# INTERPRETING CRIMINAL JUSTICE: A PRELIMINARY LOOK AT LANGUAGE, LAW AND CRIME IN IRELAND

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## INTRODUCTION

Language, law and crime are connected in basic ways: law exists through words and is made possible by language, which is a basic human characteristic; crime is part of the human condition, and communication constitutes a vital part of the criminal process, which is made up of language events from beginning to end. Some of these events include encounters with the police, testimony at trial, legislation making specific speech acts illegal and so on.[1]

The language and behaviour used by professionals within the criminal justice system is not always easy to understand for the average layperson, partly because such people have spent entire working lives "immersed in the complexities of the law",[2] but also because the language of law is a product of tradition and uses grammatical features and archaic expressions that are far removed from the English of everyday life. Lawyers and judges usually spend large amounts of time engaged in linguistic analysis like interpreting legislation, and thus tend to be excellent

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[1] See *e.g.* Solan and Tiersma, *Speaking of Crime: the Language of Criminal Justice* (University of Chicago Press, 2005); Tiersma, "The Judge as Linguist" (1993) 27 *Loyola of Los Angeles Law Review* 269, Storey, "The Linguistic Rights of Non-English Speaking Suspects, Witnesses, Victims and Defendants" in Kibbee (ed.), *Language Legislation and Linguistic Rights* (John Benjamins Publishing Company, 1998).

[2] Mikkelson, *Introduction to Court Interpreting* (Manchester, 2000), p.106.

language users.[3] In fact language is sometimes considered the primary manipulative tool of a lawyer, and one that can be used in the courtroom as a weapon to achieve desired ends; to suggest, mislead, annoy or obtain an advantage over less sophisticated users of language.[4] Sophisticated use of language does not, however, correspond to understanding the mechanics underlying language or its function in particular situations and cultures.[5] For Tiersma, this may partly explain why courts can possess "surprising linguistic acumen", while at the same time exhibiting "woeful disregard for how language operates in real life situations", and why judgments on language issues tend to be inconsistent.[6]

Linguistic and socio-cultural barriers are even more difficult to penetrate for those with a different language and culture from that of the criminal justice system; Goodrich considers that legal doctrine takes an "explicitly exclusory stance ... toward all other linguistic communities and usages".[7] The Supreme Court in the US has described as "meaningless",[8] "incomprehensible ritual",[9] "invective against an insensible object",[10] "guarantee[d] confusion"[11] and "Kafka-like"[12] the application of criminal justice to those without fluency in English, yet interpreters are increasingly needed in the courtroom; multiculturalism, modern communication, and international borders increasingly being crossed by criminals, prohibited

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[3] Tiersma, "The Judge as Linguist" (n.1 above).

[4] Eades, "Evidence Given in Unequivocal Terms: Gaining Consent of Aboriginal Young People in Court", in Cotterill (ed.), *Language in the Legal Process* (Palgrave Macmillan, 2002).

[5] Solan and Tiersma, *Speaking of Crime* (n. 1 above).

[6] Tiersma, "The Judge as Linguist" (n. 1 above).

[7] Goodrich, *Legal discourse: studies in linguistics, rhetoric and legal analysis* (Macmillan, 1987), pp. 435-6.

[8] *State v. Fa'afiti*, 54 Haw. 637, 513 P.2d 697 (1973).

[9] *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir.1973), cert. denied, 416 U.S. 907 (1974).

[10] *State v. Rios*, 12 Ariz. 143, 144 539 P.2d 900, 901 (1975).

[11] *United States v. Mayans*, 17 F.3d 1174, 1179-80 (9th Cir. 1994).

[12] *United States v. Desist*, 384 F.2d 889, 901-02 (2d Cir.1967), aff'd, 394 U.S. 244 (1969). In Kafka's *The Trial*, Josef K, an innocent man, is arrested, tried, charged and punished without understanding the procedures involved or how to defend himself.

substances and people (immigrants, refugees, tourists), combine to create a space where crimes can be committed and justice systems need to react in an increasing range of languages.[13]

### *A. Introduction to Interpreting in Ireland*

"Come, come – English. Swear him to know whether he does not understand English. Can you speak English, fellow?"

"Not a word, plase your honour."[14]

Taken from the Irish novel *The Collegians*, the scene is an early 19th century Irish court in which Phil Naughten, an Irish speaker, effectively feigns ignorance of English and frustrates the court with his halting words and simple demeanour, a reflection of what seems to have been a reality in Irish courts. In documenting the murder trial of five members of a family in Maamtrasna, Co. Mayo, Waldron describes how one of the key witnesses used the "well-known ploy in courtrooms" of not answering when asked if he spoke English. According to Waldron "[m]any non-English speakers could understand it adequately, but to think out their replies while the interpreter was translating, they feigned total ignorance".[15]

In Hickey's exploration of Irish-speaking peasants in the colonial courtroom, she identifies two contrasting portrayals; one, as above, the devious local, familiar with the language, law and procedure of the courtroom but pleading ignorance. The other is the downtrodden peasant of Irish nationalist history and literature, oppressed by laws of which he was ignorant, and suffering the "crippling handicap" of lacking fluency in the English

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[13] Storey, "The Linguistic Rights of Non-English Speaking Suspects, Witnesses, Victims and Defendants" in Kibbee (ed.), *Legal and Linguistic Perspectives on Language Legislation* (Benjamin Publishers, 1998).

[14] Griffin, *The Collegians, A Tale of Garrowen* (Dublin: James Duffy, 1857), p. 403.

[15] Myles Joyce was tried and hanged for the murder, though many still believe him to be innocent: Waldron, *Maamtrasna: The Murders and the Mystery* (Edmund Burke, 1992).

language,[16] and a contrasting judicial attitude is also certainly documented. In *R. v. Burke* (1858),[17] Burke was accused of rape. A key defence witness, claiming not to speak English, was sworn in and examined through an interpreter, but his claim was challenged on cross-examination when two witnesses said he had spoken to them and sung a song in English. Of seven judges, four deemed the evidence inadmissible, with the leading judgment stating:

> I apprehend it is perfectly possible that the witness was actuated by an honest motive in wishing to be examined in Irish. He may have wished to express himself in the language which he knew best, in which he could most clearly express his thoughts, ... and certainly if every lady who sings an Italian song is to be taken on that account to have a perfect knowledge of the Italian language, I can only say that a great number of ladies may very easily find themselves placed in a very unpleasant position indeed.[18]

Since independence, and until recently, debate on interpreting in Irish courts centred on the implications of Article 8 of the Constitution[19] for Irish-speakers before the courts; it is clear that interpreting in the courtroom is far from being a new issue, having had a long and emotive history, but it is true to say that the issue has become more complex in recent years. 750,000 people from 211 countries came to Ireland between 2000 and 2007, and while the level of immigration has now fallen, in 2007 and 2008 nearly one third of committals to prison were "non-Irish nationals".[20] The Courts Service went from spending €103,000 on translating and interpreting services in 2000, to €2.7m in 2007.[21] Judge David Riordan has estimated that up to 20% of those

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[16] Hickey, *Law and Lawyers in Modern Folk Tradition* (Four Courts Press in association with the Irish Legal History Society, 1999).
[17] *R. v. Burke* (1858) 8 Cox C.C. 44.
[18] *R. v. Burke* (1858) 8 Cox C.C. 44 , *per* Christian J.
[19] That either Irish or English can be used for official purposes.
[20] *Irish Prison Service Report* 2008.
[21] Irish Translators and Interpreters Bulletin, January 2008, available at http://translatorsassociation.ie/component/option,com_docman/task,cat_view/gid,25/Itemid,16/.

appearing before the criminal courts daily are "foreign offenders", which he considers to be creating a "permanent shift" in the way the court is run, with sittings taking longer, more resources needed for interpreting, and delays caused by an alleged reluctance of "foreign offenders" to plead guilty.[22] Ivana Bacik finds it "inexcusable that so little attention has been paid to such an important question in this jurisdiction before now".[23]

The right to an interpreter is an integral part of the right to a fair trial in international law; the International Covenant on Civil and Political Rights and the European Convention on Human Rights,[24] among others, grant those accused of a criminal charge the right to the free assistance of an interpreter where he/she does not understand or speak the language used in court.[25] The criminological and administrative interaction between immigrants and the justice system, and the wider policy impacts of this interaction, often depend on communication facilitated by interpretating. This article will look at two aspects of court interpreting in Ireland; the first is an examination of Ireland's position in relation to a set of proposed EU minimum procedural standards on legal interpreting/translating, and the second is a consideration of the right to an interpreter in Ireland, as well as judicial attitudes to issues related to legal interpreting that have arisen in Irish courts.

First, a brief introduction to the interpreting profession in the literature is given.

### *B. Introducing Interpreters: the "Necessary Evil"*

Herbert coined this phrase in his 1952 interpreters' handbook, and it has been widely used since, to represent a

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[22] Riordan, "Immigrants in the Criminal Courts" (2007) 7(2) J.S.I.J. 95.

[23] Bacik, "Breaking the Language Barrier: Access to Justice in the New Ireland" (2007) 7(2) J.S.I.J. 109.

[24] European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(2), Nov. 4 1950, 213 U.N.T.S. 221, 226 (entered into force Sept. 3, 1953) (henceforth "ECHR").

[25] International Covenant on Civil and Political Rights Art. 14, Dec. 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976). Further exploration here of the right to an interpreter in international law is beyond the scope of this article.

certain lack of enthusiasm around interpreter participation in trials. Some possible explanations for this reluctance could be that bilingual cases can take up to twice as long as other trials,[26] the interpreting process could be seen as giving those with some knowledge of the court language extra time to think out answers, or there may be an element of distrust towards foreign language speakers.[27] Other issues could include difficulties gauging witness credibility without direct communication, and the potential of interpreters to alter content or intervene on behalf of or against the suspect.[28] Cynically Ellison submits that interpreters can undermine the ability of a lawyer to destroy witness credibility.[29] In terms of the person being interpreted for, Tribe describes a potential vulnerability and sense of having "lost their voice", resulting from dependence on another to convey their words.[30]

As to what is expected of interpreters, Granger and Baker find evidence of role conflicts amongst interpreters themselves; while most consider language translation delivered with impartial accuracy their primary goal, in practice situations are complex and require careful balancing; most considered it part of their job to be a cultural broker, technical explainer and advocate.[31] However Collin and Morris stress the need to avoid any impression of a private relationship with the person being interpreting, for fear lest an interpreter be accused of "putting words" into the speaker's mouth.[32] Berk-Seligson's seminal court interpreting study began from the premise that "in an ideal world, the American legal system would ... have the court interpreter

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[26] Gibbons, *Forensic Linguistics: An Introduction to Language in the Justice System* (Blackwell Publishing, 2003).

[27] Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan, 1987).

[28] Gibbons, *Forensic Linguistics* (n. 26 above).

[29] Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford University Press, 2001).

[30] Tribe, "Working with Interpreters" in Barrett and George (eds.), *Race, Culture, Psychology, and Law* (SAGE, 2005).

[31] Granger and Baker, "The Role and Experience of Interpreters", in Tribe and Raval (eds.), *Working with Interpreters in Mental Health* (Brunner/Routledge, 2003).

[32] Colin and Morris, *Interpreters and the Legal Process* (Waterside, 1996).

physically invisible and vocally silent, if at all possible".[33] She found, in fact, that the impact on legal proceedings was far greater than had been imagined: interpreters can manipulate language to shift blame structures and affect sympathy, and change speech style in terms of politeness, formality, and length amongst others; the interpreter can influence a jury's perception of a non-English speaking testifying witness: and overall is far more verbally active than generally realised, which strongly affects the court's power relations. Other studies have corroborated these findings.

The literature abounds with lists describing the skills of a competent interpreter: linguistic skills, memory, sensitivity, ability to build rapport and inspire confidence, objectivity, diplomacy, patience, tolerance, cultural, social and political awareness; the ability to listen, analyse and repeat a message; excellent knowledge of languages worked in; awareness of specific aspects of countries, cultures, groups or subject matter; good hearing, a clear speaking voice, physical stamina and strong nerves.[34] Documented widely are difficulties experienced by interpreters, with a lack of respect and appreciation being particularly notable; "[n]ot infrequently [people who work in legal settings] treat interpreters with suspicion, distrust and a lack of respect for the skills which they bring to the job".[35] Other common problems are the emotionally draining nature of the work, lack of training and support, unpredictable employment and low wages.

The fact remains that "working with an interpreter is a qualitatively different experience from working without one".[36] The South Yorkshire Police *Notes of Guidance for Interpreters*

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[33] Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process: with a new chapter* (University of Chicago Press, 2002), p.54.

[34] See *e.g.* Granger and Baker, "The Role and Experience of Interpreters"; *in* Tribe and Raval (eds.), *Interpreters and the Legal Process* (Brunner/Routledge, 2003; Colin and Morris, *Interpreters and the Legal Process* (Waterside, 1996).

[35] Colin and Morris, *Interpreters and the Legal Process* (Waterside, 1996), p.15.

[36] Tribe, "Working with Interpreters" in Barrett and George (eds.), *Race, Culture, Psychology, & Law* (SAGE, 2005).

*and Police Officers* requests their members to remember "that the interpreters are often professional people with advanced linguistic skills, and they should be treated accordingly". However, not all those employed as interpreters are skilled, experienced or fully competent, and the fact is that interpreting has much potential for error; the content or context may be misunderstood or the message incompletely rendered, a lack of precision can lead to incorrect meanings or use of register, and where speech patterns of the courtroom, such as terms of address, are not taken seriously, feeling towards the suspect may be inadvertently prejudiced.[37] Nonetheless it has been asserted that interpreting quality is "almost consistently ignored by all but language professionals".[38]

## I. THE EU AND THE RIGHT TO AN INTERPRETER

### *A. Minimum Procedural Rights In Criminal Proceedings*

It was highlighted above that the right to an interpreter is essentially a procedural right that derives from the right to a fair trial: everyone charged with a criminal offence has the right to certain minimum procedural guarantees, and these include the right to the free assistance of an interpreter where he cannot understand or speak the language used in court. The right, as set out in the ECHR,[39] has been refined and defined through case-law at the European Court of Human Rights (ECtHR). All EU Member States have ratified the ECHR, and Article 6 of the Treaty on the European Union (TEU) provides that the fundamental rights guaranteed by the ECHR shall be protected by the Union.

Research by the European Commission showed that Member States were not consistently observing procedural rights,

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[37] See *e.g.* Colin and Morris, *Interpreters and the Legal Process* (Waterside, 1996); Edwards, *The Practice of Court Interpreting* (J. Benjamins, 1995).

[38] Morris, "Great Mischiefs: An Historical Look at Language Legislation in Britain", in Kibbee (ed.), *Language Legislation and Linguistic Rights* (J. Benjamins, 1998), pp. 39-40.

[39] Article 6(3)(e) of the ECHR is the right "to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

and it was decided that the EU was justified in acting to improve the situation.[40] In 2003, a Green Paper on "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the EU"[41] was published, leading to the Proposal for a Council Framework Decision (FD) on Certain Procedural Rights in Criminal Proceedings throughout the European Union in 2004.[42] The aim was a set of common minimum procedural rights that would increase the protection of the ECHR, and it focussed on five areas; the provision of information on fundamental procedural rights, and the rights to have legal assistance; free legal assistance for those who cannot otherwise meet the cost of proceedings; witnesses present and examined, and finally free interpretation and the free translation of documents. A study by Spronken and Attinger,[43] which aimed to identify those States meeting the minimum proposed standards and locate possible lacunae in relation to the rights, found that the rights were implemented very differently across the EU (Ireland's response will be considered below). However the proposed FD was abandoned in 2007 due to reservations and a consequent lack of unanimous acceptance.[44]

An EU project called the AGIS Project, which aims to ensure procedural safeguards in criminal proceedings and justice

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[40] Spronken and Attinger. *Freedom, Security and Justice; Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, European Commission, 12 December 2005, available at http://arno.unimaas.nl/show.cgi?fid=3891.

[41] European Commission Green Paper, *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, COM (2003) 75, Brussels, 19 February 2003.

[42] *Proposal for Council Framework Decision on certain Procedural Rights in Criminal Proceedings throughout the European Union*, Brussels, 28 April 2004, COM (2004) 328 final, 2004/0113 (CNS). Since this article was prepared for publication, it has become clear that the Proposal cannot go ahead in quite the form envisaged (in consequence of the Lisbon Treaty), though it seems likely that a similar document will be drawn up in line with the new Treaty.

[43] Spronken and Attinger (n.40 above).

[44] Council of the European Union, *Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union*, 10287/07, Brussels, 5 June 2007.

"across language and culture",[45] has continued to compile information on the subject.[46] A study on existing provisions in legal interpreting and translation across the EU was published in 2008,[47] concluding that there are currently insufficient legal interpreting and translating skills available to ensure respect for procedural rights across language and culture for every individual in each Member State, but that there is a process of development in evidence across the EU (Ireland's response will be considered below).

The most recent related development within the EU stems from the fact that of all the procedural rights contained in the 2004 proposed FD, the right to free legal interpreting and translation was the least controversial. Having decided to adopt a step-by-step approach to establishing common minimum procedural rights, the Commission thus focused on this area as the first step, and the text of a proposed FD on the right to interpretation and to translation in criminal proceedings was adopted in July 2009. It is also based on the relevant articles and case- aw of the ECHR, and is intended to facilitate applying these rights in practice.[48]

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[45] The first Grotius project explained the role of culture for the legal interpreter: "[i]nterpreters and translators ... do not only have to be in full command of ... language skills ..., they ... need knowledge of the countries and awareness of the cultures in which they work": *Aequitas Access to Justice across Language and Culture in the EU*, Hertog (ed.), Grotius Project 98/GR/131, 2001 at 22. The interpreter as cultural mediator will not be discussed here in more detail.

[46] *Executive Summary: Status Quaestionis*, Hertog and van Gucht (eds.), Intersentia, available at www.agisproject.com/Documents/status%20Quaesionis%20Summary.pdf (AGIS Project JLS/2006/AGIS/052).

[47] Hertog and van Gucht, *Status Quaestionis* (Intersentia, 2008). Each country was profiled and ranked according to two sets of indicators: performance (procedural safeguards, regulation of professions, quality assurance), and those of the 2003 EU Green Paper on procedural safeguards in criminal proceedings (accreditation, register, code, training, vulnerable groups); profiles available at http://www.agisproject.com/.

[48] Preamble to the *Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings*, 2009/0101 (CNS).

### *B. Legal Interpreting in the proposed EU Council Framework Decisions*

Articles 6, 8 and 9 of the 2004 proposed FD on certain procedural rights in criminal proceedings throughout the European Union relate to legal interpreting.[49] The right to interpretation free of charge when the suspect does not understand the court language, is applicable as soon as possible after it becomes clear the suspect does not understand the language of proceedings, and extends throughout the proceedings;[50] free interpretation of legal advice where necessary continues throughout the proceedings.[51] Furthermore, member states should ensure interpreters are sufficiently qualified to provide accurate interpretation.[52] Failing this, there should be a mechanism to replace the interpreter.[53] Finally, proceedings should be recorded and transcribed, to facilitate verifying accuracy of interpretation in a dispute.[54]

The final two provisions – that of replacing insufficiently qualified interpreters and that of recording proceedings – go beyond the specific case-law of the ECtHR, and indeed neither provision has been included in the 2009 Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings. On quality, the 2009 FD stipulates that interpretation should be such as to ensure that the suspect can exercise his or her rights fully. Interestingly, it adds that with regard to quality, training should be offered to judges,

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[49] The focus of this article is interpreting, information on translation is included only where necessary to prevent missions. It is also not focussing on persons with hearing or speech impediments.

[50] Article 6(1); *Luedicke, Belkacem and Koç v. Germany*, 28 November 1978, Series A N°29 para.46: assistance of the interpreter must be free, and no charge can be made for the services afterwards. *Kamasinski v. Austria*, 19 December 1989, A Series N° 168*:* that the right extends to translating "documentary material".

[51] Article 6(2).

[52] Article 8(1): the interpreting assistance should be of such a standard as to enable the suspect to understand the case against him, and to defend himself, (see *Kamasinski*, n. 50 below, §74), and it must be "adequate", see *Brozicek v. Italy*, 19 December 1989, (10964/84) [1989] E.C.H.R. 23.

[53] Article 8(2).

[54] Article 9.

lawyers and other relevant court staff.[55] A further addition stipulates that there should be a procedure in place "to ascertain whether the suspect understands and speaks the language of the criminal proceedings."[56] The remainder of the provisions survived, and some became more explicit; for example, Art. 2(1) specifies that the right applies "during police questioning, during all necessary meetings between the suspect and his lawyer, during all court hearings and during any necessary interim hearings". The right to the free translation of documents is also set out in a more detailed way.

### *C. Ireland's Compliance with the 2004 Proposed Framework Decision: Response to EU Surveys*

Two EU studies were referred to above that aimed to measure, among other things, the extent to which the right to legal interpreting is observed across EU Member States. As little or no research has been conducted into interpreting in the criminal process in Ireland, these studies are useful in considering Ireland's position in this regard. This section will thus analyse Ireland's responses within the framework of the 2004 proposed FD.

The first is the Spronken and Attinger study. Questionnaires were sent to Ministries for Justice and Home Affairs, and answers were mostly given based on legislation rather than practice.[57] An analysis of the responses from the Irish Department of Justice, Equality and Law Reform Department suggests that Ireland meets only one of the minimum standards fully, as set out in the 2004 proposed FD[58].

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[55] Article 5(2).

[56] Article 2(3).

[57] Data is from 2002. Authors stress that some responses were incomplete or unclear, and that replies may be out-dated.

[58] The authors found it difficult to analyse Ireland's responses due to unclear answers; however their "analysis" is really a summary rather than an assessment of standards or identification of lacunae. In addition they do not take full and accurate account of the Department's answers, such that the Department's verbatim answers are analysed here directly. For example, the authors state that "[i]n general, interviews are audio or video recorded, which seems to imply that also the interviews with the assistance of an interpreter are electronically recorded", but verbatim answers do not mention recording.

The second is the AGIS study. Questionnaires of around 100 questions, covering an impressive array of issues including payment, registers, skills, standards, training, monitoring, ethics, and disciplinary measures, were distributed online to targeted groups.[59] There were 13 Irish responses,[60] 12 of which were interpreters/translators and interpreting/translating service providers or training institutes. There were no responses from the police, prosecution, judiciary, defence counsel, victim/witness support organisation or NGOs, such that Ireland's response really depicts how interpreters/translators and those working with them perceive the practice of legal interpreting in Ireland.[61] The scope of the questionnaire may have been overly-ambitious, particularly as there was little consensus on questions, such that the study's worth, at least in the case of Ireland, may be in highlighting a lack of comprehensive knowledge about and familiarity with the issues at hand.

The first provision of the 2004 proposed FD is the right to interpretation free of charge when the suspect does not understand the court language, and the Department clearly indicates that Ireland is compliant with this: an interpreter will be requested by the police, a legal representative, the defendant or the judge. The police are the most likely to request one, but there is no indication of how decisions are made regarding the need for interpreters. The State will pay the resulting costs via the police budget when requested by the police, and via the Courts Service when requested by the courts. A solicitor requesting an interpreter can do so at the expense of the State, with a free legal aid certificate. Questionnaire respondents are divided, however, on

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[59] The study differentiated "official" (government) and "non-official" (professional) groups. However, 12 of the Irish responses were "non-official", while only one was "official"; this was a civil servant whose connection with legal interpreting/translating is unknown, but as their answers could be identified, and a significant number of "don't know" responses suggested a lack of familiarity with the issues, the categories are not considered separately.

[60] While 13 seems a small response, there were only 8 from Germany, 7 from the Netherlands, 8 from Denmark and Spain and so on, though these are less dominated by the interpreting/translation profession.

[61] This is reflected in the answers which strongly suggest that respondents have legal interpreting/translating experience, but are not fully familiar with legal issues, or budgetary or other statistics.

whether requirements for legal interpreting in criminal proceedings exist; 38% say there are no requirements, and those that assert requirements exist, say agencies or service provider regulations are the main source, followed by Government policy, legislation, *ad hoc* regulations, court regulations, and civil service guidelines. Respondents indicate that interpreters are most often engaged by the court, followed by the police, the legal team and the defendant, and 61% say that there are procedures for ascertaining the need for translation or interpreting. Respondents consider that the Ministry of Justice most often pays for interpreting; 69% say there are standard rates of fees for legal interpreting, 31% say there are not. Only 15% said that there are national sanctions where the State fails to provide interpretation/translation when a person is entitled; these mentioned the possibility for appeal to the Equal Status Act, 2000.

The second provision is free interpretation of legal advice where necessary. Neither study is clear on Ireland's compliance; the Department indicates that a detained person who must, by law, be informed of certain matters, including the right to consult a solicitor, will be provided with an interpreter free of charge where necessary, and it appears that a general right to free interpretation of legal advice applies where a free legal aid certificate has been granted, and is otherwise at the discretion of the police or courts. The questionnaire did not address the issue of cost in interpreting legal advice, but respondents indicate that legal interpreting is provided at the police interview, court proceedings, custody procedure, arrest, investigation, detention, preparation defence and at any other stage; but only when needed.

The third provision requires the use of qualified interpreters, and both studies indicate Ireland's lack of compliance. The Department states that no qualifications are necessary to act as a legal interpreter. It is also stated that not having understood proceedings is grounds for appeal, but it is unclear how or if this relates to the quality of the interpreter. 85% of questionnaire respondents say there are no binding provisions on quality in criminal proceedings, and 70% say the legal interpreting profession is unregulated. However, the majority considers that legal interpreters "sometimes" master all

necessary skills. Some also indicate that interpreting standards are tested by agencies or professional organisations, and that some agencies have internal guidelines. Nonetheless most agree that in practice there is no monitoring of quality or testing of standards, no requirement for documentation of competence or proficiency; there is a lack of guidelines, and no national register.

The fourth provision is directly related to the third, and provides that there should be a mechanism to replace insufficiently qualified interpreters; this is not commented on directly by the Department, though non compliance with the third provision implies the same for the fourth. Similarly, most questionnaire respondents point out that interpreting is not monitored. It was also stated by some respondents that where no qualified legal interpreter/translator is available a less qualified legal interpreter/translator may be used, there may be no translation/interpretation (the case may be adjourned), or communication via a third language may be used. The fifth provision, which is not included in the 2009 proposed FD, requires that proceedings be recorded and transcribed. The Department did not respond to this question. 54% of questionnaire respondents said that interpreting during criminal proceedings is never recorded, 31% said it is sometimes recorded (most said that this is during police questioning), and the remainder did not know.

Although the two studies involved different methodologies, in comparing the relevant information it becomes clear that there are no clear and definitive answers to the questions posed, and that there are widely varying impressions on every level as to the status and practice of legal interpreting in Ireland's criminal courts. It is also clear, based on the answers given, that standards in Ireland fall below the minimum standards envisioned by the European Union's 2004 Proposed Framework Decision, as based on the ECHR.[62]

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[62] For a comparison of Ireland's position with regard to other EU Member States, see Hertog and van Gucht, *Status Quaestionis* (Intersentia, 2008). Analysis is based on (usually low), subjective responses from "governmental" and "professional" sources, and thus offers only a general idea of the perception of legal interpreting/translating.

## II. INTERPRETING IN IRELAND: THE LAW AND THE CASE LAW

The above analysis is particularly interesting in light of Ireland's opposition to the 2004 proposed FD; aside from objecting that the EU does not have the legal competence to legislate in the area of procedural safeguards, the argument was made that the ECHR already contains sufficient procedural safeguards, and that Ireland "has a comprehensive set of procedural rights in place which exceed those in the ... proposal".[63] While it is outside the scope of this paper to address fully the issue of protection for the right to an interpreter at ECHR level, a few points are worth noting. Firstly, the right as enshrined in the ECHR is a minimum one, and the specific issues enumerated in the FD that stem from this basic right – including interpreter qualifications, translation of documentary evidence, and interpreting at other stages of the criminal process – depend at this level upon interpretation by the ECtHR. However, Trechsel points out that some of these issues have not yet raised serious issues at the ECtHR, and that it is rare for such complaints to be investigated in detail.[64] It is further worth referring again to Tiersma's assertion that courts have not tended to address language issues consistently,[65] and to suggest that the ECtHR is not immune to this trend.[66] This is not to say, of course, that there has been no depth to the ECHR case-law on these issues, or that it is not of value,[67] merely that it might not be considered to have fully and consistently addressed all of the areas that a Framework Decision might be able to do.

The Human Rights Act, 2003, incorporates the ECHR into Irish law, and purports to give further effect to certain provisions of the ECHR, subject to the Constitution; all statutory provisions or rules of law should be interpreted in accordance with the

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[63] *Dáil Debates*, 638, 26 September 2007.

[64] Trechsel, *Human rights in criminal proceedings* (Oxford University Press, 2005). The Irish case-law examined below tends to point to a similar trend in which language issues are raised more often than they are ruled upon.

[65] Tiersma, "The Judge as Linguist" (1993) 27 *Loyola of Los Angeles Law Review* 269.

[66] Tiersma, "The Judge as Linguist" (previous note).

[67] The footnotes of the section on "Legal Interpreting in the proposed EU Council Framework Decisions" give an introduction to some of the important decisions.

ECHR "in so far as is possible".[68] Judge O'Donnell notes that its most significant impact on jurisprudence has been at superior court level, often by way of judicial review, and often in relation to asylum seekers, but that in the lower courts the Convention is not being raised "with any great conviction", or at all.[69] The former is reflected in the review of case-law below, and this latter point may be significant when one considers the large number of Limited English Proficiency (LEP) appearances in the lower courts, and ongoing concern about the quality and monitoring of court interpreting.[70] Perhaps it should be considered whether ECHR case-law could actually be used to effect in the lower courts to improve the consistency of interpreting standards, though as Judge O'Donnell points out by doing so one may be "at the risk of incurring judicial wrath!".[71]

In terms of ECHR provisions being subject to the Constitution, it was mentioned above that until recently most interpreting and language issues were connected to the constitutional rights of Irish speakers in the courts, so it is useful to consider whether this can be instructive with regard to a right to interpreting more generally. In 1929 Kennedy C.J. expressed the view that giving evidence in one's vernacular was a "requisite of natural justice, particularly in a criminal trial",[72] and Irish citizens, he asserted, were entitled to use the language, regardless of whether it was their vernacular or otherwise. It is doubtful that Kennedy C.J. anticipated the volume of non-English speakers that would one day be appearing daily before the courts, when he spoke of the right to use one's vernacular. It is further to be strongly contested that there is a general right to use one's native tongue in a criminal trial; certainly in terms of the defendant accused of a criminal charge, international case-law is clear that the right is a procedural one to understand and participate in one's

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[68] European Convention On Human Rights Act, 2003, Article 2(1)

[69] O'Donnell J., "The Constitution, the ECHR Act, 2003 and the District Court: A Personal View-from a Judicial Perspective" [2007] 1 J.S.I.J. 137.

[70] See ITIA website, http://www.translatorsassociation.ie, also *e.g.* O'Brien, "Are we lost in Translation?", *Irish Times*, 4 April 2006; "Growing demand exposes poor translation services", *Irish Times*, 27 April 2007.

[71] O'Donnell J., "The Constitution, the ECHR Act 2003 and the District Court: A Personal View-from a Judicial Perspective" (n. 69 above) at 148.

[72] *Attorney-General v. Joyce and Walsh* [1929] I.R. 526, *per* Kennedy C.J.

trial, rather than the right to use one's mother tongue; the U.N. Human Rights Committee has been particularly adamant that it is unrelated to the issues of minority language speakers.[73] Indeed one of Ireland's main cases ruling on language issues, *Mac Carthaigh,*[74] cited the Canadian case *Andre Mercure v. Attorney-General for Saskatchewan* that "[t]he right to be understood is not a language right but one arising out of the requirements of due process".[75]

However in terms of the Irish language, as mentioned, the 1937 Constitution made Irish and English equal for official purposes, and the constitutional right to conduct cases through either Irish or English is recognised.[76] Nic Suibhne differentiates between the use by Free State courts of natural justice principles, and later cases that tend to refer to a constitutional "right" to use the Irish language,[77] and this distinction is relevant to this discussion, as there is no constitutional right to use any non-official language there is reliance on the principles of natural justice and due process for a right to interpreting at trial; the 1937 Constitution, like that of 1922, provides that "[n]o person shall be

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[73] See *e.g. Dominique Guesdon v. France*, Communication No. 219/1986, U.N. Doc. CCPR/C/39/D/219/1986, (1990), *Yves Cadoret and Hervé Le Bihan v. France*, Communication No. 221/1987, U.N. Doc.

[74] [1999] 1 I.R. 186. [1980-1998] T.É. (Tuairiscí Speisialta) 57, [1980-1998] IR (Special Reports) 127.

[75] [1988] S.C.R. 234, at 237, Human Rights Committee, General Comment No. 23, *The Rights of Minorities (Art. 27)*, April 8, 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.5, at para. 5.3.

[76] Nic Shuibhne, "State Duty and the Irish Language" (1997) 4(1) D.U.L.J. 33, points out that the court first recognised this as a right in *An Stát (Mac Fhearraigh) v. Mac Gamhna*, High Court, unreported, July 1, 1983. Other relevant cases include *O'Colieain v. D.J. Crotty* [1927] 61 I.L.T.R. 81, *The State (Buchan) v. Coyne* [1936] 70 I.L.T.R. 185, and *O'Monachain v. An Taoiseach* (Supreme Court, 16 July, 1982, unreported). See also the Official Languages Act, 2003, s. 8, making the right explicit: (1) that either official language can be used in court, (2) duty of each court to ensure persons appearing or giving evidence may be heard in official language of choice, (3) that facilities may be made available for simultaneous or consecutive interpretation.

[77] Nic Shuibhne, "The Constitution, the Courts and the Irish Language", in Murphy and Twomey (eds.), *Ireland's Evolving Constitution: 1937-1997: Collected Essays* (Hart Publishing, 1998).

tried on any criminal charge save in due course of law".[78] Kennedy C.J. recognised that should the language of the defendant differ from that of the court, "means of interpreting ... should be provided".[79] Sullivan C.J held that not interpreting evidence for the defendant contravened "one of the fundamental principles of the administration of justice".[80] In *O'Monachain v. An Taoiseach*[81] the Supreme Court stated that "[i]t is a fundamental principle of law – part of natural justice which is not permitted to be set aside – that it is neither just nor lawful to hear a case in any language" that the defendant does not understand.[82] Although these cases are primarily concerned with the Irish language, they suggest that being able to understand one's trial is one of the principles of natural justice and a requirement of due process. As there is a constitutional right to be tried in due course of law, there seems no obvious reason for any conflict between the ECHR right to an interpreter and the Irish Constitution.

But are interpreters specifically provided for? There is no statutory right to an interpreter in Ireland, such that there is effective reliance for the right on the court's interpretation of the due course of law and the principles of natural justice, and on the ECHR. Regulations, as pointed out by the respondents in the AGIS project above are *ad hoc*. The Rules of the Superior Courts state that interpreters should "be available to attend those Courts as required for the hearing of any cause or matter".[83] The Courts Service were committed, in their 2005-2008 Strategic Plan, to providing interpreters for those whose first language is neither Irish nor English, but such an aim is absent from their most recent Strategic Plan.[84] The Criminal Justice Act, 1984 (Treatment of

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[78] Article 38(1).

[79] *Attorney-General v. Joyce and Walsh* [1929] I.R. 526, at 531 (S.C.).

[80] *State (Buchan) v. Coyne* (1936) 70 I.L.T.R. 185, at 186 (S.C.).

[81] [1986] I.L.R.M. 660, cited in Carey, "Criminal Trials and Language Rights", (2003) 13(1) I.C.L.J. 15.

[82] This case dealt with the use of the Irish language in the court, cited in Carey, "Criminal Trials and Language Rights", (2003) 13(1) I.C.L.J. 15.

[83] Order 120, "Interpreters and Translations".

[84] Courts Service Strategic Plans 2005-2008 and 2008-2011. This is despite recommendations and explicit concerns of ITIA: *Submission of the Irish Translators' and Interpreters' Association on the Courts Service Statement of Strategy 2008-2011* (2008).

Persons in Garda Siochána Stations) Regulations, 1987, provides foreign nationals with a right to consular assistance, but not the right to be dealt with in a language they understand,[85] and while they stipulate that the accused should be informed of matters "in ordinary language", they do not specifically provide for the right to an interpreter.[86]

To get an idea of the extent to which Irish cases have addressed language and interpreting issues more generally, and to attempt to ascertain the attitude of the Judiciary towards related issues, a search of cases containing the term "interpreter" was performed yielding 67 cases.[87] The table show a summary of the cases; "relevance" refers to whether the case provides some insight into judicial attitudes towards court interpreting/translating; it is interesting that just over a quarter could be considered relevant, more than half involve judicial review of asylum, and there are only 4 relevant criminal cases.

| | **Not relevant** | **Relevant** | **Total** |
|---|---|---|---|
| **Asylum/judicial review** | 24 | 15 | **39** (58%) |
| **Criminal/other** | 24 | 4 | **28** (42%) |
| **Total** | **48** (72%) | **19** (28%) | **67** (100%) |

*A. Cases not providing insight into judicial attitudes*

48 of the cases are in no way relevant: within the asylum/judicial review cases, some refer simply to the fact that an interpreter was used during the process, that one had not been needed, or that one had been requested at appeal. Some reference

[85] Regulation 14.

[86] Bacik finds this "extraordinary". She also looks at specific provisions within the asylum and refugee process; Bacik, "Breaking the Language Barrier: Access to Justice in the New Ireland" (2007) 7(2) J.S.I.J. 109.

[87] Searches on Westlaw.ie: March/July 2008 and October 2009. Supplemental search of Courts Service website: two additional relevant cases (not included in table). Obvious omissions stem from the facts that (a) the search engine only goes back to 1976, and (b) only one search term was used.

the Refugee Act, 1996 ("an interview … shall, where necessary and possible, be conducted with the assistance of an interpreter"[88]), the "Information Guide for Applicants for Refugee Status" ("[y]ou will be given access to the necessary facilities ... including access, where available, to an interpreter"), and letters from the Minister for Justice stating that the applicant could be provided with a "competent" interpreter during interviews. Of the other cases, some were repeated and references are made variously to an interpreter used to buy land, to a medical interpreter, to statutory interpretation, to an interpreter bringing a case of sexual harassment, to premises to be used for interpreting services, to Article 6 of the ECHR and the right to an interpreter under the European Arrest Warrant, to interpreters being used for police interviews, to an interpreter *as* a witness, and to Christ as an interpreter of morality.

### *B. Asylum cases providing insight into judicial attitudes*

Of the 19 relevant cases, 15 involve asylum/judicial review, and although they are not criminal proceedings they raise interesting issues. They are mainly High Court cases.

#### *1. On interpreting standards*

In *Naomitsu Kanaya v. Minister for Justice, Equality and Law Reform*,[89] it was stated that: "[w]hile the applicant's evidence was given via a Japanese interpreter, I am satisfied from his evidence that he was not in possession of a valid return flight to his country of origin". This indicates awareness that evidence given through an interpreter might not always be completely reliable, an issue more explicitly addressed in *Skender Memishi;*[90] amongst the reasons for rejecting Memishi's application at the Refugee Appeals Tribunal was credibility. The US case *Diaz-*

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[88] S. 11(2)

[89] *Naomitsu Kanaya v. Minister for Justice, Equality and Law Reform* [2000] 2 I.L.R.M. 503

[90] *Skender Memishi v. The Refugee Appeals Tribunal, Rory McCabe, The Minister for Justice, Equality and Law Reform, The Attorney-General, and Ireland* (High Court, unreported , Peart J., 25 June 2003).

*Marroquin v. Immigration and Naturalization Service*[91] was referenced; there were inconsistencies in Diaz's evidence, and one issue raised was that the evidence had been communicated through an interpreter, the implication being that interpreting is fallible, and that establishing credibility should have reference to this. The same context was applied to Memishi's case, which was not successful.

*Omaar Aly Sherif* [92] is the only case which refers to a qualified interpreter. *Petrea Stefan*[93] (Supreme Court) contains translation issues; omissions in the English translation of the original asylum application questionnaire meant one question was incomplete. Leave was granted to apply for judicial review, the respondents appealed and the Supreme Court dismissed their appeal finding that "[t]here may well be many instances where omissions in translation occur but which are not such as to render the proceedings unfair", but this omission was considered to breach fair procedures such that even a full rehearing through the Tribunal would be unsatisfactory. (The issue of quality was raised but left undiscussed.) Although not specifically referring to interpreting, it shows that translation omissions can breach fair procedure. In a later case, *M.M.A.*,[94] it was declared possible that problems with spelling and language translation were the cause of the failed asylum application, and that it would be "unfortunate if an applicant ... were to be rejected on the basis of the English spelling of the villages of Darfur", such that leave to apply for judicial review was granted.

In *Daud Abdilahi Gilingil*[95] the Applicant, who did not understand English, relied on another Somali to complete the refugee application questionnaire. Asylum was rejected.

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[91] *Diaz-Marroquin v. Immigration and Naturalization Service* [2001] U.S Court of Appeals for the Ninth Circuit, U.S. App. Lexis 2352.

[92] *Omaar Aly Sherif v. Refugee Appeals Tribunal* (High Court, unreported, Herbert J., November 16 2006).

[93] *Petrea Stefan v. Minister for Justice, Equality and Law Reform, the Refugee Appeals Authority Ireland and the Attorney-General* [2002] 2 I.L.R.M. 134.

[94] *M.M.A. v. The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* (High Court, unreported, Clark J., 12 May 2009).

[95] *Daud Abdilahi Gilingil v. Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Attorney General Ireland; Human Rights Commission*, (High Court, unreported, Feeney J., 1 June 2006).

The Commissioner's report stated it was the responsibility of the Applicant to ensure all information in the questionnaire was accurate and truthful, and that he had not pointed out inaccuracies in the eight months before his interview created "a serious credibility issue". Considering the appeal for judicial review Feeney J. accepted responsibility of the Applicant to ensure accuracy, but said the court should take circumstances into consideration, noting that "how the Applicant was to be cognisant of any inaccuracies given his lack of English is not detailed". While not the central focus of the case, it is interesting that the judge recognises the difficulty of assessing accuracy in a language one does not understand.

*2. On the need for interpreters*

In *Youssef Benderare*,[96] one of the grounds for seeking judicial review was a lack of fair procedures at the appeals level. Smyth J. submitted that a lot had been made about the Applicant's understanding of language, "whether he would understand Berber or Algerian or Arabic with an Algerian accent", and that he claimed not to have understood the interpreter very well after the interview. The judge had doubts: firstly the Applicant had been able to undertake journeys and organise himself on arrival in Ireland, and additionally the Tribunal had disregarded inconsistencies in the application which may otherwise have gone to credibility "in the context of any problems with the interpreter". The judge thus felt that any disadvantage resulting from defective interpretation, whether "real or imaginary", was irrelevant, and leave to appeal refused. This suggests awareness and potential scepticism about advantage being taken of language and interpreting difficulties in court.

In *Fuwa Oladale Olawale*,[97] one ground for applying for judicial review was that the Respondents had failed to provide an interpreter. Smyth J. considered this baseless; the Applicant had

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[96] *Youssef Benderare v. The Minister for Justice Equality and Law Reform*, Conor Bowman sitting as The Appeals Authority (High Court, unreported, Smyth J., 2 October 2002).

[97] *Fuwa Oladale Olawale v. The Office of the Refugee Applications Commissioner, The Minister for Justice, Equality and Law Reform*, (High Court, unreported, Smyth J., 3 October 2002).

explicitly stated he was happy to be questioned in English, had signed a form agreeing his language was English and he did not need a translator, and had signed a receipt for interview notes specifying that an interpreter was not needed. According to the judge "[s]eeking to advance such a ground is spurious science". Similarly, in *S.O.A.*,[98] the applicant claimed that her s. 11 interview with the Office of the Refugees Applications Commissioner (ORAC) had been difficult due to there being no interpreter, but when asked whether she had had requested one she replied "I can't remember" and "No-one asked me". Her contradictory responses were considered to undermine her credibility, and her language ability was further commented upon; specifically that her first language was English, that she had completed the ORAC questionnaire in this language herself, and that her "educated hand and the comprehensive and fluent answers" indicated no language difficulty.

*3. On delays caused by language difficulties/interpreters*

In *Grace Edobar*[99] (Supreme Court), it is noted that the availability of interpreters "and any number of other banal daily circumstances" can slow down the work of the Refugee Appeals Tribunal, which highlights the issues of interpreter availability and their potential to cause delay. In *Zabolotnaya and Zabolotnaya*,[100] extension of the time permitted for asylum application was requested, using language issues as possible grounds, and referencing *G.K. v. Minister for Justice, Equality and Law Reform.*[101] This case states that it is relevant to consider language difficulties and difficulties obtaining an interpreter in deciding whether to allow an extension of the 14-day deadline for applications of judicial review, as per the Illegal Immigrants

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[98] *S.O.A. v. The Minister for Justice, Equality and Law Reform and Judy Blake, Sitting as the Refugee Appeals Tribunal* (High Court, unreported, Clark J., 24 March 2009).

[99] *Grace Edobar v. John S. Ryan as Chairperson of the Refugee Appeals Tribunal* [2005] 1 I.L.R.M. 113.

[100] *Nadya Zabolotnaya, Vladimir Zabolotnaya v. Minister for Justice, Equality and Law reform, Refugee Appeals Tribunal, Refugee Applications Commissioner, Ireland and the Attorney-General* (High Court, unreported, Peart J., 1 November 2004).

[101] [2002] 1 I.L.R.M. 81.

(Trafficking) Bill. The case was unsuccessful. In *Benson,*[102] it was held that language difficulties or difficulties obtaining an interpreter should be taken into consideration by the Court in deciding whether to extend the time allowed to challenge a deportation order. See also *Costa and Batista* below.

*4. On type of interpreting*

In *Wei Sung Jiang,*[103] the judge's decision implicitly accepts that police questioning can legitimately be carried out using a telephone interpreter; "I am also satisfied that the applicant, who had available to him the services of an interpreter, albeit by telephone …". See also *MacCarthaigh* below.

*5. On interpreter ethics/bias*

In *"X"*[104] the Applicant had been interviewed by an Officer of the Refugee Applications Commissioner through an interpreter, who had "signed the appropriate Interview-Interpreter Form". His appeal to the Refugee Appeals Tribunal included a complaint that the interpreter was "completely biased", but Herbert J. noted that this was not put to the Court in the application for judicial review, such there was no ruling in this case on ethics or bias. The issue arises again in *Yu Jie* below.

*6. On recording interviews*

In *Jean Ryan Hakizimana*[105] it is stated that the English asylum process is not directly comparable to the Irish one; in Ireland verbatim accounts are not required and tape recording is not necessary. The judgment states that fairness of proceedings does not depend on verbatim records or tape-recording being

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[102] *Benson v. Minister for Justice, Equality and Law Reform* (High Court, unreported, Finnegan J., 2 April 2001).

[103] *Wei Sung Jiang v. D.P.P.* (High Court, unreported, Peart J., 16 November 2005).

[104] *"X" v. Refugee Appeals Tribunal, The Minister for Justice, Equality and Law Reform, Attorney-General Ireland Human Rights Commission* (High Court, unreported, Herbert J., 11 December 2007).

[105] *Jean Ryan Hakizimana v. The Minister for Justice, Equality and Law Reform, Refugee Applications Commissioner, Ireland and the Attorney General; The Human Rights Commission* (2006) [2006] I.E.H.C. 355.

available, although it may be that this could be an improvement of procedures.

### *C. Other cases providing insight into judicial attitudes*

#### *1. On interpreters free of charge*

In *Edward Carmody*[106] the plaintiff argued inconsistency of Section 2 of the Criminal Justice (Legal Aid) Act, 1962, with the Constitution, and the State's obligation under the ECHR; there is no provision – other than for murder charges – for assigning counsel in addition to a solicitor to help with the defence. The contention as regards the ECHR touches on the issue of interpreters, as it centres on the right to a fair trial in Article 6. Although this case does not involve interpreters, the judge refers to *Luedicke and others*,[107] in which Article 6(3)(e) was found to allow an accused who cannot understand or speak the language used in court the free assistance of an interpreter, in order to prevent inequality between the accused who is conversant with the language used in court and the accused who is not. Both cases also reference Article 14 on discrimination, but it was found not to create a separate issue. The case was not successful, but its use of ECHR case-law on the right to an interpreter is of interest.

#### *2. On attention to language difficulties*

In *Ismet Ceka*[108] (Court of Criminal Appeal), the defendant requested leave to appeal a murder conviction claiming, among other things, that the trial was unfair due to a lack of consideration of the defendant's poor knowledge of English; "the judge failed to give sufficient weight to the fact that the accused was a foreign national with poor knowledge of English". This argument was rejected, on the grounds that it had been clear and obvious to the jury that the accused was unable to speak English; he had given evidence through an interpreter, and

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[106] *Edward Carmody v. Minister for Justice, Equality and Law Reform; Ireland; and the Attorney-General* [2005] 2 I.L.R.M. 1.
[107] *Luedicke, Belkacem et Koç v. Germany*, Judgment of 28th November 1978, Series A, No. 29.
[108] *D.P.P. v. Ismet Ceka* [2004] I.E.C.C.A. 25.

it was clear that counsel for the prosecution had made every allowance for the difficulties created by the need for interpretation and had referred to the difficulties several times.

In *Fitzpatrick and another v. K. and another*[109] Ms. K., from the Democratic Republic of Congo (DRC), gave birth in the Coombe Women's Hospital and was then given a blood transfusion against her will but with court approval. The case involves interpreting in a medical setting, but it features as a reasonably significant element of the facts on which the case was judged. Ms. K's friend, Ms. F., acted as her interpreter; her native language was Portuguese and she had "a level of proficiency" in French, English and Lingala, a DRC national language. Ms. F. was not a professional interpreter and said her English proficiency did not extend to medical terminology, but she testified that she had no problems translating what the medical personnel asked her to, and the judge accepted this evidence.

The plaintiffs, asserting Ms. K. may not have been *compos mentis* when she refused the transfusion, included potential communication difficulties as one of four factors, due to her reliance on interpreting. One testifying doctor noted that communication via an interpreter meant that they were not getting responses appropriate to indicate that she understood the gravity of her situation and was making an informed refusal. Ms. K. testified in French, and the judge noted that "[e]ven with a professional interpreter the process was difficult. On occasions during her cross-examination it was difficult to determine whether she was being evasive or whether she genuinely did not understand what was being put to her". He was satisfied the hospital had done all possible to test the validity of the refusal, being hampered by communication difficulties that were not limited to linguistic ones.

It is interesting that the judge identifies communication as not solely a linguistic event, and that even with a professional interpreter it was difficult to gauge Ms. K's intentions, which highlights a perennial problem with court interpreting; its potential to be used as a means of evasion. The case shows an awareness of linguistic diversity through identification of

[109] [2006] I.E.H.C. 392.

languages spoken and their origin. The acceptance of Ms. F.'s competence as an interpreter is probably the most problematic issue, considering that she was neither fluent in either of the languages she was interpreting, nor a professional interpreter. Despite admitting to her English being insufficient to cope with medical terms, and the communication doubts expressed by the medical personnel, the judge accepted her ability to interpret everything that the medical personnel had asked her to. It seems the judge considers the communication issues not to have been caused by the interpreter, though it is unclear what the implications might be.

*3. On delay*

*Costa and Batista*[110] was heard and rejected in the Court of Criminal Appeal. The first police interview with Mr. Batista involved an interpreter; it is noted that "any suggestion that an interpreter had not been present for this interview was not put to any of the preceding witnesses", that the second interview was video-recorded and also used an interpreter. It is not explicitly stated what, if any, arguments were made regarding interpreting at the conviction stage, but the judge concludes that "complaints about the role of interpreters and translators do not amount to more than matters of inconvenience and delay experienced during the course of the trial itself: they do not in any way go to the safety or reliability of the conviction", leading to the presumption that a trial delayed by interpreting would not affect the outcome.

*4. On interpreter bias*

In *Yu Jie*[111] (Court of Criminal Appeal) the defendant, convicted of murder, sought leave to appeal to the Supreme Court on three separate grounds, one being interpreter-related; the applicant had been questioned by the police through an interpreter, but had later learned the interpreter was a Chinese police officer seconded to Interpol. The objection was that he had not been aware of this fact, and the judge notes that this was based primarily on possible inhibition caused by realising it was a

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[110] *D.P.P. v. Adriano Martins Costa and Jose Claudio Batista* [2008] I.E.C.C.A. 1.

[111] *D.P.P. v. Yu Jie* [2005] I.E.C.C.A. 95.

Chinese police officer, especially as there is no right to silence under questioning in China. However the Court was satisfied that there was no impropriety in relation to the interpreter; the trial judge had watched the recording, and stated that the relationship between the accused and Mr. Jim (the interpreter) appeared trusting, that Mr. Jim was acting "professionally and in a detached way … and, if anything, acted with a certain affinity and sympathy towards the accused". McCracken J. in the Court of Criminal Appeal approved of this reference, saying that it was acknowledged that there were "certain omissions in the translation but this is bound to occur in any situation involving an interpreter". He stated that there was nothing to suggest that the interpreter was biased, had acted from any improper motive, or had intimidated the Applicant. He stated that while there was evidence the Applicant had not realised the interpreter's profession until questioning, there was also evidence his solicitor had known, but that no objection had been made to the Gardaí at any time.

It is noteworthy that the Court's ruling was largely based on interpretation of the video recording, perception of the interpreter's demeanour, and the idea that there are bound to be omissions in any situation involving an interpreter; it raises the question at what point the omission might be found to prejudice a fair trial. It is also interesting that the trial judge appeared to approve of the interpreter's perceived empathy towards the accused, as most guidelines expect the professional interpreter to remain impartial and without bias of any kind.

*5. On Irish language: recording and type of interpreting*

In *MacCarthaigh* (High Court 2002/Supreme Court 2008),[112] MacCarthaigh was charged with robbery and receiving stolen goods; the plea was "not guilty", and his case was brought through Irish. The Supreme Court had rejected his previous claim of a right to an Irish-speaking jury that would allow the trial to proceed without interpreting. In this High Court case the Applicant sought judicial review of his prosecution and trial in

[112] *MacCarthaigh v. Minister for Justice, Equality and Law Reform* [2002] 6 I.C.L.M.D. 70.

the Circuit Criminal Court, on the grounds that he was entitled to a transcription of proceedings as spoken, and that there should be a satisfactory recording system and/or effective simultaneous translation system in place. This was refused on the grounds that the Circuit Criminal Court now had a "Lanier system"[113] available, satisfying this requirement.

The argument for requiring simultaneous translation was that the conventional system used by Irish courts was disruptive to the flow of proceedings, thus contravening his rights; this system is referred to here as sequential translation (also known as consecutive interpreting), where a question is "asked and translated either in its entirety or in several separate stages and likewise the answer to that question". The system of translation had been discussed in *MacCarthaigh v. Ireland*,[114] in which Schulman had been cited as saying that "non English speaking defendants are not judged on their own words. The words attributed to the defendant are those of the interpreter. No matter how accurate the interpretation is, the words are not the defendants, nor is the style, syntax or the emotion ... Perfect interpretations do not exist as no interpretation will convey precisely the same meaning as the original testimony".[115] He goes on to note that although juries should not consider the words and emotions of the interpreter as being exactly those of the defendant, typically they do, and based on the fact that the smallest nuance of language or emotion can influence determination of guilt or innocence, it cannot be fair for the defendant to be judged in this way. Hamilton J. considered this "true enough", but said there was no better solution available. The Applicant argued that simultaneous interpreting had not been considered, but that it was a better alternative.

Finnegan J. noted that while time could be saved by using simultaneous translation, this was not the primary concern, and it involved certain defects: an inevitable delay between witness

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[113] A digital audio recording system that was used first in October 2008 in the Circuit and Central Criminal Courts and the High Court Family Law Court.

[114] [1999] 1 I.R. 200.

[115] Shulman, M. B., "No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants" (1993) 46 *Vanderbilt Law Review*.

speaking and the translation, possibly causing jury or judge to associate facial or bodily expression with the evidence being translated rather than the evidence being given; the method precludes revising what has been said; and accuracy would require that relevant papers and possibly skeleton arguments be given to the interpreter in advance, inappropriate in a criminal trial where a defendant is entitled to reserve his position. In considering other international research, he finds the emphasis has largely been on accuracy and interpreter training over method; he was not satisfied that the interests of justice could be better served with simultaneous translation, and refused the application.

On 6 March 2008 the case proceeded to the Supreme Court making national headlines for being the first Supreme Court case to use simultaneous interpreting in Ireland. The applicant was granted leave to re-apply to the Circuit Criminal Court for simultaneous translation at his trial, considering that Section 8 of the Official Languages Act, 2003 (the right to use Irish in court proceedings) had come into force.[116]

While again primarily concerned with the Irish language, the issues are relevant to interpreting generally; possible effects of the interpreter on court were explicitly recognised, the importance of training interpreters was highlighted, and the merits and disadvantages of modes of interpreting were discussed. It is also interesting to note that time is considered unimportant in view of the fact that delays caused by interpreting are commonly highlighted in the literature as a cause for complaint.

### *D. Summary of findings*

Within the asylum cases, there was an acceptance of telephone interpreting at police interviews, awareness that interpreting is not always completely reliable, and recognition that some omissions can lead to breach of fair procedure while others may not. It was highlighted that the person for whom the translation is done is not necessarily in a position to assess the

[116] See Carolan, "Irish translation sought in criminal trial", *Irish Times*, 7 March 2008.

quality of that translation, and the issue of interpreter bias was raised, though not dealt with. There was scepticism and condemnation of claiming the right to an interpreter when not needed, and awareness of the possibilities for delay caused by language difficulties, interpreting and locating interpreters. It was found that fairness of procedure in asylum cases did not require verbatim records or recording of procedure.

In criminal trials involving the Irish language, the Court found an English-only transcript of proceedings unconstitutional, and while the High Court found sequential translation adequate to serve the needs of justice, the Supreme Court ruled in favour of simultaneous translation. In addressing interpreter bias, emphasis was placed on the defendant's demeanor in relation to the interpreter, and on the interpreter's demeanor; professionalism seemed to be linked to acting in a detached way, with the implication that should the interpreter intimidate the defendant or act from "improper motive", bias may be found. It was stated that any situation involving an interpreter would involve omissions in translation, and it was found that language difficulties were adequately acknowledged where the jury was aware of the difficulties, evidence was given through an interpreter, and prosecution made allowances for, and referred several times to, the need for interpretation. A non-professional interpreter with self-confessed limited language skills in the relevant field was held to be competent in a life-threatening medical situation, and it was stated that communication is not solely linguistic, such that difficulties can arise even with a professional interpreter. ECHR case-law on interpreting was referenced, and there was implicit acceptance that when a person cannot understand or speak the language used in court, that person is entitled to the free assistance of an interpreter.

It may be worth including a very brief note on interpreting in international courts here, if only to highlight the fact that due to their very nature many of these courts refer specifically to interpreting in their Statutes or rules of procedure, and that some are known for maintaining rigorous standards of interpreting: it is interesting to start with the Nuremberg Tribunal, which is sometimes credited with the origin of simultaneous interpreting. The Rome Statute of the International Criminal Court (ICC)

provides for the free assistance of a competent interpreter and the translation of necessary documents, and as per the Statute of the International Court of Justice (ICJ) the official languages are French and English, but the court may, at the request of any party, authorise the use of any language.

The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (ICTR) provides for the assistance of a free interpreter if the language used in questioning is not understood, and translators and interpreters are sworn to carry out duties faithfully, independently and impartially. The Rules of Procedure and Evidence of the International Tribunal for Yugoslavia (ICTY) provide for the free assistance of an interpreter, and the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC) state that "[i]n case of need, the Co-Prosecutors, Co-Investigating Judges and Chambers shall use interpreters. Any witness or party may also request the use of an interpreter where needed. Each interpreter shall take an oath or affirmation in accordance with his or her religion or beliefs to interpret honestly, confidentially and to the best of his or her ability. Interpreters may not be selected from among ECCC Judges, Co-Prosecutors, Judicial Police, Investigators, parties or witnesses". The Special Court for Sierra Leone has a dedicated language unit that aims to ensure "the accurate translation and interpretation of court proceedings for the benefit of the Judges, lawyers, witnesses, detainees and public".

## III. CONCLUSION

Language, law and crime are intimately interconnected, and language is an important factor in access to justice, particularly for those who do not speak the language of the court. Multiculturalism, globalisation, the international drug trade and so on means that there is an increasing reliance on court interpreting globally, and the increase in immigration to Ireland has created a shift in how the courts are run, with significant amounts being spent on legal translating and interpreting. From analysis of Irish responses to two EU studies measuring Ireland's compliance with the 2004 proposed minimum procedural rights on interpreting and translating in criminal

proceedings, a picture emerges of a new and uncertain situation, where necessity has had to be met quickly, but also, where there is a dearth of statistics, concrete information and unified awareness as to procedure, policy and practice. It is also clear that Ireland does not meet the proposed minimum standards, and that it does not rank as highly as some other EU states.

The ECHR is part of Ireland's domestic law, and although subject to the Constitution there seems to be no reason for any conflict over the right to an interpreter. The right should also be protected under the aegis of the due process of law and the principles of natural justice, but there is no statutory right to an interpreter, and regulations are *ad hoc*. Many of the cases that have dealt with interpreting/translating-related issues involve judicial review of asylum applications, and few criminal cases have made rulings of significance on relevant issues. Cases have commented on the right to the free assistance of an interpreter, the reliability of interpreting, the inevitability of omissions in translation and the consequences for fair procedure, the interpreter's professional behaviour and propriety, interpreter qualifications, and modes of interpreting.

Considering the qualitative impact of interpreting on the Irish courts system, the significant amount of money being spent on providing interpreting services, and the rich potential for error, distortion and breach of fair procedure inherent in such a service, it is understandable that Bacik finds "inexcusable" the lack of attention to the question in this jurisdiction. This brief consideration of current information on procedural aspects of legal interpreting and translation, while acknowledging the limitations of available resources, has failed to identify a coherent and consistent approach to, and understanding of, the issues.