Interpreting and Translation : Meeting the Legal Rights of Non-Native Citizens

Sarah de Mas
Fair Trials Abroad, United Kingdom

Here is the challenge : to meet the legal rights of a citizen who does not understand the language of the courts.

Improving access to justice, an area of work long ignored by the European institutions, has become a topic of acute interest during the last few years. Although the emphasis used to be on security, law and order, there is a growing recognition that matters of legal rights and civil liberties must receive due attention. Thus in June 1990 in Cologne, Heads of State and governments agreed it was necessary to establish a charter to make the importance and relevance of these fundamental rights more visible to the Union's citizens.

In January 2000, the Council of Europe Parliamentary Assembly declared that they were unanimously in favour of a coherent system of human rights protection and urged the European Union to incorporate into the proposed Charter of Fundamental Rights the rights protected by the ECHR and its protocols. A Resolution was adopted to this effect, henceforth requesting that the European Union make every effort to ensure consistency in the protection of human rights and to avoid divergent interpretations of those rights across Europe. As was pointed out by the United Nations Human Rights Committee :

> *"One of the clearest signs of progress in human rights is the fact that individuals who claim that their rights and freedoms have been violated by the State, may call the State in question to account for its action."*

However, the problem that many EU citizens are facing, and one which has been addressed at this conference in various ways, is that all the rules of "best practice" have little effect if the rules cannot be enforced, if the requirements laid down in such rules, charters or pro-

tocols are beyond the budgets of most authorities, or if those who are charged with effecting those rules, charters or protocols lack sufficient training to do so. From our experience, it would seem that the abuse of basic human rights committed by the authorities on a routine basis—that is, little or no provision of competent interpreting and translation of documents—is due largely to lack of information and/or lack of resources.

I work for Fair Trials Abroad (Justice à l'Étranger) an NGO concerned with the legal rights of EU citizens out of country. We advise and assist citizens to assert their legal rights under international law, in particular their right to due administration of justice during all stages of legal proceedings, from arrest and investigation to the conclusion of the trial process. My work focuses on underpinning structures that provide citizens with the necessary safeguards to protect their legal rights. One of the principal threats to being able to access justice in a foreign country is the inability to understand and be understood.

The European Legal Interpreter Project was undertaken against a background of disturbing cases in which it was shown that poor or no interpreting and translation facilities had been provided during justice proceedings, leading to miscarriages of justice and unnecessary hardship. The Grotius Programme of the European Commission's Task Force of Justice and Home Affairs agreed to fund the Fair Trials Abroad Trust (FTA) to carry out a feasibility study to assess the practicality of running a survey across a number of representative EU member states. Five countries were agreed upon both by funders and participants, representing a broad spectrum of legal practice, legislation and multi-lingual criminal investigations and crime. The objective of the survey was to identify the obstacles to providing coherent translation and interpreting services within the legal systems of EU member states in accordance with current legislation. It was acknowledged at the time that these obstacles could be of a financial, cultural or sociological nature. The aim was that such knowledge and information would enable essential development to take place effectively and in mutual co-operation.

One of the issues gaining prominence was whether interpreting and translation were recognised for the crucial role they play in the administration of justice to people who do not understand, or who cannot make themselves understood, in the language of the courts.

This issue, long ignored by most authorities and institutions, received some recognition with the Treaty of Maastricht (1992), which outlined EU aims for greater inter-governmental co-operation on justice and home affairs. At the subsequent inter-governmental conference in 1996, the European Union stated its intention to assist the process of strengthening co-operation between the justice systems of Europe. This would be achieved by setting up frameworks for projects of training, information, studies and exchanges for legal practitioners. The aim was to contribute to the improvement of mutual understanding, highlighting points of convergence and lowering the barriers to judicial co-operation between member states. A funding programme for legal practitioners was established for the period 1996-2000 in order to foster mutual knowledge and facilitate co-operation. Article 1, Para 2 of the inaugural document stated :

> *For the purposes of this joint action, "legal practitioners" means judges, prosecutors, advocates, solicitors, academic and scientific personnel, ministry officials, criminal investigation officers, court officers, bailiffs, court interpreters and other professionals associated with the judiciary.* (Joint Action Interinstitutional File No.96/0146, Brussels, 1996.)

That such a list should include interpreters was indicative of the growing acknowledgement of the crucial role of the interpreter in the administration of justice.

Alas, the same cannot be said for authorities in national administrations of justice of EU member states. In too many jurisdictions of the European Union it is still fondly believed that the interpreter and or translator provide their services to assist those making inquiries and carrying out the investigation. On that basis, the defendant has little choice as to what he can expect to understand, or how much of what he says might be understood. And yet the law states quite clearly that it is the right of every citizen to be informed in a language which he can understand of the nature and cause of the accusation made against him, and to have the free assistance of an interpreter in the preparation and presentation of his defence. Indeed, the Commissioner for Justice and Home Affairs, Antonio Vitorino recently stated :

> *"It is necessary to guarantee that any citizen who is in another member state and has a judicial problem, is entitled to the same access to justice as a citizen of that state ; for example, that he will not be punished for not speaking the same language."*

The case law of the European Court on Human Rights may have a crucial role to play in safeguarding minimum rights by providing a bedrock of precedence on which to build good practice. Relevant judgements reveal an important line of reasoning. In its Artico judgement (1980) the Court further stated :

> *"The Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective."*

Which in turn, raises the question, do the present systems for the provision of interpreters and translators work ?

It is widely accepted, and indeed documented, that interpreters working in the administration of justice practice a demanding profession. It is widely accepted that interpreters and translators are required to have thorough knowledge of, and ability to use, all existing language registers in both of the languages in which they are working, and to be able to transfer from one register to another seamlessly across both languages, something which happens with frequency in legal interpreting. They are required to have a good understanding of the law and its procedures in both cultures they work with. Interpreters are often expected to be able to work for long hours in high pressure situations, and they must remain non-partisan throughout.

And yet, in most cases, these interpreters, whether "sworn", "authorised" or "official", provide their service without the benefit of adequate training, professional evaluation, or professional support from the system. They are frequently expected to work under questionable working conditions or poorly designed courtrooms. Remuneration is usually poor and in some cases non-existent. Frequent comment would suggest that these factors cause the better interpreters to look for work elsewhere, such as Brussels, Geneva or Strasbourg. Evidence also suggested that the authorities would prefer to save money by employing untrained, unofficial interpreters or translators.

Such a system, if allowed to continue unchecked, is likely to confirm low quality interpreting—with few controls against bias, inaccuracy or précis—leading to the inevitable acceptance by justice systems of a low standard of interpreting as the norm. When something is done often enough it becomes routine and accepted as good practice. This then begs the question : Who is responsible for upholding the law, for safeguarding the rights of the citizen ? Who is res-

ponsible, in other words, for ensuring that the translator or interpreter are competent to do the job ?

In the case of *Kamasinski v. Austria* (9/1988/153/207), an American defendant argued he could not understand sufficient information in order to prepare his defence ; the Court stated that it was not called upon to adjudicate on the Austrian system of registered interpreters as such, but solely on the issue of whether the interpretation assistance received satisfied the requirements of Article 6. Very cautiously the Court decided :

> *"In view of the need for the right guaranteed by para.3(e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided."*

Complexities of the system

In legal systems that depend entirely on oral evidence given at a one-off trial (such as the Anglo-American system), the legal implications of deviations from the original testimony of the defendant or the witnesses are alarming, insofar as the law appears to accept the interpreted expression as a legally valid equivalent of the original statement. The only safeguard appears to be a reliance on the ability of the legal practitioners involved to detect mistakes. The situation is not very different in systems where adjudication relies on the written evidence contained in the case file or dossier. Written witness statements are often summarised by an interpreter and delivered orally to the defendant ; translating the documents is time consuming and costly, and empirical evidence suggests that is precisely why it's kept to a minimum in most jurisdictions. Statements that were often made by defendants without electronic recording are later translated for the dossier. Naturally, the defendant cannot know if what was said has been accurately translated. Thus, documents in a dossier written in the language of the court may bear little resemblance to original statements.

There have been few test cases to see whether the current laws fully protect the citizen. Compliance with Article 6.3(a) and (e) and Article 14 of the ECHR is rarely tested at the court in Strasbourg. The

Convention does not expressly provide for the information required by Article 6.3(a) to be given in writing. In *Kamasinski*, the ECHR found that although the applicant had received no written translation of the indictment, he was sufficiently informed of the accusation against him as a result of oral explanations given to him in English. To date there has been no case law to determine whether Article 6.3(a) requires a written translation, so the question of obligation still arises. Whether the article provides a sufficient safeguard or not appears to be determined on whether or not the defendant protests at the time, or more exactly, whether or not the defendant's protests are logged at the time. Case evidence would suggest that defendants out of country in non-adversarial systems have very few and very brief interviews with their lawyer. If that is the case, can it reasonably be expected that a non-native speaking defendant receive, "in sufficient detail" all the necessary information, rendered orally, (usually in consecutive translation and summarised) for the preparation of his defence ? Can oral renditions suffice in a system grounded on written evidence ? This could suggest discrimination under Article 14 of the ECHR which states that "the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, political opinion, LANGUAGE, etc. (emphasis added).

In most jurisdictions in Europe, the word interpreter and translator appear to be indistinguishable. Translators of all the lengthy documentation which makes up the dossier are often called upon to interpret and interpreters are asked to translate. Linguistic transfer is requested by the examining magistrate or equivalent, less frequently by the defence. Linguistic transfer usually consists of either the oral summary of written texts such as charges, or witness statements, or a written translation. A written translation of these is provided more often in significant civil cases, less frequently so in criminal cases. Oral interpretation is offered during hearings. It is often consecutive and summarised, and the judge is the one who decides what is to be interpreted orally and/or translated in writing. Simultaneous interpreting, such as is used at the International Criminal Tribunal at The Hague, is rarely provided in either system. In that well appointed courtroom, interpreters sit in glass booths on either side of the court with a good view over the proceedings and in clear sight of everyone in the room. In this sense, the interpreter works in the same way as a conference interpreter. Every word that is said in the courtroom from

start to finish is repeated in all required languages. No one is left in doubt as to what any person stated.

Seating arrangements for interpreters in most criminal courts are not as well laid out as at the Hague, however. In *Kamasinski*, the registered interpreter was seated next to the defendant's counsel to the left of the judges' bench, while the applicant was sitting facing the bench about 6 - 7 metres away. The accused complained that the layout of the courtroom where his trial was held rendered it impossible for him to consult his English-speaking counsel or the interpreter for an explanation of what was being said in German without requesting the bench to interrupt the proceedings. Since no formal objection was raised at the time, the Court (ECHR) concluded that there had not been a violation of Article 6.

In view of all the difficulties mentioned above, i.e. language register, length and complexity of sessions ; poor working conditions, differing legal systems and terminology, poor or no co-operation from the legal authorities, untested legislation, etc. are interpreters and translators generally well trained and prepared for the work to be done ? The survey showed that few comprehensive training courses exist, and those that do are frequently too expensive for many freelance interpreters or do not cover all languages. They do not offer sufficient incentive in the way of national recognition (certification, for example) to prompt linguists to train for their work in the legal sector. Not one single member of the legal establishment mentioned the need for training to better work with and through an interpreter.

As the number of people living, working and travelling in a country other than their own continues to rise, the risk to their right to understand and to be understood and their right to a fair trial is increasingly at risk. If politics, commerce and industry do not allow language barriers to impede progress, then the administrators of justice should not allow language barriers to obstruct justice and equally for all.

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