TRAFUT WORKSHOP – HELSINKI JUNE 2012

PRESENTATION BY THE LORD JUSTICE CLERK

Interpretation Facilities in the Scottish Courts

The growth of the problem

Until the 1960's Scotland was neither a multi-lingual nor multi-cultural society. There was an occasional need for interpreters in the courts; but it was not a major problem and was generally dealt with in an *ad hoc* way: for example, by engaging staff from the local consulates; or from language schools, university departments and commercial translation agencies.

In the last 20 years the problem has grown exponentially for three reasons. (1) the scale of immigration from the Indian sub-continent and the Eastern European accession countries; (2) the large number of asylum seekers, mainly from the sub-continent, Asia Minor and Africa; and (3) the creation of the European Arrest Warrant (EAW) and the growth of extradition proceedings.

How we have dealt with the problem

The contract

In 2009 the Scottish Court Service entered into a framework contract for spoken language interpretation services in the courts. The contract is managed by Central Government Centre of Procurement Expertise.

The contract was awarded to two separate contractors, a preferred contractor and an alternate. There are related provisions for translation and transcription services that have not been of any great significance in practice.

Monitoring

The Central Government Centre of Procurement Expertise monitors the performance of the contractor; but in practice the day-to-day monitoring is done by the court staff who have to deal with practical emergencies as they arise.

The Procurement Centre holds quarterly meetings with users at which SCS is represented by an official who acts as the liaison with the Procurement Centre and with the court itself.

Payment is made to the contractor on monthly invoices by SCS and detailed data are kept for the purpose of parliamentary questions, ministerial correspondence and freedom of information requests.

Exception reports

Whenever there appears to have been a failure by the contractor, court staff prepare an exception report on the matter which is put before the contractor and which requires a detailed response.

In the first year of the contract, there were 18 exception reports. Of these only two related to cases where the court was unable to proceed because of interpretation difficulties. In the first case the requirement was for interpretation in Cantonese but the contractor sent a Mandarin speaker. The second was a Polish case where the interpreter's lack of proficiency became obvious at an early stage.

The majority of exception reports appeared to have related to a lack of clarity as to the interpreter's qualifications and experience and to the use of interpreters who did not have the Diploma in Public Service Interpreting (DPSI).

Trends

The usage of interpreters fluctuates widely. For example, in 2010, in the months of March and May there were over 1000 assignments. In the months of January and December there were 337 and 375 respectively.

The use of contractors has relieved the court staff of the administrative burden of finding suitably qualified and proficient interpreters. That now falls to the contractor. The preferred contractor is obliged to increase the number of DPSI-accredited interpreters on a year to year basis.

Other benefits

The SCS Finance Unit has analysed the figures and concluded that the framework contract has produced major savings. In the first year of the contract it produced, in the view of the Finance Unit, a saving of over £287,000

on a total spend of over £688,000. I do not know how the figure of £287,000 was calculated.

Overview

It is difficult to identify trends because one long trial involving interpreters can skew the figures. In the 12 months to April 2012, there were just over 6,000 uses of the interpretation service, the division being, approximately, 80%: 20% between first instance and appellate criminal proceedings.

So far 29 languages have been involved. The greatest demand appears to be for Polish, especially in relation to EAWs that are resisted on grounds of the alleged non-compliance of Polish prison conditions with the European Convention on Human Rights (ECHR).

The problems

The picture that I have described demonstrates that Scotland is already compliant with much of the forthcoming Directive in a reasonable and positive way; but is not fully compliant. We do not at the moment comply with articles 5.1, 5.2 and 6, for example.

There are two main groups of problems from a judicial standpoint.

(1) Resource implications

Interpretation puts a huge strain on the resources of the court in terms both of time and staff. It can double the length of trials. By lengthening the trials it causes a considerable increase in lawyers' fees and since most criminal cases are conducted with Legal Aid, the increased cost is a public cost. There are also other public costs, including the administrative costs of the court.

The need for interpretation cannot adequately be planned for, since it cannot be predicted either in terms of time, cost or the languages required.

(2) Quality of justice

The overhanging problem is assess how effective interpretation is in practice.

At first instance there are two interpretation processes, namely the interpretation of the evidence of English speaking witnesses for the

> benefit of a foreign accused; and the interpretation of foreign language speaking witnesses for the benefit of English speaking judges, lawyers, jurors and usually also accused.

In my view, the effectiveness of interpretation depends to a great degree on the competence of the interpreter and his understanding of the nature and the rules of the proceedings in which he takes part. I am not concerned today with the problems that arise pre-trial and are covered by article 5 of ECHR (Arrest and Detention).

At first instance the risks of a linguistic mishap are considerable. There are so many Scottish words that exist only in the spoken language. There is the added problem of strong local accents, for example in Aberdeen and Glasgow. The risks in that for even the most experienced interpreter are obvious.

There is also the worry in the background that a trial conducted with scrupulous fairness may later be challenged under article 6(3)(e) if it should later be discovered that the interpretation was inadequate or positively misleading. I am not sure how one can devise adequate safeguards against this.

As far as appellate proceedings are concerned the current practice in Scotland is entirely different from the practice adopted at trials. Whereas at trials the role of the interpreter is to give a *verbatim* translation of the evidence or speeches to or from English, the approach in appellate practice is to leave the conduct of the appeal in the hands of the accused's lawyer with the interpreter assisting the appellant in understanding the course of the proceedings as they go along. The practice therefore is for the interpreter to be seated in the dock beside the appellant and to give him a running commentary on what is being said. The theory is that the appellant's legal representation is an adequate safeguard. However, this assumes that the interpreter understands the legal language and the rules of procedure.

In appellate practice the role of the lawyer and the manner in which proceedings are conducted are different from practice in the trial courts. There are normally no witnesses. There are seldom any members of the public present. The hearing is confined to points of law.

In the result, appellate lawyers do not engage in flights of oratory. They stand close to the bench. They adopt a conversational tone. They generally have their back to or are side-on to the dock. They have to be constantly reminded that the interpreter has to hear what they say. Moreover, since the lawyers

have put in written notes of their arguments in advance of the hearing, which there is no need for them to read out, the dialogue between bench and bar may not be readily understandable by an onlooker or an interpreter.

Lastly, lawyers and judges share a common vocabulary of legal shorthand – "a section 70 notice" or "an Anderson ground of appeal", and so on.

Some might think that all of this is capable of making the role of the interpreter more formal that real.

The status of the interpreter

In Scottish procedure the position of the interpreter is rather special. The interpreter is treated as an official of the court. His immediate responsibility is to the court itself and not to either of the parties. It is the practice of the court for the presiding judge to administer to the interpreter the oath *de fideli administratione*, by which the interpreter swears that he will faithfully fulfil the duties of interpreter at the trial or the hearing. If the interpreter were to be in breach of that oath, he would be subject to penal sanctions at the hands of the court for contempt.

Some points for consideration

Should the court require interpretation even when the accused says that he does not wish it?

The primary obligation of the court is to ensure that the accused has a proper understanding of the language of the proceedings. Therefore if the court should take the view that the accused's understanding of the proceedings is imperfect, it would seem that, in light of the court's direct responsibility to the accused under the Directive, it is the duty of the court to assign an interpreter to the accused whether he wishes to listen to the interpreter or not.

Is accreditation or certification of all interpreters a realistic ambition?

The Directive looks towards a system of employing only accredited interpreters in order properly to satisfy the accused person's rights under the Directive. However, the sheer diversity of the languages involved suggests to me that a universal requirement of accreditation or certification is an impossible ideal. Look, for example, at the list of languages with which the Scottish Courts have had to deal. There have been 29 requested languages. Among these are Albanian, Yoruba and Pushtu; and two languages that I had never even heard of before, namely Igbo and Chichewa.

Unrepresented litigants

In my view where there is an unrepresented litigant the court has no choice but to have a *verbatim* interpretation made at all stages of the case. My only difficulty with the Directive in relation to this problem arises under article 2. It is not clear to me who is to decide whether the accused person speaks and understands the language of the proceedings (cf article 2.4) and what is to be the criterion that will apply in the event of there being an appeal from that decision (cf article 2.5).

Case documentation

The right under article 6(3)(e) of the Directive extends to the right to have the case documentation translated. It seems to me that in the case of unrepresented litigants this right could have considerable administrative and cost implications.