunal provided the applicant with a Russian interpreter who spoke Georgian rather than an accredited Georgian interpreter. DIMIA's solicitors advised the Minister that the errors in interpretation were so serious as to constitute a breach procedural fairness and likely jurisdictional error.

96 Federal Court of Australia, Hartnett FM, 23 March 2004 (R & H Litigation – Fortnightly Report as at 2 April 2004).
97 Federal Court of Australia, Marshall J, 13 October 2003 (R & H Litigation – Fortnightly Report as at 19 October 2003).
98 Federal Court of Australia, 8 September 2003 (R & H Litigation – Fortnightly Report as at 19 October 2003).

ATTACHMENT 3 – Examples of recent cases where the court found inadequacies in the interpreting services did not amount to jurisdictional error – where errors were not material or significant to the Tribunal's decision

In a number of recent judgments, while the court recognised that there were errors in the interpreting services provided, these errors did not relate to matters material or significant to the Tribunal's decision and therefore did not constitute jurisdictional error. In the following judgments, while the Tribunal's conduct may not have constituted jurisdictional error, similar problems and errors in the future could amount to jurisdictional error if they to relate to matters significant or material to a Tribunal's decision.

SZAAJ v MIMIA[99]

The Federal Magistrate refused a request for an adjournment to obtain a translation of the hearing tapes and the applicant appealed that decision to the Federal Court.

The Federal Court affirmed the decision of the Federal Magistrate on the basis that His Honour's discretion had not miscarried, but Hill J proceeded to consider whether the now tendered translation of the transcript, if correct, revealed any jurisdictional error.

Hill J was satisfied that there was one arguably significant translation error however did not find that this amounted to a denial of procedural fairness as most of the interpretation was correct, the applicant spoke English "sufficiently to understand the Tribunal member and to indicate there was a problem of translation if he believed there was one,"[100] and made no complaint about the interpreter during the hearing or at any time prior to proceedings commencing in the Federal Magistrates' court for judicial review. Hill J concluded that despite some apparent errors none of the matters really bore upon the substance of the applicant's case so that it could be said that the defect in translation might have affected the outcome.

NAIF v MIMIA[101]

The applicant requested a Tamil interpreter of Indian dialect however the Tribunal provided a Tamil interpreter of Sri Lankan dialect. The applicant claimed that this caused a denial of procedural fairness as he misunderstood some questions, his responses to the questions were not clear and the interpreter made mistakes. The applicant did not raise any concerns regarding the interpreting or understanding of proceedings in the hearing or prior to the decision being handed down.

Barnes FM found that the provision of a Sri Lankan rather than Indian Tamil interpreter did not result in the denial of procedural fairness. Although there were some errors in translation, "neither the instances in the transcript pointed to by the applicant or any other parts of the transcript or hearing tapes support the conclusion that the provision of a Tamil interpreter or Sri Lankan rather than Indian dialect caused any material error to occur in the interpretation of the Tribunal's or the applicant's statements or in the applicant's understanding of what was said". Barnes FM emphasised no complaint was made about the "dialect" of the interpreter at any time prior to handing down of the Tribunal's decision. The Tribunal was found to have accommodated the manner in which the applicant sought to communicate and a transcript and hearing tapes did not establish that the applicant was prevented from giving his evidence effectively. It was therefore not established that the applicant was misled in any significant way by any mistranslation and no breach of s.425 was established.

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99 [2004] FCA 312 (Hill J, 26 March 2004)

100 *ibid* at [38]

101 [2003] FMCA 458 (Barnes FM, 22 October 2003)

P119/2002 v MIMIA[102]

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 Full Court 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".[103]

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.

NAOV v MIMIA[104]

Following the Tribunal hearing, the Georgian applicant wrote to the Tribunal claiming that the interpreter did not have adequate command of the Georgian or English language, thereby causing the Tribunal to misunderstand the applicant's claims.

The applicant claimed a well-founded fear of persecution by reason of his religion (Jehovah's Witness). He claimed that the interpretation during the hearing had been inadequate in relation to issues regarding his religion, his job, the police, his persecution, what his friends said to him about returning to Georgia, his knowledge of particular Biblical passage and where the Jehovah's Witnesses met. The applicant stated that he would provide further comment regarding the interpreters' mistakes if required. The Tribunal advised the applicant that it accepted there were problems and would take them into account.

The Tribunal subsequently received documentary evidence from Georgia which suggested that the applicant was not a member of the Jehovah's witness religion. The Tribunal wrote to the applicant to advise him of this document and seek his comments, the letter stated "…the Member considering your case has indicated that he sees the above information, suggesting you were not involved with the Jehovah's Witnesses in Georgia, as so significant that he does not envisage that any errors in interpretation at the hearing would be material to the outcome of your application for review. Nevertheless he will consider any further submissions you might care to make on this point." The applicant responded by stating that the Tribunal had misunderstood his claims due to the interpreting errors and suggested reasons why the documentary evidence did not represent the truth regarding his religion and experiences in Georgia.

102 [2003] FCAFC 230 (Mansfield, Emmett, Selway JJ, 16 October 2003)
103 *ibid* at [22]
104 [2003] FCAFC 13 (Barnes FM, 16 April 2003)

In rejecting the applicant's claims, the Tribunal stated that it was "satisfied that there was no material issue on which translation problems may have impacted.[105] The Tribunal also stated that it was satisfied that it understood the applicant's case and that the applicant understood all claims against him throughout and subsequent to the hearing process.

Upon listening to the hearing tapes the Court accepted that there were errors arising from the interpreting service. However, the court found that while there may have been some errors they were not in any way significant to the applicant's case or the Tribunal decision which was based on credibility findings arising out of the adverse documentary evidence. The court emphasised that the Tribunal's credibility findings did not arise out of the applicant's evidence at the hearing. The Court was satisfied that the applicant had been able to give evidence and present arguments to the Tribunal in accordance with s. 425 and that no breach of procedural fairness was apparent.

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.

105 *ibid* at [14]

ATTACHMENT 4 - Other recent judgments of interest - where the application for judicial review was dismissed.

SZEPJ v MIMIA[106]

The applicant's contended that the interpreting at the Tribunal was deficient due to the interpreter's lack of knowledge of Falun Gong and inability to clearly and articulately interpret the exchanges between the applicant and the Tribunal. He contended that because the Tribunal's knowledge about Falun Gong was obtained from an English text and then translated back into Chinese for the applicant, its meaning was greatly changed somehow.

The Court was unable to infer that there was any failure in the standard of interpretation because the applicant had not submitted any evidence of what allegedly occurred or did not occur. It went on to state, "Further, there is no requirement that the Tribunal should provide an interpreter who is an expert in any relevant area of the subject matter to be discussed. The level of expertise required is in the capacity of the interpreter to translate from one language into another the words used by the Tribunal, applicants and any witnesses such that there is an adequate level of interpretation to enable the giving of evidence. It does not follow that a lack of knowledge of "Falun Gong" on its own would be sufficient, even if there was such evidence before the Court, to show that the standard of interpretation provided by the interpreter was somehow deficient in terms of allowing the provision of such evidence".[107]

VWPT v MIMIA[108]

Upon the applicant's request, while the Tribunal expressed confidence in the interpreter's abilities it agreed to adjourn the hearing because the interpreter was not NAATI accredited as an "interpreter", he was accredited at only the "paraprofessional" standard by NAATI. It later became apparent that the only person accredited to the "Interpreter" standard in the applicant's mother tongue, "Punjabi", resided overseas and there were no other Punjabi interpreters in Australia accredited to higher standards. The Tribunal determined that it would proceed with a hearing using the "paraprofessional interpreter". After receiving correspondence to this effect from the Tribunal, the applicant requested an indefinite adjournment until a suitably accredited interpreter was available. The Tribunal determined to proceed with the hearing and the applicant, on the advice of his migration agent, did not attend.

The court held that by taking this course of action the Tribunal did not fail to comply with its s.425(1) or procedural fairness obligations. It confirmed that there is no obligation on the Tribunal to engage interpreters at a particular NAATI accreditation and was satisfied that the Tribunal took all possible steps to arrange for the best available Punjabi interpreter. The level of competence was clearly a matter for the Tribunal and not the applicant or his legal representative.

The court was of the view that the competence of the interpreter could only be assessed by the Tribunal, by applying the indicia set out in *Perera*, once he or she had been given an opportunity to interpret at the hearing. The applicant had no right to insist on an interpreter who had been accredited by NAATI, and to refuse to attend a hearing until such an interpreter had been arranged. [109] An indefinite adjournment would be inconsistent with the Tribunal's statutory objective of providing a mechanism of review that is fair,

106 [2005] FMCA 1639 (Nicholls FM,14 November 2005).
107 *ibid* at [11].
108 [2005] FMCA 753 (O'Dwyer, 13 October 2005).
109 *ibid* at [22].

just, economical, informal and quick (see s.420(1) of the Act).[110]

SZBTK v MIMIA[111]

The applicant claimed to have experienced difficulty in the Tribunal hearing as the interpreter spoke Mandarin whereas he came from Fujian Province and his first language is the Fujian dialect.

The Court was unable to identify any difficulty arising out of the interpretation and noted that the applicant stated that he speaks, reads and writes "Chinese" in his PV application. In his review application he requested a "Chinese" interpreter. He would also have had a further chance to clarify his need for an interpreter in the Fujian dialect in responding to the hearing invitation he required. Accordingly, there was no indication to the Tribunal that the applicant required anything other than a Mandarin interpreter.

The Court stated, "…while I accept that the applicant might have been better served by a Cantonese interpreter fluent in the Fujian dialect I see no breach of the Tribunal's procedural fairness obligations under the general law or pursuant to s.425….The Tribunal met its obligations to provide interpretation as best it was able on the information before it…There is nothing in the available evidence to indicate that there was any disadvantage suffered by the applicant."[112]

SZAIX v MIMIA[113]

The applicant complained that she was denied a female interpreter and did not feel comfortable presenting her evidence regarding an assault through a male interpreter. However, the court was satisfied upon reading the transcript that "the Tribunal was sensitive of the applicant's concerns. The Tribunal accepted the applicant's evidence concerning the assault and it does not seem that anything she would have said to a female interpreter would have affected the Tribunal's decision on this point. No credibility findings were made against the applicant so that any reticence she may have felt in discussing matters through a male interpreter did not affect the outcome of her application."[114]

WABZ v MIMIA[115]

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.

SZADQ v MIMIA[116]

110 *ibid* at [24].
111 [2005] FMCA 1263 (Driver FM, 2 September 2005).
112 *ibid* at [9].
113 [2004] FMCA 104 (Raphael FM, 15 March 2004).
114 *ibid* at [22].
115 [2004] FCAFC 30 (French, Lee and Hill JJ, 18 February 2004).
116 [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 judgement 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".[117]

WACO v MIMIA[118]

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 sufficies that the translation is sufficiently accurate as to permit the idea or concept being translated to be communicated".[119]

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.

NAYQ v MIMIA[120]

The applicant had a speech impediment and requested that he be able to write down his answers in the hearing and have the interpreter translate them for the benefit of the Tribunal. The applicant also submitted that his Mental Health Nurse should have been present to assist him and that a female interpreter should have been used.

During the hearing, the Tribunal advised the applicant that it was aware of his speech impediment and that he could take his time in providing oral responses. The Tribunal advised the applicant that should he become unable to provide an oral response he could write his response down.

The hearing proceeded on this basis and when the applicant was unable to speak he wrote down his response or question to be faxed to the Tribunal for its file. The Tribunal then stated the matters about which he needed further information from the applicant. At the end of that process, he adjourned the hearing so that the answers could be written down. The hearing then resumed upon the Tribunal's receipt of the faxed material, apparently in Farsi, which was placed on the file and read onto the tape in English by the interpreter.

The Court was satisfied that the Tribunal was aware of the applicant's speech problems and "conducted the proceeding in a manner that was designed to assist the applicant in the giving of his evidence. On many occasions, [the Member] invited the applicant to take his time in responding, including compiling his written answers to the matters listed by [the Member] towards the end of the hearing. The applicant then prepared a document, in his own language, that responded to the concerns expressed by [the Member]. I see no basis for the suggestion that the Tribunal denied the applicant procedural fairness. There is nothing in the material

117 *ibid* at [8].
118 [2003] FCAFC 171 (Lee, Hill and Carr JJ, 16 August 2003).
119 *ibid* at [66].
120 [2004] FCA 365 (Wilcox J, 31 March 2003).

before me that suggests the applicant's ability to communicate his case to the Tribunal was impeded by the absence of [the Mental Health Nurse] or the fact that the supplied interpreter was male rather than female.[121]

[121] *ibid* at [27].

Relevant Legislation [as at 13 June 2006]

Migration Review Tribunal

Section 366C - Interpreters

(1) A person appearing before the Tribunal to give evidence may request the Tribunal to appoint an interpreter for the purposes of communication between the Tribunal and the person.

(2) The Tribunal must comply with a request made by a person under subsection (1) unless it considers that the person is sufficiently proficient in English.

(3) If the Tribunal considers that a person appearing before it to give evidence is not sufficiently proficient in English, the Tribunal must appoint an interpreter for the purposes of communication between the Tribunal and the person, even though the person has not made a request under subsection (1).

Section 360 - Tribunal must invite applicant to appear

(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.

(2) Subsection (1) does not apply if:

(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or

(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or

(c) subsection 359C(1) or (2) applies to the applicant.

(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

Refugee Review Tribunal

Section 425 - Tribunal must invite applicant to appear

(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.

(2) Subsection (1) does not apply if:

(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or

(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or

(c) subsection 424C(1) or (2) applies to the applicant.

(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

Section 427 – Powers of the Refugee Review Tribunal etc.

… 427(7) If a person appearing before the Tribunal to give evidence is not proficient in English, the Tribunal may direct that communication with that person during his or her appearance proceed through an interpreter.

Australian Government

Migration Review Tribunal · Refugee Review Tribunal

PRINCIPAL MEMBER DIRECTION – 1/2007

[Date of issue: 31 January 2007]

Principal Member Direction 1/2007 (in effect from 31/01/2007).
This Direction applies to both the Migration Review Tribunal and the Refugee Review Tribunal.

MANAGEMENT OF DETENTION CASES

Definitions

the Act means the *Migration Act 1958*
the ASA means the Agency Security Advisor
bridging visa (detention) means an application for review of a decision to refuse to grant a bridging visa, or of a decision to cancel a bridging visa, where a person is in immigration detention because of that refusal or cancellation.
the Department means the Department of Immigration and Citizenship
Detention Service Provider means the service provider contracted by the Department to deliver detention services.
immigration detention is defined in Section 5 of the Act and extends to persons covered by *residence determinations* (see s.197AC)
the MRT means the Migration Review Tribunal
the Regulations means the Migration Regulations 1994
the RRT means the Refugee Review Tribunal
the Tribunals means the Migration Review Tribunal and the Refugee Review Tribunal

Introduction

1. The purpose of this Direction is to encourage Members and staff to take all reasonable steps to finalise detention cases at the earliest possible time. This document also provides guidance on the identification of issues relevant to detention cases and sets out the arrangements that the Tribunals have in place to minimise the risk of security incidents.

2. The Tribunals give the highest priority (Priority 1) to cases involving a person being held in immigration detention.

3. Applicants in an alternative place of detention under s.5(b)(v) of the Act, such as in an approved residential housing project, hospital/nursing home or a hotel/motel, and applicants under residence determination arrangements (under s.197AB of the Act) residing at a specified place, are legally regarded as being in immigration detention.

4. The Tribunals make every effort to ensure that applicants for review are not disadvantaged in their capacity to participate in the review process by virtue of the fact

that they are in immigration detention.

5. Members and staff are to be mindful of the impact detention may have on individuals and their families, and endeavour to finalise reviews relating to persons in immigration detention without delay, subject to compliance with procedural fairness requirements.

6. The Tribunals are committed to providing a safe and secure environment for Members and staff and for applicants and visitors to the Tribunals.

Expediting review of detention cases

7. All detention cases must be initiated in the Tribunals' Case Management System, CaseMate, on the same day the application is received or on the following working day if the application was received via facsimile on a weekend or after close of business. Once a case is progressed past the 'Case Initiation' stage in CaseMate, the Department is automatically notified of the lodgement (and this also generates a file request within the Department). The agreed time-standard for the receipt of the Departmental file is 2 working days.

8. While Departmental files relating to persons in immigration detention are requested automatically, in order to facilitate the prompt receipt of files the Tribunals will send an email advising receipt of the application, to the Compliance Section of the Department, which is copied to the delegate concerned. The Tribunals will proactively contact relevant areas within the Department to follow-up outstanding file requests until the matter is resolved.

9. Pending the arrival of the Departmental files, constitution of the Tribunal will be arranged, and a case team allocated. In bridging visa (detention) cases, the case team will contact the Member to settle a hearing date, schedule the hearing in CaseMate, advise the applicant, the Department and the Detention Service Provider of the hearing date, and arrange an interpreter if required.

10. The Act and Regulations contain express provisions which promote expeditious reviews relating to persons in immigration detention. These include:

    - prescribed periods to comment or give additional information;
    - prescribed periods relating to the period of notice that must be given if the applicant is invited to appear before the Tribunal;
    - prescribed periods for deciding the review of bridging visa (detention) cases.

11. The Regulations also make special provision in regulation 5.02 for the service of documents on persons in immigration detention. Under this provision, any document to be served on a person in immigration detention may be served by giving it to the person himself or herself, or to another person authorised by the person in detention to receive documents on his or her behalf. In practice the Tribunals sends documents to the relevant immigration detention centre or facility by electronic communication and an officer at the centre or facility arranges for the document to be handed to the person in detention.

12. Where the person in detention has appointed an authorised recipient, the Tribunals will send the correspondence to the authorised recipient as well as arranging for a copy to be handed to the applicant. Wherever possible, correspondence is sent by facsimile (see PMD 2/2005 – 'Efficient Conduct of MRT Reviews' and PMD 3/2005 – 'Efficient

Conduct of RRT Reviews').

13. To facilitate the finalisation of bridging visa (detention) cases as quickly as possible within the statutory time frame, Registry staff may provide greater administrative assistance to Members than that provided in standard cases. Registry staff will generally prepare a decision template for the consideration of the Member.

Security arrangements

14. The Tribunals' security policies and procedures are set out in the 'Emergency & Security' page which can be accessed via a prominent link on the homepage of ***express***. This includes a general description of security arrangements, which as at the date of issue of this PMD, provided as follows:

> General Security Arrangements
>
> Members and staff should be acquainted with the Tribunals' *Security Plan 2005* and related security policies and procedures (available from this page).
>
> All Members and staff have a responsibility to report security incidents and risks. It is important that reporting occurs even if the immediate incident is quickly resolved, as it is important to collect information on all incidents so that assessments of risks, threats and vulnerabilities can be updated, and so that procedures are reviewed and training needs identified. Security incidents include medical emergencies; building emergencies; threats or violence; aggressive or threatening behaviour; damage or theft to property; unauthorised access to premises or to confidential information; alarms; loss or theft of passwords, codes, keys or access cards; unlocked or faulty security doors.
>
> The Tribunals recognise that stress related to the migration process, being in immigration detention or other factors may result in occasional incidents on the Tribunals' premises such as threats to the safety and well being of Members and staff or the general public; self harm; or attempted escapes. Although the likelihood of serious threat has been assessed as generally low, it is important that the Tribunals have security arrangements in place which are not compromised by complacency.
>
> The Tribunals use access control systems, have surveillance cameras in public areas and network storage areas, and have duress alarms fitted in reception areas and in hearing rooms. The duress alarms are tested regularly and Members and staff using public areas should be familiar with the correct operation of the duress alarms.
>
> All Members and staff are asked to be vigilant. Any concerns about a person who does not appear to have a reason for being on the Tribunals' premises should be reported to a supervisor or manager who will then decide on the appropriate course of action. Reception staff offer assistance to persons who do not report to reception, so as to increase awareness of who is in the public areas.
>
> Members and staff who become aware of evidence of any psychological, behavioural or health issues of an applicant or other person which may impact on security or the safety of that person or others on the Tribunals' premises, must bring the information to the attention of a Senior Member or senior manager as soon as possible.
>
> Where an immediate or significant incident or risk is identified, it should be reported in person to the manager who is responsible for the particular area of work where the incident occurred or the risk was identified. If that person is unavailable, or where the seriousness of the incident or potential risk warrants it, the matter should be reported to the Registrar, Deputy Registrar, District Registrar, Senior Member and/or ASA. Members and staff should not hesitate to call '000' in an emergency.

Whenever an incident occurs it should be recorded on a *Security Incident and Risk Report* which is to be submitted to the ASA.

All Members and staff should be mindful of OH&S issues and their personal safety and the safety of others. Members and staff are required to report any OH&S incident and/or injury in writing. An 'OH&S Incident Form' is available for this purpose.

The Safety and Rehabilitation Co-ordinator in Human Resources provides information and assists with health and safety issues. The Tribunals also provide access to an employee assistance program (Access EAP) to all Members and staff of the Tribunals which can be accessed to provide counselling and support following an incident.

The Business Services Section has responsibilities in relation to security issues, including maintaining information and records.

Specific security arrangements for persons in immigration detention

15. Every effort should be made to schedule a hearing for a person in immigration detention in a designated hearing room at a non-peak time.

16. The Tribunals receive weekly reports detailing any concerns about persons expected to appear before the Tribunals in the following week. Any concerns or special requirements will be discussed, as appropriate, with the Member, the relevant Senior Member, senior staff and the ASA.

17. The Tribunals aim to conduct face-to-face hearings on the Tribunals' premises wherever possible in cases where the person is in detention in Sydney or Melbourne. However, it may be appropriate in some circumstances, such as in instances where the Detention Service Provider and the Department indicate that security considerations warrant it, to consider whether a hearing should be held by video or by telephone, or in the detention centre or at some other location. Where the person is in detention outside Sydney or Melbourne, the hearing will generally be conducted by video-link.

18. The direct responsibility for the care and security for persons in immigration detention who are on the Tribunals' premises, rests at all times with the Department and the Detention Service Provider.

19. The Detention Service Provider has procedures for maintaining security and custody of all persons in immigration detention appearing at the Tribunals. Security guards will wait with applicants in designated waiting areas and ensure that applicants are kept in close proximity at all times and that any contact with other persons is adequately supervised. Applicants may have representatives or friends and family present, and there may be a need to request the assistance of the interpreter booked for the hearing to assist with communication.

20. Security guards provided by the Detention Service Provider accompany all persons in immigration detention who appear before the Tribunals. The security guard(s) will normally be in the hearing room for MRT hearings. In the case of RRT hearings, the security guards will be present during the opening of a hearing, but will wait immediately outside the hearing room during the hearing, and return at the closing of the hearing, and on any occasion where the Member calls an adjournment. The security guards have an access card to open hearing room doors where a room is locked for a private hearing.

21. In some RRT cases the Member may decide that it is appropriate for a security guard to remain in the hearing room while an applicant is giving evidence. In some MRT cases the Member may decide it is not appropriate for a security guard to be present in the hearing room while an applicant is giving evidence. The Member should weigh up the desirability of persons being able to give evidence (confidentially and privately) against any perceived risk to the Member, staff or the general public.

Steve Karas
Principal Member

Date 31 January 2007

16. ROLE OF THE HEARING

16.1 The hearing

16.1.1 The hearing supplements the information already provided to the Tribunals and forms part of the evidence the Tribunals will consider when making a decision. The hearing is an opportunity for the Tribunals to further investigate the applicant's claims and an opportunity for the applicant to give evidence and present arguments to support those claims.

16.2 The inquisitorial nature of proceedings

16.2.1 The Tribunals are based on an inquisitorial rather than an adversarial model. They are administrative bodies that may obtain any information that they consider relevant[1] and may instigate investigative procedures.[2] The RRT's powers of inquiry under ss.415(1), 424(1) and 427(1)(d) and the equivalent powers of the MRT under subsections 349(1), 359(1) and 363(1)(d) are discretionary powers and not mandatory obligations.[3] While there is no general obligation to inquire, the Tribunals may need to consider whether it is appropriate in the circumstances of the case to undertake their own inquiries. In *Applicant M164/2002 v MIMIA* [2006] FCAFC 16 (Lee, Tamberlin, Dowsett JJ, 22 February 2006), Lee and Tamberlin JJ (Dowsett J dissenting) found that findings of forgery, fraud or perjury cannot be based on a superficial examination of events and materials, particularly where the conclusion represents no more than a suspicion held by the Tribunal, and where that suspicion remains untested by the reasonable use of powers available to the Tribunal to have further enquiries made. In this case the Court held that the Tribunal would have been assisted in its decision by the reasonable use of the powers in s.427(1)(d), and that to not make further inquiries where the need was obvious and there is no impediment to making such inquiries may point to a conclusion that the Tribunal has failed to provide a fair hearing.[4]

16.2.2 The Tribunals are not bound by technicalities, legal forms or rules of evidence[5] and the applicant is the only party to the proceedings before the Tribunals. Further, the applicant does not have a right to call witnesses[6]or to cross-examine witnesses.[7] RRT applicants do not have the right to be represented in *giving evidence*,[8] whilst

[1] ss.359 [MRT] and 424 [RRT]. Unless otherwise specified, all references in this chapter to legislation are references to the *Migration Act 1958* and the Migration Regulations 1994 as now in force.
[2] ss.363(1)(d) [MRT] and 427(1)(d) [RRT].
[3] *Re MIMA; Ex parte Cassim* (2000) 175 ALR 209.
[4] At [76]. Note also that in *SZELA v MIMIA* [2005] FMCA 1068 (Smith FM, 11 August 2005), the Court found that where the DIMA Document Examination Unit provides advice that a document is fraudulent, the Tribunal should seek reasons for this decisions and provide these to the applicant – in this case the Tribunal made negative findings on the basis of the opinion of the Document Examiner that one of the documents provided was a fraudulent document. The Tribunal proceeded to affirm the decision despite a request from the applicant to provide information of why the document had been found to be fraudulent.
[5] ss.353(2)(a) [MRT] and 420(2)(a) [RRT].
[6] ss.361(3); 362(3) for s.338(4) bridging visa detention applicants [MRT] and 426(3) [RRT].
[7] ss.366(b) [MRT] and 427(6) [RRT].
[8] s.427(6). Note however, in *WABZ v MIMIA* (2004) 204 ALR 687, the Full Court of the Federal Court held that whilst s.427(6) excludes an entitlement to a right to representation to a person appearing before the Tribunal to give evidence, it

MRT applicants do have the right to be assisted by another person but not represented.[9]

16.3 Avoiding misleading statements at the hearing

16.3.1 Because of the importance of the inquisitorial function of the hearing, it is vital that the Tribunal should not impede the applicant's ability to give evidence, for example by making misleading statements as to what is or is not relevant to the review.

16.3.2 In *Applicant NAFF of 2002 v MIMIA*[10], the High Court held that the Tribunal's failure to honour an undertaking given at the hearing that it would communicate further with the applicant and receive further submissions was a breach of procedural fairness going to jurisdiction. In *MIMA v Cho*,[11] Tamberlin and Katz JJ observed that there may be a failure to comply with s.425 where the applicant had not been given a real opportunity to appear and give evidence. This could occur, for instance, where relevant evidence was not admitted or misleading statements were made by the decision-maker which discouraged an applicant from calling or proceeding with a particular line of evidence. Similarly, in *Applicant VBAB v MIMIA* [2002] FCA 804, Ryan J held that the Refugee Review Tribunal had failed to comply with s.425 in circumstances where the Tribunal's statements at the hearing had induced the applicant and her adviser into believing that the timing and method of departure from Afghanistan would not influence the Tribunal's resolution of the ultimate issues. For the MRT, an identical requirement exists under s.360.

16.4 Further reference material concerning the hearing

16.4.1 There are a number of Tribunals' directions and publications which explain the hearing process.

16.4.2 The MRT Principal Member Direction – 2/2005 and RRT Principal Member Direction 3/2005 deal with aspects of the hearing and address matters such as adjournments, interpreters and the participation of various parties such as witnesses, representatives and observers. The 'Migration Review Tribunal Member's Handbook' contains a section on hearings, and covers some procedural aspects.

16.4.3 The pamphlet 'What is a Hearing' is designed for the Refugee Review Tribunal applicant and is available in several languages. This information, in English, is available on the Tribunal's Internet, and is given to applicants when invited to attend a hearing. Brochures designed for the applicant addressing aspects of Migration Review Tribunal hearings include the 'Migration Review Tribunal' (M10) brochure and the 'Information about Tribunal Procedures for Review Applicants' (M15).

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does not exclude the rules of procedural fairness insofar as they may require representation in individual circumstances. The Court concluded that there may be various instances where a failure to allow the applicant to be represented before the Tribunal would involve a breach of natural justice, such as when the issues are serious and the applicant is not highly educated, speaks little English and would have difficulty dealing with the issues in the review. For further discussion of this issue see Chapter 23.

[9] s.366A.

[10] (2005) 211 ALR 642.

[11] (1999) 92 FCR 315.

16.4.4 The ‘RRT Interpreters' Handbook' fully describes the role and responsibility of the interpreter at a hearing. It can be found on both the Tribunals’ Intranet and Internet Homepage. The Migration Review Tribunal ‘Interpreter Handbook’ can be found on the MRT Internet homepage. It covers both the procedural aspects of the hearing and outlines the role of the interpreter.

16.4.5 The 'Refugee Review Tribunal’ brochure covers many of the questions asked by applicants in relation to the hearing. It can be found on both *Express* and the RRT's Internet Homepage. *Express* contains a variety of brochures and fact sheets that provide similar information for applicants to the MRT.