

**INTEPRETERS, TRANSLATORS AND LEGAL PRACTITIONERS:
A PERSPECTIVE OF WORKING TOGETHER FOR REFUGEE AND
ASYLUM-SEEKING CLIENTS IN AUSTRALIA**

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Abstract: At this moment in the twenty-first century, displaced human beings are increasingly seeking refuge in safe-haven foreign countries. For lawyers assisting refugee clients, communication is a fundamental issue. Frequently the lawyer and refugee client do not share a common verbal language. Consequently, lawyers rely heavily upon the specific expertise of interpreters and translators to ascertain essential information from the client. Administrative decisions by government bodies and courts in Australia demonstrate that a team approach by lawyers, interpreters and translators is required for the optimum preparation of a refugee client's case.

Keywords: Refugee legal clients; interpreters; translators; ethics.

1. Introduction

We are legal practitioners as well as teachers and researchers in law at Australian universities. Our practice in the law includes refugee clients.

This paper presents a brief overview of some of the legislative, procedural and policy issues relevant to lawyers assisting refugee clients in Australia. The importance of interpreters and translators in this area of legal practice is considered. Particular examples of interpreting and translating in refugee cases are discussed.

The paper concludes with the suggestion that interpreting and translating in the legal context of refugee and asylum-seeking clients is best undertaken as a team. To achieve the most advantageous outcome for the client, translators, interpreters, clerical assistants and legal practitioners need to combine their talents and not work in isolation from each other.

2. Interpreters and translators in refugee law

The official language of Australia is English. Applicants for refugee status and asylum-seekers in Australia are rarely fluent in speaking and writing in English¹. Consequently interpreters and translators are required for the carriage of the case. The legal practitioner needs instructions from the client regarding matters such as how, when and why the client arrived in Australia. This is where the interpreter's expertise assists.

¹ In fact one of the many services provided to those who meet refugee and asylum status in Australia is specialist tuition in the English language.

Also, sometimes the client has documents in a language other than English and this is where the translator's expertise assists.

In legal situations, the interpreter and translator are bound by the duty of confidentiality to the client in much the same way as that of the legal practitioner's duty of confidentiality to the client.

The ethical duty of confidentiality remains even when the case is closed. Client confidentiality in refugee and asylum-seeker cases has an added dimension because of the potential political ramifications upon the client's family, friends and associates.

Consequently in writing about examples from cases in this paper we do not disclose any information regarding the specific identity of clients. The cases are identified by number and sometimes alphabetical letter, as they appear on the public record. Whenever an alphabetical letter is used to identify a particular case, it is entirely fictitious and bears no relation to the client's name.

3. Organizations assisting refugees in Australia

Various organizations in Australia - some provided by the state and others provided by private and volunteer groups - offer assistance to refugees. For example, *Austcare* is an Australian agency with the aim of improving the safety, dignity and integrity of civilians facing threats to their security and freedom². The Catholic Church has a long involvement of providing assistance to refugees and migrants in Australia and the *Australian Catholic Migrant and Refugee Office* is one of the outward signs of this outreach³.

Victoria Legal Aid is a state government organization with a specific refugee outreach conducted in Dandenong, Victoria. It assists, in particular, refugees from Africa, Afghanistan, Jamaica and Pakistan with traffic offences and repeat traffic offences under the domestic law of the state of Victoria⁴.

These are just three of the many organizations in Australia which provide assistance to refugees.

4. Australia: Island, Continent and Commonwealth

Australia is an island. There is a romantic ambience attaching to the notion of an escape to an island. The novelist Robert Louis Stevenson projected it in *Treasure Island*. Australia's vast coastline lures many people into attempting to land on the beach and seek residency. However the compelling humanitarian issues of those who simply arrive on the beach must be tempered with Australia's necessity to retain border control.

² Austcare website, 'Protection,' www.austcare.org.au, visited 18 March 2009

³ Australian Catholic Migrant and Refugee Office website, www.acmro.catholic.org.au/policies/ visited 18 March 2009

⁴ Victoria Legal Aid, 'Victoria Legal Aid reaching out to new refugees', www.legalaid.vic.gov.au website, visited 18 March 2009

Consequently, Australia has migration and customs policy, legislation and procedures which must be followed by all who seek to enter and leave.

Being a nation that is comprised of a huge land mass surrounded by water, Australia has what is known as a ‘migration zone’. The ‘migration zone’ defines the area where a non-citizen must hold a visa to legally enter and remain in Australia⁵.

All persons entering the ‘migration zone’, including Australian citizens, must present themselves for immigration clearance⁶. Thus, the ‘migration zone’ can be seen as the nation’s boundary.

Australia’s ‘migration zone’ consists of the land area of all the states and territories together with the waters of the proclaimed ports within those states and territories⁷. The land area begins at the mean low water mark⁸. Importantly, the territorial sea off the coast of the Australian states and territories is not included in the ‘migration zone.’

5. Definitions of refugees and asylum-seekers in Australia

Under the *United Nations Convention Relating to the Status of Refugees* 1951(*Refugee Convention*) and the *Protocol on the Status of Refugees* 1967(*Protocol*), to qualify as a refugee, a person must fulfil three criteria. These are that the person:

1. must be outside his or her country of nationality or habitual residence, and
2. hold well-founded fears of persecution on grounds of race, religion, nationality, relationship with a social group or political opinion, and
3. is unable to seek or fearful to seek protection in that country or fearful of returning to that country⁹.

An asylum-seeker is defined as a person seeking official recognition under the *Refugee Convention*¹⁰.

Australia ratified the *Refugee Convention* on 22 January 1954 and the *Protocol* on 13 December 1973¹¹.

⁵Australian Lawyers for Human Rights Law Kit, www.alhr.asu.au/refugeekit/downloads/chapter_3.doc website visited 18 March 2009

⁶ Australian Lawyers for Human Rights Law Kit, www.alhr.asu.au/refugeekit/downloads/chapter_3.doc website visited 16 March 2009

⁷ Australian Lawyers for Human Rights Law Kit, www.alhr.asu.au/refugeekit/downloads/chapter_3.doc website visited 18 March 2009

⁸ Australian Lawyers for Human Rights Law Kit, www.alhr.asu.au/refugeekit/downloads/chapter_3.doc website visited 17 March 2009

⁹ Australian Lawyers for Human Rights Law Kit, ‘Chapter 1’ @ 4 – 5, on www.alhr.asn.au> visited 15 March 2009

¹⁰ Australian Lawyers for Human Rights Law Kit, ‘Chapter 1’ @ 5, on www.alhr.asn.au> visited 16 March 2009

¹¹ Australian Lawyers for Human Rights Law Kit, ‘Chapter 2’ @ 9, on www.alhr.asn.au> visited 12 March 2009

Australia's interpretation of its obligations under these international instruments can be seen in the domestic legislation subsequently enacted, in particular, the *Migration Act* 1958 (Cth)¹².

6. Refugees and asylum-seekers entering Australia

There are two main ways refugees and asylum-seekers enter Australia: 'off-shore' and 'onshore'. People are considered differently according to their method of arrival in Australia and their method of application for protection¹³.

The 'off-shore' entry occurs when refugees seek to enter while outside Australia whereas in 'onshore' entry the refugees are already in Australia when they seek to be given refugee status.

Refugees who enter Australia through the traditional 'offshore program' are entitled to a visa which gives them permanent residence¹⁴. With this permanent residence status comes all the benefits entitled as a citizen in Australia. However refugees who enter Australia under the 'onshore program' receive only temporary residence with limited access and entitlements and services available to Australian citizens¹⁵. The 'onshore program' is also known as the 'Pacific Solution' and was announced by the Government of Australia on 1 September 2001 following the '*MV Tampa*' incident¹⁶.

7. A case study: the *MV Tampa* Incident

The *MV Tampa* incident is an example of the humanitarian versus administrative dilemma that confronts a nation when people seek asylum by simply arriving onshore.

The *MV Tampa* was a Norwegian vessel sailing in international waters in August 2001. An Australian Coastguard patrol vessel was also patrolling Australia's coastline at the same time. The Australian Coastguard observed 433 people who appeared to be drowning on a sinking fishing boat near Christmas Island on 26 August 2001.

The Commonwealth of Australia is composed of the states and territories: New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, Northern Territory and Australian Capital Territory, together with the external territories of Christmas Island, Cocos (Keeling) Islands, Ashmore and Coral Sea Islands, together with the territorial sea of Australia within 12 nautical miles off the coastline¹⁷. So

¹² Australian Lawyers for Human Rights Law Kit, 'Chapter 2' @ 10, on www.alhr.asn.au visited 15 March 2009

¹³ Australian Lawyers for Human Rights Law Kit www.alhr.asu.au/refugeekit/downloads/chapter_3.doc, Chapter 3, website visited 10 March 2009

¹⁴ Australian Lawyers for Human Rights Law Kit, www.alhr.asu.au/refugeekit/downloads/chapter_3.doc website visited 10 March 2009

¹⁵ Australian Lawyers for Human Rights Law Kit, www.alhr.asu.au/refugeekit/downloads/chapter_3.doc website visited 12 March 2009

¹⁶ Australian Lawyers for Human Rights Law Kit, www.alhr.asu.au/refugeekit/downloads/chapter_3.doc website visited 12 March 2009

Christmas Island, where the 433 people were drowning as their boat sank, was part of Australian territory.

The Law of the Sea has steadily evolved since humans began sailing on the sea. It is definite about the action to be taken when people are in distress on the sea: all attempts must be made to save them. Consequently, the Australian Coastguard directed the *MV Tampa* to rescue these people from drowning.

In the course of time it became apparent that the 433 people were actually asylum-seekers. They had contracted with a people-smuggling syndicate to transport them to Australia by ship. The ship that the people-smugglers had used for the trip was not seaworthy and it was over-laden. Consequently, it sank.

The *MV Tampa* rescued the 433 asylum-seekers in response to the Australian coast guards emergency message.

Subsequently, Australian authorities were confronted with the problem of determining what to do with the 433 illegal immigrants.

7.1. The impact of the MV Tampa incident

The *MV Tampa* incident was addressed by what is termed the ‘Pacific Solution.’ It was an agreement between Australia, Nauru and New Zealand. These nations, being islands, were most likely to experience calls for assistance by asylum-seekers drifting in by boat. Under the ‘Pacific Solution’ Australia, Nauru and New Zealand agreed to accept asylum-seekers and decide if they were entitled to protection under the *Refugee Convention*¹⁸. Thus each of the three countries shouldered responsibility to make a determination.

The ‘Pacific Solution’ saw some physical areas - i.e. the Christmas Island, Cocos (Keeling) Islands, Ashmore and Coral Sea Islands - being removed from the Australian Migration Zone where people could seek asylum in Australia¹⁹. These removed physical areas were said to be ‘excised’ from the Australian Migration Zone²⁰. Thus these land falls which were vulnerable to ocean currents ceased to be of use to boat people drifting in to shore to seek asylum.

Administrative considerations over-rode humanitarian concerns in the ‘Pacific Solution’ in that this instrument provided powers of detention and the removal of unauthorised arrivals from the excised areas to other countries²¹. The ‘Pacific Solution’ prohibited

¹⁷Australian Lawyers for Human Rights Law Kit, www.alhr.asu.au/refugeekit/downloads/chapter_3.doc website visited 18 March 2009

¹⁸ Australian Lawyers for Human Rights Law Kit, www.alhr.asu.au/refugeekit/downloads/chapter_3.doc website visited 18 March 2009

¹⁹ Australian Lawyers for Human Rights Law Kit, www.alhr.asu.au/refugeekit/downloads/chapter_3.doc website visited 17 March 2009

²⁰ Australian Lawyers for Human Rights Law Kit, www.alhr.asu.au/refugeekit/downloads/chapter_3.doc website visited 17 March 2009

²¹ Australian Lawyers for Human Rights Law Kit, www.alhr.asu.au/refugeekit/downloads/chapter_3.doc website visited 15 March 2009

asylum- seekers who arrived in excised areas from applying for any visa except with the discretion of the Minister. Further, even if the Minister does exercise discretion in favour of such an asylum-seeker, the most that can be granted is a temporary protection visa of three years,²² requiring re-application every three years and no automatic right to return if the person leaves Australia²³.

8. Administration of applications from asylum-seekers

Australian government administrators are people who are specially trained in administration: specialist government administrators administer the applications of asylum-seekers and refugees. Because administrators are human they sometimes make errors; consequently, there is provision for access to the courts of law and judicial review of decisions which are wrong in law, made unfairly and do not take appropriate factors into account²⁴.

9. Decisions from the High Court of Australia

Case law reveals that many administrative decisions relating to refugees have been challenged in Australian courts. Some administrative decisions which were unfavourable to applicants have been successfully overturned in court. The principles which result from these court decisions become common law and contribute to the rules which are required to be followed by administrators.

In *Plaintiff S157 of 2002 v Commonwealth of Australia* (2003)²⁵ the High Court of Australia held that errors which could be judicially reviewed included those where the decision-maker exceeded his or her jurisdiction or failed to exercise jurisdiction²⁶. In *Craig v State of South Australia* [1994-1995]²⁷ the High Court of Australia identified jurisdictional error as including the decision-maker identifying a wrong issue, asking the wrong questions, ignoring relevant materials, making an erroneous finding and reaching a mistaken conclusion²⁸.

The decisions from the High Court of Australia reveal that ‘persecution’ is defined broadly under the *Refugee Convention*. For example, in the case of *Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another* [1997]²⁹ His Honour Justice McHugh stated that persecution may take an infinite variety of forms,

²²Australian Lawyers for Human Rights Law Kit, www.alhr.asu.au/refugeekit/downloads/chapter_3.doc website visited 15 March 2009

²³ *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*

²⁴ Australian Lawyers for Human Rights Law Kit, ‘Chapter 3’ @ 20, on www.alhr.asn.au> visited 18 March 2009

²⁵ 195 ALR 24

²⁶ Australian Lawyers for Human Rights Law Kit, ‘Chapter 3’ @ 20, on www.alhr.asn.au> visited 18 March 2009

²⁷ 184 CLR 163

²⁸ Australian Lawyers for Human Rights Law Kit, ‘Chapter 3’ @ 22, on www.alhr.asn.au> visited 15 March 2009

²⁹ 190 CLR 225

ranging from death and torture to the deprivation of opportunities to compete on equal terms with another member of the relevant society³⁰.

10. Interpreters and translators assisting legal practitioners

The applicants for judicial review of asylum or refugee matters are usually not fluent in English, the official language of Australia. Consequently, interpreters are essential.

The Australian and state governments provide interpreters and translators on a needs basis. The needs are determined by the urgency of the case, with criminal and family matters being of high priority. Consequently, it is frequently difficult to obtain the services of the government interpreters for urgent refugee matters due to calls on their services outnumbering their availability.

Consequently, the legal practitioner who takes refugee and asylum-seeker cases on a *pro bono* basis is grateful for whatever assistance can be provided from interpreters who are willing to donate their skills without charge. Some government interpreters are NAATI ‘accredited,’ ensuring uniformity and competency, while some government interpreters are designated ‘competent³¹’. Similarly, volunteer interpreters may or may not have NAATI accreditation. Nevertheless, these volunteers are the kind-hearted, altruistic people who subject themselves to all manner of personal inconvenience to give non-paid assistance to other human beings they perceive to be in need. The legal practitioner, confronted with a refugee or asylum-seeking client lacking skills in the English language, is grateful for the assistance of volunteer interpreters and translators.

11. A case study of interpreting and translation

In the case discussed herewith, the onshore refugee was a married man, with a wife and child in China. The client had entered Australia legally on a three-month visa.

He overstayed his visa because of his fear of returning to China. He sought protection in Australia because he was a practitioner of Falon Gong. In Australia the client freely practised Falon Gong, however in China this is considered a criminal activity and practitioners are given jail sentences.

While in Australia, the client was employed by various Australian employers for his particular trade. He had been sending the money he earned in Australia home to China to support his wife and child.

He was subsequently arrested by officers of the Australian government’s Department of Immigration and Multicultural Affairs (DIMA) at the place of employment, taken to a Detention Centre and interviewed.

³⁰ Noted in Australian Lawyers for Human Rights Law Kit, ‘Chapter 3, on www.alhr.asn.au> visited 18 March 2009

³¹ The Interpreter Statement provides for the interpreter to indicate whether s/he is either an ‘accredited’ interpreter of a fully ‘competent interpreter.’

The client had very little skill in English language. He did not have any friends or relatives in Australia. Consequently, during the initial interview with the officers of DIMA at the Detention Centre, the interpreter was the client's only neutral human contact. However, the interpreter was merely a conduit through which the officers obtained information from the client: the interpreter, even though speaking the client's language, was not the client's ally.

At the conclusion of the interview, the Report of the interview was read to the client in his own language by the interviewer. The written transcript of the interview was signed by the DIMA officer, the interpreter and the client. The interpreter was required to certify whether or not the client had appeared to understand the questions put to him by the interpreter and the contents of the Report³². The client thus relied on the integrity of the interpreter to be honest and a competent interpreter.

DIMA examined the contents of the translated interview and sought further explanation of the client's response to the question:

‘Can you return to your country?’

Answered by the client as:

‘Yes I want to go, I miss my family.’

The answer provided by the client does not appear to match the question asked by the DIMA officer. It would seem that the client lacked understanding about the distinction between whether he wanted to return to his country and whether he could safely return to his country.

This is, surely, an example of an interpreter's responsibility to clarify the client's understanding of the question being asked. In the result, for this particular client, because of deviation in meaning between the question asked and the question answered, DIMA drew unfavourable inferences about the client.

Legal practitioners subsequently came to the aid of the client and an application was made on his behalf for a protection visa. This required the completion of a Pro Forma application form.

The client gave a statement in his own language and that statement was translated into English by a translator, who declared that s/he was proficient in both English and the language of the client, and had faithfully translated the contents of the client's written statement. In the statement the client stated that if he returned to China he feared he would be mistreated including being beaten, denied food and have his house and belongings destroyed, as well as ultimately being imprisoned.

The client's statement was apparently not received by DIMA as an attachment to the Pro Forma application. DIMA concluded that because the client did not mention his alleged leadership role in Falon Gong in the Pro Forma application for the protection visa, he had not attracted the adverse attention of the Chinese authorities.

³² Interpreter Statement, Record of Interview with Suspected Unlawful Non-citizen, *Migration Act 1958* (Cth)

In this there is a salient lesson for all - interpreters, translators, administrative assistants and legal practitioners - to ensure that all relevant statements from clients are securely attached to official Forms required by government authorities.

The client had in his possession a Summons to appear before a specific Judge at a particular court in China. The date and time for the required appearance were given. The client was to answer a charge of participating in a Falon Gong activity in China at a specific place. The document had the Stamp of the particular court.

It is common knowledge that there are variations in the formats of the court documents used in different provinces in China.

This particular court document was translated into English by a professional translation agency in Australia. The translator noted with an asterisk on the translation that *some of the original text was illegible. The document itself was examined by forensic personnel for DIMA. The forensic examination concluded that the document did not reveal any adverse evidence to the client.

DIMA refused to accept that the Summons was evidence that the client had attracted the adverse attention of the Chinese authorities because it did not refer to the law that the client had allegedly transgressed.

This surely sends a message to translators to provide full explanation of why and how much of an original text is illegible. It could well have been that the section of the Summons which the translator determined was illegible referred to the specific law which the client had allegedly transgressed.

The translation of legal documents needs to begin from the premise that legal documents are different from other literary texts in format, content and language. Consequently, in cases when a translator is uncertain of a legal text it is highly advisable to consult with legal practitioners on the side of the client.

In the specific case under consideration, the client's application for a Protection Visa was refused. Subsequently, the case went through all the available legal appeals and remarkably was granted Special Leave to Appeal to the High Court of Australia. However, the client was never granted protection by Australia.

12. Conclusion

This particular case study of interpreting and translating in a refugee case is indeed a sad case. It serves as a salient reminder of the importance of striving to 'get it right the first time.' The question the interpreter puts to the client on behalf of the interviewer must be an accurate interpretation of the question being asked. It is essential that the interpreter ensures that the client understands the question and answers that question which is asked.

Similarly, it is essential that the translator draws appropriate attention to any section of a document that appears to be illegible. Surely the translator has, at the very least, an obligation to provide a written reason for a section of a document appearing to be illegible.

Perhaps there is a case for some translators being given advanced and specialist instruction in methods of forensic retrieval of soiled or aged documents.