

# TRANSLATION, INTERPRETING & LEGAL RIGHTS WITHIN THE EUROPEAN UNION

## The Law & Reality

People travel. Further and further afield. Whether seeking asylum, travelling for business, politics or pleasure, people are crossing national borders in ever growing numbers. This is the reality in Europe today.

The new open border policy operating across countries belonging to the European Union makes travel increasingly possible and attractive. Unlike travel in most parts of the world, it is possible to cross at least 3 national borders in one day. That is, 3 languages, 3 different cultures, and 3 different legal systems. Thus language, and communication between peoples of a different culture, is of crucial importance.

Communication problems in the justice systems of all European Union member states are what I want to focus on today. Why? Because my work puts me in contact with citizens who have been arrested in a foreign country, often through no fault of their own, and who do not understand the system, simply because they are foreign, and largely because they do not speak the language of those in authority. I look at this field of interpreting and translation in terms of discrimination against a citizen.

I work for Fair Trials Abroad (FTA), a non-governmental organisation concerned with the legal rights of all citizens of the European Union when they become caught up in a justice system outside their own country. FTA advises, and assists people to assert their legal rights to due administration of justice under international law at all stages from arrest and investigation through to conclusion of the trial process, and to help create the circumstances where fair trial principles are upheld. Thus the work is carried out in individual casework, and by working at a political or policy level. We often use patterns of discrimination and injustice thrown up by casework as a basis for further research.

One of FTA's surveys, called the European Legal Interpreter Project (ELIP), was undertaken against a background of disquieting cases in which it had been shown that poor, or no, interpreting and translation facilities had been provided during justice proceedings, leading to miscarriages of justice and unnecessary hardship.

e.g.

An English woman was arrested in Greece together with her partner, and accused of carrying drugs. The man she was travelling with was found guilty on the same charge and sentenced to 5 years imprisonment. The woman spent 10 months in prison prior to her trial, although there was no evidence against her. All that was known about her involvement was that the man had said that she was his partner. The interpreter (an un-trained volunteer), and therefore the authorities, understood him to mean his **business partner**. In fact he meant his **common law wife**, or, **lover**. It was only then discovered that she had no idea of what the man had been

up to and had never had any personal or working involvement with drugs. She was released immediately.

The Grotius Programme of the European Commission's Task Force of Justice and Home Affairs fully supported the survey. Five countries were agreed upon both by funders and participants, representing as they did, a broad spectrum of legal practice, legislation and multi-lingual criminal investigations<sup>1</sup>. The objective of the survey was to identify the obstacles to a coherent provision of translation and interpreting services in the legal systems of EU member states in accordance with current national and international law. It was acknowledged at the time that these obstacles could be of a financial, cultural or sociological nature. The aim was that such knowledge and information would enable essential development to be taken forward effectively and in mutual co-operation.

This was an ambitious, cross-cultural, and highly political project. Although it reached only a minute sample of the European population of interpreters and legal professionals, this exploratory survey served to provide a greater understanding of the needs and requirements of multi-lingual justice.

Interestingly, at about the same time the Council of Europe undertook a similar survey by circulating a questionnaire to all authorities on the methods of placing an interpreter at the disposal of those involved in the legal process. The purpose of the Council's questionnaire was *"to seek information about the laws practices and procedures in place in Member States for meeting their obligations under Articles 5 & 6 of the European Convention on Human Rights in order to establish whether there was a need for common action at EU level"*. The final report was circulated within the multidisciplinary Group on Organised Crime.<sup>2</sup>

It is interesting to note how different are the responses contained in both surveys. Some of the responses in the ELIP survey were thought provoking.

One interpreter told of how he had been threatened by a judge in a particular case. The problem? The interpreter did not speak the language required of him to a professional standard and therefore turned down the job. The threat? A prison sentence for "contempt of court"!

A judge spoke of the difficulties of ensuring that the interpreter was doing a good job, as neither the judge nor the interpreter had received any training on working together across language and culture.

A senior lawyer and administrator of a national law association was unaware that the issue even existed and if so, how it was dealt with.

And, needless to say, definitions of the role of the interpreter varied enormously. Although this is not part of the survey, I would like to pass on to you one of the clearest descriptions of the role of the interpreter that I have come across over the years. It was something like this:

*"The work of the interpreter has definite, factual consequences. An innocent person may be found Guilty. Or vice versa. Years may be added to, or subtracted from, the period that a person must spend shut away in prison. But, without discussing theory, there is one principle that is paramount: Accuracy.*

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<sup>1</sup> These countries were Austria, Eire, France, Spain and Sweden. England and Wales had been the subject of an earlier investigate project commissioned by The Nuffield Foundation.

<sup>2</sup> Doc.5451/99, February 1999

*The interpreted version of what is said by a witness, a suspect, an interviewer or anybody else in the legal context must be **accurate**.....Elegance is of no importance. If someone starts to speak, breaks in mid-sentence, continues in a way that makes little sense, uses bad grammar or offensive language, or makes a slip of the tongue, the interpreter must reproduce this as accurately as possible. Those who are listening to evidence need not only to understand the information that is being conveyed, but also to evaluate its credibility”<sup>3</sup>*

However, accuracy is not always easy to achieve. The difficulties that an interpreter may face in his or her attempt to provide an accurate version of what is said was neatly put by a bi-lingual French-English lawyer in France.

*“The problem with my client as with so many other people who come before our courts is precisely that her own written and spoken English is of a very poor standard - I always have great sympathy for the poor interpreter when such persons come before the court!”*

The findings of the ELIP survey were submitted to the European Commission. In March 2000, the findings were discussed at a seminar held at the European Parliament in Brussels amongst a small group of language and legal professionals together with politicians and authorities from the European institutions. Antonio Vitorino, the European Commissioner for Justice & Home Affairs stated in his keynote address that the Commission was sensitive to the need for good communication within the legal systems of Europe. Regarding access to justice, one of the 3 main areas being addressed by the Commission, Mr Vitorino stated: *“I don’t need to repeat that the quality of interpretation is of crucial importance.”*

At the seminar various matters were agreed: There is a pressing need for greater dialogue between legal professionals and language professionals; More interactive training is required between the professions; an internationally recognised list of essential criteria to facilitate justice across language and culture should be drawn up; but perhaps most interesting of all was the call for the involvement of politicians and policy makers.

It was considered essential that politicians and policy makers become involved in the promotion of a professional, inter-linguistic provision of justice. Without their power and support it would be hard to achieve change.

So what is happening in the European Union?

To some extent there is already a foundation of supporting documentation and precedent that provides guidelines for the various administrations of justice across the European Union. These include the European Convention on Human Rights<sup>4</sup>, and the new, if somewhat unwieldy Charter of Fundamental Freedoms. Added to these there are also wider reaching documents such as the International Covenant on Civil and Political Rights<sup>5</sup> and the United Nations’ Body of Principles for the Protection of all Persons under any Form of Detention<sup>6</sup> to which all countries within the EU are signatories and thus morally bound, if not legally so. Perhaps of greatest

<sup>3</sup> D.Williamson in *Lingua Legis* No.3,Nov.1996,pp 28-30

<sup>4</sup> Article 5 concerns the right to personal liberty; para (2) sets out the requirements for interpreting and translation at the point of arrest; Article 6 concerns the right to a fair trial; para 3 (a)&(e) sets out the requirements for interpreting and translation although it does not specify at what point in the procedure. Article 14 concerns discrimination, including language difficulties.

<sup>5</sup> 1966

<sup>6</sup> UN General Assembly Resolution, December 1988-43/173

importance is the precedent set by the European Court of Human Rights; some of the most significant cases are appended. These cases set out terms of reference for the provision of interpreting and translation. If you wish to have some leads on that I can give you a sheet with some details later on.

Another area of potential support for a more professional and therefore effective service provision is the proposed legal area which would bring all justice systems into a harmonised working system. The idea of a European legal area arose as a result of the Treaty of Amsterdam when it was agreed that Europe should be an area of “Freedom Security and Justice”. Endorsed at the Tampere European Council meeting of October 1999 it was further agreed that, *inter alia*, mutual recognition of final decisions should become the cornerstone of judicial cooperation in civil and criminal matters within the Union. It was recognised that “*common minimum standards may be necessary in order to facilitate the implementation of the principle*”. It was also understood that there would need to be mutual confidence in the justice systems of other member states. This, I would argue, must by necessity, include absolute confidence in the service provision of interpreters and translations in each member state. However, the lead-time for the adoption of all measures set out at the Tampere meeting was extremely short.

In order to create a functioning area of Freedom, Security and Justice, the European Commission was asked to adopt, by December 2000, a programme of measures for implementation and to devise a Scoreboard to monitor progress and achievement in meeting deadlines for the creation of this area of Freedom, Security and Justice.

There are three main areas for consideration<sup>7</sup>:

1. Better Access to Justice in Europe, defined as: (i) to improve communication and to establish an easily accessible information system with user guides on judicial co-operation within the Union (ii) to establish basic provision of legal aid in civil law cases (iii) to set minimum standards for multilingual forms or documents which would then become accepted mutually as valid documents throughout the EU and (iv) to draw up minimum standards for the protection of victims of crime. There is nothing there regarding the protection of the citizen charged with a crime.
2. Mutual Recognition of Judicial Decisions: (i) a principle, applicable to judgements and to other decisions of judicial authorities which would be the cornerstone of judicial co-operation in both civil and criminal matters within the EU (ii) the reduction of intermediate measures in civil law procedures (iii) the abolishment of current extradition procedures with a move to fast track extradition without prejudice to a fair trial (iv) and European Enforcement Orders with common minimum standards of procedural law.
3. Greater Convergence in Civil Law: the preparation of new procedural legislation to enhance co-operation and access to law e.g. by improving procedures such as taking of evidence, orders for money payment etc.

If we stop to reflect that the legal implications of deviations from the original testimony of the accused or the witnesses are invariably accepted as a legally valid equivalent of the original statement, and if we remember that in most jurisdictions, there is no record of the original statement as taped recordings are not made - then, in the light of what protection is given at present in any of the jurisdictions of Europe, we begin to realise that a citizen is very unlikely to get a fair trial if he or

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<sup>7</sup> Presidency Conclusions, Tampere October 1999 SN 200/99

she does not speak the language and what is more, that current changes in policy are doing little to improve the situation.

We continue to be concerned by the lack of protection for citizens who do not understand, and who cannot be understood. It is very reassuring to hear of the various initiatives set up in EU member states to improve the standards of service provision. One in particular is the Grotius funded project set up collaboratively between four European member states in connection with agreed standards of legal interpreting and translation with the aim of establishing EU equivalencies on the essential elements of a professional service.<sup>8</sup> Nevertheless, neither the European institutions, nor the majority of their members, that is the governments of EU member states, are putting in the same kind of energy, that is, matching the drive for improved prosecution of crime with an equally improved protection of the citizen involved in the administration of justice.

No-one, it seems, is willing to ask the basic questions: at what points between arrest and sentence does an accused person have access to an interpreter and translated documentation? Does the non-native speaker have the same access to hear and read everything that the native speaker has, or does an authority decide how much must be translated and how much left out. Whose responsibility is it to ascertain quality? professionalism? aptitude? It is interesting to note that none of these questions concerning effectiveness of interpreting and translation apply to conference interpreters and their commercial or political beneficiaries.

Thus the problem that many EU citizens are facing, and one which has been addressed at this conference in various ways, is that all the rules of “best practice” have little effect in the absence of structured political and financial support. From our experience it would seem that the abuse of basic human rights committed by the authorities on a routine basis - that is, little or no provision of competent interpreting and translation of documents - is due largely to a lack of awareness of what is involved when a non-native speaker is involved and, very frequently, the absence of a decent budget to cover the costs of providing a professional service such as is suggested within the terms of all fair trials legislation.

Our concern is twofold: the potential for a personal miscarriage of justice befalling an individual as well as the damage done to justice as a whole if judgements are made at a flawed trial based on poorly translated or interpreted material. Such flawed judgements may well become binding right across Europe. So we continue to keep interpreting and translation at the top of the agenda, continually campaigning for greater political, professional and financial input<sup>9</sup>.

In the meantime, I will raise the same question that I have raised many times before, one which was recently endorsed by Erik Hertog in a paper published by the University of Bologna Press. The situation is this. If conference interpreters are generally well paid it is because industry and commerce puts great value on good, accurate communication. Similarly politicians insist that their views be translated effectively and accurately, and are therefore prepared to pay for this. An illustration of this is the public statement on the matter issued by the European Parliament:

*The European Parliament is unique among international organizations in that it has to provide a full multilingual environment. Since any citizen of the Union has*

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<sup>8</sup> Grotius Project 98/GR/131

<sup>9</sup> see also “Interpreting and Translation: Meeting the Legal Rights of Non-Native Citizens” a *Traduction Juridique*, février 2000, ASTTI, Bern et ETI, Genève; “Interpreting in the Criminal Justice Systems of Europe” *Language is a Human Right* November 1998, Graz; “Communication Within the Legal Process” [98/GR/003](#) and [99/GR/012](#) by the author

*the right to be democratically elected as a member of the European Parliament, fluency in a widely used language cannot be expected of MEPs as would be the case for diplomats or EU officials. [Therefore] The right of every Member to follow debates and express himself/herself in their own mother language is explicitly provided for in the Parliament's Rules of Procedure.*

Thus the question arises: why cannot the same consideration be given to all citizens who do not understand the language of the courts and the authorities involved in the judicial examination of their case? Justice within a European Legal Area must be of the highest standards as envisaged at the Tampere summit in October 1999. It must be a justice which fully safeguards the fundamental freedoms of all citizens equally within the European Union.

### **Case Precedent: some significant cases**

The European Court of Human Rights is unequivocal about the right to understand and to be understood throughout justice proceedings.

As early as 1978 they stated:

*“an accused who cannot understand the language used in court has the right to the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial”*

**Luedicke, Belkacem and Koç, Vol.29, Series A, 1978**

In this same case, the Court declared that the right to an interpreter free of charge.

In 1989 the European Commission of Human Rights was even more specific:

*“The Commission considers that statements of witnesses at the trial have to be interpreted for an accused who does not understand the language used in court in order to enable him effectively to exercise his right under Art 6#3(d). The same holds true for the interpretation of questions to witnesses insofar as it is necessary in order to enable the applicant to follow the proceedings and to exercise his rights of defence effectively.”*

**Kamasinski 9/1988/153/207**

In an almost concurrent case they went on to say:

*“the information referred to in Article 6#3 (a) should cover both the actual facts with which the accused is charged, and their legal classification. Lastly, and Article 6 #3 (a) mentions this expressly, this information must be given in a language which the accused understands”*

**Bozicek Case Vol.157, Series B, 1989**

Relevant judgements reveal an important line of reasoning. In its Artico judgement (1980) the Court stated that :

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

The European Court of Human Rights does not insist on any one type of procedure, accepting each system in its own right, provided that the end result is compatible with Articles 5 and 6 of the Convention.

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