

INTERPRETERS AND FAIRNESS IN ADMINISTRATIVE HEARINGS

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A fair hearing requires that people who may be affected by official or public power be given adequate notice of the issues to be decided, a fair opportunity to put their case and to question issues adverse to them. These basic principles presume that affected people can understand the matters in issue and the proceeding in which those issues are adjudicated. If an affected person cannot speak the language in which the proceeding is conducted, fairness will require that an interpreter be provided. But that alone may not satisfy the requirements of fairness. This article examines the rules governing interpreters in migration hearings as an example of the requirements of fairness in administrative hearings involving interpreters. It is argued that the common law does not require that interpreting always be provided in administrative hearings, or that the best possible interpreting be provided. The article also questions whether the Federal Court is correct to suggest that there may be notable differences in the requirements governing interpreting in hearings regulated by the detailed procedures contained in migration legislation and hearings governed by the common law.

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I INTRODUCTION

The steady expansion of the duty to observe the requirements of procedural fairness has seen that doctrine extend to virtually all administrative decisions. Procedural fairness is now presumed to apply to the exercise of statutory powers which may affect the rights or interests of a person.¹ The scope of that principle is amplified by the increasingly wide approach the courts have taken to the rights or interests that are protected by procedural fairness.² There are some exceptions to these presumptions because the cases which have expanded the scope of the duty to act fairly have also made clear the duty can be narrowed or even excluded if the legislature does so in suitably clear language.³ The expansion and entrenchment of procedural fairness has not resolved all questions that surround the doctrine. Accepting that fairness applies is one thing. Determining what it requires in each case is quite another.

This article examines one area where the precise requirements of natural justice remain unclear, namely when and why fairness may require that people have an oral interpreter in a specific area of administrative hearings — those of migration tribunals.⁴ The variable nature of the requirements of fairness means that there is not, and cannot be, a single or rigid rule governing this issue in administrative hearings. The courts have instead devised a number of factors to determine whether an interpreter is required. The courts have also made clear that, where an interpreter is required, the needs of fairness are

¹ *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 577 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 352–3 [75]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658–9 [66] (Gummow, Hayne, Crennan and Bell JJ).

² The modern evolution of these principles is explained in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 409–16.

³ See, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258–9 [12]–[14] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). It is also clear that the requirements of natural justice can be excluded by implication rather than express words: *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 654–5 [50]–[52] (French CJ and Kiefel J), 667–8 [98]–[100] (Gummow, Hayne, Crennan and Bell JJ); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 606–7 [306] (Kiefel J), 621–4 [366]–[372] (Gageler J). Crennan J agreed with Gageler J on this point: at 586 [227].

⁴ The focus of the article, on the requirements of fairness, means that it does not consider the question whether access to an interpreter is a human right. On this issue see Adolfo Gentile, 'Interpreting as a Human Right — Institutional Responses: The Australian Refugee Review Tribunal' (2012) 17 *Interpreters' Newsletter* 157.

satisfied if the standard of translation is adequate rather than perfect. A requirement of adequacy rather than perfection might seem counterintuitive. How can fairness simultaneously require a procedural right but be satisfied when that right is not provided to the fullest extent possible?

The article examines that question in the following order. The first Part explains the nature of interpretation and the flexible requirements of fairness. The article argues that the inexact or flexible rules of fairness can be given some structure by an understanding of the purpose of an interpreter in administrative proceedings. The next Parts explain the standards devised in recent cases about interpreting in hearings conducted by migration tribunals.⁵ This article has particular focus on migration cases, a notable feature of which is that they purport to determine questions about the adequacy of interpretation as ones of statutory interpretation and jurisdictional error. It will be argued, however, that approach provides little more than a gloss on the longstanding question: when the hearing is viewed as a whole, was it fair?

II THE NATURE OF LANGUAGE INTERPRETATION

There is no single or simple definition of language interpretation but the two main forms used in administrative and other hearings are consecutive and simultaneous interpreting.⁶ In simultaneous interpreting, an interpreter translates a conversation as it occurs. This mode is typically used by interpreters when they are translating for the benefit of a person who is not speaking at

⁵ The Refugee Review Tribunal ('RRT') and the Migration Review Tribunal ('MRT') were each established under the *Migration Act 1958* (Cth) ('*Migration Act*'), though long after that statute commenced. Both operated as independent bodies for many years until 1 July 2015 when they were merged into the Administrative Appeals Tribunal ('AAT') (to form the Migration and Refugee Division of the AAT). That merger was achieved by the *Tribunals Amalgamation Act 2015* (Cth), which left the detailed legislative procedures governing migration tribunal decision essentially untouched. Accordingly, the principles settled by decisions prior to 1 July 2015 remain applicable to the Migration and Refugee Division of the AAT. References to the MRT and RRT will be used in this article to indicate that the relevant case was decided before this amalgamation of tribunals. The detail of these changes is explained in Robin Creyke, 'Tribunal Amalgamation 2015: An Opportunity Lost?' (2016) 84 *AIAL Forum* 7.

⁶ There are important further issues raised by the mode of delivery of interpreting services. Many particular problems are raised by the use of remote interpreters, which occurs when the interpreter is not in the hearing room. This typically occurs when the court, tribunal, witness or party is in a remote location. The use of telephone interpreters can raise many practical difficulties: see Leong Ko, 'The Need for Long-Term Empirical Studies in Remote Interpreting Research: A Case Study of Telephone Interpreting' (2006) 5 *Linguistica Antverpiensia, New Series — Themes in Translation Studies* 325.

that time but needs to hear what others say as it is being said. This process has been explained by federal standards used in the United States as requiring interpreters ‘to listen, comprehend, translate, and reproduce a speaker or signer’s message while the speaker or signer continues to speak or sign, typically lagging a matter of seconds behind’.⁷ By contrast, consecutive interpreting involves a level of delay, so translation is typically done after a statement, question or answer is spoken. The interpreter ‘conveys the original message into the target language after the speaker has paused’, such as in ‘the “question and answer” mode in which the speaker completes a statement and the interpreter begins to interpret after the statement is completed.’⁸ This process is typically used in administrative and other hearings when the person who requires an interpreter is speaking.

Whatever the method of interpreting, it is generally agreed that meaningful or effective interpretation is more than a mechanical exercise of translation.⁹ Professor Hale has explained that:

There is still a naïve assumption that as long as someone speaks two languages (to whatever degree of competence) and swears on oath to interpret faithfully, quality will be guaranteed. This misconception is perpetuated by the belief that interpreting is a simple word-matching exercise ...¹⁰

To conceive of interpretation as a form of word-matching diverts attention from the important aspects of evidence that can be lost in interpretation. The problem arises from a subtle distinction of perception which arises between witnesses and parties who use interpreters and those who do not. Parties and witnesses who do not use interpreters are judged on their own words when they give evidence, but those whose evidence is received through an interpret-

⁷ Administrative Office of the United States Courts, *Federal Court Interpreter Orientation Manual and Glossary* (8 May 2014) United States Courts, 58 <www.uscourts.gov/file/federal-court-interpreter-orientation-manualpdf-0>. This document was published by the Director of the Administrative Office of the United States Courts, who is required to ‘establish a program to facilitate the use of certified and other qualified interpreters’ in American courts: *Court Interpreters Act of 1978*, 28 USC § 1827(a) (2012).

⁸ Administrative Office of the United States Courts, above n 7, 50, 23.

⁹ Though some judges suggest otherwise: see, eg, *Gaio v The Queen* (1960) 104 CLR 419, 430–1, where Kitto J stated that an interpreter was a ‘bilingual transmitter’ or ‘translating machine’.

¹⁰ Sandra Hale, *Interpreter Policies, Practices and Protocols in Australian Courts and Tribunals: A National Survey* (Australasian Institute of Judicial Administration, 2011) 2.

er are essentially judged on the words used by the interpreter.¹¹ One American commentator explained:

No matter how accurate the interpretation is, the words are not the defendant's, nor is the style, the syntax, or the emotion. Furthermore, some words are culturally specific and, therefore, are incapable of being translated. Perfect interpretations do not exist, as no interpretation will convey precisely the same meaning as the original testimony.¹²

These issues were recently illustrated in *New South Wales Crime Commission v Sun*,¹³ where Adamson J ordered a trial be aborted due to apparent errors in translation. The trial involved two defendants. One gave evidence in English. The other gave evidence through a Mandarin interpreter. Counsel for the latter defendant claimed that several of his client's answers were wrongly prefaced with the remarks 'well anyway' by the interpreter, which made the defendant appear unconcerned and therefore unreliable.¹⁴ The question was not simply whether the words used by the interpreter were accurate but whether they conveyed the emphasis the defendant wished to make. Adamson J concluded that the words used by the interpreter and the impression they conveyed were sufficiently different to what the defendant intended that the trial should be aborted.¹⁵ His Honour accepted translation was 'both a skill and an art' that was difficult to perform 'instantaneously in a court room' but noted that the nuance of the words chosen by an interpreter 'is important as is choice of words, both for sense, context and flavour'.¹⁶ Such reasoning confirms Hale's argument that there is much more to interpretation than 'word-matching' because the interpolation of apparently innocuous words or expressions can have significant and unforeseen consequences.

Inaccuracy may be an inevitable possibility when interpreters are used because even the best interpreter may not be able to convey completely what the interpreted person has said. So long as an interpreter is the conduit between the person who speaks and the person who listens, the dangers of inaccuracy or incomplete understanding may not be able to be eradicated from the interpretive process. If so, interpretation may be best judged by the

¹¹ Michael B Shulman, 'No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants' (1993) 46 *Vanderbilt Law Review* 175, 177.

¹² *Ibid.*

¹³ [2015] NSWSC 494 (30 April 2015) ('*Sun*').

¹⁴ *Ibid* [18].

¹⁵ *Ibid* [28].

¹⁶ *Ibid* [21], [23].

extent to which it can minimise rather than completely remove those dangers. This approach seemed evident in the influential case of *Perera v Minister for Immigration and Multicultural Affairs* ('Perera'),¹⁷ where Kenny J considered the requirement of adequate interpretation in a hearing of the Refugee Review Tribunal ('RRT'). Her Honour explained that:

The function of an interpreter in the Tribunal (as in a court) is to place the non-English speaker as nearly as possible in the same position as an English speaker. In other words, an interpreter serves to remove any barriers which prevent or impede understanding or communication. An interpreter provides the means for communication between the applicant, the Tribunal and other participants in the Tribunal hearing, in cases where the applicant's own linguistic capacities are not, on their own, sufficient to that end.¹⁸

This passage invites several comments. First, the idea that interpreters should remove barriers draws attention to the subtle point that interpretation is not limited to ensuring that the words of an affected person are heard and understood. It is equally important that interpreters ensure that affected people understand what is said by others.¹⁹ Secondly, her Honour's suggestion that interpreting is intended to place people who require an interpreter 'as nearly as possible'²⁰ in the same position as those who do not implies that differences will always remain between those whose evidence is received through an interpreter and those whose evidence is not. That possibility may explain why the courts have accepted that fairness requires adequate rather than perfect interpretation because it implicitly acknowledges the deeper problem of equality by suggesting that people who require an interpreter may never be in the same position as those who do not.²¹ Thirdly, Kenny J did not equate effective interpreting with achieving *actual* understanding between the person whose words are being interpreted and the decision-maker to whom those remarks are directed. If the goal of interpretation is simply to place the interpreted person 'as nearly as possible' in the position of someone who does not need an interpreter, the interpreted person might, at best, be understood

¹⁷ (1999) 92 FCR 6. The facts of this case are explained in more detail below in Part VIII.

¹⁸ *Ibid* 18 [24] (citations omitted).

¹⁹ See, eg, *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212, 218 [22] ('SZRMQ'), where Allsop CJ reasoned that interpreting should enable affected people 'to communicate the substance of his or her case' and understand 'what the decision-maker is saying'.

²⁰ *Perera* (1999) 92 FCR 6, 18 [24].

²¹ This requirement of adequacy is discussed below in Part V.

no more or no less than any other person. Finally, the concerns identified by Kenny J are not limited to the problem her Honour faced — which was about oral, linguistic interpretation. The interpretation of other forms of communication, such as translation of sign language for deaf people,²² or facilitated communication for people who can neither speak nor use conventional sign language,²³ raise broadly similar issues to oral interpretation and may also raise other complex issues.²⁴ Discrete problems can also occur in the translation of documents because that activity is most easily conceived as one of simple word-matching, when it can often require much more skill.²⁵ This article focuses on oral interpreters because that type of interpreting receives the most attention from courts and tribunals. That focus is not intended to suggest that other forms of interpreting are less important.²⁶

Kenny J drew attention to another problem in *Perera* when she explained that:

A witness whose answers appear to be unresponsive, incoherent, or inconsistent may well appear to lack candour, even though the unresponsiveness, incoherence or inconsistencies are due to incompetent interpretation.²⁷

This passage identifies an important problem for those who receive evidence or other material through an interpreter. Judges, jurors and administrative officials may struggle to distinguish between the words and demeanour of an

²² See generally Michele LaVigne and McCay Vernon, 'An Interpreter Isn't Enough: Deafness, Language, and Due Process' [2003] *Wisconsin Law Review* 843.

²³ See the informative discussion of the use of an interpreter for a physically disabled complainant in the trial of a sexual offence in *R v Willeman (Tetraplegic: Interpreter)* [2008] NZAR 644, 651–3 [34]–[46] (Cooper J) (High Court).

²⁴ A distinct but somewhat related problem occurs in cases involving very young children, usually when they give evidence as victims in sexual assault trials. While young children may speak and understand English, their ability to fully understand and respond to questions put to them during hearings can give rise to problems of comprehension and communication not unlike those of interpretation. The use of adversarial tactics in such cases can cause as much confusion as when an adult requires an interpreter: see Emily Henderson, 'Communicative Competence? Judges, Advocates and Intermediaries Discuss Communication Issues in the Cross-Examination of Vulnerable Witnesses' [2015] *Criminal Law Review* 659.

²⁵ A useful explanation of why this is not possible is given in Sandra Hale, 'The Need to Raise the Bar: Court Interpreters as Specialised Experts' (2011) 10 *Judicial Review* 237, 245–6.

²⁶ A distinct but closely related point is the distinction between 'speaking ability' and 'listening ability', which is discussed in *Western Australia v Gibson* (2014) 243 A Crim R 68, 81–2 [59]–[62] (Hall J). Each ability is relevant to whether a person requires an interpreter because the level of either ability can greatly affect whether a person can adequately understand and participate in a hearing, interview or discussion.

²⁷ (1999) 92 FCR 6, 25 [49].

interpreter and those of the person being interpreted.²⁸ These difficulties in understanding are not limited to those who receive or hear the evidence of the interpreted person. People whose evidence is interpreted also rely on that interpretation to understand and participate in a hearing or other proceeding. That reciprocal function of interpreting is why fairness does not simply require an interpreter to translate the words of an affected person but to do so in such a way that the person ‘can comprehend that which is being spoken and interpreted.’²⁹

III THE ACCREDITATION AND REGULATION OF INTERPRETERS

The uncertainty of the finer details of the nature of interpretation reflects a wider lack of uniformity governing the regulation of interpreters. In many common law jurisdictions, there is no single or widely accepted criterion to assess the competency of interpreters.³⁰ Professional interpreters are regulated in Australia by the National Accreditation Authority for Translators and Interpreters (‘NAATI’), which accredits interpreters for a great range of purposes including interpretation during judicial and administrative hearings.³¹ People may become an accredited interpreter after they have sat a single, generalist test that gauges their ability to conduct various tasks of interpreting.³² Hayes and Hale have strongly criticised this approach to accreditation because it enables people to become interpreters without

²⁸ This seemed to be the problem in *Sun* [2015] NSWSC 494 (30 April 2015).

²⁹ *SZGYM v Minister for Immigration and Citizenship* [2007] FCA 1923 (12 November 2007) [29] (Graham J) (‘*SZGYM*’).

³⁰ A problem noted by the Supreme Court of Canada in the leading Canadian decision of *R v Tran* [1994] 2 SCR 951, 988 (Lamer CJ). See also the similar statements of the Supreme Court of New Zealand in *Abdula v The Queen* [2012] 1 NZLR 534, 551–2 [49]–[50] (McGrath J for Elias CJ, Blanchard, Tipping, McGrath and William Young JJ) (‘*Abdula*’).

³¹ Regulation 2.26B of the *Migration Regulations 1994* (Cth) provides the Minister for Immigration and Border Protection with authority to designate an agency or body as the authority to assess people seeking to enter the occupation of translators or interpreters under ANZSCO Codes 272412 and 272413. The Minister has designated NAATI as the relevant authority, which effectively provides NAATI with a monopoly over the accreditation of interpreters and translators: Minister for Immigration and Border Protection (Cth), *Specification of Occupations, a Person or Body, a Country or Countries 2016/059*, IMMI 16/059, 6 May 2016, paras 3–5, sch 1.

³² The process of gaining accreditation is outlined in NAATI, *Accreditation by Testing: Information Booklet* (December 2015) <https://www.naati.com.au/media/1104/accreditation_by_testing_booklet.pdf>. The various changes NAATI has made to its standards in recent times were usefully reviewed in *M175 of 2002 v Minister for Immigration and Citizenship* [2007] FCA 1212 (10 August 2007) [23]–[30] (Gray J).

knowledge of the significance and possible influence interpreting has in legal hearings.³³ Another commentator has also complained about the ‘serious limitations to NAATI accreditation’ because ‘[n]one of the NAATI levels of accreditation involve specialist examination or legal interpreting accreditation’.³⁴ There is considerable force in such criticisms because the various policies and information materials produced by NAATI do not address the standards applicable to interpreters in judicial or administrative hearings. The absence of such training is all the more curious because NAATI has long provided specialist guidance to people who wish to migrate to Australia and become interpreters.³⁵ It is odd that NAATI has devised detailed standards for people who might wish to gain a visa on the basis of their ability to act as interpreters, yet provides no publicly available information about, or standards governing, interpreters in the many thousands of hearings about migration law conducted each year in Australian courts and tribunals.

The lack of specialist legal training within the NAATI system has led many government and legal agencies to suggest that official accreditation is not a necessary guarantee of the quality of an interpreter. Guidance produced by the Western Australian Office of Multicultural Interests, for example, notes that interpreters may have either university qualifications or certification by NAATI but concludes that, ‘[i]deally, practitioners will have both’.³⁶ The policy governing the use of interpreters in federal migration tribunal hearings simply states that tribunal officials ‘prefer to use interpreters accredited at Interpreter level 3 or above’ by NAATI.³⁷ A more holistic approach is taken in the *Equal Treatment Benchbook* issued by the Supreme Court of Queensland. The first edition of that book accepts that ‘[l]egal interpreting ... is ... a more

³³ Alejandra Hayes and Sandra Hale, ‘Appeals on Incompetent Interpreting’ (2010) 20 *Journal of Judicial Administration* 119, 120.

³⁴ Len Roberts-Smith, ‘Forensic Interpreting: Trial and Error’ in Sandra Hale, Uldis Ozolins and Ludmila Stern (eds), *The Critical Link 5: Quality in Interpreting — A Shared Responsibility* (John Benjamins Publishing, 2009) 13, 32.

³⁵ NAATI, *Accreditation for Migration Purposes: Information Booklet* (July 2016) <https://www.naati.com.au/media/1285/migration_information_booklet.pdf>.

³⁶ Office of Multicultural Interests, Department of Local Government and Communities (WA), *Western Australian Language Services Policy 2014 and Guidelines* (2014) 33 <http://www.omi.wa.gov.au/resources/publications/Languages/Language_Services_Policy_2014.pdf>.

³⁷ AAT, Migration and Refugee Division, *Guidelines for Interpreters* (July 2015) 17 [89] <<http://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-for-Interpreters.pdf>>.

specialised field than generalist interpreting'.³⁸ That guide suggests that legal interpreters should possess:

Comprehensive knowledge about the Australian legal system; [t]horough understanding of the roles of lawyers and judicial officers; [s]ensitivity to legal culture; [c]ommand of legal terminology; [u]nderstanding of the structure of the legal systems in Australia and the country where the target language is spoken; [t]ertiary-level education or equivalent life experience; [a]bility to interpret consecutively and simultaneously; [c]ommitment to ethical principles in legal settings; [u]nderstanding of lawyer's expectations and how to work professionally with them.³⁹

This passage is not included in the recently published second edition of the *Equal Treatment Benchbook* but that newer edition refers with apparent approval to scholarly research about the particular skills required for effective legal interpreting.⁴⁰

The absence of specialist legal training is not the only gap within the NAATI system. NAATI provides accreditation for over 60 languages, but not for every language other than English spoken in Australia.⁴¹ The number of languages that are accredited also does not take account of the great range of 'dialects within those broad language descriptions' employed by NAATI.⁴² One can hardly criticise NAATI for struggling to accommodate all of the many languages and dialects spoken in Australia but such problems explain why NAATI accreditation has never been viewed as a necessary indication of the quality of an interpreter's work. In many instances, it may not be possible to obtain a NAATI accredited interpreter. Even when a NAATI accredited interpreter is available, it cannot be presumed the interpreter is experienced and will be competent in a legal hearing. Questions about the adequacy of

³⁸ Supreme Court of Queensland, *Equal Treatment Benchbook* (1st ed, 2005) 65.

³⁹ Ibid 65–6, citing Bureau of Ethnic Affairs and Department of Justice (Qld), *Interpreters and the Courts: A Report into the Provision of Interpreters in Queensland's Magistrates Courts* (Queensland Government, 1997) 16–17.

⁴⁰ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed, 2016) 46 <http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf>, citing Anne Susskind, 'Justice Suffers When Communication Breaks Down' (2011) 20 *Law Society Journal* 19, 19; Hale, above n 25, 241–2.

⁴¹ Though testing for all languages is typically not conducted within a single year. See NAATI, *Accreditation by Testing*, above n 32, 2, which outlines just over 60 languages for which testing would be conducted in 2015.

⁴² Justice Melissa Perry and Kristen Zornada, 'Working with Interpreters: Judicial Perspectives' (2015) 24 *Journal of Judicial Administration* 207, 209.

interpretation are typically ones of degree and context, in which the presence or absence of NAATI accreditation is only one factor.

These issues were usefully illustrated in *SZHEW v Minister for Immigration and Citizenship* ('SZHEW').⁴³ The applicant in that case was fluent in the Chinese dialect of Fuqing and claimed to only have a basic working knowledge of Mandarin, which was the language the interpreter employed in his migration hearing. The applicant claimed that the many mistakes of interpretation caused legal error and also that use of an interpreter not accredited by NAATI was itself evidence of inadequacy or error.⁴⁴ Jagot J accepted that the question of whether interpretation in a hearing for a protection visa was so inadequate as to deny the applicant 'of the opportunity given by s 425 of the *Migration Act* [to give evidence and present arguments before the Tribunal] involves a qualitative assessment of the conduct of the hearing before the Tribunal as a whole.'⁴⁵ Her Honour reasoned that absence of accreditation 'whether in isolation or considered with every other claim made by the applicant' was 'insufficient to found jurisdictional error' in the case at hand, because claims of jurisdictional error 'based on inadequate interpretation inevitably involve questions of fact and degree'.⁴⁶ Her Honour continued:

The lack of NAATI accreditation may bear upon the drawing of inferences about the adequacy of interpretation. But neither the lack nor the holding of NAATI accreditation provides a necessary answer to the question as to whether a hearing miscarried by reason of inadequate interpretation.⁴⁷

Although this hearing was governed by the detailed hearing procedures contained in migration legislation and, as with almost all such cases, turned on the question of whether jurisdictional error was established, there is no reason why the same approach cannot and should not apply at common law or in cases involving other statutes. Accordingly, tribunals, courts and administrative officials may prefer or insist that interpreters have NAATI accreditation but the existence or absence of that accreditation may have little bearing on whether the interpretation was in fact adequate.

⁴³ [2009] FCA 783 (24 July 2009).

⁴⁴ *Ibid* [44] (Jagot J).

⁴⁵ *Ibid* [52].

⁴⁶ *Ibid* [91].

⁴⁷ *Ibid*.

IV FLEXIBILITY, FAIRNESS AND INTERPRETERS

The courts have long made clear that the content of fairness is variable, so its particular requirements will vary according to the circumstances of each case.⁴⁸ In *CPCF v Minister for Immigration and Border Protection*,⁴⁹ Gageler J accepted that natural justice may ‘have a flexible, chameleon-like, content capable of varying according to the exigencies of the exercise of power between nothingness at one extreme and a full-blown trial at the other’.⁵⁰ An enduring problem that follows from this flexibility is the difficulty in deciding when and how the procedural requirements of a particular case may be situated between these procedural extremes. The courts have made clear that the common law interpretive principles used to resolve that problem must pay careful attention to the legislation under which the decision at hand is made.⁵¹ Beyond such general guidance, the courts are usually reluctant to pronounce specific criteria about the content of the requirements of fairness.⁵² The question that judicial reticence leaves open is deceptively simple: what does fairness require in this case? Courts and administrative officials often reach different answers to this question. Different courts can also reach different answers.

A useful recent example is the English case of *R (L) v West London Mental Health NHS Trust*,⁵³ which was about the procedures fairness might require in decisions about the transfer of patients to high security psychiatric institutions. The judge at first instance held that the simple procedures used by the hospital did not meet the requirements of fairness.⁵⁴ He devised quite detailed

⁴⁸ A classic statement to this effect was made in *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ). See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 16–17 [48] (McHugh and Gummow JJ) (‘*Lam*’); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 99 [25]; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 160–1 [26] (‘*SZBEL*’).

⁴⁹ (2015) 255 CLR 514.

⁵⁰ *Ibid* 622 [367]. The ‘chameleon-like’ quality of the requirements of fairness was also noted by Brennan J in *Kioa v West* (1985) 159 CLR 550, 612.

⁵¹ See, eg, *SZBEL* (2006) 228 CLR 152, 160–1 [26] where the Court explained that analysis ‘proceeds at too high a level of abstraction’ if careful attention is not given to the relevant statutory framework.

⁵² See, eg, *SZRMQ* (2013) 219 FCR 212, 215 [6]–[7] where Allsop CJ stated that fairness was ‘normative, evaluative, context specific and relative’ and thus its requirements were not ‘generally apt for precise delineation’.

⁵³ [2014] 1 WLR 3103 (‘*West London Mental Health Trust*’).

⁵⁴ *Ibid* 3107 [4] (Beatson LJ).

procedural requirements for such decisions.⁵⁵ The Court of Appeal overturned that ruling because the twelve ‘legislative-type subsections’ of the lower court had constructed ‘in substance an adversarial form of adjudication’ that was unsuited for administrative decision-making.⁵⁶ There is an obvious reply to that criticism. The judge at first instance devised detailed procedures to guide decision-makers who were normally not legally qualified but were regularly obliged to make decisions that could have an enormous impact on the rights of patients. The legislature had empowered doctors to make those decisions but had given no guidance on how to do so. What the Court of Appeal saw as overly prescriptive might easily have been viewed by decision-makers simply as very helpful.

Beatson LJ was mindful of the problems faced by administrative officials because he conceded that, just as courts could provide too much and too detailed guidance on the requirements of fairness, there was a danger they could provide too little. His Honour cautioned that fairness could not be gauged ‘simply by emphasising flexibility and context-sensitivity’ as part of some ‘notion of overarching fairness’.⁵⁷ Beatson LJ cautioned that courts should avoid the:

nightmare of a Tennysonian ‘wilderness of single instances’ in which all the contextual factors will be relevant in considering what the requirements of procedural fairness are in a given situation without any factor or group of factors having decisive weight in shaping what is in practice required. The consequence may either risk obscuring the overarching principle or stating it at a level of generality which is not of use as a practical tool to decision-making. The result could be undue uncertainty and unpredictability. There is a need for principled guidance which is practical and does not constitute either a procedural straitjacket, or ‘safe harbour’ for longstanding ways of doing things in a particular context, or operate with centripetal force towards an adversarial adjudicative process.⁵⁸

⁵⁵ Ibid 3107–8 [6].

⁵⁶ Ibid 3124 [68]. Such cautions are regularly expressed in other jurisdictions: see, eg, the concern of ‘over-lawyering’ the requirements of natural justice stated by the Hong Kong Court of Final Appeal in *Lam Sui Po v Commissioner of Police* (2009) 12 HKCFAR 237, 266 [71] (Riberio P).

⁵⁷ *West London Mental Health Trust* [2014] 1 WLR 3103, 3125 [69].

⁵⁸ Ibid 3125 [72]. Beatson LJ also thought that unduly vague notions of fairness could blur the distinction between substantive and procedural conceptions of fairness: at 3125 [69].

Even the most generally expressed principles of fairness can be drawn upon to illustrate why fairness can require an interpreter. Two cardinal elements of fairness are notice and the right to a hearing.⁵⁹ Fairness requires that people have notice of a decision that may adversely affect them, and also the chance to respond.⁶⁰ That notice must include sufficient detail and time for people to adequately prepare.⁶¹ The hearing required by fairness is not necessarily an oral one in the traditional adversarial sense, but some sort of occasion for people to put their case.⁶² The ability of affected people to know about and respond to a case lies at the heart of fairness. These principles assume that people who may be adversely affected by administrative action — those to whom a duty to act fairly is owed — can understand the basic elements of the administrative process they face. The Court of Appeal of New Zealand has explained that these most basic ‘requirements of fairness cannot be met if a person does not understand the questions put to them and therefore does not have a fair opportunity to answer’.⁶³

That reasoning provides guidance to courts, tribunals and administrative officials on the key question when considering whether a person needs an interpreter: can the person reasonably understand, and properly respond to, what is said and must be answered?⁶⁴ Kirby P suggested that question should

⁵⁹ The right to a hearing and notice of the relevant issues are inextricably linked. Lord Denning famously explained that ‘[i]f the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him’: *Kanda v Malaya* [1962] AC 322, 337.

⁶⁰ The vital role of notice has long been stressed: see, eg, *R v Small Claims Tribunal; Ex parte Cameron* [1976] VR 427, 432 (Anderson J) (describing notice as ‘a cardinal principle of justice’); *Re Hamilton* [1981] AC 1038, 1047 (Lord Fraser) (describing notice as ‘a matter of constitutional importance’).

⁶¹ The finer details of notice requirements and the information that administrative decision makers should provide are explained in Aronson, Groves and Weeks, above n 2, 530–41.

⁶² Much administrative decision-making is done ‘on the papers’, by which officials and people affected by their decisions communicate by writing. Written processes are typically cheaper, more convenient and can be fairer because they provide time to make a considered response, but the Supreme Court of the United Kingdom recently confirmed that fairness can often oblige administrative officials to provide oral hearings: *R (Osborn) v Parole Board* [2014] AC 1115, 1152–5 (Lord Reed JSC).

⁶³ *A-G (NZ) v Udompun* [2005] 3 NZLR 204, 225 [89] (Glazebrook J for McGrath, Glazebrook, William Young and O’Regan JJ). See also *SZGYM* [2007] FCA 1923 (12 November 2007) [29], where Graham J stated that ‘a fair hearing requires that there be no doubt at the outset that an applicant seeking review can comprehend that which is being spoken and interpreted’.

⁶⁴ This is different to considering whether the affected person thought the procedure was fair. The perspective from which legal judgments of fairness are made is clear only to the extent that such issues are ultimately questions of law and thus the province of the courts.

not depend on whether the person could perform ‘mundane or social tasks’ but how they were able to cope in the ‘potentially hostile environment of a courtroom’.⁶⁵ That approach may be especially apt in administrative proceedings, where it may be more likely that the affected person is unrepresented and the hearing is conducted by a tribunal constituted along more inquisitorial lines than the greater adversarial focus traditionally associated with the courts.⁶⁶ In such cases, the hearing environment may be more forbidding because the affected person lacks the advice and support of a lawyer and may also face challenging questions from the decision-maker.⁶⁷ Kenny J was mindful of such issues in *Perera*, where her Honour suggested that:

an applicant for refugee status [might be] able to use English for some purposes, even professional purposes, but [be] insufficiently proficient to give evidence before the Tribunal in support of an application vital to his or her future prospects ...⁶⁸

The important point made by her Honour is that both the nature of the hearing environment and also the issues under review can impair the proficiency of people in their use of language.

The more difficult cases are those where a person has some command of English, at least enough to make it unclear whether he or she can participate adequately in a hearing without an interpreter. Flick J suggested that:

where a party has no command, or very little competence, in speaking and understanding English, procedural fairness may well require the provision of an interpreter. Where a party, however, has some competence in English, the absence of an interpreter may not necessarily lead to an unfair hearing. An appli-

⁶⁵ *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75, 77–8.

⁶⁶ The High Court has made clear that distinctions between the adversarial and inquisitorial modes cannot be taken too far because courts and tribunals do not represent ideal or pure versions of each mode: see, eg, *SZBEL* (2006) 228 CLR 152, 164 [40] where the Court stated that the proceedings in the RRT were ‘inquisitorial in their *general* character’ (emphasis added).

⁶⁷ The exact extent of the procedural latitude available to such decision-makers is unclear. The High Court has accepted that decision-makers operating under a more inquisitorial mode can ‘plainly confront’ a party on relevant issues but not so strongly that it ‘result[s] in the person whose evidence is in question being overborne or intimidated’: *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425, 435 [30]–[31] (Gleeson CJ, Gaudron and Gummow JJ).

⁶⁸ (1999) 92 FCR 6, 21 [35]. The Supreme Court of New Zealand made similar remarks in *Abdula* [2012] 1 NZLR 534, 550 [46] (McGrath J for Elias CJ, Blanchard, Tipping, McGrath and William Young JJ).

cant who has some command of English but who nevertheless complains of a denial of procedural fairness by reason of the absence of an interpreter may have to point to some prejudice or difficulty occasioned by the absence of an interpreter.⁶⁹

Such reasoning makes clear that the absence of an interpreter will not necessarily lead a court to conclude that the affected person was denied natural justice. The difficult issue is how to distinguish between people with 'very little competence' in English, and for whom fairness almost certainly requires an interpreter; and those who have 'some competence', for whom fairness may not require an interpreter. The answer will surely lie in a close analysis of all the circumstances of the case at hand.⁷⁰

Some judges have suggested that interpreters can, and perhaps should, provide opinions on this difficult question. In *SZHEW*,⁷¹ Jagot J conceded that the extent to which people whose evidence was received through an interpreter might understand the wider proceedings or the particular questions put to them was necessarily uncertain because 'one person can never know the true level of comprehension of another whether they are communicating in the same language or through an interpreter'.⁷² But, her Honour continued:

that fact does not prevent an interpreter from analysing a person's questions and answers in a language and from that analysis providing a cogent opinion about that person's apparent capacity to communicate in, and thus comprehend, that language.⁷³

This reasoning conceals several problems. First, it makes the questionable assumptions that an interpreter can make such judgments easily during a hearing, or that decision-makers and lawyers would be alert to the difficult position in which this task places interpreters. The contrary is suggested by empirical evidence that interpreters feel that their work is regularly hampered by the failure of courts and lawyers to brief interpreters in advance of a

⁶⁹ *Zoltaszek v Downer EDI Engineering Pty Ltd* [2011] FCA 744 (1 July 2011) [16].

⁷⁰ Though problems can arise even from how the issue is stated. An example can be taken from the two phrases just used, namely 'very little' or 'some'. Each arguably has a different tone that hints to a different conclusion. To suggest a person has 'very little' competence in a language implies they did not have enough competence. To suggest a person has 'some' perhaps hints the person may have 'just enough'.

⁷¹ [2009] FCA 783 (24 July 2009).

⁷² *Ibid* [102].

⁷³ *Ibid*.

hearing, or to alert them to key issues.⁷⁴ Secondly, many of the professional standards or codes governing interpreters caution them against providing 'advocacy, guidance or advice'.⁷⁵ Thirdly, a court or other decision-maker cannot place weight on the views of the interpreter until it has assured itself that the interpreter has the competence to determine the linguistic skills of the affected person. A decision-maker who doubts whether the affected person requires an interpreter may unwittingly elide the issues of the professional competence of an interpreter and the linguistic competence of the person they are interpreting for. When that happens, decision-makers may mistake the quality of interpretation for proficiency of the affected person.

There are situations where an interpreter's expertise may be properly drawn upon by a decision-maker, though such instances remain subject to wider rules of fairness. An instructive example can be taken from the decision of the Full Court of the Federal Court in *Sook v Minister for Immigration and Multicultural Affairs* ('Sook').⁷⁶ The applicant in that case appeared before the RRT in relation to her claim for a protection visa. The applicant claimed she was fleeing persecution in North Korea but the tribunal member suspected she was actually from South Korea.⁷⁷ The member asked the interpreter whether the applicant had an accent from North Korea or South Korea. The interpreter stated that some parts of the applicant's evidence suggested she was from North Korea but other parts suggested she was from South Korea. The tribunal member then challenged the applicant on the basis that her accent and expressions suggested that she was from South Korea and, by implication, lying about core parts of her claim.⁷⁸ The member made adverse findings about the applicant's credibility and rejected her claim.

⁷⁴ See, eg, Sandra Hale, 'Helping Interpreters to Truly and Faithfully Interpret the Evidence: The Importance of Briefing and Preparation Materials' (2013) 37 *Australian Bar Review* 307, 312–17. Hale found that interpreters are rarely provided sufficient background material and often they get none. She concluded that this lack of advance assistance greatly hampers the ability of interpreters to understand the context of the particular hearing in which they work.

⁷⁵ Australian Institute of Interpreters and Translators, *AUSIT Code of Ethics and Code of Conduct* (November 2012) 6 <http://australiatranslations.ru/images/AUSIT-Code_Of_Ethics2015.pdf>.

⁷⁶ (1999) 86 FCR 584.

⁷⁷ *Ibid* 592 [17].

⁷⁸ *Ibid* 599–601 [38]. These problems were made difficult because the applicant admitted arriving by use of a false South Korean passport and claimed to be of Chinese ethnicity. Whether the applicant was from North or South Korea was important to both the applicant's credibility and whether she would face persecution if returned.

The Full Court of the Federal Court held that the RRT had fallen into error because it did not explain its crucial conversation with the interpreter to the applicant. At one level, the finding rested on a simple rule of fairness. Burchett J held that the failure to provide a clear account of the conversation between the member and the interpreter about the applicant's accent was a failure to provide adverse, relevant material to the applicant.⁷⁹ But Moore J also strongly doubted the tribunal's decision to question the interpreter. He held that 'a fundamental unfairness' occurred if an interpreter was called upon to provide an opinion on the accent or speech used by the interpreted person.⁸⁰ Moore J explained:

The role of the interpreter should be clear. It is to translate and do nothing more. 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. It could readily lead, on the part of the applicant and witness, to a loss of confidence in the interpreter, a hesitation in answering questions or answering them fully, and confusion. It is all the more unfair if the applicant and witness is not informed of precisely what was asked of the interpreter and any views the interpreter might have proffered.⁸¹

This passage makes clear that the unfairness arose not simply because the applicant was not clearly told of important, relevant information but also that disclosure of that material could have given rise to a different form of unfairness by leading the applicant to doubt the neutrality and role of the interpreter. That doubt could, in turn, preclude an applicant from properly participating in the hearing. Justice Perry and Zornada recently noted that this unfairness was amplified by the impossible position of the applicant. Any response she might have made would have to be conveyed through the very interpreter who had become a *de facto* witness against her.⁸²

The reasoning in *Sook*⁸³ is consistent with others in which the courts have made clear that decision-makers fall may into error if they unduly rely on the opinion or involvement of an interpreter.⁸⁴ In *SZSEI v Minister for Immigra-*

⁷⁹ Ibid 586 [2].

⁸⁰ Ibid 602 [45].

⁸¹ Ibid.

⁸² Perry and Zornada, above n 42, 208.

⁸³ (1999) 86 FCR 584.

⁸⁴ On one view, such problems could be seen as akin to the interpreter assuming the role of an expert witness. While administrative tribunals are typically subject to specific provisions that

tion and Border Protection,⁸⁵ for example, the Federal Court overturned a decision of the RRT because the standard of interpretation was so poor that it prevented the applicant from properly putting key aspects of her case.⁸⁶ The interpreter did not simply make errors of translation. She also asked questions of the applicant that were not put by the tribunal member, or added her own comments, and failed to translate many statements of the applicant.⁸⁷ Griffiths J held that these many errors and instances of inappropriate behaviour did not mean that the interpreter had actually assumed control of the hearing,⁸⁸ though his Honour's reasoning seemed to suggest that illegality could have occurred if the interpreter had somehow 'unlawfully usurped the Tribunal's statutory role.'⁸⁹

Such reasoning makes clear that interpreters can and should assist the conduct of a hearing but not in a way that somehow overtakes or assumes de facto control of the central function of a decision-maker. It follows that the role of interpreters is to facilitate administrative hearings. That purpose has failed if interpreters move from providing assistance to somehow controlling the decision-making process. This caution is easy to state but may not always be easy to apply because many cases involving errors of interpretation typically contain small errors of translation which are accompanied by other errors, such as the addition by the interpreter of statements not made by the interpreted person, or the failure to interpret statements that were made. However these problems are viewed, the difficult question is always how and when it can be judged that the errors have sufficiently affected either the proper presentation or consideration of the statements of an affected person. The inexact nature of the requirements of fairness may make it impossible to devise a clear principle to answer that question. The next Part examines a recent decision of the Full Court of the Federal Court, which considered the

exempt them from the rules of evidence, such freedoms cannot provide the basis for interpreters or others to cast aside well-settled principles governing expert witnesses.

⁸⁵ [2014] FCA 465 (16 May 2014).

⁸⁶ *Ibid* [115], [121] (Griffiths J).

⁸⁷ *Ibid* [55]–[61].

⁸⁸ *Ibid* [66]–[68].

⁸⁹ *Ibid* [68]. The reference to the RRT's statutory function was perhaps in recognition that general principles of fairness do not contain a general prohibition against decision-makers delegating some of their functions under the hearing rule: Aronson, Groves and Weeks, above n 2, 576–80. The extent to which the RRT was obliged by statute to discharge specific functions in a hearing provides a legislative amendment to those more general common law principles.

imprecise requirements of fairness in an administrative hearing where problems about interpreting were central.

V COMMON LAW FAIRNESS AND STANDARDS OF INTERPRETING

The Full Court of the Federal Court reviewed the common law principles governing interpreters in administrative hearings in *SZRMQ v Minister for Immigration and Border Protection* ('SZRMQ').⁹⁰ The decision-making process under review in that case was one of independent merits review ('IMR'), which was facilitated but not regulated in detail by migration legislation, and thus was regulated by common law requirements.⁹¹ The appellant claimed that repeated errors of interpretation which occurred when he was interviewed during the assessment of his claim for refugee status by the reviewer constituted a breach of the rules of natural justice.⁹² Although it was clear that there had been many errors of interpretation, a majority of the Full Court held those errors did not adversely affect any key finding of the reviewer. Accordingly, no breach of fairness had occurred.⁹³ The reasoning of the Full Court reveals three key themes — opportunity, adequacy and the frequent need for courts to evaluate the wider hearing.

The Full Court made clear that fairness requires affected people be given a reasonable opportunity to be heard and to present their claim.⁹⁴ This reasoning is consistent with longstanding authority which has made clear that the notion of opportunity is central to fairness and a fair hearing.⁹⁵ A 'reasonable opportunity' required neither a perfect hearing nor perfect interpretation. According to this approach, fairness could be satisfied by interpreting that was

⁹⁰ (2013) 219 FCR 212.

⁹¹ The process was applied as part of a wider administrative regime, the end result of which could have led to the grant of a protection visa under ss 46A or 195A of the *Migration Act*, if the criterion in s 36 was met. The IMR was itself not regulated in any detail by the statute.

⁹² *SZRMQ* (2013) 219 FCR 212, 220–1 [30]–[34] (Flick J).

⁹³ *Ibid* 219–20 [27] (Allsop CJ), 244 [116] (Robertson J). Flick J dissented on this point: at 221 [34]. Flick J held that, even if the errors did not directly affect the decision, the hearing could not be seen as fair: at 227–8 [58]–[60].

⁹⁴ *Ibid* 219 [24] (Allsop CJ), 224 [45] (Flick J), 229 [72] (Robertson J).

⁹⁵ *Lam* (2003) 214 CLR 1, 13 [36], 14 [38] where Gleeson CJ considered whether a denial of natural justice had occurred by asking whether the applicant had lost some sort of opportunity. See also *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 346 [18] (French CJ) ('*Li*'); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 338–9 [41]–[43] (Kiefel, Bell and Keane JJ), 341 [52]–[53] (Gageler and Gordon JJ) ('*WZARH*').

adequate rather than ‘accurate’ or ‘first-flight’.⁹⁶ Flick J held that ‘[t]he integrity of the administrative process does not require or depend upon perfection or unachievable accuracy in translation.’⁹⁷ A person affected by the administrative process must instead:

be provided with a standard of interpretation such that he is afforded a meaningful opportunity to communicate his claims, evidence and submissions to a decision-maker and a meaningful opportunity to respond to that which a decision-maker may wish to say.⁹⁸

Allsop CJ similarly reasoned that when ‘interpretation or translation is necessary, it must be adequate to convey the substance of what is said, to a degree that the hearing can be described both as real and fair.’⁹⁹ These remarks each suggest that interpretation should facilitate an adequate or sufficient chance for people to understand the proceeding they are involved in, so that they may put their own views and respond to what is put by others. Robertson J added an important qualification to these issues when he drew attention to the errors that might occur and were clearly not related to interpretation, such as errors of fact or other mistakes unrelated to translation.¹⁰⁰ His Honour also noted that interpreting could not transform what was incoherent because ‘it may be that a translation is confused and confusing because what an applicant has said is confused and confusing.’¹⁰¹

Although the Full Court accepted that affected people must receive interpreting of a standard enabling a fair opportunity to put their case, determining the adequacy of any such chance proved more difficult. Allsop CJ reasoned that the question required examination of the circumstances of a case. His Honour explained:

It will be a matter of evaluation in all the circumstances, by reference to the issues, the nature of the evidence, the character and frequency of any proven er-

⁹⁶ The two quoted terms were mentioned by Flick J as some of the possible ‘touchstones’ that it would ‘be a mistake to fix the standard of interpretation by reference to’: *SZRMQ* (2013) 219 FCR 212, 224 [46].

⁹⁷ *Ibid* 225 [48].

⁹⁸ *Ibid* 224 [45].

⁹⁹ *Ibid* 215 [9].

¹⁰⁰ *Ibid* 229–30 [73].

¹⁰¹ *Ibid* 230 [73].

rors in interpretation, and any other factor apparently relevant to the quality of the communication, as to whether the hearing was fair.¹⁰²

Flick J also held that the adequacy of interpreting, and the consequential fairness of a hearing, should be determined as a whole. His Honour accepted that '[e]rrors in translation will inevitably occur. Even in the absence of such errors, words or expressions used may initially fall short of conveying an intended meaning.'¹⁰³ Flick J noted that such errors might not cause unfairness if 'corrected by subsequent questioning and answers'¹⁰⁴ but cautioned that courts should not focus so much on the presence or correction of errors of interpreting such that they do not also consider the fairness of the process in a more holistic sense.¹⁰⁵ That approach is consistent with the detailed examination by Robertson J of the transcript of the interview conducted as part of the IMR, which led his Honour to conclude that the many particular errors of translation did not 'in the aggregate' constitute a denial of fairness because they 'were intermittent rather than continuous and did not have a cumulative effect' that 'may have contributed to adverse findings or otherwise have been of significance to the process'.¹⁰⁶ That reasoning makes clear that errors of interpreting alone will not constitute a denial of natural justice but may do so if they cause a decision-maker to reach wrongful findings or somehow have a significantly adverse effect on the process.

This aspect of *SZRMQ*¹⁰⁷ accords with the recent assessment of Justice Perry and Zornada, who concluded that such cases confirmed that the question of whether errors of interpretation had led to an unfair or unlawful hearing was 'ultimately one of fact and degree'.¹⁰⁸ Those authors also drew two clear principles from the relevant cases. The first was that the courts 'will more readily find a denial of procedural fairness' in cases where the errors of interpretation were 'frequent or continuous' because such errors make it easier to find 'that the process overall has miscarried'.¹⁰⁹ The second arose from cases where errors of interpretation were 'intermittent'.¹¹⁰ Justice Perry

¹⁰² Ibid 215 [9].

¹⁰³ Ibid 224 [46].

¹⁰⁴ Ibid 225 [46].

¹⁰⁵ Ibid 225 [48]–[51].

¹⁰⁶ Ibid 244 [116]; see also at 229 [66].

¹⁰⁷ (2013) 219 FCR 212.

¹⁰⁸ Perry and Zornada, above n 42, 212.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

and Zornada concluded that such cases required an assessment of ‘not only the individual errors but their impact on the overall fairness of the hearing’.¹¹¹ They reasoned that such errors could still lead to a finding of legal error if ‘viewed together they ... demonstrate a pattern that indicates a denial of procedural fairness’.¹¹²

All members of the Full Court also accepted that there could be some instances where the influence of errors of interpretation was not immediately clear but a denial of fairness had still occurred. Allsop CJ explained that such cases could include those where there was no obvious error in the findings or reasoning of the decision-maker but the wrongful interpretation was ‘such as to have prevented material and substantive information being communicated to the decision-maker in a way that leads to the conclusion that the hearing was not fair’.¹¹³ Robertson J adopted a similar view when his Honour noted that errors in interpreting could affect the reasoning of the decision-maker, as stated in their findings and reasons, but also accepted that those reasons might not always reveal the impact of errors of interpretation because the decision-maker was ‘unaware of the mistranslation or non-translation’.¹¹⁴ His Honour also cautioned that, where intermittent errors in translation had occurred, courts should not lose sight of the wider process when considering individual errors. Robertson J explained that:

care must be taken to evaluate the overall fairness of the hearing as well as the individual instances in order to assess the quality of the process and whether it amounts to the applicant having had a reasonable opportunity to be heard and to present his or her claim.¹¹⁵

These slightly different expressions are each consistent with the widely cited suggestion of Gleeson CJ that claims of fairness are ‘essentially practical’ and that ‘the concern of the law is to avoid practical injustice’.¹¹⁶ This practical focus on determining whether a denial of fairness had occurred led Gleeson CJ to stress form over substance, which meant that the question in that case was not whether the requirements of the legitimate expectation were met but whether the applicant ‘lost an opportunity to put any information or

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *SZRMQ* (2013) 219 FCR 212, 219 [24]. Compare the approach adopted by Flick J: at 224–5 [46], 225 [50], 227 [58].

¹¹⁴ *Ibid* 229 [68].

¹¹⁵ *Ibid* 229 [72].

¹¹⁶ *Lam* (2003) 214 CLR 1, 14 [37].

argument to the decision-maker, or otherwise suffered any detriment.¹¹⁷ Gageler and Gordon JJ recently explained that such instances of practical unfairness included not only cases where an applicant had clearly lost some sort of advantage but also those where the very procedure adopted was itself unfair.¹¹⁸ It followed that an affected person was not always required to demonstrate that he or she had lost an opportunity or advantage.¹¹⁹

In *SZRMQ*, Flick J noted that the key issue for the requirements of fairness was whether an affected person was given the chance to use the services of an interpreter, rather than whether that chance was used.¹²⁰ His Honour also drew attention to the special difficulties that could arise where it was unclear whether the problem lay with the interpreting or what was being interpreted. His Honour explained:

What course should be pursued by the decision-maker when confronted with a manifestly incoherent claimant is a question that need not be presently pursued. It would, perhaps, be surprising should procedural fairness not require a decision-maker to take some steps to render meaningful an opportunity to be heard in those circumstances where a claimant is experiencing obvious difficulties in presenting his claims. But such questions as may there arise are best left to another occasion to resolve.¹²¹

This reasoning reflects longstanding problems that courts have faced in devising principles governing the assistance that decision-makers, including tribunal members and judges, should provide to unrepresented people in order to satisfy the requirements of fairness.¹²² There is no doubt that fairness can require a judge or tribunal member to take steps to assist an unrepresented person to understand and interact in a hearing but that obligation is not unlimited. Decision-makers must provide assistance with caution because '[t]here is a clear line between ... persuading a self-represented party as to the appropriateness of a suggested course and ... overriding his or her right to

¹¹⁷ *Ibid* 13 [36].

¹¹⁸ *WZARH* (2015) 256 CLR 326, 342–3 [59]–[60]. Kiefel, Bell and Keane JJ decided the case on the slightly narrower basis that the claimant had not lost any opportunity to advance his case: at 337–9 [36]–[42].

¹¹⁹ *Ibid* 342 [58] (Gageler and Gordon JJ).

¹²⁰ (2013) 219 FCR 212, 224 [45].

¹²¹ *Ibid*.

¹²² An influential restatement of the many principles governing this area was made in *Hamod v New South Wales* [2011] NSWCA 375 (6 December 2011) [309]–[316] (Beazley JA).

decide'.¹²³ The courts have made clear that the obligation to assist an unrepresented party may press more heavily on a tribunal member than a judge. According to one influential Victorian case, that approach may require tribunal members 'taking a more active role and identifying the real issues between the parties and directing them as to the evidence which legally and logically bears on those issues.'¹²⁴ But this apparently heavier obligation in administrative rather than judicial hearings remains subject to the important distinction between alerting unrepresented parties to the core issues and becoming a de facto advocate for, or legal adviser to, them.¹²⁵

In *SZRMQ*, Flick J left open the question of precisely how such principles might unfold in cases involving interpreters though his Honour did explain that 'it is no part of the task of an interpreter to make comprehensible that which may be incoherent.'¹²⁶ This statement reflects the limitations on the role of interpreters which were explained above. The more active role that a decision-maker must take in cases involving unrepresented people does not extend to impose a greater obligation upon the interpreter, though as a matter of common sense it would seem entirely appropriate for interpreters to remain especially alert to potential confusion in a hearing involving an unrepresented person.

VI THE LIMITS OF FAIRNESS

The inherent flexibility of fairness means that its content or requirements may become more or less demanding, depending on the circumstances of the case at hand. Precisely how much fairness can weaken in the name of flexibility has long been debated. While it is clear that the rules of natural justice can be excluded or limited, such cases are invariably governed by statute.¹²⁷ The difficult questions in such cases are often ones of statutory interpretation, such as whether the intention of legislation that seeks to exclude or limit fairness is

¹²³ *Wade v Comcare* (2002) 69 ALD 602, 607 [25] (Drummond and Dowsett JJ).

¹²⁴ *Winn v Blueprint Instant Printing Pty Ltd* [2002] VSC 295 (2 August 2002) [9] (Byrne J).

¹²⁵ A point confirmed by Nettle J in *Collection House Ltd v Taylor* [2004] ATPR ¶41-989, 48 593 [27].

¹²⁶ (2013) 219 FCR 212, 224 [45].

¹²⁷ An issue considered in detail in Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39 *Monash University Law Review* 285.

expressed with the requisite unmistakable clarity.¹²⁸ There are other instances where the requirements of fairness that would otherwise apply cannot or do not apply.¹²⁹ In such cases natural justice may be excluded or limited, though not by express legislation to that effect but rather because the legislation creates a scheme for decision-making or confers a particular power that the courts accept may be frustrated if the requirements of natural justice are given unqualified effect.¹³⁰

One example is urgency. The variable rules of fairness can reduce to almost nothing, or may even not apply, when a decision maker must act urgently. The courts have accepted that the existence of urgent circumstances does not always or automatically exclude the duty to observe the rules of natural justice,¹³¹ but urgent circumstances can reduce the content of those rules.¹³² The courts are more prepared to conclude that the rules of fairness have been excluded or limited when the nature of the power, or the likely circumstances of its exercise, would be defeated or frustrated by the requirements of fairness.¹³³ Examples include when an official must decide whether to place a person in quarantine,¹³⁴ or whether to place children in foster care when

¹²⁸ This high standard for the effective legislative removal of the duty to observe the requirements of fairness was strongly affirmed in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

¹²⁹ Such as when providing the trappings of fairness would defeat the very purpose of the power, such as providing notice to people that they might be subject to covert surveillance. Such powers can be regarded as an example of the wider class of those 'which, by their very nature, are inconsistent with an obligation to accord an opportunity to be heard': *Marine Hull & Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234, 241 (Wilcox J).

¹³⁰ Or it may be that the regime in which decisions are made, and also the practical nature of the decisions or actions to be taken, do not allow a role for procedural fairness. See, eg, *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 622–4 [368]–[372] where Gageler J held that the practical difficulties faced by maritime officers, and the many legislative requirements and restraints to which officers were subject, meant they were not subject to the requirements of fairness when exercising powers to detain or transfer people intercepted during sea voyages to Australia. Crennan J agreed with Gageler on this point: at 586 [227]. Kiefel J reached a similar conclusion: at 606 [306].

¹³¹ See, eg, *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia* (1996) 66 FCR 40, 59.

¹³² See, eg, *J Wattie Canneries Ltd v Hayes* (1987) 74 ALR 202, 214; *Western Australia v Native Title Registrar* (1999) 95 FCR 93, 101 [26] (Carr J).

¹³³ See, eg, *Marine Hull & Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234, 241 (Wilcox J).

¹³⁴ *R v Davey* [1899] 2 QB 301, 305–6 (Channell J). Such decisions are now largely regulated by statute: see, eg, *Public Health Act 2005* (Qld) ss 349–55, which grant officials very wide discretionary powers to make and enforce decisions to detain and isolate people during medical emergencies.

called to make a critical judgment in the early hours of the morning.¹³⁵ In *SZRMQ*,¹³⁶ Flick J noted these difficult possible instances when he expressly 'left to one side' from his ruling the situation where 'a party may be otherwise protected by the rules of procedural fairness but where the circumstances do not readily permit of an opportunity to locate or provide an interpreter before a decision has to be made.'¹³⁷

The Court of Appeal of New Zealand faced that very problem in *Attorney-General v Udompun* ('*Udompun*').¹³⁸ Mrs Udompun was refused entry to New Zealand and returned on the same aircraft, only two hours after she arrived. The following year she again travelled by air to New Zealand but could not be returned on the next available flight, so she was detained for two days at a local police station.¹³⁹ The immigration officers at the airport could not locate a Thai-English interpreter because the regular one was on leave and the Thai consulate, which often provided assistance, repeatedly did not answer their calls.¹⁴⁰ The Court of Appeal accepted that the officials were bound by the rules of natural justice but held that Mrs Udompun was not denied natural justice. The Court refused to state 'rigid rules' on how the immigration officials could satisfy the requirements of natural justice because 'each case must be determined having regard to all the circumstances'.¹⁴¹ The Court of Appeal did note, however, that the 'relative simplicity and swiftness, of necessity, characterise the procedures for refusal of entry at the border' which meant that 'any standards cannot be too stringent'.¹⁴²

The Court of Appeal's reference to 'standards' makes clear that the key question is not whether fairness applies but precisely what it requires in a case. Where an interpreter should be provided, but for some reason cannot be, the demands of fairness arguably require officials to make reasonable efforts to obtain one. The practical outcome of such a case may be the same as one

¹³⁵ *Re Greta [No 2]* [2012] NSWSC 856 (31 July 2012) [25] (White J). This reasoning was influenced by the Court's acceptance that the social worker had to make an urgent decision in the middle of the night.

¹³⁶ (2013) 219 FCR 212.

¹³⁷ *Ibid* 222 [39].

¹³⁸ [2005] 3 NZLR 204.

¹³⁹ *Ibid* 208-9 [1] (Glazebrook J for McGrath, Glazebrook, William Young and O'Regan JJ).

¹⁴⁰ Other members of the party that arrived with Mrs Udompun initially acted as interpreters but their responses left the immigration officials with strong doubts about the accuracy of the translations, so the officials ended this informal interpretation: *ibid* 211 [13]-[16].

¹⁴¹ *Ibid* 225 [90].

¹⁴² *Ibid*.

where officials do not even try, but the distinction between those officials who do and those who do not try to comply with the requirements of fairness may be very influential to the courts.¹⁴³ The result in *Udompun*¹⁴⁴ reflects a distinction between urgency and practicality. The procedural expectations that may reasonably be imposed upon officials required to act within hours rather than days must inevitably be different. The Court of Appeal arguably accepted that the difficulties in finding an interpreter for the longer period were practical. The demand for Thai–English interpreters was relatively low but immigration officials had standing arrangements including a contingency plan, however weak the latter was. It was arguably not practical or reasonable to expect even more plans, but that does not mean fairness could never require more onerous obligations. If, for example, it was known that some flights often contained people who required interpreters for a specific language, or interpreters for a few languages were regularly required, the court may have found that fairness required the provision of interpreters for those instances. That is because what can reasonably be required under the rubric of fairness and the circumstances of a case can and should include the experience of the officials in question. Another practical issue is the mode of Mrs Udompun’s entry, or rather the corresponding mode of her return. Those returned by air, particularly on a return flight with the airline they arrive with, will necessarily be subject to swift decision-making in order to make use of the available mode of return. A different approach would surely apply to those arriving by a ship that was scheduled to remain in port for any lengthy period.

The example of Flick J’s reasoning mentioned earlier in this section can be examined in this wider context. *SZRMQ* concerned an applicant for refugee status, who was detained and interviewed by Australian officials during a two-year period.¹⁴⁵ One can question whether such a case could ever fall within his Honour’s instance where ‘circumstances do not readily permit’ finding or providing an interpreter.¹⁴⁶ Government officials can reasonably be expected to find and provide a suitable interpreter within a two-year period, but what

¹⁴³ Whether such matters move from being highly influential to decisive is unclear in the wake of *Li* (2013) 249 CLR 332. The requirement in that case of ‘intelligible justification’ by decision-makers in some circumstances suggests a key issue will be the explanation given by officials for their actions: at 367 [76] (Hayne, Kiefel and Bell JJ).

¹⁴⁴ [2005] 3 NZLR 204.

¹⁴⁵ This period spanned the time from when the applicant was first interviewed by immigration officials to the time of his second independent merits review, though complaints about interpretation focused on only one of several interviews: (2013) 219 FCR 212, 220 [30]–[31], 221 [34].

¹⁴⁶ *Ibid* 222 [39].

of more extreme facts? Take the example of someone travelling to Australia by boat, intercepted at sea and interviewed by Australian maritime forces. If the person does not speak English, would fairness require maritime officials to provide an interpreter while at sea? The relevant legislation is entirely silent on this point,¹⁴⁷ so the presumption that natural justice applies to the power would prima facie apply. But how could natural justice be satisfied? Should maritime officials travel with interpreters in anticipation that they would very likely be needed? If so, for which languages and dialects? In my view, it is strongly arguable that maritime officials cannot reasonably be expected to plan in advance so that they can be accompanied by interpreters of many different languages. That may mean that any theoretical requirement of fairness (in the form of providing an interpreter) becomes impossible to perform in such cases.

A different practical issue that can limit the requirements of fairness is cost. Considerations of cost are why fairness can require an interpreter but not necessarily that one be provided at public expense. Some guidance can be gleaned from the cases that followed *Dietrich v The Queen* ('*Dietrich*'),¹⁴⁸ where the High Court confirmed the inherent power of courts to prevent an abuse of the process which would occur if accused people facing serious criminal charges were unrepresented through no fault of their own and could not afford representation.¹⁴⁹ A short time later, a majority of the New South Wales Court of Appeal adopted similar reasoning when it held that a statutory inquiry into the soundness of a person's conviction could be stayed if people whose interests were affected by the inquiry were not legally represented.¹⁵⁰ The Court of Appeal based this reasoning upon the common law requirements of fairness but that development was overturned by the High Court. The High Court was mindful of the 'very considerable' costs of such an extension of *Dietrich*.¹⁵¹ The High Court also made clear the jurisdiction confirmed in *Dietrich* did not extend to witnesses in criminal cases or civil

¹⁴⁷ *Migration Act* s 46A.

¹⁴⁸ (1992) 177 CLR 292.

¹⁴⁹ *Ibid* 311 (Mason CJ and McHugh J). The case did not establish a direct right of accused people to state-funded representation even if its various requirements were met. It provided a de facto right because, if the factors specified by the High Court were met, the court is empowered to stay the trial until representation is provided. That means the state may either fund legal representation for the accused or abandon its prosecution.

¹⁵⁰ *Canellis v Slattery* (1994) 33 NSWLR 104, 123–6 (Kirby P), 137–8 (Sheller JA). The people affected in that case were witnesses listed to appear before the inquiry: at 106–7 (Kirby P).

¹⁵¹ *New South Wales v Canellis* (1994) 181 CLR 309, 331 (Mason CJ, Dawson, Toohey and McHugh JJ).

proceedings in general.¹⁵² Similar reasoning led Kirby J in the case of *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* to reject suggestions that the courts should recognise a general obligation on migration tribunals to translate documents at public expense.¹⁵³ His Honour was concerned, among other things, about the 'significant public costs' involved in any such duty.¹⁵⁴

The translation of written material raises similar but slightly different issues. The similar issue is that the translation of material is not unlike interpretation because it requires the conversion of material from one language to another before it can be considered by a decision-maker. Translation can raise different issues to interpretation because it can often be done more easily than interpretation. A separate but closely related question that often arises is whether something should be translated after a hearing, such as when an affected person tenders further (untranslated) material. In such cases, any duty of a decision-maker to arrange for translation of material may depend heavily on whether the affected person has given some explanation of why the material may be relevant.¹⁵⁵ If an affected person does not explain why the material is relevant, he or she cannot complain of a denial of fairness in the form of a failure to consider the material in its translated form. It follows that a decision-maker cannot simply refuse to consider untranslated material but should instead notify the affected person that the material will not be translated (and then considered) and provide the person with an opportunity to explain the contents and relevance of the material.¹⁵⁶

VII INTERPRETERS AND MIGRATION TRIBUNAL HEARINGS

Migration cases have given Australian courts the most cause to consider the role of interpreters in administrative hearings, partly because migration legislation itself provides no real guidance on the role of interpreters. The

¹⁵² Ibid 328.

¹⁵³ (2004) 210 ALR 190, 215 [98].

¹⁵⁴ Ibid. Kirby J also noted that the *Migration Act* provided no support for the implication of such a duty.

¹⁵⁵ *Cabal v Minister for Immigration and Multicultural Affairs* [2001] FCA 546 (10 May 2001) [25]. The Full Court made clear that the same principle applied to instances where 'large volumes of material' were before a court.

¹⁵⁶ *X v Minister for Immigration and Multicultural Affairs* (2002) 116 FCR 319, 328 [30]–[31] (Gray J), 334–5 [53] (Moore J); *S14/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1153 (22 October 2003) [49] (Moore J); *SZQGL v Minister for Immigration and Citizenship* (2012) 206 FCR 474, 489–90 [91] (Cowdroy J).

Migration Act 1958 (Cth) (*'Migration Act'*) does not provide affected people with a right to an interpreter in administrative hearings, but those conducting hearings in the Migration and Refugee Division of the Administrative Appeals Tribunal (which reviews a range of decisions to refuse protection and other visas) are obliged to invite applicants to give evidence and present arguments.¹⁵⁷ Other parts of the *Migration Act* give that Tribunal the discretion to allow applicants who are 'not proficient in English' to 'proceed through an interpreter'.¹⁵⁸ The Federal Court has made clear that, when an applicant cannot properly give evidence or present arguments, the full obligation of the former sections (*Migration Act* ss 360(1), 425(1)) can essentially compel the favourable exercise of the discretion in the latter sections (*Migration Act* ss 366C(3), 427(7)).¹⁵⁹

The *Migration Act* does not provide guidance on other key issues, such as the standard that interpretation must meet, or the legal consequences of inadequate interpretation. The guidelines for federal migration tribunal hearings provide some instruction, in the form of a lengthy list of activities that interpreters must not engage in during hearings. According to those guidelines, the key task of an interpreter 'is to accurately, directly and fully interpret what is said during the course of the hearing'.¹⁶⁰ Aside from that short positive statement of the duties of interpreters, the guidelines proscribe a lengthy list of conduct, stating that interpreters must not:

- 'explain procedures to applicants, unless interpreting on behalf of a Member or hearing officer;
- explain meanings or words to applicants (explanations should always be given by the Member not the interpreter);
- advise an applicant how to answer or supply him or her with facts;
- elaborate or explain the meaning of question (if the applicant is confused by a question or gives a confused response, the interpreter should interpret that faithfully and completely to the Member);
- summarise a long question or answer;

¹⁵⁷ *Migration Act* ss 360(1) (governing applications for a range of visas other than those for refugee status), 425(1) (governing applications for refugee protection visas).

¹⁵⁸ *Ibid* s 427(7) (governing applications for refugee protection visas); see also s 366C(3) (governing applications for a range of visas other than those for refugee status).

¹⁵⁹ *Perera* (1999) 92 FCR 6, 16 [17] (Kenny J); *Singh v Minister for Immigration and Multicultural Affairs* (2001) 115 FCR 1, 6 [27]; *Mazhar v Minister for Immigration and Multicultural Affairs* (2000) 183 ALR 188, 193–5 [28]–[32] (Goldberg J).

¹⁶⁰ AAT, Migration and Refugee Division, above n 37, 18 [94].

- censor or tone down what is said (even if, for example, the applicant is angry or rude);
- provide opinion about the accent and language of the applicant, except as it relates to the accuracy of the interpreting, even if asked to do so by a Member;
- make comments or asides to the applicant or Member (even if the applicant asks the interpreter a personal question, or says something which is irrelevant in the interpreter's opinion, it should be interpreted so that both the applicant and the Member are aware of all communication during the hearing);
- express an opinion as to whether a document tendered as evidence is genuine or whether a statement made by the applicant is true or not true;
- discontinue interpreting because the interpreter considers the applicant has a reasonable command of English (it is for the Member to decide whether the applicant's command of English is sufficient); and
- provide cultural or other commentary during the hearing (in general, the Member will seek clarification directly from the applicant if any cultural issues arise, for instance, non-verbal signs which may be culturally specific).¹⁶¹

Such detailed administrative guidance seems to invite decision-makers into the Tennysonian wilderness Beatson LJ warned against,¹⁶² by providing many prohibitions but no positive indication as to what interpreters should do, but it does have several benefits. The prohibitions make clear that the role of an interpreter is to facilitate rather than control the exchange of information. They also suggest that interpreters should only provide their opinion on an issue at the request of the tribunal member which, in turn, makes clear that the perception and conclusions of the member are the ultimate concern. The allowance in the guidelines for interpreters to provide or seek clarification on issues only when requested by the presiding member leaves no doubt that decisions about the content or direction of a hearing are matters for the member.

¹⁶¹ Ibid.

¹⁶² See above n 58 and accompanying text.

VIII JUDICIAL APPROACHES TO MIGRATION TRIBUNAL
HEARINGS: *PERERA* AND BEYOND

The administrative guidelines governing interpreters in migration hearings can only be understood in light of the detailed body of case law governing the wider legislative regime. The leading authority on those issues is the decision of Kenny J in *Perera*.¹⁶³ The applicant in that case claimed refugee status by reason of his political and professional activities in Sri Lanka and gave evidence about this to the RRT in Sinhalese.¹⁶⁴ His migration agent attended the hearing and noted that no national accreditation standard for Sinhalese interpreters had been adopted (at that time) and suggested the lack of such standards explained the interpreter's apparent confusion at many points. Two days after the hearing, before the RRT delivered a decision, the agent submitted that these issues should be taken into account by the RRT.¹⁶⁵ The RRT rejected the applicant's claim after it found that his evidence was not credible and the supporting materials he provided were of questionable provenance. The RRT also rejected suggestions the interpreter was not adequate.¹⁶⁶

Kenny J held that the quality of interpretation was so poor that the applicant was unable to properly exercise his right to appear before, and give evidence to, the RRT.¹⁶⁷ Her Honour held that these rights were important to affected people but were also crucial to the jurisdiction of the RRT. The failings of interpreting impaired the presentation of the applicant's case to an extent that the RRT had not discharged its statutory hearing obligations sufficiently for a valid exercise of its jurisdiction.¹⁶⁸ Kenny J also provided detailed guidance on how a court or tribunal could decide the quality of interpreters. They could draw upon several 'extrinsic considerations' to decide the competence of interpreters, including:

the interpreter's oath, the interpreter's qualifications, any statement by the interpreter as to his or her capacity or experience, any indication from the interpreter or the witness that interpretation is beyond the particular competence of

¹⁶³ (1999) 92 FCR 6.

¹⁶⁴ *Ibid* 9–10 [7] (Kenny J).

¹⁶⁵ *Ibid* 10 [8].

¹⁶⁶ *Ibid* 11 [11].

¹⁶⁷ *Ibid* 12–15 [14]–[15], 23 [42], 24 [46].

¹⁶⁸ *Ibid* 17 [21].

the interpreter, and the course of the evidence, including its coherence and the responsiveness of answers to questions asked.¹⁶⁹

But her Honour also cautioned that:

It remains possible, however, that an interpreter, who satisfies a court or tribunal that, by reason of qualifications and experience, he or she would be likely to provide a competent interpretation, may nonetheless provide an incompetent one. Conversely, though lacking in qualifications and experience indicative of a capacity to interpret competently, an interpreter may turn out to provide a competent interpretation.¹⁷⁰

Kenny J suggested that decision-makers could not simply rely upon advance judgments about the proficiency of an interpreter. They should also remain alert to problems during a hearing. A tribunal or court could determine whether interpretation was proceeding well or otherwise by several obvious indicators, including:

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, more generally, any evident confusion in exchanges between the Tribunal and the interpreter ...¹⁷¹

Kenny J examined the transcript of the hearing under challenge in great detail before her Honour decided that the interpretation was inadequate,¹⁷² though she was at pains to suggest that there could be problems ‘of a non-verbal nature, apparent to the Tribunal and not to the reviewing court.’¹⁷³ Kenny J also accepted that some errors or problems revealed by a transcript might be due to errors in transcription rather than interpretation.¹⁷⁴

The criterion by which Kenny J gauged the interpretation in the case at hand was one of adequacy rather than perfection. She acknowledged that ‘some interpretations are better than others’ and continued:

Whilst the interpretation at a Tribunal hearing need not be at the very highest standard of a first-flight interpreter, the interpretation must, nonetheless, ex-

¹⁶⁹ Ibid 21 [37].

¹⁷⁰ Ibid 20 [31].

¹⁷¹ Ibid 23 [41].

¹⁷² Ibid 12–16 [14]–[16].

¹⁷³ Ibid 21 [37].

¹⁷⁴ Ibid 22 [39].

press in one language, as accurately as that language and the circumstances permit, the idea or concept as it has been expressed in the other language.¹⁷⁵

In one sense the reasoning of Kenny J explained and obscured the role of interpreters in equal measure. It explained the role of interpreters by making clear that questions about the adequacy of interpretation were ones of substance rather than form, which usefully made clear that evidence about the qualifications of interpreters would be of limited value because the key question was whether the interpreter appeared to have enabled both the affected person and the tribunal member to understand both particular words and wider concepts used in the hearing. At the same time, however, the openly pragmatic approach Kenny J adopted arguably served to obscure the role of interpreters because her Honour conceded that an interpretation in an RRT hearing would pass legal muster if it expressed as accurately ‘as [the] language and the circumstances permit’.¹⁷⁶ This approach lies somewhere between adequacy and perfection and ultimately requires review courts to carefully examine specific claims of wrongful interpretation and their overall possible impact in order to decide whether the error or errors led to jurisdictional error. The careful analysis Kenny J made of the case at hand suggests this exercise is one that ultimately rests on an overall and intuitive assessment of the hearing as much as the interpretation.

Although there is an enormous number of later cases examining the principles governing interpreters in the hearings of migration tribunals, *Perera*¹⁷⁷ remains the ‘seminal authority’ on the issue.¹⁷⁸ The many subsequent decisions have added some more detailed principles to those developed by Kenny J but have not changed them in any significant way. Many of those later cases have held that the requirement of adequacy rather than perfection may be met if interpretation ‘is sufficiently accurate as to permit the idea or concept being translated to be communicated.’¹⁷⁹ Another point made clear in later cases is that the often demanding standards devised by Kenny J do not remove the obligation upon those complaining about interpretation to clearly

¹⁷⁵ Ibid 19 [29].

¹⁷⁶ Ibid.

¹⁷⁷ (1999) 92 FCR 6.

¹⁷⁸ *SZOYU v Minister for Immigration and Citizenship* [2012] FCA 936 (31 August 2012) [29] (Jacobson J). The case and its aftermath are also usefully summarised by Edelman J in *BZAID v Minister for Immigration and Border Protection* (2016) 242 FCR 310, 319–20 [52].

¹⁷⁹ *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511, 527 [66].

demonstrate some sort of error.¹⁸⁰ Other cases have made clear that affected people cannot claim unfairness because they were not provided with an interpreter of their preferred type, such as a female complainant for refugee status wanting a female interpreter,¹⁸¹ or a Christian claimant seeking a Christian interpreter.¹⁸² The key question in such cases remains whether the work of the interpreter was somehow deficient in a way that prevented a fair hearing. Such cases provide specific illustrations of the wider principle that the question of whether any claimed inadequacy of interpretation caused legal error requires a qualitative assessment of the whole of the hearing.¹⁸³

The principles devised by Kenny J are consistent with a different principle that has been subsequently established by the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* ('SCAR').¹⁸⁴ That case took an expansive approach to the statutory obligation imposed upon the RRT by s 425 of the *Migration Act* to 'invite' applicants to appear before it 'to give evidence and present arguments relating to' their applications.¹⁸⁵ The Full Court accepted that this obligation did not require the RRT to 'actively assist' applicants in putting their case or 'require the Tribunal to carry out an inquiry in order to identify what that case might be' but it did oblige the RRT to provide a 'real and meaningful' hearing.¹⁸⁶ This

¹⁸⁰ *SZJBD v Minister for Immigration and Citizenship* (2009) 179 FCR 109, 125 [73] (Buchanan J).

¹⁸¹ *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 271, 296–7 [72]–[74] (French and Lee JJ).

¹⁸² *SZRJS v Minister for Immigration and Citizenship* (2013) 213 FCR 317, 322–3 [17]–[19] (Farrell J).

¹⁸³ *SZHEW v Minister for Immigration and Citizenship* [2009] FCA 783 (24 July 2009) [52] (Jagot J).

¹⁸⁴ (2003) 128 FCR 553. Section 425(1) of the *Migration Act* was the focus of this case and was enacted in its relevant form after *Perera* but many cases have held that the reasoning of *Perera* remains valid: see, eg, *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511, 527 [66].

¹⁸⁵ *Migration Act* s 425(1). A similar obligation is contained in s 360(1). The two provisions are regarded as substantively the same: see, eg, *Kaur v Minister for Immigration and Border Protection* (2014) 236 FCR 393, 427 [132]–[133] (Mortimer J).

¹⁸⁶ *SCAR* (2003) 128 FCR 553, 561 [36]–[37] (citations omitted). While the requirements of *SCAR* ostensibly focus on the content of an 'invitation' to a hearing, they are inextricably linked to the conduct of the hearing because sufficient prior notice by a decision-maker of the issues to be considered cannot be separated from the ability of an affected person to participate adequately in the hearing. The wider principle of *SCAR* is consistent with the more general rule requiring that a hearing or similar chance to put a claim must be 'reasonable': see, eg, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 611 [40] (Gaudron and Gummow JJ).

reasoning imposed a gloss on the obligations of the RRT, for which the text of s 425 provides no obvious support.¹⁸⁷ The requirement that an invitation to a hearing be ‘real and meaningful’ is also odd because its terms are vague and, more importantly, the crucial issue is surely the hearing itself rather than the invitation to it.

The principle articulated in *SCAR* has attracted mixed views in the Federal Court itself. It has been applied without difficulty in some cases,¹⁸⁸ described as plainly wrong in others¹⁸⁹ and as an authority that ‘has not commanded universal assent’,¹⁹⁰ but it plainly remains good law.¹⁹¹ The High Court has not directly ruled upon the standing of *SCAR*,¹⁹² though when it examined an identical provision in another part of the *Migration Act*, the Court was clearly sympathetic to the implication of a similar requirement that invitations to migration hearings be ‘real’ and ‘meaningful’.¹⁹³ The weight of authority is therefore clearly in favour to the additional requirement that invitations to hearings be ‘real and meaningful’. Importantly, for present purposes, that requirement aligns well with the approach that Kenny J took to determining whether inadequate interpreting had led to jurisdictional error in RRT hearings.

¹⁸⁷ A point made with force by Graham J in *Minister for Immigration and Citizenship v SZFDE* (2006) 154 FCR 365, 417 [212] (*‘SZFDE’*). Though French J, as his Honour then was, took a different view: at 389 [93]–[94].

¹⁸⁸ See, eg, *P119/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 230 (16 October 2003) [16] (Mansfield and Selway JJ); *NALQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 121 (10 May 2004) [30]–[31]; *SZKA v Minister for Immigration and Citizenship* (2008) 172 FCR 1, 4 [5] (Gray J).

¹⁸⁹ *SZFDE* (2006) 154 FCR 365, 417 [212] (Graham J). French J disagreed: at 389 [93]–[94].

¹⁹⁰ *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575, 585 [31] (Keane CJ).

¹⁹¹ See, eg, *SZRJS v Minister for Immigration and Citizenship* (2013) 213 FCR 317, 322 [16] (Farrell J).

¹⁹² *SCAR* was cited with apparent approval for a separate point by the High Court in *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, 202 [35], 202 n 67. See also Transcript of Proceedings, *Minister for Immigration and Citizenship v SZGUR* [2010] HCA Trans 250 (24 September 2010) 510–17 (S B Lloyd SC), though this latter reference does not suggest the correctness of *SCAR* was in issue before the High Court.

¹⁹³ *Li* (2013) 249 CLR 332, 362 [61] (Hayne, Kiefel and Bell JJ). That case concerned s 360(1) of the *Migration Act*, which is identical to the provision considered in *SCAR*.

IX IS THE COMMON LAW APPROACH DIFFERENT —
OR IS SZRMQ WRONG?

The principles drawn together by Kenny J in *Perera*¹⁹⁴ were, until recently, treated by courts and tribunals as applicable to both the statutory procedural requirements governing migration hearings, and other administrative processes governed more by common law requirements of fairness than statutory procedures.¹⁹⁵ That approach was doubted by the Full Court of the Federal Court in *SZRMQ*,¹⁹⁶ the facts of which were explained above,¹⁹⁷ because of the two somewhat contradictory threads of reasoning of the Full Court. On the one hand, the Court applied principles that were quite similar to those that can be traced to *Perera*.¹⁹⁸ On the other hand, the Full Court held that the principles governing the adequacy of interpretation developed under the complex statutory procedures governing migration hearings did not necessarily equate to the requirements of fairness at common law.¹⁹⁹

The different judgments in the Full Court do not contain a single or clear principle on the possible difference in the requirements governing interpreters under the *Migration Act* and the common law, and a closer inspection suggests the difference may not be great. Allsop CJ dealt with the apparently different requirements of the common law only briefly and after considering several cases decided under the statutory procedures of the *Migration Act* in which the courts had made clear that questions about the adequacy of interpretation should be decided by reference to the *Migration Act* rather than the common law.²⁰⁰ The Chief Justice concluded that the reverse was true of the case at hand. His Honour explained that whether errors of interpretation had caused a denial of natural justice ‘require[d] an evaluation of the fairness of the process’.²⁰¹ He continued:

¹⁹⁴ (1999) 92 FCR 6.

¹⁹⁵ *Perera* was a case that arose under the complex procedures governing migration tribunals but has been adopted or treated as applicable by courts in many other contexts: see, eg, *de la Espriella-Velasco v The Queen* (2006) 31 WAR 291, 306–10 [47]–[59] where Roberts-Smith JA applied much of the reasoning of *Perera* to a criminal trial.

¹⁹⁶ (2013) 219 FCR 212.

¹⁹⁷ See above n 145 and accompanying text.

¹⁹⁸ (1999) 92 FCR 6.

¹⁹⁹ See above Parts V–VI.

²⁰⁰ *SZRMQ* (2013) 219 FCR 212, 219 [23].

²⁰¹ *Ibid* 219 [24].

fundamentally, the question is one of evaluation as to whether the applicant has had a real and fair opportunity to put what she or he wanted to put, to understand what was being said to her or him, and to participate in the hearing in a way from which it can be concluded that the hearing was fair, and thus that administrative justice was done.²⁰²

It is difficult to see how these requirements differ in any material way from those applicable to hearings conducted by migration tribunals under the detailed procedures in the *Migration Act*. Just how a 'real and fair opportunity' at common law differs from a 'real and meaningful' hearing which the courts have decided must be provided by tribunals which determine applications under the detailed hearings procedures contained in the *Migration Act* remains uncertain.

Robertson J also distinguished the common law requirements of fairness governing interpreters with the 'blunter question' of whether a migration tribunal had provided an applicant with the opportunity required by statute to 'appear before it to give evidence'.²⁰³ His Honour did not explain how the common law requirements of fairness as they applied to interpreters might differ from the statutory procedures contained in migration legislation. His Honour simply noted that it was 'significant' that the case at hand was governed by the common law.²⁰⁴ Robertson J suggested the requirements of the common law had been stated 'too narrowly' by several cases which had held that legal error arose if an applicant was 'effectively prevented from giving evidence' or if the hearing involved errors made by an interpreter that were 'material to the conclusions which the [decision-maker] made adversely to the appellant'.²⁰⁵ It follows that the extensive case law which explains the content of the statutory procedures governing migration tribunal decision-making may represent a minimum benchmark. Common law requirements may be more demanding but His Honour did not explain how much more that could be.

Flick J expressly left open the question of whether the common law requirements of fairness and the statutory procedures by which applicants must be provided a meaningful opportunity to be heard differed significantly in cases where questions about the adequacy of interpretation arose.²⁰⁶ But his

²⁰² Ibid.

²⁰³ Ibid 230 [74].

²⁰⁴ Ibid.

²⁰⁵ Ibid 230 [75].

²⁰⁶ Ibid 224 [44].

Honour appeared to suggest the two were broadly similar when his Honour affirmed that both ultimately required applicants to be given an appropriate or sufficient opportunity to present their claims. That is apparent through the brief mention by Flick J of the statutory duty of migration tribunals ‘to invite a person to give evidence and afford that person a “real opportunity” to be heard.’²⁰⁷

The various remarks about differences between the common law principles governing interpreters and those contained in the detailed legislative scheme governing migration hearings invite several comments. First, we should not assume that the doctrinal distinctions between the common law and any statutory regime are large. The different origin of each should not obscure the fact that each exists and operates for a similar purpose, namely to provide a fair hearing. That broadly similar purpose may explain why the common law principles identified by the Full Court in *SZRMQ*²⁰⁸ appeared quite similar to those devised by Kenny J in *Perera*²⁰⁹ and built upon by later migration cases governed by statutory hearing procedures of migration tribunals. A separate but closely related point is that decisions based upon legislative schemes can and should be instructive to the common law, and vice versa. At one level, decisions from either source could inform problems arising in the other because a workable solution devised by the courts, if sensible, can and should be considered elsewhere. If migration litigation has greatly influenced fundamental elements of Australian administrative law,²¹⁰ it can surely also influence finer points about the content of fairness. We should also query whether in fact there can or should be any substantive difference in rules governing interpreters in hearings regulated by the common law or the statutory procedural requirements for migration hearings when the purpose of interpreters remains constant.

X CONCLUSION

There are good reasons why people with language difficulties should be provided with interpreters in administrative hearings. In each instance, the presence of an interpreter can aid the person affected, the decision-maker and

²⁰⁷ *Ibid.*

²⁰⁸ (2013) 219 FCR 212.

²⁰⁹ (1999) 92 FCR 6.

²¹⁰ A compelling argument to this effect is made in Stephen Gageler, ‘Impact of Migration Law on the Development of Australian Administrative Law’ (2010) 17 *Australian Journal of Administrative Law* 92.

whatever administrative process is being conducted. An interpreter can enable affected people to better understand and participate in a hearing which, in turn, enables affected people to articulate their points and to understand and respond to the issues raised by others. This ability to participate and respond in a hearing provides respectful treatment to affected people but it is also valuable to decision-makers because it enables them to better heed, understand and consider the relevant issues. These many benefits of interpreters transcend any division that might be drawn between cases involving the requirements of natural justice at common law or jurisdictional error as a governing principle in migration hearings. Accordingly, there seems no clear reason why the principles governing interpreting for those who cannot communicate easily or adequately in the administrative process should differ depending on whether the relevant process is regulated by the common law requirements of fairness or statutory procedural regimes such as those governing migration hearings. The Full Court of the Federal Court certainly provided no coherent basis for the distinction it sought to draw along those lines in *SZRMQ* and there are arguably many reasons to suggest any such distinction is illusory.

The standards governing interpreters in administrative hearings subject to the common law requirements of fairness or the complex procedures contained in the *Migration Act* are remarkably similar. In each instance, interpreting must be adequate rather than perfect. Legal error, whether in the form of a breach of the rules of natural justice or a failure to provide the statutory opportunity of a hearing, is not simply established by proof of errors in interpretation. In each case, the legality of the relevant administrative process often requires a holistic assessment of both the interpreting that has been provided and the apparent effect of any errors on that process. Any assessment of these issues is not easy because assessing both the quality and effect of interpreting requires an almost intuitive judgement that cannot be entirely reduced to a single or precise formula — whether in the form of common law principles or statutory procedures. That difficulty almost certainly explains why the common law rules of fairness governing interpreting remain relatively elastic and the otherwise very detailed procedures governing migration hearings do not directly regulate the provision or assessment of interpreting. In each instance, questions about the adequacy of interpreting or the apparent effect of inadequate interpreting can only be stated at a general level and must be applied in each particular case. Once that caution is understood, the suggestions in *SZRMQ* that requirements of the common law and those arising from migration legislation may be different in some (yet to be determined) material way appear unnecessary.