IN THE SUPREME COURT OF NEW ZEALAND SC 80/2010

[2011] NZSC Trans 9

CHALA SANI ABDULA

v

THE QUEEN

Respondent

Hearing:	25 March 2011
Coram:	Elias CJ Blanchard J Tipping J McGrath J William Young J
Appearances:	D L Stevens QC for the Appellant D B Collins QC with H W Ebersohn and R A Kirkness for the Respondent

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CRIMINAL APPEAL

MR STEVENS QC:

May it please the Court, I appear for the appellant.

ELIAS CJ:

Yes, thank you, Mr Stevens.

SOLICITOR-GENERAL:

Mr Ebersohn and Mr Kirkness appear with me this morning, Your Honours.

ELIAS CJ:

Thank you, Mr Solicitor, Mr Ebersohn and Mr Kirkness. Yes, Mr Stevens.

MR STEVENS QC:

Thank you, Your Honour. The issue in this appeal is whether the interpreter assistance provided to the appellant in his trial in the Wellington District Court was deficient to the extent that it was a significant departure from the standard required to ensure compliance with section 24(g) of the Bill of Rights. The appellant's contention is that he was effectively denied, because of deficient interpreting, the right to the assistance of an interpreter, and consequently he did not, he contends, receive a fair trial. The importance of the issue in this case, and the importance of a high standard of interpreting assistance being afforded to an accused in a criminal case, have been emphasised in recent times. Only last year, the Race Relations Commissioner urged what he called, "A more enlightened and better resourced approach to language services, including translation and interpreting." He said that this was called for now more than ever before, and no doubt that's a reference to the increasing number of people in the country who are not familiar with the English language, in particular refugees, and the appellant comes into that category. He suggested that there had been an absence of language leadership in government, and he suggested that there was a need for a body to be established to correct this. Other commentators have said that there is a need for a more robust language policy and for efforts to achieve the professionalization of interpreting in this country. It has been said by one commentator that it is essential that we review our procedures on a regular basis to ensure a high level of integrity, professional ethics and fairness. Further, the increasing awareness of the importance of accuracy and correctness, it has been said, means drawing to the professional nature of this industry. Another commentator has observed that we simply, in New Zealand, have not had an adequate understanding of language support issues. The appellant contends that the appeal has to be determined against that background.

The legal principles that apply are set out in the section of my written submissions commencing with paragraph 7 and running through to paragraph 13 and, in essence, section 24(g) repeats the language in article 14(3)(f) of the International Covenant on Civil and Political Rights, and also the language in article 6(3) of European Conventions on Human Rights. A similar provision, which is expanded to include witnesses, is to be found in section 14 of the Canadian Charter of Rights. The leading case in Canada is, of course, the case of *R v Tran* [1994] 2 SCR 951 and that –

ELIAS CJ:

Mr Stevens, in the ICCPR it's a subset of the fair trial –

MR STEVENS QC:

Yes, yes.

ELIAS CJ:

– protections. Is that so in the case of the Charter? I'm not sure.

MR STEVENS QC:

I think it's probably been viewed in that way.

TIPPING J:

It's not expressed in that way though, is it, on the –

MR STEVENS QC:

No, it's –

TIPPING J:

– face of the instrument?

MR STEVENS QC:

No, I think it's separate provision.

TIPPING J:

Yes.

MR STEVENS QC:

A stand-alone provision.

ELIAS CJ:

In the Canadian Charter?

MR STEVENS QC:

In the Canadian Charter, yes.

ELIAS CJ:

Yes, thank you. So it's more like our Bill of Rights Act in that respect, is it, than the ICCPR?

MR STEVENS QC:

Yes, except that in the Bill of Rights Act, of course, the right to an interpreter is one of the rights that are covered in section 24.

ELIAS CJ:

Yes, yes.

MR STEVENS QC:

And so it is probably fair to say it's a subsidiary right or a constituent right of the right to a fair trial. The –

ELIAS CJ:

I'm sorry, you are conceding that it is a constituent right of a right to fair trial, are you? Because I would have thought that your position is strengthened if it's a stand-alone right.

MR STEVENS QC:

Well, I would say it's a stand-alone right, but I would also have to accept that it's part of the overall package of rights that are designed to ensure a fair trial. So I'm probably wanting a bob each way. The purpose of the right has been described by the Canadian Supreme Court in the case of *Tran* as serving several important purposes. First, to enable the accused to hear the case against him and to ensure that he or she is given a full opportunity to answer it. It was said in *Tran* that this was, "intimately related to our basic notions of justice, including the appearance of fairness." It was said in *Tran* that it, "touches on the very integrity of the administration of criminal justice," and also had a bearing on the multicultural aspect of Canadian society, something which was in itself given expression in another part of the Canadian Charter.

Commentators in New Zealand have said that it's obvious that no criminal proceeding can claim to be fair if the accused is not able to meaningly participate in or defend the proceedings. Butler and Butler suggest that section 24(g) supports other rights protected under the Bill of Rights, in particular the right to a fair trial and the right to present a full answer and defence. In a decision in the High Court, the judgment of Justice Robertson in the case of *Alwen Industries Limited v Collector of Customs* [1996] 3 NZLR 226 (HC), His Honour said that this right really related to the right of an accused to have the trial conducted in his or her presence. And that was the theme of the judgment of the Privy Council in the case on appeal from Mauritius, *Kunnath v The State* [1993] 4 All ER 30, [1993] 1 WLR 1315 (PC), where it was said it's an essential principle that a trial should be conducted in the presence of the accused, and that the basis of the principle was not only that there should be corporeal presence but the accused, by reason of his presence, should be able to understand the proceedings and decide the witnesses he wished to call, whether or not to evidence, and upon what matters he wished to do so.

TIPPING J:

What aspect of the proceedings is it that the appellant contends he didn't understand, Mr Stevens?

MR STEVENS QC:

There is no particular aspect that the appellant says, "I didn't understand that part," or, "I didn't understand this part." The appellant's contention is that he doesn't have to do that and that it's sufficient if he establishes that he was not able to understand parts of the proceedings.

TIPPING J:

I'm sorry, I don't quite follow that last observation. You mean, in general terms, rather than in specific terms?

MR STEVENS QC:

Yes, yes. So he can't say, "Well, I didn't understand that part," or, "I didn't understand this part," he –

TIPPING J:

He doesn't make any complaint about preparations for trial, does he? He doesn't assert that when this trial started he didn't have any idea what it was that was alleged against him.

MR STEVENS QC:

Well, he doesn't make complaint that he didn't have any idea of what was alleged against him. He did make a complaint about preparation for trial and that was the, that was pursued in the Court of Appeal –

TIPPING J:

I see.

MR STEVENS QC:

– but it's not a matter that's –

TIPPING J:

Not a matter –

MR STEVENS QC:

– able to be pursued here.

TIPPING J:

And what conclusion did the Court of Appeal come to about that complaint?

MR STEVENS QC:

Well, there are a number of complaints made about preparation and the Court of Appeal did not uphold them.

TIPPING J:

Yes.

MR STEVENS QC:

But in terms of preparation the appellant said, "Well, I only saw my counsel on two occasions."

TIPPING J:

Well, I don't want to start you into something which clearly doesn't arise discretely here, but it – for me, at least provisionally, it's a relevant part of the background.

MR STEVENS QC:

Well, it is a relevant part of the background and Your Honour may have noticed in the appellant's affidavit that he said, amongst other things, that he did not know that the trial was going to commence on the day. It was going to commence the day before. So there was a pattern of complaint but he wasn't particularly aware of what –

TIPPING J:

But he doesn't put his finger on anything specific at the trial.

MR STEVENS QC:

No, no. No, he doesn't.

TIPPING J:

He just says that, "I didn't have a sufficient grip of it."

MR STEVENS QC:

Yes.

TIPPING J:

All right.

McGRATH J:

So, Mr Stevens, does it follow that your argument is that the deficiency alone is sufficient for you to prove breach –

MR STEVENS QC:

Yes.

McGRATH J:

– and that you don't have to go on to say that that deficiency alone or in combination with something else has resulted in a trial that was unfair in the particular circumstances?

MR STEVENS QC:

Yes. It's sufficient, in my submission, if the appellant establishes that there was a failure to provide the level of interpreting assistance that would be required to meet the minimum standard.

McGRATH J:

There's no need for an analysis of the particular consequences to see if there was something akin to a miscarriage or a particular factual conclusion that the trial was unfair.

MR STEVENS QC:

Yes.

McGRATH J:

It's an absolute proposition you really rely on then.

MR STEVENS QC:

Well, it's not completely absolute. My submission is that while the right to a fair trial is absolute –

McGRATH J:

Yes.

MR STEVENS QC:

– one can't perhaps say that the right to interpreter assistance is absolute. But if the –

ELIAS CJ:

But don't you have to take it back to section 385, is it? Don't you have to – even accepting that you're right, that there is a breach, we still have to be persuaded that the conviction is unsafe.

MR STEVENS QC:

Yes, a miscarriage of justice.

ELIAS CJ:

Yes.

MR STEVENS QC:

Yes.

ELIAS CJ:

So you still have to take us to the point of miscarriage of justice.

MR STEVENS QC:

Yes.

ELIAS CJ:

Now you may say, well, the onus turns and the Crown should establish or affirmatively satisfy the Court that there wasn't a miscarriage of justice. But there's – we still need to be carried to that point, don't we?

MR STEVENS QC:

Yes. And my submission is that if there was a failure to provide adequate interpreting assistance, then there would not be a fair trial, and if there is not a fair trial, then there must be a miscarriage of justice, but…

TIPPING J:

Well, if it's not a fair trial you can't apply the proviso.

MR STEVENS QC:

Indeed, yes.

TIPPING J:

That's really what, why your client wants there to be no fair trial is that it prevents the application of the proviso.

MR STEVENS QC:

Yes, it does have that effect.

TIPPING J:

Putting it rather bluntly, Mr Stevens.

MR STEVENS QC:

Yes, it does have that effect but also his submission, apart from that, is that there wasn't a fair trial –

TIPPING J:

Yes, I understand.

MR STEVENS QC:

– because there wasn't adequate interpretation, therefore, there's a miscarriage.

TIPPING J:

But if it's at the level of lack of fair trial, well, the law is quite clear.

MR STEVENS QC:

Yes.

ELIAS CJ:

But you have to establish breach of fair trial. It's a separate right, and you have to convince us that failure to provide interpretation because of the deficiencies you identify does amount, in the particular case, to breach of the right of fair trial.

MR STEVENS QC:

Yes, I accept that.

TIPPING J:

And the Chief Justice has emphasised, and I, in the particular case, not as a matter of abstract thesis surely.

MR STEVENS QC:

Yes, yes, and my submission is that we do establish in this particular case that there has been a breach of the right to the – that is the right to interpreter assistance – to the extent that there has been an unfair trial, so –

TIPPING J:

But let's assume that this interpreter was not adequately qualified. Let us assume that for the moment. Are you saying that one need go no further, but that it doesn't really matter what consequences –

MR STEVENS QC:

No.

TIPPING J:

– or none followed?

MR STEVENS QC:

No, I'm not, I'm not saying that. What I'm saying in that regard is that the question of qualification relates to the issue of competence; that those who are engaged to provide interpreter assistance must be competent and they must have a high level of skill in both languages, an aptitude for interpreting and experience in interpreting, and familiarity with legal procedures. Unless such competence is achieved, there will be the appearance only of a fair trial, despite the ostensible provision of an interpreter.

It's difficult for a trial Court to measure competence. How is the trial Judge to know that the interpreter is performing competently or is not? In *Tran*, it was said that there is no universally acceptable standard for assessing competency, so the only realistic way to do it is to insist that the interpreter is able to establish qualifications, accreditation and experience to an acceptable level.

ELIAS CJ:

Or that – and qualifications may be a prima facie indication of competence, or there must be a means to check competence, as through recording of the translation, so that the accused on appeal has the opportunity to point to serious deficiencies.

MR STEVENS QC:

Yes, ex post facto review on the issue of competence, but to answer the question that was put to me, if – my submission is that if the proposed interpreter is clearly not qualified, doesn't have the accreditation that's required and/or doesn't have the necessary experience in interpreting, then he or she should not be permitted to interpret. But if he is, or she is, allowed to go ahead and do the interpreting, then there may be competent interpreting provided, in which event it would have to be said, well, there wasn't an unfair trial.

So the position is that if an interpreter who is not qualified or experienced is allowed to perform the function, there is a real risk that it won't be done competently, and so

on a review after the trial it could be said, well, look at these problems in the interpreting, and look, he or she wasn't adequately qualified, accredited or experienced, and it's going to be a lot easier for an appellant, with an unqualified interpreter, to establish that there was a failure to meet the minimum standard.

So my answer to the question is no, it doesn't follow automatically that because the interpreter was unqualified that there was an unfair trial, but if he was not, or she was not, adequately qualified and there are other features to the case indicating that the interpreting was deficient, then that, in the round, is going to make it very much easier for an appellant to establish deficient interpreting and an unfair trial.

TIPPING J:

Are you suggesting that the Crown should eliminate the possibility of a risk of it being done not competently? Sorry, I put that in a rather clumsy way, but are you really saying that once you've got to this deficiency of qualification, the Crown should have the onus of saying despite that it was okay?

MR STEVENS QC:

Well, yes. I would submit that initially there's an onus on the system to make sure the interpreter is qualified but if he is not and then the accused subsequently says, look at all these other problems, then he is able to establish, depending on the nature of the other problems, that there has been a deficit in interpreting assistance. In which event, there may be an onus on the Crown to establish that everything was okay.

ELIAS CJ:

What bothers me in these sort of cases, and this is in the abstract, not in the particular, is the inability to check whether interpretation is adequate, except by the sort of impressionistic evidence that we have here, defence counsel and prosecution counsel giving their impression, which isn't really able to be substantiated because you can't compare the transcript with the interpretation. I say that that is in the abstract because I do think you have a need in this case to highlight on the matters that you say were deficit because that's a hurdle that you're setting yourself.

MR STEVENS QC:

Yes, and perhaps that's an appropriate point for me to come to the failings, as I've suggested they are, and deal with them.

TIPPING J:

They fall into two categories, do they? One are the, what you might call qualificatory failings and the others are the failings in practice.

YOUNG J:

Well, I've –

TIPPING J:

Is that –

MR STEVENS QC:

Yes, they do, Sir and I've also broken them down into a further subcategory, if I can call it that and I'm giving – there are five principal failings. I've got 15 failings set out in the submissions but I'm really arguing that of those 15 failings, five of them can be categorised as principal failings. Three of which would on their own, in my submission, render the interpreter assistance deficit to the extent that it was, on each one of those instances, a departure from the basic standard of interpretation. The remaining 10 failings were what I would call secondary failings. They serve to reinforce in the five principal failings and taken together further establish a departure from the basic standard.

So an obvious example of a secondary failing would be the failure to record the proceedings. So the five principal failings are first the –

ELIAS CJ:

Sorry, where are you in your synopsis?

MR STEVENS QC:

This isn't in the synopsis Your Honour, this is –

TIPPING J:

A refinement?

MR STEVENS QC:

A refinement, yes.

ELIAS CJ:

No, that's fine, thank you.

MR STEVENS QC:

The five principal failings are first, the issue of competence and that relates, as we have just discussed, to qualifications, accreditation and experience. The second principal failing was the absence of an essential safeguard that must be adopted when the interpreting is consecutive and that essential safeguard is that the interpreter has to speak sufficiently loudly for everyone in the Court to hear him or her.

The third principal failing is the adoption of the mode of interpreting known as whisper interpreting and the provision of that mode of interpreting for two accused. The fourth principal failing was the failing to provide the interpreter in advance with notice of the assignment and detail of the assignment so that he was able to adequately prepare for it.

The final principal failing relates to a period of the interpreting being done simultaneously and according to the interpreter in his evidence before the Court of Appeal, up to 10% of the interpreting was done simultaneously and that in circumstances where the interpreter was hopelessly under qualified to do that type of interpreting and where the equipment required for that type of interpreting was not present.

So, they are the principal failings and the submission is that the failing relating to consecutive interpreting, the safeguard concerning that being absent, on its own, should establish that the interpreting assistance was deficient.

ELIAS CJ:

Mr Stevens, I don't disagree that there may be some systemic problems with the course being adopted here and that these are worrying aspects but don't you have to go further than that and point to ways in which your client was disadvantaged by lack of adequate interpretation?

MR STEVENS QC:

In my submission no, I do not and I rely, in making that submission, on the judgment of the Canadian Supreme Court in *Tran* where it was said, once there is a failing to provide the level of interpreting required, then that's enough.

ELIAS CJ:

Well, that may be so in terms of that there's a breach but I thought you were going to identify the reasons why in the particular case there's been a miscarriage of justice?

MR STEVENS QC:

Yes, well I'm going to go through these principal failings and say –

ELIAS CJ:

And then come on to the particular?

MR STEVENS QC:

Yes.

ELIAS CJ:

Yes, thank you, that's fine.

MR STEVENS QC:

I was indicating the three of the five principal failings which, in my submission, would be enough on their own to establish a failure to provide effective interpreting assistance and –

McGRATH J:

Mr Stevens, can I just interrupt you and say that the – obviously with interpretation there are two key audiences in the courtroom. One is your client, is the accused person, in view of his right to understand what's happening and the other is jury. Are we concerned in this case solely with the effect of failures of interpretation in relation to the accused person and not with the jury at all?

MR STEVENS QC:

Yes.

McGRATH J:

And that's really because it's not the evidence, it's not the deficiency in relation to the evidence of what a person was saying in another language that's in issue here, what's in issue is the understanding that your client, the accused, had?

MR STEVENS QC:

Yes, yes, if –

McGRATH J:

Fine. I just wanted to be sure that that was the basis, thank you.

MR STEVENS QC:

The issue that Your Honour has referred to of the jury, would only arise, of course, if a witness' evidence were –

McGRATH J:

Indeed.

MR STEVENS QC:

– to have been interpreted. Such has happened in the Australian case the Crown have provided and –

McGRATH J:

Well, it happens in a lot of cases but it hasn't happened in this case, your point is –

MR STEVENS QC:

No, it hasn't happened in this case –

McGRATH J:

– a different one.

MR STEVENS QC:

So the position here concerns only the level of understanding of the accused, as indeed it did in *Tran* where an interpreter provided interpretation of the evidence to –

McGRATH J:

Well, he did everything really, didn't he?

MR STEVENS QC:

Oh, he did, yes, he did more than he should of.

McGRATH J:

Yes, he gave the evidence and he gave the interpretation of it.

MR STEVENS QC:

And he gave the interpretation in a summary form. I think two sentences summarised his evidence-in-chief, which looks as though the evidence was pretty limited anyway, it was a limited issue and a further sentence or two summarised his re-examination. Now that in *Tran* was enough on its own to establish that there had been a failure of precision and continuity in the interpreting and so the conviction was unsafe in *Tran* on that basis alone. Now, my submission here is that the failings that I'm pointing to, in particular each of the three failings that I say would be enough on its own, are demonstrably more serious failings than the failing in *Tran.*

BLANCHARD J:

I don't want to advance you prematurely in your argument, but you may have to take us to that. Because at the moment I'm seeing *Tran* as a case in which the audience was the jury as well as the accused, and interpretation of the witness himself was an issue, which seems to be slightly different to your case.

YOUNG J:

I think he gave, the witness gave evidence in English, didn't he, in *Tran*, and then translated what he'd said, or summarised what he'd said, for the benefit of the defendant?

MR STEVENS QC:

Yes. So, I was indicating the three principle failings that I say on their own are more significant and more serious than the failing in *Tran.* First, the consecutive interpreting safeguard being absent, second, the whisper interpreting for two men at the same time and, three, the 10 percent of interpreting being done simultaneously without a qualified interpreter to do that advanced form of interpreting and without the equipment that is required to do it. Can I come then, and looking at those five principle failings first, to the issue of the qualifications? Now, we've already addressed that, and it may be that there's not a lot that I need to add to that, other

than to say that the importance of adequate qualification has been referred to by the Ministry of Justice in a Courts Operational Circular, and it has established that what's required is an interpreting qualification equivalent to the Australian NAATI 3 qualification or higher. The importance of qualification has been referred to in the Australian case of *De La Espriella-Velasco v The Queen* [2006] WASCA 31, (2006) 31 WAR 291, which is in the Crown's bundle of authorities under tab 26, and I refer Your Honours to page 313, where, between or at paragraph 73 and 74, it is said in the judgment of Justice Roberts-Smith, "As to competence, whilst there are no universally acceptable standards for assessing competency, an interpreter must at least be sworn by taking the oath before beginning to interpret the proceedings." There's nothing in the record in this case to indicate the interpreter took the oath, one simply doesn't know, but I'm not relying on that – when I say, "This case," I mean the appellant's case.

Para 74, His Honour observed that, "while there is a legitimate reason to doubt the competency of a particular interpreter," sorry, "where there is a legitimate reason, a Court would be well advised to conduct an inquiry into the interpreter's qualifications. For myself, I would add that it will ordinarily be prudent for an interpreter to be required to state their qualifications for the record before being sworn or affirmed. The present case is a good illustration of the desirability of that being done. It also recognises the principle at common law that it is the responsibility of the trial Judge to ensure that adequate interpretation is afforded the accused or witness."

And then again at page 379, para 362, where the judgment is citing a statement made in the case of *Perera v Minister for Immigration and Multicultural Affairs* [1999] FCA 507, (1999) 92 FCR 6, and it cites a statement by Justice Kenny, "An interpretation is competent if it is adequate or satisfactory when judged against the relevant standard. An interpreter is competent if he or she can provide a competent interpretation," and then going to the last two sentences in that statement, "In assessing whether an interpreter is likely to be competent, courts and tribunals ordinarily have regard to various factors, including the interpreter's qualifications, accreditation or experience. It remains possible, however, that an interpreter who satisfies a court or tribunal that, by reason of qualifications and experience, he or she would be likely to provide a competent interpretation, may nonetheless provide an incompetent one." And obviously the reverse could be the case as well, an unqualified interpreter could provide a competent interpretation, as seems to have occurred in the appellant's case on the second week of the trial, when a second

interpreter was employed and there was no complaint made about his competency or the adequacy of the interpreting. But those statements of principle, in my submission, are authority for the proposition that there is a need for a certain level of qualification, accreditation or experience to be established.

Now, in the present case –

McGRATH J:

What's the best case you've got that would effectively say that, because the standard of accreditation in the jurisdiction was at a lower level than the optimum level or the preferable level, the interpretation was not of the requisite quality? There seems to be some suggestions saying that it's one factor, but not the entire consideration.

MR STEVENS QC:

No, I accept that, Your Honour, it's not the entire issue.

McGRATH J:

Yes.

MR STEVENS QC:

Because you could, as I have said, have an unqualified –

McGRATH J:

Yes.

MR STEVENS QC:

– inexperienced interpreter, who was great and doing the job.

McGRATH J:

Yes, but we're dealing with the converse situation here.

MR STEVENS QC:

Yes.

McGRATH J:

And we're dealing, are we not, with someone who is, I think, what can be loosely described, according to various changes, at level 2, and you're saying they should be at level 3?

MR STEVENS QC:

Level 3 to do consecutive interpreting, level 4 to do simultaneous interpreting.

McGRATH J:

Are there any cases that turn on –

MR STEVENS QC:

No.

McGRATH J:

– the difference of those sort of levels?

MR STEVENS QC:

No, there's not.

McGRATH J:

This case you've cited, which is in Justice Robert-Smith's judgment, is a very well-known one in Australia, it didn't turn on it there, I take it?

MR STEVENS QC:

No, no. I simply cite that as authority for the proposition that there is a need to inquire into qualifications and experience, and that will be an important aspect.

McGRATH J:

And you say there was no evidence that that was done here?

MR STEVENS QC:

It wasn't done.

McGRATH J:

Yes, it wasn't done, right.

MR STEVENS QC:

So I say that there was no proper inquiry conducted to establish –

TIPPING J:

Are you saying the trial Judge should, in effect, conduct a voir dire on the competency of the interpreter?

MR STEVENS QC:

Well, there should –

TIPPING J:

If there's any reason to suspect –

MR STEVENS QC:

Yes.

TIPPING J:

– or in any event?

MR STEVENS QC:

In any event. My submission is there is a responsibility on the trial Judge to ensure that the interpreter is adequately experienced and qualified to do the job, and so there should be an inquiry undertaken at the outset – and I rely on the Australian authority for that proposition – to determine competency.

TIPPING J:

Against what standard?

MR STEVENS QC:

Well, the standard would be, what qualifications does the interpreter, proposed interpreter, have?

TIPPING J:

But this could only be a formal inquiry, in the sense of ticking boxes. You wouldn't ask for a trial run or anything like that, or – what are you suggesting Mr Stevens? You're inviting us to lay down a fairly prescriptive sort of approach.

MR STEVENS QC:

Well, the Judge needs to be satisfied that the proposed interpreter is competent. The only way to work that out is to say, what qualifications have you got, what accreditation do you have, how does that feature in terms of the, in New Zealand's case, the NAATI accreditation standards and what experience have you got in interpreting –

TIPPING J:

So, this gentleman should have been rejected because he didn't have NAATI 3?

MR STEVENS QC:

Yes.

BLANCHARD J:

And so should the gentleman who gave the interpretation in the second week which is not challenged?

MR STEVENS QC:

Yes because – my argument there is the Court can, if it likes, run the risk of using a interpreter who cannot establish competence. If there are no problems then it's okay, they get away with it if you like.

TIPPING J:

But you're always going to challenge it if you get convicted and you find that the person doesn't have the necessary competence, aren't you?

MR STEVENS QC:

Yes, but you have got to go further than that because my – I've accepted that one can't appeal solely because the interpreter was not adequately qualified without something else. So, if one is saying the interpreter was not adequately qualified or experienced, then there is a need to go further than that and show that it impacted on the quality.

TIPPING J:

I see, this is not one of the per se –

MR STEVENS QC:

No, no –

TIPPING J:

All right, sorry I think I –

MR STEVENS QC:

– no, no, this is number one of the five, not one of the

TIPPING J:

Which doesn't have the per se tick alongside it?

MR STEVENS QC:

No.

TIPPING J:

Sorry, I had it and I appreciate, I got that wrong.

MR STEVENS QC:

So, the submission is, just coming back to this issue of what needs to be done at the beginning. The Judge does need to conduct an inquiry, if I can use that expression, to determine whether the proposed interpreter has got the qualifications, experience and accreditation required. I have in para 27 of –

ELIAS CJ:

Well, there's no requirement of accreditation, it's the accreditation that would give the Judge comfort.

MR STEVENS QC:

Yes, comfort that the interpreter was competent.

ELIAS CJ:

Yes.

MR STEVENS QC:

And if that comfort is not obtained then –

ELIAS CJ:

Then further enquiry might be necessary.

MR STEVENS QC:

Yes, and if it's not done then there is a real risk of subsequent problems.

ELIAS CJ:

And if that risk eventuates, is what might lead to the trial being unfair.

MR STEVENS QC:

Yes. That's my argument on that. So, it's signi – there is support for this proposition derived from the 10 canons of interpreting, referred to by Louise Feuerle in her paper "A Sword and A Shield – The Code of Professional Responsibility for Court Interpreters", where she says, canon number 2, "The interpreter shall accurately and completely represent his or her certifications, training and pertinent experience."

It's perhaps significant that Courts in the United States are rigorous in requiring an interpreter to establish his or her qualifications and I have included in the appellant's casebook a decision of a Ohio Court *City of Columbus v Lopez-Antonio* (Franklin County Municipal Court, Ohio, No.2009 CRB 013050, July 2 2009), for no other reason than that the Judge in that case sets out in detail the sort of questions that should be canvassed in a review of competence.

If I can take Your Honours to the case which is at tab 5 in the appellant's bundle. At page 5 and page 6, the judgment sets out a whole range of questions that should be covered, "Training or credentials? Who granted the credentials? What is the native language? How did you learn English? How did you learn the foreign language? Highest grade completed in school? Spent time in the foreign country? Did you formally study the language in school? How many times have you interpreted in Court? How did you become familiar with legal terminology?" and the authorities appear to indicate that it is important that an interpreter have an understanding of not only the procedures of the Court, but the type of legal terminology that could be expected to be used in the case.

"Have you interpreted for this type of hearing or trial before? How many times? Familiarity with the Code of Ethics? Are you a potential witness? Know or work for

the parties?" And so the case or the judgment goes on, setting out additional questions but all of which indicating, in my submission, that there needs to be a lot more done at the outset in the inquiry into competency than was done here.

McGRATH J:

Than was done at the outset of the trial here but of course there was evidence given in the Court of Appeal and you cross-examined the interpreter on his qualifications there. So it's not a problem in this case to the extent that we can consider the record of the matters that you in cross-examination raised, testing after the event the qualifications of the interpreter.

MR STEVENS QC:

Yes, and indeed some of those answers provide support to the appellants.

McGRATH J:

Yes, that's – I'm sure you're going to point us out those ones.

MR STEVENS QC:

So, that then is the submission concerning the inquiry at the outset into qualifications, experience and accreditation. So I move on then to the issue of the interpreter in this case not being qualified. As we have already canvassed, a level 3 accreditation is required for consecutive interpreting and that is described as being the minimum standard. Level 3 is the first professional level and, said the appellant's expert Deborah Burns in her affidavit, "represents the minimum level of competence for professional interpreting. Such interpreters are qualified to cope with specialised subjects but they can cope only with consecutive rather than simultaneous interpreting. The next level up, level 4, is the minimum level required for simultaneous interpreting and a interpreter qualified at that level is competent to handle complex, technical and sophisticated interpreting and can do both consecutive and simultaneous."

The interpreter in the present case held, of course, neither level 3 nor level 4, he held level 2 which is a paraprofessional qualification representing, as Ms Burns puts it, "a level of competence in interpreting for the purpose of general conversations. Not qualified to undertake the interpretation of non-specialist dialogues. Described as being a preparatory level with an expectation of progress towards accreditation." Not, Ms Burns says, a level that qualifies a person to interpret Court proceedings, but

qualifies the person to interpret simple speech consecutively. The Australian NAATI accreditation levels are also referred to, apart from Ms Burns' description of them in her affidavit, and she, Your Honours will have noted, attaches a description of the accreditation levels as "Annexure B" to her affidavit, these levels are also described in the *De La Espriella-Velasco* case, tab 26, at pages 299 in the course of the judgment of Justice Robert-Smith, where he describes, in para 11 on page 299 through to paras 12 and 13 and 14, the various accreditations that are operated or included in the NAATI accreditation system. So, the submission then is made here that the interpreter did not have the level of qualification or accreditation that was required.

And that brings me then to the issue of his experience, and the submission is made that the absence of the necessary accreditation is compounded by the lack of experience in interpreting in jury trials – I refer to jury trials as a measure, really, of the seriousness of the proceeding – a lack of experience in interpreting in jury trials and also a lack of experience in interpreting in hearings of the length of this one. As was established in the cross-examination of Mr Qerenso in the course of the Court of Appeal hearing, his experience was confined to interpreting in the Magistrates Courts of Victoria and, he said, maybe a dozen times in, "cases of short duration," as he put it, sometimes even 20 minutes or sometimes two hours. In New Zealand, he had interpreted in two previous cases, neither being jury trials, one of those cases lasting maybe half a day and the other a day.

BLANCHARD J:

What's the significance of the length of time? Is it suggested that he simply ran out of puff after a while?

MR STEVENS QC:

I think that's a possible concern, that a hearing which runs 20 minutes requires far less experience or expertise than a hearing which runs for a week. And there is a suggestion that interpreters should really be given a break after 30 minutes of interpreting, which is obviously not done, because interpreting is a very demanding, complex and exacting activity, and so the Court needs to be confident that an interpreter has been able to discharge those responsibilities over, in previous cases, a time period similar to that which is contemplated in the case in question.

ELIAS CJ:

Is the relevance of the time in the past not so much the running out of puff, although that might be part of it, but that it's indicative that the cases were simple cases?

MR STEVENS QC:

Yes, yes.

ELIAS CJ:

And almost certainly didn't have very lengthy evidence.

MR STEVENS QC:

Yes.

ELIAS CJ:

Twenty minutes or whatever.

MR STEVENS QC:

And so possibly easier for a para-professional to do the interpreting. But I think, Your Honour, that is certainly one of the aspects, perhaps the principal one, but the issue of whether the interpreter has the capacity to interpret over a long period of time must also be a consideration. So, in the present case then, we have an interpreter who is required to interpret for a week and interpret for two people. His previous experience of interpreting for two people had been limited to two people in some domestic-type hearing, who were apparently on opposite sides, but not a case of this length or complexity.

McGRATH J:

It's not so much the number of people, Mr Stevens, but obviously if evidence is being given which is interpreted, the interpreter's interpreting for the whole courtroom. It's really the need to interpret silently with the focus on one person whose capacity in the English language was a lot less than your client's capacity.

MR STEVENS QC:

Yes, yes.

McGRATH J:

It seems to me that's the real issue, rather than the number of people that were involved.

MR STEVENS QC:

Yes, the number of people would not be a relevant consideration if everyone in the courtroom could hear the interpreting.

McGRATH J:

Is it the only point in relation to the number of people in the particular circumstances in which one was more adept in the language than the other, that you say your client was not able to hear everything in the interpretation?

MR STEVENS QC:

Yes, I think the number of people –

McGRATH J:

It's an environmental thing rather than a capacity thing, I would have thought.

MR STEVENS QC:

I think so, yes. It's simply – because one interpreter would be sufficient for two, three, four accused, if everyone in the courtroom could hear him, that's obviously accepted. The problem here of course, with two accused, is the point Your Honour makes that two accused had the one interpreter who was doing whisper interpreting.

McGRATH J:

That's what I understand your point to be, yes.

MR STEVENS QC:

That's really the significance of the number of accused, yes. So, can I move on then, Your Honours, to the second of the five principal failings – I think I've probably exhausted the qualifications issue, other than to note in passing that the interpreter was not a member of a professional body and that that has relevance in terms of his obligation to adhere to ethical standards.

So, if I move on then to the point that a safeguard for consecutive interpreting was absent. The major part of the consecutive interpreting was done – sorry, the major

part of the interpreting was done consecutively – and that was not done, it's submitted, in the manner required for this type of interpreting. Your Honours will see that, in para 44, I have set out three paragraphs from Ms Burns' affidavit, where she describes the way in which consecutive interpreting should be done. In particular, paragraph 43 of her affidavit, set out in paragraph 44 of my submissions and she says, "Consecutive interpreting that is heard full voice because it requires English speakers to wait for the interpreting to be completed before they proceed, minimises the risk of errors or omissions by the interpreter but also enables other people who are in Court and who speak the interpreted language to hear the interpreting and act as a check on its accuracy."

In the Canadian Supreme Court judgment in *Tran*, the Canadian Chief Justice said that he tended to agree with the author of an article by a man called Steele on interpreting in criminal proceedings but although consecutive interpretation effectively doubles the time necessary to complete the proceedings, it offers a number of advantages over simultaneous interpretation. The judgment says that, "Simultaneous interpretation is a complex and demanding task for which court interpreters, unlike conference interpreters, are seldom trained. Moreover, it requires expensive sound equipment. In addition, it works best where there is a minimum of distraction. Consecutive interpreting, on the other hand, has the advantage of allowing the accused to react at the appropriate time, such as when making objections. It also makes it easier to assess on the spot the accuracy of the interpretation."

So, Ms Burns says that consecutive interpreting has to be heard full voice. The Chief Justice of Canada says well, yes, the effect of that is that it doubles the time required for the hearing. Even the witness who provided expert evidence for the respondent, Christine Goodman, appeared to agree that with consecutive interpreting, as she puts its, "The interpreter speaks audibly to the Court for the record, delivering after approximately two sentences have been spoken by one of the interlocutors."

Now, the benefit of this of course is that every English speaker in the courtroom knows when the interpreting has been completed. So the question is asked, it's then interpreted, the English speakers can hear the interpretation and they know when to proceed. In the absence of full voice interpreting that can be heard by everyone in the courtroom, the English speakers have no way of knowing when the interpretation

of the last statement has been completed and so, although in this case every, or almost every, witness was told to pace him or herself in answering the questions so that the answer could be interpreted, the failure of a means of ensuring that everyone knew when the interpreting was finished meant that this essential aspect of consecutive interpreting was absent.

If we picture the situation where counsel have got their back to – or their backs to the interpreter and the accused and cannot hear the interpreter, they are simply not going to be able to tell whether the interpreting has been completed unless they turn around and have a look on every occasion.

TIPPING J:

So counsel might speak over, if you like, the interpretation which is still carrying on, is that what you're saying?

MR STEVENS QC:

Yes, yes.

YOUNG J:

Well, only the Judge can deal with that really.

MR STEVENS QC:

Yes, and if the Judge, if the Judge, I mean, the Judge has got a view of the interpreter and the accused but he's not necessarily going to be able to appreciate whether the interpreting has been completed because the interpreter – the next question is asked, the interpreter may in fact not complete –

TIPPING J:

Well, couldn't the Judge stop counsel from – while the interpreter is still speaking the Judge stops counsel from moving on. That is my experience, that you had to control it in such a way that you didn't get this sort of overlap.

MR STEVENS QC:

Sure.

TIPPING J:

Is that – are you saying that that didn't happen here?

MR STEVENS QC:

Well, according to the evidence it didn't happen because the deponents who have provided affidavits on the issue, two people, say that the English speakers continued to speak while the interpreter was still doing the interpreting. Now, that's the evidence, that's obviously evidence which is dispute –

TIPPING J:

What did the Court of Appeal find about that?

MR STEVENS QC:

Well, there was no finding on that issue.

ELIAS CJ:

There was conflicting evidence on that, wasn't there?

MR STEVENS QC:

Yes, yes.

ELIAS CJ:

Is there a more basic problem that interpretation and this methodology is treated as a private communication with the accused, whereas perhaps it needs to be a matter of public record?

MR STEVENS QC:

Well, that's a subsidiary issue indeed, Your Honour, that the interpreting should be recorded and –

TIPPING J:

And it has to be recorded, you say, in the other language, the non-English?

MR STEVENS QC:

Yes, yes.

TIPPING J:

Which is a real challenge for a recording service.

ELIAS CJ:

Well, it could be taped.

YOUNG J:

Well, it could be recorded on the tape, on the audio.

TIPPING J:

It's on the tape, yes.

MR STEVENS QC:

And that's happening –

ELIAS CJ:

But that would be – that would require sequential speaking instead of whispered communication, which one worries is of the substance of what is being said, the interpreter's view of the substance of what is being said and there's no means of checking.

MR STEVENS QC:

Yes.

YOUNG J:

It would require, though, probably a microphone in or around the dock, which might have other consequences which are problematic, I think, wouldn't it?

MR STEVENS QC:

I can't –

YOUNG J:

I'm just thinking of the way FTR works.

MR STEVENS QC:

– think of any problematic consequences off the top of my head.

YOUNG J:

Well, if counsel wants to talk to the defendant?

ELIAS CJ:

All mics are off.

MR STEVENS QC:

Mmm, turn the microphone off.

YOUNG J:

Well, yes, there's a Murphy's Law that is often the predominant law in our lives really.

MR STEVENS QC:

The practice is now adopted in some overseas jurisdictions of recording the interpreting. It happens in Australia and it happens –

YOUNG J:

Well, it obviously happened in the Western Australian case.

MR STEVENS QC:

Yes.

ELIAS CJ:

In the case of simultaneous transcription, where somebody has an earphone on and listens to it as it goes, there wouldn't be a problem about recording what is being said there?

MR STEVENS QC:

No.

TIPPING J:

Of course, if it's the other way round, out of a foreign language into English, these sort of issues don't arise, do they because –

ELIAS CJ:

They are treated as public.

TIPPING J:

Yes, the English translation of the non-English speaking witness' evidence is given out loud in my experience and then the English speaking accused, if you like, hears it

and understands it. So it is a slightly different situation this way round from the other way round.

MR STEVENS QC:

Yes, but there should, in my submission, be no difficulty in recording the interpretation as indeed, I submit, is happening in Australia and Canada and apparently Britain.

ELIAS CJ:

What was said in the evidence in the Court of Appeal about recording?

MR STEVENS QC:

Nothing's said about that. The only issue that could touch on that was the interpreter saying, "Well, I should have been given a microphone." But that was in the context of –

ELIAS CJ:

No, I mean the expert evidence that was given in the –

MR STEVENS QC:

No, nothing on that. No, no, Ms Burns says –

ELIAS CJ:

Yes.

MR STEVENS QC:

– that it should be recorded.

ELIAS CJ:

Says it should be, yes.

MR STEVENS QC:

Yes.

ELIAS CJ:

Yes, that's right.

BLANCHARD J:

Was the interpreter told to whisper or was that just a technique that he elected to adopt?

MR STEVENS QC:

He said that he was told to speak at a level that would enable the accused to hear him but he wasn't told to speak so that everyone could hear him. So he wasn't told not to speak so that everyone could hear him, but he says he was not told to speak so that everyone could hear him.

And so he understood that he was required to speak only so the two accused could hear, and Ms Burns says well, that's an indication of his lack of experience because if he were to have been adequately experienced, he would have said to the Judge, "Consecutive interpreting, I must speak so everyone can hear."

So the argument then is that this essential safeguard for consecutive interpreting was absent, and that could almost be expected to lead to an outcome where, because the English speakers did not have a means of knowing when the interpreting had been completed, that they started to speak before it had been completed. And regardless of the factual debate about whether that happened or whether it didn't, the argument is that with this manner of interpreting it could be expected to happen, and I refer again to the point, and place reliance on this, that counsel would have their backs to the interpreter.

So the argument that the appellant advances is, on that basis alone, the interpreting in this case must have been defective, and that is one of the three shortcomings that the appellant argues render the interpreting assistance defective to the point that it failed to meet the basic standard.

McGRATH J:

Could you just articulate that? You seem to be holding back from saying, "and there was prejudice in this case."

MR STEVENS QC:

No, I'm quite happy to say that.

McGRATH J:

Well, I think that you, perhaps just to – it would help us if you actually summarised –

MR STEVENS QC:

Yes.

McGRATH J:

– what the prejudice was.

MR STEVENS QC:

The prejudice was that the accused would not have been able to hear all of the evidence. There would have been an absence of continuity and precision. The test, of course, according to *Tran*, is whether there has been competent, precise, impartial and – impartial interpreting.

So there must be continuity, precision, impartiality and competence, and the appellant says that if you've got people speaking over each other, as this method would have almost invited, particularly over the course of a week, then you're going to have an absence of continuity of interpreting and precision. And the appellant says well, there's evidence, although it's contested, to support that proposition, but, he says, even without that evidence, there would be a reasonable expectation of that failure in continuity and precision, and the evidence simply goes to bolster the position in that regard.

McGRATH J:

So it's a combination of the whispering, low volume voice with the speaking over that you say occurred on the evidence of your affidavits –

MR STEVENS QC:

Yes.

McGRATH J:

– in the Court of Appeal?

MR STEVENS QC:

Yes.

McGRATH J:

Thank you.

BLANCHARD J:

Are you going to take us to those affidavits?

MR STEVENS QC:

Yes, I will, Your Honour. The appellant's partner, Ms Erica Simms, whose –

BLANCHARD J:

Which volume?

MR STEVENS QC:

That's volume 3, tab 9, and in particular paragraph 16 on page 283, where Ms Simms says, "The prosecutor made a point of telling witnesses at the beginning of their evidence that their evidence would be interpreted and that they would have to regulate the speed of their evidence. Some witnesses appeared to do so and others did not. Some did for a time and then seemed to forget. Some would look over to the interpreter to see if he was speaking and others would not. Sometimes counsel turned around to see if the interpreter had finished interpreting but they did not do so on a regular basis."

TIPPING J:

Well, she says – 17 could have some significance, if it's accepted.

MR STEVENS QC:

The witness in –

TIPPING J:

Which seems to be direct evidence, if it's accepted, that he –

MR STEVENS QC:

Yes.

TIPPING J:

– he was misunderstanding, at least from this witness's point of view, what the evidence was.

MR STEVENS QC:

Yes.

YOUNG J:

The Court of Appeal didn't accept this evidence though, did it?

MR STEVENS QC:

Well, it said that it found it difficult to accept that the witness would not have done something about the problems that she thought had arisen with the interpreting.

YOUNG J:

They said she'd two university degrees and she could have been –

MR STEVENS QC:

Yes.

YOUNG J:

– expected to raise an issue if there was something which was of concern to her at the time.

MR STEVENS QC:

Indeed, yes.

TIPPING J:

Was this witness cross-examined in the Court of Appeal?

MR STEVENS QC:

No. No, the only witness to –

TIPPING J:

She was not cross –

MR STEVENS QC:

– be cross-examined –

TIPPING J:

She was not cross-examined but the Crown was asking the Court to discount her evidence?

MR STEVENS QC:

Yes, sir. The only witness to be cross-examined in the Court of Appeal was the interpreter.

BLANCHARD J:

You've also got Ms Fairbrother, I notice, at page 286.

MR STEVENS QC:

She, in paragraph 7, says that the witnesses and counsel were often speaking at the same time that the interpreter was interpreting.

ELIAS CJ:

She gets very roughly treated by the Court of Appeal, doesn't she?

MR STEVENS QC:

She does, she does.

TIPPING J:

And she wasn't cross-examined either.

MR STEVENS QC:

No. She goes on, paragraph 9, to say that both she and Mr Nisbet became concerned about whether the interpreter was coping, turned around to look at the dock on several occasions as a result, misgivings about whether the evidence was being adequately interpreted, seemed to be periods when no interpreting was taking place. They had, she says, a concern about whether the interpreter could hear what was being said, and as a result they made enquiries with the registrar to see if another interpreter could be obtained. No other interpreter was available. And so they said to –

TIPPING J:

It's strange they didn't raise the matter more robustly with the Judge.

MR STEVENS QC:

Indeed, yes.

TIPPING J:

Yet speak to the registrar –

MR STEVENS QC:

Yes.

TIPPING J:

– to see if there's another, impliedly, expressing major concerns, and you don't say anything to the Judge, or is that unfair?

MR STEVENS QC:

No, I don't think it is. And the approach was – well, the registrar said, "We can't get anyone else," and –

TIPPING J:

Well, clearly, that was so, because it was a very difficult language, wasn't it?

MR STEVENS QC:

Sure, yes. And so counsel to the appellant, "Well, are you happy with this?" but they asked him in English. He, apparently, indicated that he was happy, and counsel decided there was little alternative but to proceed with things as they were. And that seems –

TIPPING J:

Did you appear in the Court of Appeal, Mr Stevens?

MR STEVENS QC:

Yes.

TIPPING J:

Was there any suggestion during the course of counsel's addresses or raised with the Court as to, trying to uncover why it wasn't raised with the Judge? I mean, obviously, if these witnesses weren't there for cross-examination, you couldn't do it by that means, unless somebody actually required them to attend for cross-

examination, but it seems extraordinary to me that you make a serious complaint like this, effectively to the registrar, anyway…

ELIAS CJ:

Counsel error was an issue in the Court of Appeal?

MR STEVENS QC:

Yes, but not in this context.

ELIAS CJ:

No, not in this context, no, that's right.

MR STEVENS QC:

No, no.

ELIAS CJ:

That's why there's the affidavit from Mr Nisbet –

MR STEVENS QC:

Yes.

ELIAS CJ:

– pursuant to the Court of Appeal rules.

MR STEVENS QC:

Yes. And, Mr Nisbet in that affidavit filed for the Crown, says, well, it wouldn't surprise him if Mr Abdula were not able to hear some of the interpreting because the interpreter was speaking more to the other accused, who had no English ability at all. So –

TIPPING J:

His affidavit is at tab 13, is it? Yes.

MR STEVENS QC:

Yes.

TIPPING J:

I know that the Court of Appeal's quoted passages from it.

MR STEVENS QC:

Yes.

TIPPING J:

But he's actually deposing in answer to a complaint of counsel deficiency, is he?

MR STEVENS QC:

Yes.

TIPPING J:

Rather than specifically on the interpretation issue, although –

MR STEVENS QC:

Well, he does –

TIPPING J:

– he does cover that.

MR STEVENS QC:

Yes. Primarily he's dealing with the issue of counsel competence, but in paragraph 13 he says, "It's not surprising that Mr Abdula did at times struggle to understand everything the interpreter was saying. It's important to remember that Mr Jefferies' client had no understanding of English at all, and thus much would be interpreted as time was spent ensuring he understood the evidence and the Court process. This could have been to the detriment of Abdula's understanding of the evidence being led." So, if one accepts that and accepts the evidence of Ms Fairbrother and Ms Simms, then there is a powerful body of evidence to support the contention –

TIPPING J:

That it did actually make a difference?

MR STEVENS QC:

Yes.

TIPPING J:

All these problems.

MR STEVENS QC:

Yes.

TIPPING J:

One thing that you may or may not be able to help on, and it may be that the problem of Mr Nisbet's affidavit gives a clue, is the quite significant difference between the two defence counsel as to their testimony on this interpretation issue. Ms Fairbrother is substantially more forthright, if you like, in her reservations about it, than the senior counsel, which is unusual, to say the least.

MR STEVENS QC:

I can only explain that by saying, well, Ms Fairbrother's affidavit was sworn at the request of the appellant and filed on his behalf, and Mr Nisbet's was sworn at the request of the Crown and drafted by the Crown and sworn on their behalf. But, in any event, Mr Nisbet is accepting that there may very well – and in fact he's going beyond may very – he's suggesting that there probably were difficulties with the appellant –

TIPPING J:

Well, Ms Fairbrother talks about Mr Nisbet taking something up with the Judge, which is a matter that Mr Nisbet doesn't depose to in his own affidavit –

MR STEVENS QC:

Yes.

TIPPING J:

Which makes one wonder whether what you've just submitted may be part of the answer.

MR STEVENS QC:

Yes. Can I move on, Your Honours, to the third principal failing, and that concerns the whisper interpreting, and this is dealt with in the submissions at paragraph 50. Ms Burns expressed the view that whisper interpreting to two accused, sitting in

between them in the dock, could be expected to be unsuccessful. She defined "whisper interpreting" as, "The interpreter speaking in a soft voice, often prompted by a desire for the Court not to be slowed down and indicative," she says, "of a lack of recognition of language support issues." She opines that whisper interpreting is not suited to consecutive interpreting for the reasons I have canvassed, and that it would not be appropriate for serving the needs of two people.

The appellant notes that defence counsel foreshadowed to the trial Judge a possible practical difficulty with the interpreter sitting in between the two accused and having to interpret for them both. The appellant has said in, in his affidavit for the Court of Appeal, that the interpreter, who was quietly spoken, spent a lot of time interpreting towards the co-accused, with his head turned to the co-accused, and those times, the appellant said, he could often not hear what was being said. And, in the written submissions, I have then set out the passage of Mr Nisbet's affidavit that I have referred Your Honours to a moment ago. Ms Burns has said that it should have been obvious to the interpreter that whisper interpreting was not going to be satisfactory. She says that the fact that he did not express that concern is indicative of his lack of experience. She says it's not surprising, given that whisper interpreting was adopted, that it is asserted by the appellant that there were times the appellant could not hear what the interpreter was saying.

She deals with those matters in paragraph 47 of her affidavit, which is in volume 3, tab 11, paragraph 47 on page 299: "Not only would whisper interpreting, by its nature, be unsuited to consecutive interpreting, it would also be inappropriate for serving the needs of two people." It is, therefore, not surprising that the affidavits of the appellant and of Erica Simms assert that there were times when the appellant could not hear what the interpreter was saying. "In my opinion," para 48, "it should have been obvious to the interpreter that whisper interpreting to two accused, while sitting between them, was a method of interpreting that was not going to be satisfactory."

ELIAS CJ:

Is that a convenient point to take the adjournment?

MR STEVENS QC:

Yes, thank you, Your Honour.

ELIAS CJ:

Thank you, we'll adjourn for 15 minutes.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.52 AM

ELIAS CJ:

Yes, Mr Stevens.

MR STEVENS QC:

Thank you, Your Honour. I conclude my submission concerning the whisper interpreting by saying that this is one of the three failings that the appellant contends are, on its own, is sufficient to reduce the interpreting assistance below the basic standard required.

The next one of the five principal failings is the failure to provide the interpreter in advance with information about the assignment to enable the interpreter to adequately prepare for it. The Courts Operational Circular makes it apparent that it is important to enable adequate preparation on the part of the interpreter, and suggests that a decision needs to be made pre-trial as to the material that is going to be supplied.

BLANCHARD J:

Did the interpreter actually say that he was under a disadvantage because he didn't have certain information in advance?

MR STEVENS QC:

No.

ELIAS CJ:

Was he asked about that, did you cross-examine on that?

MR STEVENS QC:

He was asked whether he agreed it was important to be able to prepare. I think he agreed it was, going on memory there.

BLANCHARD J:

Well, no doubt that is so, but at a practical level is there any evidence suggesting that he was actually at a disadvantage in this particular case?

MR STEVENS QC:

No. But the argument is that when one looks at the emphasis that is placed by the expert witnesses, Ms Burns, on the importance of adequate preparation and when one looks at what the Courts Operational Circular has to say about it, and when one looks at the evidence of the interpreter that he was simply told on the morning, "This case is about a sex allegation," and that's all he was told, then there was not an adequate opportunity to prepare.

McGRATH J:

Could you just give us the reference to the Circular, the page?

MR STEVENS QC:

That's attached to the affidavit of Ms Burns, so volume 3, tab 11, and the Circular deals with this issue at page 316, page 317.

ELIAS CJ:

I never know what this stamp, "Released under the Official Information Act," is meant to convey, whether we're permitted to look at it, unless we ourselves have requested it, but I take it there's no issue about that.

MR STEVENS QC:

None that I'm aware of. And also page 318.

McGRATH J:

Thank you.

MR STEVENS QC:

Now, the importance of that, according to the expert evidence, is that the interpreter needs to be familiar with the terminology –

BLANCHARD J:

I think all this is pretty obvious, Mr Stevens.

MR STEVENS QC:

Yes, I'm quite happy to go through this quite quick…

McGRATH J:

Has it ever been raised as an issue in the leading overseas cases?

MR STEVENS QC:

No, not that I'm aware of.

McGRATH J:

I'm just really wondering if that, that might indicate it was best practice elsewhere. But you're really relying on the fact that the department itself says, "Do this."

MR STEVENS QC:

And also that the expert witness, Ms Burns, says that it's important that it should be done.

McGRATH J:

Yes, right, thank you.

MR STEVENS QC:

So that brings me to the last of the five principal failings, and that is the interpreting being done simultaneously for 10 percent of the time. I have already dealt with this in the course of argument to date. In summary, the position is that a very high level of qualification is required to do simultaneous interpreting, that it's a qualification and an experience seldom to be found in court interpreters and, if it is undertaken, there is a need for specialist equipment, soundproof booth and headphones. I think it's described in the article that the Canadian Chief Justice refers to. None of those were used here, 10 percent of the interpreting done in that way –

BLANCHARD J:

Where's that reference in the evidence?

MR STEVENS QC:

To the 10%, Sir?

BLANCHARD J:

Yes.

MR STEVENS QC:

That's in volume 3 on tab 17, and page 404 of the case or page 11 of the notes of evidence. Line 1, question, "So most of the interpreting – so most of the proceeding in consecutive, some of it simultaneous?" Answer, "Yeah, really few." Question, "How much in simultaneous interpreting?" Answer, "Maybe 10%."

BLANCHARD J:

Was it explained how there came to be simultaneous interpretation?

MR STEVENS QC:

No. But the appellant's argument is that there clearly should not have been, the qualification wasn't there, the equipment wasn't there, and that 10% of the proceeding being interpreted in that manner is a significant part of the interpreting – sorry, a significant part of the proceeding, and that in itself could well be a greater part of the proceeding than was the subject of the deficient interpreting in *Tran*. And so the appellant submits that that is one of the three principal failings that, in itself, is sufficient to reduce the interpreting below the requisite standard.

So I can very quickly then go through the other failings because we've dealt with most of them in the course of argument to date. There's the failing to advise the Court as to the mode of interpreting to be adopted. These, of course, are failings that on their own don't amount to all that much but in totality amount to something quite significant and also provide, or lend a lot of support to, the five principal failings.

The issue of a microphone has already been dealt with. The question of recording the interpreting has been dealt with. No delegation to the interpreter of the power to control the flow of the dialogue. Oh, this is said by the defence expert, or the appellant's expert, to be a significant matter, and then the thirteenth failing, lack of interpreter continuity. We have really dealt with that in the course of the argument to this point, and the appellant's argument is that the interpreting could not have been

continuous because of the various failings that have been discussed, and the interpreting lacked precision for exactly the same reason, and, in summary, those reasons are:

The appellant sometimes asked the interpreter to repeat what he hadn't heard. On those occasions, the interpreter would miss, if he repeated what the appellant hadn't heard, what was being said in Court. Sometimes he would not ask for that to be repeated. The interpreter had difficulty in keeping up, according to the evidence. Didn't always succeed, according to the evidence, in getting the English speaker to pause or repeat what had been said. So the submission is that those failings, and also failings concerning hearing and English competency issues, which are dealt with in para 62 of the written submissions, also have a bearing on the issue.

There was also an issue, and this is the final failing, the fifteenth failing, page 22 of the submissions, about the impartiality of the interpreter having been potentially compromised, and that being because, in this case, the two accused were, whilst they weren't running a cut-throat defence, were suggesting that it must have been the other person who was the offender. That potentially gave rise to a problem with one interpreter acting for the two accused, compounded, it is submitted, by the interpreter having earlier interpreted for the co-accused in an earlier case involving him. So the submission is that all of these failings, either in the case of three of them on their own, or the rest in totality, have resulted in a deficient standard of interpreting. As was said in *Tran*, the interpreting must be of a high enough quality to ensure that justice is done, and seen to be done, and the submission is that it's manifestly apparent in this case that that standard was not met.

I move on then to look at the question of the Court of Appeal's approach to the interpreter's qualifications. The Court said that Mr Qerenso was the most highly-qualified interpreter available in Australasia. The appellant submits that the evidence didn't exactly establish that. Rather, it established he was one of seven Oromo interpreters in Australia, all of whom had the level two paraprofessional qualification. But even if he were to be the most highly qualified interpreter in Australia, that doesn't alter the fact that he was not qualified for court interpreting, and the submission that is advanced by the appellant is that if a qualified interpreter is not available in Australasia, then the way to address that issue is either to use modern technology for the purpose of bringing an audio-visual feed to the courtroom from an interpreter who is based somewhere else and sending a feed of what is

happening in the courtroom to that interpreter. If it's felt that the technology has not advanced to the point where that is a feasible option, then the appellant submits that an interpreter should have been obtained from somewhere outside of Australasia.

Oromo is a language spoken by 25 million people. It is the fourth most widely spoken African language in Africa. It is one of the official languages in Ethiopia. It is the language of commerce and learning in Ethiopia, spoken, apart from in Ethiopia, in Somalia, Egypt and Kenya. The appellant submits that it would be inconceivable that a suitably qualified interpreter, who could interpret proceedings in Court from English into Oromo, could not be sourced in Africa or in North America or in Britain, and the submission is made that if the alternative of technology is not one that is really available, in my submission as it would be, but if it's felt it's not, then the obvious solution is to obtain an interpreter from outside of Australasia if a qualified interpreter is not available in this region.

In para 66 of my submissions, I refer to various objections that were put up by Ms Goodman, who is the CEO of Interpreting New Zealand, about the problems with audio-visual interpreting from a distant location, and my submission is even if there were to be something to them, the problems would pale into insignificance compared with the difficulties presented by using an incompetent interpreter. And so the submission is that the Court of Appeal was in error in ruling that it was unreasonable to bring an interpreter to New Zealand from further afield. The Court didn't say why it concluded it would be unreasonable but conceivably it was considerations of cost and convenience, and as was said by Justice Robertson in *Alwen Industries Limited*, the Courts will be reluctant to limit the scope of those rights for reasons of convenience or economics. This attitude is not novel.

The Crown advanced an argument in *Alwen* that cost was a prohibitive factor there, but was unsuccessful in advancing that argument. And the submission is made that the Court of Appeal effectively limited the appellant's right under section 24(g), and this is not permissible to do, by permitting the use of an interpreter who was inadequately qualified, insufficiently experienced, lacking the necessary accreditation, especially when the means would have been available to obtain a qualified and experienced interpreter. Really, one might think that what's happened here is that Interpreting New Zealand, who were asked by the District Court to source an interpreter, have simply said, "Well, we've got one, the best qualified we can get in Australia, we'll use him, there's no need to look any further afield," which could really

be characterised as a somewhat lazy approach because what should have happened if there was no qualified interpreter in Australia, was for Interpreting New Zealand to source one from further afield.

The Court of Appeal dealt with the issue of the interpreter not speaking at a level that could be heard by all in the courtroom by saying, "This may be best practice, but it was not the instruction Mr Qerenso received from the Judge." In my submission, that's an erroneous approach to the issue. The fact the direction came from the Judge does not alter the fact that an essential prerequisite for consecutive interpreting was absent. The Court of Appeal said that reasonable steps were taken throughout the first week to ensure that everything said was interpreted for the appellant. Apart from the question of the interpreter's qualifications and the issue of whether the interpreter should have been able to be heard by all in the courtroom, the Court of Appeal failed to deal with the numerous other criticisms. It said it was impressed by Mr Qerenso as a man who had done a conscientious and competent interpreting job. Well, the submission that the appellant makes is that there was no real basis for that conclusion. The fact that Mr Qerenso claimed to have done a satisfactory job cannot overcome his lack of qualification, his lack of experience, his lack of accreditation, and all the other manifest failings that are apparent. The absence of a recording of the interpreting makes it impossible to conclude that Mr Qerenso had done a competent and conscientious job and makes it impossible to determine that all reasonable steps were taken to ensure everything said was interpreted.

So I move on then to the Court of Appeal saying that it was a quite overwhelming feature of the case, the failure of counsel to complain about the interpreting. The Court accepted the reluctance of the appellant himself to complain for the reasons he gave in his affidavit, which essentially were that he had been on the receiving end of harsh treatment in Ethiopia and was reluctant in any way to challenge authority. And that was expanded by a Professor Abawajy, who is a professor in Melbourne and swore an affidavit talking about a concept known as, a cultural concept, known as "kabbaga", and this is described in volume 3, tab 12, where Professor Abawajy in para 7 described "kabbaga" as being a concept of obedience. "It involves obedience to the state and also to those in a superior position in the social or community hierarchy," and it means that a person subject to it may not disagree with, dispute or challenge anything done or said by a person higher in social structure, and it would

extend, the professor says, “To the acceptance, without question or criticism, of any service provided by a person in a higher position or by the state.”

The professor says that, para 10 page 361,”The obligation of obedience would prevent an Oromo person from complaining about a service provided to him by the state. No matter how deficient the service was, it would not be an option for that person to express dissatisfaction with it. For the appellant to have expressed dissatisfaction with the interpretation provided would be seen by him as his challenging the whole institution of the Court, as well as the legal system and those socially superior to him. He would view it as an affront to the Court, the Judge, the law enforcement agency, the law of New Zealand and the interpreter himself. He would not feel able to do that. Rather, he would feel obliged to express satisfaction of it, and the environment of the courtroom would emphasise this.” Para 12, “Those values would be deeply ingrained.”

So, that may have a bearing on a point we were discussing before the adjournment, namely, the point that Ms Fairbrother and Mr Nisbet checked with Mr Abdula to see if he was happy with the interpreting, and he said he was. Professor Abawajy provides an explanation for that, in the event that the appellant was not happy with it. The appellant’s partner, Ms Simms, in her affidavit, deals with this issue, where she says that Mr Abdula would never challenge anyone, even in the workplace, and that she tried to impress upon him that, in New Zealand, it was possible to express your opinion if it was contrary to a superior’s position, but she didn’t make any headway in doing so. So that explains, in my submission, why there was no complaint from the appellant and, in my submission, that's perfectly understandable given the cultural dimension.

And I saw recently, Your Honours, a person who worked in the Third World, on television, discussing the provision of services to people in the Third World. And she made the rather telling comment that in this country we have an expectation that we’re going to get a minimum in a service provided to us. But in the Third World, they don’t have that expectation, they’re simply glad that someone has given them the service, and hence the appellant says here he was, “appreciative of the fact that someone had even come along to represent him,” and Mr Nisbet makes that point in the affidavit as well. He appreciated the fact that someone had come along to interpret the proceedings for him, and it would not be right to complain.

Well, the Court of Appeal then went on to say that the quite overwhelming feature of the case was the failure of counsel to complain, and we've dealt with that in argument hitherto. And it also, as has been observed, spoke in strong language about the failure of the appellant's partner to express her concerns, and the submission that the appellant makes in that regard is that a person can be educated and have two university degrees and be an office manager, but still feel intimidated if outside of her normal environment. She says she had no experience in Courts or in the criminal justice system and was simply overwhelmed by it, and, in my submission, her concerns, as expressed in her affidavit, cannot be dismissed in the way that they were because they are supported by Ms Fairbrother, they are supported by what Mr Nisbet says about the possible difficulties the appellant had in understanding everything of what was said, and they are supported by the other failings that I have –

TIPPING J:

And she wasn't cross-examined?

MR STEVENS QC:

Yes. Yes. My submission is the Court of Appeal should have appreciated the Courts can be daunting and intimidating places, even for the well-educated.

The submission that is advanced then, in the following pages of the written submissions, is that the appellant's failure to complain cannot be viewed as a waiver, nor can the failure of his partner to complain.

YOUNG J:

It might point to the possibility that whatever imperfections there were with the interpretation provided, it wasn't regarded by the defendant, his partner or the lawyers as very material.

MR STEVENS QC:

Certainly it could point in that direction and I would have to accept that, but my submission would be that although that could point in that direction, the other evidence is a very strong pointer in the opposite direction.

YOUNG J:

What's the other evidence?

MR STEVENS QC:

The evidence about the concerns of – well, apart from the concerns, the evidence about the failings.

YOUNG J:

Yes. Well, my proposition is assuming – the proposition I put to you assumes that there were deficiencies in the communication to the appellant of what had been said in the witness box or by counsel or the Judge. So assuming that, assuming that a few things haven't, or perhaps more than a few things haven't got through, the failure to complain might suggest that those who were in his camp didn't see these failings as very material.

BLANCHARD J:

And how did they know what wasn't getting through?

YOUNG J:

Well, that may be so, but I'm just putting that proposition to you. It can't be a waiver.

MR STEVENS QC:

No, it can't.

TIPPING J:

What effect it has, if any, is of an evidentiary kind as to how those at the time saw it, but its weight in that respect may not be very great.

MR STEVENS QC:

No, because of kabbaga, because of the overwhelming experience that Ms Simms felt in the courtroom environment.

TIPPING J:

And they went off to the Registrar. Well, they must have thought – to see if there was someone else available. Well, you don't do that if you don't think it matters. Perhaps. I don't know. It's a very strange set of circumstances this.

MR STEVENS QC:

And then say, "Well, what can we do? No one else is available. The appellant seems to be happy, but we asked him in English, and then there's kabbaga, but there doesn't seem to be much option but to go on." That seems to be what it came down to.

TIPPING J:
But the very thing that you'd think anyone would think of would be go and see the Judge.

MR STEVENS QC:
Yep.

TIPPING J:
I don't know what we make of that, Mr Stevens.

MR STEVENS QC:
Well, there's only one thing one can make of it and that is it should have been done but wasn't, and there's enough, aside from that, to indicate that there were all these shortcomings.

So finally the appellant deals with the Court of Appeal's finding that the appellant had not identified any aspect of the conduct of his defence which was in any way hindered by any shortcomings in the interpretation process. The appellant's submission is that *Tran* is authority for the proposition that such an approach cannot be adopted.

TIPPING J:
Can I just explore that with you, just slightly? If, if the breach of the right falls short of impacting on fair trial rights, then the materiality of the breach, notwithstanding *Tran*, might be thought to be relevant.

MR STEVENS QC:
Yes.

TIPPING J:

If, however, it gets as high as reaching fair trial rights, then clearly in terms of *R v Condon* [2006] 1 NZLR 300 (SC), [2006] NZSC 62 and *Matenga v R* [2009] 3 NZLR 145 it doesn't matter.

MR STEVENS QC:

Yes.

TIPPING J:

Is – do you accept that dichotomy?

MR STEVENS QC:

Yes.

TIPPING J:

Thank you.

MR STEVENS QC:

Well, what I do rely on is the statement in *Tran* that Courts can't engage in speculation, in this type of situation, as to whether or not the lack or lapse in interpretation made any difference, and –

TIPPING J:

Well, that's an aspect of *Tran* that might be thought to be a little controversial.

MR STEVENS QC:

It is indeed, but I think it, in my submission, comes down to the statement that to second guess or ponder the utility of proper interpretation is a dangerous exercise, and the Crown position appears to be well, the appellant has had the transcript from the trial since the trial and he's not identified any way in which he was disadvantaged, and my submission in response to that is that it's simply too dangerous to start embarking upon on assessment of how the appellant might have been disadvantaged for the reasons that the Chief Justice of Canada has given in *Tran*.

YOUNG J:

You could, presumably, if you could point to an area of disadvantage, you would.

MR STEVENS QC:

Yes.

YOUNG J:

And I don't imagine that you would have left undone the attempt to locate a disadvantage. It would be unreasonable to expect an appellant would.

MR STEVENS QC:

Well, the difficulty is that the appellant doesn't – he had the transcript but he doesn't understand English, and –

YOUNG J:

Well, there are interpreters available.

MR STEVENS QC:

Yeah, but it was a devil of a job to find an interpreter in Wellington to accompany counsel to the prison to actually find out what the basics of the whole issue were from the appellant's point of view, and the only interpreter was a taxi driver. We were having to take what Ms Burns refers to as a BYO interpreter, and she talks about the dangers of relying on them, to the prison just to get a basic understanding of the problem.

It was not feasible to get or expect the appellant to go through all the hundred and something pages of the transcript and identify where there might have been a problem. There simply wasn't an interpreter, who was adequately qualified, available to do it and not the resources to obtain someone from overseas who would have been qualified. So that, coupled with the dangers that the Canadian case identifies in terms of trying to work out whether there has been prejudice, is really an indication that it's, there's no reasonable expectation in such an exercise being undertaken or any realistic utility of it being workable.

It would, as the Chief Justice of Canada said, be an inherently dangerous exercise. It's impossible to know, as the judgment in that case says, what would have happened if an accused had been provided with full and contemporaneous interpretation. Nowhere, says the judgment, does section 14 contemplate an ex post facto assessment of prejudice, and, as the judgment says, section 14 guarantees the right to interpreter assistance without the qualification. It would be wrong to introduce

into the assessment of whether the right has been breached any consideration of whether or not the accused actually suffered prejudice. The charter, in effect, proclaims that being denied proper interpretation is prejudicial. And the appellant says, well, the Privy Council in *Kunnath* case arrived really at a similar conclusion.

McGRATH J:

Espriella was a case where the appellant did not succeed on this point in the –

MR STEVENS QC:

Yes, yes, it was, Sir and *Espriella* is an unusual case in the sense that the accused in that case had taken his own interpreter to Court and that interpreter had interpreted all of the proceedings for him with the exception of the evidence that the accused himself gave. When it came to the accused giving evidence, the court appointed interpreter interpreted that evidence for the Court and the focus in *Espriella* was concentrated on the interpreting done by the court appointed interpreter of the evidence of the accused and it was said there was some 538 omissions and 500 and something or other inaccuracies and the Court in that case said, well, yes there might have been but almost all of them were pedantic and of no consequence. But, in addition to that, there was the additional component that the accused had become aware of a suggestion during the course of the giving of his evidence that there might be a problem with the interpreting by the court appointed interpreter and that had been discussed with counsel and the decision had been made to proceed nonetheless and so the Court, the Western Australia Court of Appeal, said when you look at all the alleged deficiencies, they come to nothing. There'd been a conscious decision made to proceed nonetheless and so it can't be said in this case, they said, that there was a departure from the standard of competence, continuity, precision, impartiality and contemporaneousness.

So my submission would be that if the *Condon* approach is to be taken, then the issue of remedy should be that in the great majority of cases, as it was put there, failure to provide legal representation, unless there is some justification for the failure, will mean that the trial had not been fine. So in the great majority of cases. In *Tran* it was said as a general rule the failure to provide adequate interpretation will mean that the trial has not been fair. The appellant's condition is that – the appellant's submission is that the matter should be approached in those ways. That as a general rule if there's a breach, then the trial won't have been fair, or to adopt the *Condon* approach in the great majority of cases, the trial had not been fair.

That's my submission as to the approach that should be taken to the issue of remedy.

So can I conclude my submissions, Your Honours, by saying that there was not in this case adherence to the minimum standard that requires continuity, precision, impartiality and competence. And, Your Honours, those are the submissions on behalf of the appellant.

ELIAS CJ:

Thank you, Mr Stevens. Yes, Mr Solicitor?

SOLICITOR-GENERAL:

Thank you very much, Your Honours. I have a one page synopsis, which sets out the structure of the arguments that I propose to advance to the Court. You'll see that there are five parts to the submission that I wish to advance. The introduction will focus on the purpose of the right set out in section 24(g) and will summarise the Crown's case. I then wish to spend some time analysing the ingredients of the rights set out in section 24(g). I will then focus on why the right was, right was not breached in this particular case and I will then address the Crown's views on the appellant's theory of the case and of the law. And finally I will address any issues that might arise as a result of the arguments that have been advanced.

I think that the beginning part will be quite uncontroversial. The purpose of the right, as set out in section 24(g), is to guarantee that interpretation services provided for an accused will be of sufficient quality to enable the accused to understand the case against them and to enable them to fully participate in their trial. That statement of purpose is derived from both the common law right to a fair trial, such as in the Court of Appeal of England and Wales decision in *R v Lee Kun* [1916] 1 KB 337 (CA), the Privy Council's decision in *Kunnath* and the Western Australia Court of Appeal in *De La Espriella-Velasco* and also from jurisdictions where the right to an interpreter is part of a recognised subset of codified rights, such as in *Tran*.

Now it will come as no surprise to the Court that, in the Crown's submission, in this particular case, the case before this Court, the following ingredients are pertinent to whether the standard guaranteed by section 24(g) was satisfied. Namely, whether the interpretation services provided were accurate, whether they were continuous

and whether they were contemporaneous. I will deal with the issues of impartiality and competence a little later.

If the appellant fails to satisfy the Court of a breach, then, with respect, the appeal should be dismissed. If the appellant can prove a breach, then the Court must still go on and be satisfied that the breach has caused an unfair trial before allowing the appeal and the essence of the Crown's case is that the appellant has not discharged the onus on him of proving that the interpreting assistance, in this case, did not meet the standard required by section 24(g). Furthermore, if he has met that threshold, then, in the circumstances of that case, he has not been deprived of a fair trial.

I will now go on to deal with the ingredients of the right and it will be instantly appreciated by the Court that the following submissions are substantially based upon the Supreme Court's analysis in *Tran* with, what I hope will be regarded as, appropriate modifications by this Court. Dealing firstly with accuracy referred to in *Tran* as precision and, in the Crown's submission, it is axiomatic that for an accused, who requires an interpreter to understand the evidence and to participate fully in their trial, the interpreting services have to be accurate. However, as emphasised by both the Supreme Court in *Tran* and the Court of Appeal of Western Australia in *De La Espriella-Velasco*, while the standard of interpreter should be high, it should not, it need not be perfect. And the Supreme Court of Canada was at pains to point out, and I'll just read this section rather than take you to the judgment, but it's at page 987 of the judgment. "Interpretation is an inherently human endeavour which often takes place in less than ideal circumstances. Therefore, it would not be realistic or sensible to require even a constitutional guaranteed standard of interpreter to be one of perfection." And then quoting from a book by Steele, "Even the best interpretation is not perfect in that the interpreter can never convey the evidence with the sense and nuance identical to the original speech. For that reason, the Courts have cautioned that interpreted evidence should not be examined microscopically for inconsistencies." And the Court went on at page 987 and 988, "In light of the fact that interpretation involves a process of mediation between two people which must occur on the spot with little opportunity for reflection, it follows that the standard for interpretation will tend to be lower than might be the case for translation." So the Crown submits accuracy is clearly very important but we're not aiming for perfection and can't aim for perfection.

ELIAS CJ:

But you must aim for no material deficiency –

SOLICITOR-GENERAL:

Correct.

ELIAS CJ:

– and it's so difficult to assess that in circumstances where we don't have a record.

SOLICITOR-GENERAL:

Yes, that is difficult to assess but the onus is on the appellant to, nevertheless, point to some part of the evidence which he says was not explained to him at the time.

ELIAS CJ:

Why –

SOLICITOR-GENERAL:

Some material part.

ELIAS CJ:

Why do you say that the onus is on the appellant? I mean there must be some onus –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– but once there is doubt about the adequacy of the interpretation, as for example that standards, usual standards, haven't been observed and the course has been less than ideal, the whispering and so on, why does the burden then remain with the appellant?

SOLICITOR-GENERAL:

Because establishing that there has been an inaccuracy is a fundamental obligation of the appellant's and in *Tran* it was very easy because –

ELIAS CJ:

It's not the approach we adopted in *Condon*. There was a clear failure to provide a lawyer there I suppose.

SOLICITOR-GENERAL:

Yes, indeed. Yes, there it was very clear –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

– as in *Tran* and where I disagree with my friend's analysis of *Tran* is on this very material point. In *Tran*, the summary that was provided by the interpreter was inaccurate and the Court focused upon inaccuracy and had inaccuracy at the forefront of its mind when it criticised the calibre of the interpreting that was provided in that particular case. It wasn't just the fact that it was a summary. It was an inaccurate summary. It was incredibly important in that case and here we have no evidence of inaccuracy at all.

ELIAS CJ:

If the evidence was that instead of interpretation of the evidence, the evidence was summarised –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– would that not be a deficiency in the right to interpretation?

SOLICITOR-GENERAL:

It would be, Your Honour and, at that point, the obligation would, I respectfully submit, change and if the summary was accurate, unlike *Tran*, but if the summary was accurate, the Court would be invited to conclude that no fair trial breach had occurred.

TIPPING J:

Inaccurate or perhaps insufficient.

SOLICITOR-GENERAL:

Yes, yes.

TIPPING J:

Materially insufficient.

SOLICITOR-GENERAL:

Materially insufficient, yes.

ELIAS CJ:

That's running straight into fair trial.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

I'm interested in the stand-alone question of breach first.

SOLICITOR-GENERAL:

Yes, well, I would accept that proposition, Your Honour, that a summary, per se, is a breach.

ELIAS CJ:

Yes, thank you.

SOLICITOR-GENERAL:

That –

TIPPING J:

The key point perhaps is that the consequences of the breach will not necessarily be the same in each case.

SOLICITOR-GENERAL:

Correct.

YOUNG J:

Can I just explore this in a little detail? It is quite common for people who speak English to a certain standard, nonetheless, to require, and perfectly understandably, an interpreter.

SOLICITOR-GENERAL:
Yes.

YOUNG J:
And they may feel more comfortable with some aspects of the case in English to other aspects?

SOLICITOR-GENERAL:
Yes.

YOUNG J:
And perhaps particularly if they come to give evidence where they want to choose the right word?

SOLICITOR-GENERAL:
Precisely.

YOUNG J:
It can't be the case that the right of the assistance of an interpreter means that someone who can speak reasonable English has to get an interpretation whether he or she wants it or not.

SOLICITOR-GENERAL:
That would involve a very careful assessment of the particular circumstances before the Court and provided the person can establish that they do need the advantage of an interpreter in order to participate fully in their trial, then I think they've got a –

YOUNG J:
Well –

SOLICITOR-GENERAL:
– section 24(g) position.

YOUNG J:

I'm thinking of a very usual situation where someone is giving evidence with the assistance of an interpreter and their evidence is half in English and half in their foreign language.

SOLICITOR-GENERAL:

Yes.

YOUNG J:

They're quite happy to answer some questions in English –

SOLICITOR-GENERAL:

Yes.

YOUNG J:

– and other questions they might seek a word or give their answer in their native tongue and then have it interpreted. Well, that can't be a breach of the fair trial right.

SOLICITOR-GENERAL:

No, that's not a breach of the fair trial –

YOUNG J:

If they choose sometimes to engage in English and sometimes not.

SOLICITOR-GENERAL:

Oh, I accept that entirely and, indeed, the transcript of the interview of the appellant shows that he did speak in English in some parts of that.

YOUNG J:

Well, it does, it shows some questions he answered in English and other questions he had interpreted to him and answered.

SOLICITOR-GENERAL:

Yes.

YOUNG J:

We don't have his original written statement which was in English. Perhaps if we could – I would quite like to have a look at that after lunch.

SOLICITOR-GENERAL:

Yes.

YOUNG J:

Although I think he had the assistance at the time of, was it the taxi driver friend?

SOLICITOR-GENERAL:

Yes. That was all I was proposing to say about accuracy, unless I can assist the Court any further on that particular point?

ELIAS CJ:

Yes, thank you.

SOLICITOR-GENERAL:

I was then going to go on and very quickly deal with the concept of the need for the interpreting services to be continuous and I accept it's also axiomatic that if an accused person requires the services of an interpreter for the purposes that we have explained, that service must be provided throughout their trial. If they require interpreting services, then those interpreting services should be provided continuously, not at the behest of the interpreter just when the interpreter believes it's necessary.

And dealing with contemporaneousness, whilst ideally, and I emphasis ideally, interpreting services should be provided in a consecutive fashion, no harm is done, in my respectful submission, if there is, in fact, a simultaneous translation. What is important is that the accused understands the evidence contemporaneously rather than, say, be presented with a summary of the evidence or a translation at the end of the day.

Now those, in my respectful submissions, are the three ingredients to 24(g) pertinent to this case but I do want to deal with impartiality and competence in the sense of formal qualifications as I understand that concept to be used. Both competence, in the sense of formal qualifications, and impartiality are indicators as to whether or not the quality of the interpretation has met the standard. But they are not, in the

circumstances of this case, essential ingredients to the test. And competence, if I can deal with that first, in terms of pure qualifications, is merely an indicator as to whether or not services have been provided to the requisite standard. Qualifications are not a pre-requisite. They are not an essential element to the right and the logic of this is borne out by the present case where, as the Court appreciates, Mr Borde, the taxi driver in Wellington, who doesn't appear to have any interpreting qualifications, was able to do a very good job, according to the appellant, in the second week. He described –

ELIAS CJ:

The evidence in the second week, of course, was much less critical probably for the case.

SOLICITOR-GENERAL:

With respect, it still involved closing submissions, the summing up from the trial Judge, plus the case of the co-accused as I understood it.

TIPPING J:

Mr Solicitor, if a person doesn't have the qualifications that a reputable person versed in this field says they need –

SOLICITOR-GENERAL:

Yes.

TIPPING J:

– might that not put the Court on some sort of enquiry or at least raise some anxiety about the actual competence and require the Court to be affirmatively satisfied, if you like, that there was actual competence. It's not as if there's absolutely nothing to go on –

SOLICITOR-GENERAL:

Yes.

TIPPING J:

– as far as qualifications are concerned.

SOLICITOR-GENERAL:

And the only response, I think, I can make to that point, Your Honour, is that in this case, as in all other cases, the Court is reliant upon a reputable body to find a competent translator. They rely on New Zealand Translation Services to find a translator for the Court. Now, I accept the Judge doesn't make those enquiries but a reputable organisation does do so –

TIPPING J:

But we have here evidence, and I know the evidence is not all one way –

SOLICITOR-GENERAL:

Yes.

TIPPING J:

–that suggests that to do what this person was required to do, you needed qualifications at a certain level and this person didn't have them.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

Now, to me that makes me think, oh –

SOLICITOR-GENERAL:

I can understand –

TIPPING J:

– you know, there's something that we should be a bit careful about here.

SOLICITOR-GENERAL:

Yes. But before you got too concerned, Your Honour, you would need to be satisfied that there was, in fact, a failure of interpreting services. You are entirely correct to be on guard and to be making enquiries but at the end of the day you still need to be satisfied that there was a failure to accurately interpret.

TIPPING J:

Well, it's a question of how much one makes or how much one infers regarding the actuality from the evidence that they weren't, by qualification at least, up to it.

SOLICITOR-GENERAL:

Well, the most important piece of evidence, which hasn't been referred to the Court so far is, of course, the evidence of the interpreter himself, who was cross-examined about what he interpreted and how much he interpreted and he told the Court of Appeal that he interpreted everything. He was the only person who was cross-examined and, therefore, perhaps the only person whose credibility could be accurately assessed. The Court of Appeal was impressed by him and concluded that he was an honest, competent interpreter.

ELIAS CJ:

Well, how could they? Maybe you can take me to the evidence that demonstrates this, but I have a query as to how they could assess competence from the cross-examination. I accept they can assess that he did his conscientious best, they could make an assessment of the man himself –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– but how could they assess competence?

SOLICITOR-GENERAL:

Only by relying upon his word, Your Honour and they did rely on his word.

ELIAS CJ:

Well, we all think we're competent.

SOLICITOR-GENERAL:

Yes, but some of us don't withstand much cross-examination on the point.

TIPPING J:

Not many people care to acknowledge their incompetence, Mr Solicitor.

SOLICITOR-GENERAL:

Your Honours, we are still getting one step ahead of ourselves, or at least I am, because at the end of the day we still have to have identified some part of the evidence which the appellant says he didn't know about, that prevented him from participating fully in the trial. And I do make the point, because it is too easy to gloss over, that – and it's a point that I do wish to emphasise a little later in the submissions as well so forgive me if I repeat it later – we do have here a situation in which an appellant has had the transcript for two years. He says that when he was going home in the evening, or his partner said when he went home in the evening, he, according to her, didn't understand parts of what was happening during the day's evidence, yet they've never had the opportunity of being told what it was that he didn't understand. What was it that the partner says he didn't appear to comprehend? And that, with respect, is a very legitimate question to be asking. It's – the extraordinary thing about this case, the overwhelming feature of this case, in my respectful submission, is that we don't know what it is that the appellant says he didn't know. We haven't even the slightest hint of what it is that he says he didn't know.

TIPPING J:

Or understand.

SOLICITOR-GENERAL:

Or understand.

TIPPING J:

Probably more understand than – well, it's the same point really.

SOLICITOR-GENERAL:

Yes, that's exactly the point I'm making, Your Honour.

ELIAS CJ:

Well, I understand that that is highly material to the next step, the consequence, but in terms of a right to interpretation, and against a circumstance that the appellant is acknowledged to require interpretation, because that's the way everything has proceeded –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– why is proof of particular and material impact necessary in forming the view that there's been a breach?

SOLICITOR-GENERAL:

It's material in this way, Your Honour. If this Court accepts that an ingredient of the right is accurate interpretation, then the onus is on the appellant to prove that there has been, not then accurate interpretation and he needs to be able to say, this part here –

YOUNG J:

He's trying to prove it. He's trying to prove it by saying the conditions in which the interpreter operated were not conducive to accurate interpretation.

SOLICITOR-GENERAL:

Yes.

YOUNG J:

And then there are the generalised concerns expressed by Ms Simms and Ms Fairbrother.

SOLICITOR-GENERAL:

Yes, so he, nevertheless, needs to be able to demonstrate inaccuracy in some material way, not just simply leave it left hanging on the basis of, well, look at the environment in which this was happening, there must have been inaccuracies.

TIPPING J:

Is it, Mr Solicitor, he has to demonstrate actual inaccuracy or simply a material risk of an inaccuracy?

SOLICITOR-GENERAL:

He has to establish inaccuracies, Your Honour.

TIPPING J:

Positive inaccuracies?

SOLICITOR-GENERAL:

Absolutely.

TIPPING J:

Rather than just the climate, if you like?

SOLICITOR-GENERAL:

Yes, yes, indeed.

TIPPING J:

That could be quite a significant distinction if the distinction is sound.

SOLICITOR-GENERAL:

Yes, yes.

ELIAS CJ:

But if he establishes that the interpretation is not full because there are episodes where he is speaking when evidence is being given – sorry not –

SOLICITOR-GENERAL:

Yes, I understand what you mean.

ELIAS CJ:

Matters such as that, is that not sufficient threshold to say that there's a deficiency here?

SOLICITOR-GENERAL:

No, Your Honour. It's not a sufficient, that doesn't meet the threshold because it's still necessary to establish a material error in the evidence as he understood it. A material error through –

ELIAS CJ:

But that goes to fair trial, but as to the absolute right to interpretation –

SOLICITOR-GENERAL:

Well, that's why I focus so much on accuracy as the most important ingredient in this right and the obligation in proving the breach of the right rests with the appellant.

TIPPING J:

I think one could possibly infer from all the circumstances that there was something less than what was necessary from the point of view of accuracy, just from the way it all happened. That would be the danger for the Crown, in my mind. Now, you may be able to displace it.

SOLICITOR-GENERAL:

And I will spend some time doing that under the third element of my submissions.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.15 PM

ELIAS CJ:

Thank you, Mr Solicitor.

SOLICITOR-GENERAL:

Thank you, Your Honours. I was proceeding to move on to item 3 in that table of my synopsis but just before I do I realise that I hadn't addressed the Court on impartiality and I should do so. Before I do, Your Honour Justice Young asked for a copy of the statement and it isn't part of the Court record. It was not produced at trial I understand –

YOUNG J:

Oh, was it not?

SOLICITOR-GENERAL:

No. And that accounts for it not being in the case on appeal.

YOUNG J:

I see.

ELIAS CJ:

So it wasn't before the Court of Appeal either?

SOLICITOR-GENERAL:

No.

McGRATH J:

There were references, however, to him having made a statement –

SOLICITOR-GENERAL:

Correct.

McGRATH J:

– without the assistance of an interpreter –

SOLICITOR-GENERAL:

Yes, that's correct.

McGRATH J:

– and it was just being tossed around without the statement being in front of the Court of Appeal?

SOLICITOR-GENERAL:

It was in, I think the reference to it is in Mr Nisbet's affidavit, Your Honour.

McGRATH J:

Right.

YOUNG J:

Which was, I mean I've seen it somewhere and it may have been in his affidavit, but the statement he made in English was basically the same in substance as the statement made by the interpreter?

SOLICITOR-GENERAL:

Correct, Sir. Impartiality. I had placed this in brackets simply because I didn't believe it was truly an issue in this case. I would obviously support the approach taken by the Supreme Court of Canada that interpreters must be impartial. I listened

to my friend on this point and, with the greatest of respect, I really struggled to fully understand the suggestion that an interpreter lacks the requisite qualifications to interpret when interpreting for two people who might be in conflict with each other. The role of interpreter isn't to do anything that could possibly be considered partial to one accused over another and this interpreter made that very, very clear in his evidence in the Court of Appeal and so I continue to place that in brackets.

ELIAS CJ:

Well, it's probably not impartiality in the sense of neutrality between them but it's, the suggestion rather is that because one of them was more inadequate with English, and he's necessarily spending more time helping that person.

SOLICITOR-GENERAL:

Yes and that is a point which I'll come onto because that's a question of fact that the Court of Appeal did have to come to grips with.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

So, I move on to item 3, why the right was not breached, and I have already, in exchanges with the Court, covered the key point. Namely, no specific failures have been identified and unlike the Court of Appeal, I regard this as being the overwhelming feature of this particular case and the fact that no concerns were raised at trial, I have listed as the fourth element and that's the priority that I would give that particular concern. The failure to identify any alleged inaccuracy or inadequacy in the interpretation is, in my respectful submission, the truly overwhelming feature of this case.

TIPPING J:

Is there a difference here between the breach of the right and whether the breach has any consequence?

SOLICITOR-GENERAL:

I – this is, harkens back to the point that Her Honour, the Chief Justice and I exchanged –

TIPPING J:

You say there can't be a breach without consequence as opposed to there is a breach but it is inconsequential?

SOLICITOR-GENERAL:

No. I'm saying, in this particular case, there hasn't been a breach because no inaccuracies –

TIPPING J:

Yes.

SOLICITOR-GENERAL:

– have been identified.

BLANCHARD J:

How would he go about identifying inaccuracies?

SOLICITOR-GENERAL:

There are two ways. One, his partner could have been more specific in saying what it was that she says he failed to understand during the course of the trial. Instead, we just have this very vague assertion that in the evenings, when they discussed the day's events, he had a different understanding of events from her. Well, there was clearly, if there were significant misunderstandings on the part of the appellant, there was the perfect opportunity for those to be identified. Secondly, Your Honour, he's had the transcript and it would not be such a difficult task for one of his friends, who can interpret, to go through that transcript and if he can identify matters which he says he learnt for the first time when somebody translated the transcript for him, then we would be in a position of understanding what his grievance really is.

BLANCHARD J:

And where would this be done?

SOLICITOR-GENERAL:

Where?

BLANCHARD J:

Isn't he in prison?

SOLICITOR-GENERAL:

Yes, but that's not an issue with respect. He has a friend, who is an interpreter, who is able to go up to the prison with his lawyer. I don't regard that as an overwhelmingly challenging task at all.

BLANCHARD J:

Wouldn't it take hours to do?

SOLICITOR-GENERAL:

It might take some time, I accept that.

ELIAS CJ:

It's really like proof-reading. Enormously tedious, it requires huge effort, doesn't it?

SOLICITOR-GENERAL:

Well, it's an effort that should have been made if there is any substance to this point, with respect.

ELIAS CJ:

I wondered, I was just looking back at section 24(g) –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Because I think it's helpful to tie the submission to the language of that provision. Is your submission that he hasn't shown that he could not understand?

SOLICITOR-GENERAL:

Correct.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Yes. Yes. And Your Honour is quite right, I have been a little loose in referring to quality of interpreting services. Now, the second point is another point which we have touched on already so I will be very, very brief on this point, and that concerns the fact that the Court of Appeal found no facts that supported the appellant's thesis. Mr Qerenso, the interpreter, testified on oath and was cross-examined on this point that he had interpreted all the evidence during the trial. That was his sworn testimony. The Court of Appeal assessed his credibility and concluded he was a man who'd done a conscientious and competent interpreting job. Whether –

ELIAS CJ:

Was there anything in his evidence that substantiates that? I mean, presumably, effectively what he was giving was his opinion that he had interpreted accurately. He couldn't do more than that, could he?

SOLICITOR-GENERAL:

That is correct, Your Honour but he also explained the process that he followed so that if somebody was talking, he would finish his interpretation of what part of the trial he was interpreting and ask for the bit that was being spoken when he was interpreting to be repeated and he explained that to His Honour Justice Wild right at the end of the –

ELIAS CJ:

And does the transcript substantiate that?

SOLICITOR-GENERAL:

There's very little in the transcript relating to anything relating to the interpreter but what I am going to do is take Your Honours to the conduct of the trial Judge and counsel during the course of the trial because there are many instances where it was quite obvious that both the trial Judge and counsel were very alert to the need to ensure that the interpreting services were being provided appropriately. So we have the factual findings from the Court of Appeal and, in my respectful submissions, those are factual findings which this Court should be very hesitant to interfere with because the Court of Appeal was well positioned to be able to assess the credibility of Mr Qerenso and did so.

I will now move on to the conduct of the trial and can I divide this into two parts, one relating to the conduct of the trial Judge and the second relating to the conduct of counsel during the course of the trial. The District Court Judge was, in my respectful submission, very aware of his responsibility to ensure that the interpreter was able to do his job appropriately and I will take you to some examples. If Your Honours have volume 2 of the case on appeal, tab 6, the first one I'll take Your Honours to is at page 45, lines 8 to 11. So we have a very clear direction from the trial Judge as to how the interpreting service was to be provided as a matter of practice in the courtroom. And this is confirmed when we go to the next day of the hearing and that starts at page 58 and, to put this in context, the complainant is still giving her evidence and you'll see that the Court congratulated her on the way in which she delivered her evidence the previous day, the style in which she delivered her evidence the previous day and reminded her to continue to do the same as she had the previous day. So here we have the Court recognising that the key witness, the complainant, had been waiting between the question and answer in order to ensure the interpreter could do his job.

ELIAS CJ:

Sorry, what page again?

SOLICITOR-GENERAL:

That's page 58 Your Honour. It's the handwritten page numbering, Your Honour.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And, over the page, we have a reference to a statement, which was the complainant's statement, and the Court making sure that that is read to the accused. Now, there are other instances where we find the Court pausing the proceedings and asking for questions to be repeated. The Court doesn't specifically say that, and it's because of the need for the interpreter to be able to interpret that particular portion, but there are instances of that throughout the transcript.

Now, I want to take the Court to a number of instances where counsel made sure that witnesses were aware of the need for them to speak slowly so that the

interpreter could do his job and the first place is at page 44 of the transcript, lines 19 to 23.

McGRATH J:

Sorry, page number again?

SOLICITOR-GENERAL:

Page 44, Your Honour, lines 19 to 23. I don't know what the word "dialect" is doing in that sentence, it should be language, but aside from that it's very clear that instructions were being given quite clearly to the witness and it's going to be slow. And there are other instances of this. If we go to page 96 at lines 8 to 10 and again at 110 at lines 8 to 11, although again the word "dialect" is being used instead of language. Page 120, at lines 9 to 12. I've included as lines the bold lines at the top about the identity of counsel and the process. So the question, "Now I'm going to ask you some questions."

At page 128, lines 5 to 8. Page 134, lines 8 to 13. Page 137, lines 9 to 11. Page 155, lines 14 to 16. Page 193, lines 7 to 10. In relation to the ESR expert evidence, there was a discussion on how to proceed, which is recorded at page 137, lines 22 to 33.

McGRATH J:

Just hold off, I'd just like to read that because it seems quite –

ELIAS CJ:

Which page?

SOLICITOR-GENERAL:

That's page 137, lines 22 to 33. Now, the next part of the submission takes the Court's attention to instances where counsel and the Court ask for answers or evidence to be repeated. Sometimes that's specifically identified as being through the interpreter and, on other occasions, there's no explanation given but I would respectfully submit that it would be a logical inference that that was to enable the interpreter to do his job. And if I, an issue Your Honours want me to take you to these parts specifically, perhaps if I just read into the record where these can be found in the transcripts rather than laboriously going to each page for Your Honours.

BLANCHARD J:

Well, perhaps you could go to a few until we get the flavor.

SOLICITOR-GENERAL:

Sir, if I deal firstly with the Judge, that – I think the first one is page 59, lines 20 to 21.

ELIAS CJ:

Sorry, what are you referring to?

SOLICITOR-GENERAL:

Sorry, I'm – sorry, that's not the one that I wanted to take the Court to. I'm sorry, Your Honours, it's page 96, lines 33 to 34, and then at the bottom of that page –

ELIAS CJ:

Sorry.

McGRATH J:

Could you read out just the first few words?

SOLICITOR-GENERAL:

Yes. So, at the top of page 27 – 97 I'm sorry, we have the Court inviting the last question to be repeated. I accept that no explanation is given for that but –

TIPPING J:

It's maybe because of the very peculiar name.

SOLICITOR-GENERAL:

That is possible, Sir, yes. Perhaps I would better off just going to where counsel were clearly requiring parts to be repeated for the purposes of the interpreter. If you go to page 121, well, sorry, Your Honours, probably the best one to start with is right at the beginning of page 6, line 50 to 51.

YOUNG J:

Page, sorry?

SOLICITOR-GENERAL:

Page 6.

BLANCHARD J:

Page 6?

SOLICITOR-GENERAL:

Transcript page – page 50, Your Honour.

BLANCHARD J:

And the line numbers?

SOLICITOR-GENERAL:

21 where we see the question is repeated word for word.

ELIAS CJ:

What's the question, sorry? I'm lost, sorry. What are we referring to?

SOLICITOR-GENERAL:

Line 21.

McGRATH J:

We don't have the numbers on the side because of the way it's –

SOLICITOR-GENERAL:

I see, Your Honour.

McGRATH J:

They're mainly cut out by the binding.

ELIAS CJ:

And they don't seem to be relating to the numbers you're giving us.

SOLICITOR-GENERAL:

So, at page 50, in the middle of the page, we have the same question repeated twice.

YOUNG J:
What's the question?

SOLICITOR-GENERAL:
"Did you get much of a view of the second man? Did you get much of a look at the second man?"

YOUNG J:
I see.

SOLICITOR-GENERAL:
Now, I accept that the repetition of the question per se, well, there's no explanation for the repetition of the question but there are a number of instances in the transcript where questions are repeated word for word and the only point that I was making was that there was a reasonable inference that can be drawn that there was a reason for that, namely, to assist the interpreter.

ELIAS CJ:
I don't know, Mr Solicitor. I've seen lots of questions asked a number of times as people go through. There's nothing to indicate that there's an interruption, which usually transcribers put in, and there's an intervention by the Judge or something like that.

SOLICITOR-GENERAL:
Well, that submission though is supported by the affidavit evidence in which counsel for the prosecution, in his affidavit before the Court of Appeal, stated that the trial moved at a very slow pace which was due to the need to allow the interpreter to keep up. Now, that's in volume 3, tab 14, at page 371, paragraph 13. And the same point is repeated in paragraphs 14 through to 18. Furthermore, Mr Qerenso states, in his affidavit, the process that he followed and his affidavit is under tab 16 and at page 391. The first bullet point he explains that what happened at the trial, at trial was that, "Court went very slowly and I followed them. If I missed something I asked for it to be repeated. I do not believe there was any part of the trial I did not interpret." And he stuck to that evidence when he was cross-examined and the cross-examination, as you know, is under tab 17 and at page 415 – sorry, this isn't in cross-examination. The first two lines succinctly summarise –

ELIAS CJ:

Where?

SOLICITOR-GENERAL:

Page 415, Your Honour. The first two lines summarise it and then, in response to questions from His Honour Justice Wild, he explains the process that he followed and that, I think that most important part starts with the question, "You were asked by Mr Stevens about…" and through to the end of his evidence, which is about eight lines on page 416.

ELIAS CJ:

It's hardly enormously reassuring this.

SOLICITOR-GENERAL:

Well –

ELIAS CJ:

There's quite a lot of difficulty here understanding these questions.

SOLICITOR-GENERAL:

Nevertheless, the essence of his evidence is, I respectfully submit –

ELIAS CJ:

Yes, I accept –

SOLICITOR-GENERAL:

– very, very clear.

ELIAS CJ:

– that.

SOLICITOR-GENERAL:

Can I summarise this part of my submission by saying that I've taken Your Honours to a number of parts of the transcript where it is very clear that both the trial Judge and counsel were acutely aware of the need to ensure that the trial progressed at a pace so as to enable the interpreter to do his job properly. That is supported by the

affidavit evidence of senior counsel for the prosecution and the interpreter, and the interpreter gave evidence in person in the Court of Appeal by video link and the Court of Appeal found him to be a person who they believed. And I would respectfully submit that that's a factual finding that this Court should be very hesitate to overturn. And the final point is the fact that no concerns were raised at trial.

The Court of Appeal in the Supreme Court in Canada, of Canada in *Tran* made the very obvious point that the Courts are not, and cannot be, expected to be mind readers. They were making the point that absence of objections over the quality of an interpretation should be treated as a factor that weighs against the appellant when they raise their concerns for the first time on appeal months, and in some jurisdictions, years after the event. And the clearest statement to this effect can be found in a judgment from the United States 11th Circuit Courts of Appeal, a case called *United States v Joshi & Ors* 896 F 2d 1303 (11th Cir 1990), and that can be found in the respondent's volume 2 of authorities, tab 22, page 6, right in the middle of the paragraph commencing, "A reviewing Court is unlikely to find that a defendant received a fundamentally unfair trial," except that we're dealing with unfair trials in this instance, "due to an inadequate translation in the absence of contemporaneous objections to the quality of the interpretation."

And then, "Only if the defendant makes any difficulty with the interpreter known to the Court can the Judge take corrective measures. To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse."

In the Crown's respectful submission, there really is no convincing reason why the appellant, his counsel, or his supporters did not raise any concerns if they had them at the time of the trial. The appellant himself possessed some understanding of English. He was able to compare the day's events with his counsel and his partner during breaks and, in his affidavit, he also claims that he corrected the interpreter, Mr Qerenso, on a number of occasions. That, in my respectful submission, is not consistent with the concept of kabbaga, if I have pronounced that correctly. It seems to be quite inconsistent for him, on the one hand, to say that he would correct Mr Qerenso but, on the other, say he couldn't take any steps or measures to support his position because of his cultural convictions.

Whilst dealing with that point, Mr Qerenso, for his part, says he got on well with the appellant. They would talk about the old country during breaks and discuss how the trial was proceeding. The evidence for that is at page 391. Yet, the appellant did not, at any stage, speak to Mr Qerenso about any interpreter problems. If there was a cultural factor at play, it certainly does not explain why none of the other participants in the hearing complained at the time if they had concerns.

ELIAS CJ:

Mr Solicitor, have any of the cases that you've come across dealt with one interpreter for two accused?

YOUNG J:

Presumably there was one somewhere that says it's really best to have one interpreter because they might not want two defendants getting different, a different sort of nuanced interpretation of the case?

ELIAS CJ:

Well, that's hardly reassuring.

YOUNG J:

No, well, but I think that's – I think there is. I've read that somewhere, I think.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Can I just pause? I can't think of any case like that, Your Honour but –

ELIAS CJ:

Do we know what the practice is in other jurisdictions, for example, in Australia which is –

SOLICITOR-GENERAL:

No, I don't know the answer to that question, Your Honour.

ELIAS CJ:

Whether they do operate with one on one or?

SOLICITOR-GENERAL:

No. I can make some enquiries if that would assist the Court and perhaps file a memorandum to answer that question. I haven't made that enquiry and I'm sorry, Your Honour, I perhaps should have.

ELIAS CJ:

Well, we probably shouldn't be taking in additional stuff because it could well be partial anyway.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

But there's no suggestion that they've got anything similar to a protocol or standards? I suppose the standards that are set for accreditation may contain something about best practice.

SOLICITOR-GENERAL:

Yes. I'm not aware of any case where this issue has been considered –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And I'm not aware of anything in any of the protocols relating to New Zealand where that issue is addressed but I'll ask my juniors to think if there is anything that might assist the Court on that point.

YOUNG J:

It would only arise where there's whisper interpreting.

ELIAS CJ:

Yes, that's right, because you could have one interpreter if it's all proceeding publicly.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

It seems that the gentleman that did it on the second week was a somewhat louder and more confident speaker, not that one would infer necessarily from that that the other one was inadequate.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

But that's presumably part of the reason why that was seen to be more acceptable.

SOLICITOR-GENERAL:

Yes, that might be part of the reason. I can't go any further than to say it might be.

TIPPING J:

Might be, yes.

ELIAS CJ:

And just because you'd been interrupted, what do you say to the nagging doubt I have about the lack of public record –

SOLICITOR-GENERAL:

Yes. My answer to that involves two responses, Your Honour. Firstly, it is not a requirement of interpretation that the – that there be a recording or a transcript of the language that is being interpreted. That is – yes, I think I've expressed that correctly.

ELIAS CJ:

Yes of the –

SOLICITOR-GENERAL:

Accused's language.

ELIAS CJ:

Yes, on the interpretation.

SOLICITOR-GENERAL:

The purpose of the right is to ensure the accused knows the evidence and can participate fully in the trial and nowhere has it been said, that I am aware of in any of the cases that we've looked at, that that right extends to a recording of the foreign language that is being spoken.

ELIAS CJ:

If, however, understanding is a matter which is, underlies a right –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– it's a bit like the reason we record evidence. It's not a right as such but it's very much good trial practice to be able to exercise the supervision that is envisaged by the right.

SOLICITOR-GENERAL:

Yes. I agree with Your Honour. I think that at a standard of perfection, which no doubt we should all strive to try and achieve, having a taped recording of the interpreter's speaking in the foreign language would be helpful but it's not part of the right that we're focusing on. It might, and I wouldn't put it any higher than it might, be a matter that might go towards appeal rights because that would be the only purpose for –

ELIAS CJ:

Well, that's really what I was suggesting but if the issue is understanding and if the argument is not merely colourable so that there is an issue, which as you've said has been resolved on evidence by the Court of Appeal, it's not very good evidence. It's not the best evidence we could have in these circumstances and it just seems inherently risky to me and not really treating the right seriously enough.

SOLICITOR-GENERAL:

Well, I can only repeat what I said earlier, that it's not part of the right –

ELIAS CJ:

No but –

SOLICITOR-GENERAL:

– but I accept that it would be good practice in future for a recording to be made of the foreign language that had been spoken.

ELIAS CJ:

And are you also going to say anything more about whisper interpretation?

SOLICITOR-GENERAL:

Yes, I'm going to come onto that.

ELIAS CJ:

Yes, that's fine.

SOLICITOR-GENERAL:

Can I just very quickly deal with a couple of other matters where Courts place considerable weight on the failure of an appellant to draw the Court's attention, the trial Court's attention, to perceived inadequacies, In *De La Espriella-Velasco*, which is at tab 25, volume 2, page 325 – hold on. Tab 26, I'm sorry, page 325. Justice Roberts-Smith at line 3 through to the end of that paragraph addresses the point very forcibly.

McGRATH J:

Best practice perhaps might require that a trial Judge at the beginning of the trial in open Court flags, as it's put here, how such an objection could be dealt with.

SOLICITOR-GENERAL:

Yes.

McGRATH J:

In other words, so that the accused hears it and his or her counsel knows that they have a responsibility.

SOLICITOR-GENERAL:

Yes, I think that that would be also something that this Court could say in its judgment for, as a means of future guidance for the way in which these sorts of cases are dealt with. Now, I am conscious of the fact that time is marching on so I wanted to deal with the appellant's case and, in dealing with it, I'll deal with this so-called whispering interpretation. I make the following points, and I'll make them very succinctly. The problem with the appellant's theory is that he has approached *Tran* as a prescriptive set of directions on how interpreting services are to be provided. Overlooks the fact that in *Tran* two very important points were made. One, that whilst the standard of interpretation is high, it's not to be one of perfection and secondly, the five criteria for assessing the interpreting services that were identified in *Tran* can, with respect, be consolidated down, in this case, to ones of accuracy, continuity and contemporaneousness.

Now, my friend's written submissions focus primarily on Mr Qerenso's qualifications and experience and if that is an issue that is still of any concern to the Court, can I just very briefly summarise the Crown's position. Mr Qerenso was one of only seven Oromo interpreters in Australasia with the NAATI 2 qualification. So, as far as the Court is aware, that's the highest level of interpreting service available in Oromo in this part of the world, and the evidence for that is in volume 3, tab 15, pages 378 and 379. Secondly, Mr Qerenso was sourced from the translating and interpreting service of the Australian Department of Immigration and Citizenship. So this wasn't a bring your own interpreter; this was one that was sourced through responsible and respected organisations. Mr Qerenso had carried out over 300 interpreting assignments under the auspices of the Australian Department of Immigration and Citizenship, including several immigration tribunal hearings and more than a dozen Magistrate Court hearings. And the evidence for that is at tab 15 at page 378, paragraph 16 and also in Mr Qerenso's own evidence at tab 17, page 399.

Mr Qerenso was trained in interpreting at an Australian university approved by the accrediting body in Australia and the evidence for that is also at tab 15 at page 378. And, interestingly, Mr Qerenso volunteered that he was bound by the Australian Institute of Interpreters and Translators Code of Ethics. So whilst he only had the NAATI 2 qualification, he was one of seven with that qualification in Australasia. No one in Australasia has any higher qualification that the interpreting services are aware of.

Now, can I deal with, put the question of qualification to one side, unless the Court has any questions or concerns about the issue of qualifications because, in my respectful submission, that is a red herring in this particular case.

ELIAS CJ:

Well, it's evidence of accuracy and so on, it's some sort of quality control, but it's not determinative.

SOLICITOR-GENERAL:

Not the answer.

ELIAS CJ:

No.

SOLICITOR-GENERAL:

Yes, okay. So, can I deal with the three issues that my friend says are the knockouts for him? I had anticipated that I'd be able to reduce those down to two, but I'll deal with the three of them.

The first concern is not speaking loud enough for all to hear during consecutive interpreting. I get back to basic principles. The purpose of the right is to enable the accused to understand the evidence and participate fully in the trial.

TIPPING J:

It's to give the accused assistance, in terms of the way it's expressed.

SOLICITOR-GENERAL:

Yes, yes.

TIPPING J:

I'm not disagreeing with you, I only say that is the purpose.

SOLICITOR-GENERAL:

Yes, yes. Now –

TIPPING J:

It doesn't mean that, necessarily, that everyone else has to be assisted too.

SOLICITOR-GENERAL:

Precisely. That is, not, if it's projected through a headphone that only the accused can hear or if it's spoken very, very loudly so that everyone in the courtroom can here, it really doesn't matter.

ELIAS CJ:

No, but if it's conducted as if it's a private communication –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– the pressure is to minimise the disruption and to – it's a much less formal method of ensuring that the right is fulfilled.

SOLICITOR-GENERAL:

Yes. It may be, it may be less formal, Your Honour, but it doesn't mean to say that the right is not fulfilled.

ELIAS CJ:

Well, it's a less deliberate – formality's perhaps not putting it high enough. It's treating it as if it's an optional extra, it's not treating it with the seriousness, perhaps, that is required, it is an interruption.

SOLICITOR-GENERAL:

Yes, well, I think, with respect, I wouldn't go so far as to endorse what Your Honour is suggesting.

ELIAS CJ:

I'm not suggesting that that's the way it was treated here.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

I am just saying it has that tendency, it goes, it goes on in a corner.

YOUNG J:

It can, I suppose, there's that risk, there is, I suppose, the advantage from the point of view of the person who's receiving the interpretation, that if there's anything that's unclear that can be raised there and then without having to stop the whole –

SOLICITOR-GENERAL:

Process.

YOUNG J:

– process, stand up and wave an arm or something.

SOLICITOR-GENERAL:

Yes, and Mr Qerenso says –

McGRATH J:

Chief Justice Lamer, of course, thought it was preferable, didn't he, for the, for full continuity –

SOLICITOR-GENERAL:

Yes.

McGRATH J:

– and that speaking out loud would facilitate that.

SOLICITOR-GENERAL:

He said that was preferable –

McGRATH J:

Yes.

SOLICITOR-GENERAL:

– and I accept Your Honour the Chief Justice's observations that there is a risk, but I couldn't go any further than to say – and I don't think you're inviting me to go any further –

ELIAS CJ:

No, no, I have to say that's it's a risk I've seen fulfilled in Court situations, but I'm not saying that that is what happened here, and you've taken us through the transcript which shows the care that was –

SOLICITOR-GENERAL:

Being taken.

ELIAS CJ:

– being taken.

SOLICITOR-GENERAL:

So, I don't know that I can say anything more about this not speaking louder enough. It seems that the only significant difference between the two interpreters was the level of their voices, because the other interpreter is praised because he spoke loudly. I might be being a little unkind in making that submission in that way, and I don't mean to belittle the way in which the case has been put by the appellant, but I really do struggle with the concept that speaking loudly or not speaking loudly is a fatal flaw.

ELIAS CJ:

Well, it's a shorthand to say "loudly".

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

I don't think it is about volume; it's about whether it's part of the deliberative process.

SOLICITOR-GENERAL:

Right, yes.

BLANCHARD J:

It's about whether the whispering doesn't adequately send a signal to the English speaker.

SOLICITOR-GENERAL:

Yes. Well, and in this case Mr Qerenso doesn't accept that he was whispering, at all, and I think this has crept in by way of submission.

ELIAS CJ:

But no one else was listening, that's the impressing that I've got. No one was listening to what he was saying. He was speaking simply to the two accused in the dock.

SOLICITOR-GENERAL:

Well, we have instances, which I have taken the Court to, where counsel for the Crown, in particular, were turning and making sure that the evidence had been delivered and was being interpreted and they were waiting for the interpreter to finish and then asking the next question.

ELIAS CJ:

But contrast that with the taking of the evidence of a witness. The whole Court listens respectfully, even though you don't know what's being said.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

It's part of the process.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

It just doesn't seem to me it was treated in that way through this mechanism that was adopted.

SOLICITOR-GENERAL:

Well…

TIPPING J:

Well, I suppose you could say, with respect, that when the witness is giving their evidence in the foreign language, everyone's got to wait. But the problem here is that people wouldn't have had a clue what the interpreter was saying in the foreign language.

SOLICITOR-GENERAL:

Well, that is correct, yes.

TIPPING J:

Whether they were listening or not.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

It may well be they weren't listening because they didn't have a hope of understanding.

SOLICITOR-GENERAL:

Yes, well, can I just knock on the head this notion that there was whispering, because that is purely submission. There is no evidence to support the contention that there was whispering. What there is, is Mr Qerenso's evidence that he was speaking loudly enough for the two accused to hear him. Now, I accept that that isn't perfect and that, ideally, it would be louder, but there is no evidence to support the proposition that the volume resulted in a failure to interpret.

TIPPING J:

As long as it's being recorded – and that's going, I'd invite you to go back into that issue – what's the point of the loudness, as long as the accused can hear it? Because no one is going to understand it.

SOLICITOR-GENERAL:

Well, it goes, I think that the point that Her Honour the Chief Justice is making. I would describe it as really going towards the dignity of the process. I think that that perhaps accurately summarises the concern –

YOUNG J:

But it would also limit over talking, wouldn't it? I mean, it –

ELIAS CJ:

Well, it would, that's what it would do.

McGRATH J:

Limits distraction for the accused.

ELIAS CJ:

Not simply for the accused, but in terms of the pace. Then you can ensure – if this interpreter had been placed in the body of the Court and told to translate, in a reverse way to the witness –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– translation, then there could have been no question of over talking or anything like that.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

And it may be that having them in a booth and having them speaking only to the accused is fine, if you've got a record of it.

SOLICITOR-GENERAL:

Yes, yes.

ELIAS CJ:

There may be different ways of doing this, but this, it seems to me, was inherently a risky way of doing it. Two accused, speaking privately, so, therefore, not being a full participant in the Court proceedings so that everything fed in through the interpreter.

TIPPING J:

I have a worry, Mr Solicitor, about this two accused. How one man could sufficiently assist both accused in these circumstances, I find a little – assist within the spirit and meaning of the right. Now –

SOLICITOR-GENERAL:

Yes. Could I address that?

TIPPING J:

Yes.

SOLICITOR-GENERAL:

Because, in the written submissions and the way in which the argument had been put, it was suggested that the interpreter's focus was on the appellant's co-accused, because of his –

TIPPING J:

He was completely unable.

SOLICITOR-GENERAL:

– apparent complete lack of command of English, or no, no understanding of English. And Mr Qerenso has specifically deposed that he spoke loudly enough for both accused to hear – that's at volume 3 of the case on appeal, tab 16, page 392. "I do not believe I spoke too softly for Mr Abdula to hear. I spoke loudly enough for both accused to hear. I got on well with Mr Abdula and we spoke freely to each other. He could also have asked me to talk later. He did on occasions ask me to repeat things and I did this. I was aware that I was sitting between the two accused and that I had to ensure that both of them could hear me. My belief is that I spoke loud enough for both to hear even if I was leaning towards one at the time."

And when he was cross-examined on this point, under tab 17 at page 413, he repeated, the question is, "So if you're watching both men closely, you will have had

to have turned to each of them to be able to watch them closely, wouldn't you?" "Of course, that is what I did." "And when you were doing that the other couldn't hear?" "Not so. I sat between them and I spoke loud enough that both of them hear, leaning or not leaning. I don't think it makes any difference but Mr Abdula say this for maybe his own reason. I don't. I don't understand he tries to say this."

And the Court of Appeal, in its findings, was that reasonable steps were taken throughout the first week of the trial to ensure that everything said was interpreted for the appellant and that is a factual finding at paragraph 57 of the Court of Appeal judgment, which should not be disturbed.

Now, in relation to simultaneous speaking, sorry simultaneous translation, again, Mr Qerenso emphasises that he interpreted everything. Everything in the trial. And whilst simultaneous translation is not desirable, it isn't fatal to the Crown in any way.

BLANCHARD J:

Was he asked to explain the circumstances in which he came to have to give a simultaneous interpretation?

SOLICITOR-GENERAL:

He didn't, he was not asked that specifically but what he did say was that if he was translating and somebody else was talking then he would finish the translation and invite, or ask the person who had been speaking, to repeat what they said and my inference from that, Your Honour, is that sometimes it would be possible for him to do simultaneous translation simply because of the speed with which the trial was progressing. But the fact that there was some simultaneous translation is, in my respectful submission, not fatal to the Crown's case because –

ELIAS CJ:

It does mean though that the – one has to be careful about assuming that the trial followed the pattern of, which is suggested, of question, translation, next question, answer and all of that sort of thing, because – and there's no interruption to show when it's happening, when it's not happening.

SOLICITOR-GENERAL:

Yes. I agree.

YOUNG J:

It could be interactions between Judge and counsel or it could be closing addresses. There are, you know, a number of parts of the case we don't do a transcript for.

SOLICITOR-GENERAL:

Yes, that is possible but the important thing, I interpreted Mr Qerenso's evidence, if he was engaged in simultaneous translation, then he would ask the person who had been speaking to repeat what they said as soon as he'd finished his translation so that he ensured that everything was translated. And that's the most fundamental fact. He says, and the Court of Appeal were entitled to accept his account, that he interpreted everything.

ELIAS CJ:

I'm sorry are you saying that he, I hadn't appreciated that he would simultaneously translate and then ask for a repeat of the question to check whether he had simultaneous translated correctly?

SOLICITOR-GENERAL:

No I don't –

ELIAS CJ:

No?

SOLICITOR-GENERAL:

I wasn't trying to say that.

ELIAS CJ:

I'm sorry, well, I didn't understand that.

TIPPING J:

When he was over-spoken, that part that was over-spoken he asked to be repeated.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Yes, that's all I was trying to say, Your Honour.

ELIAS CJ:

But if he was simultaneously translating, you are being over-spoken.

SOLICITOR-GENERAL:

Yes but I think the important point is that he was making sure that he had got everything translated.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And the Court, can I just finish on this point because it shouldn't be left unsaid, this was a very experienced trial Judge and a person who is very, very conscious of an accused person's rights and one who very diligently ensures throughout his career that they be adhered to and it is, with respect, highly improbable that somebody of his experience and view on accused person's rights would be, in any way, permitting anything to happen that would not ensure the accused received a fair trial.

ELIAS CJ:

It is the case, however, that this right to an interpreter has not been the subject of appellate determination in New Zealand and that it may be that none of us have been taking it, perhaps, as seriously as we should have been.

SOLICITOR-GENERAL:

Your Honour, I acknowledge that things could be done better and that this is an opportunity for the Court to give some guidance to trial Courts on how things can be done better and we've discussed aspects of the way in which things can be improved and I would endorse all of that. But I also submit that that's for future guidance rather than for this case.

ELIAS CJ:

Yes, no, I understand that.

SOLICITOR-GENERAL:

Now, I'm conscious of the time. I was going to, if necessary, go through *Condon* and the analysis but that point just doesn't seem to be in dispute. I respectfully submit that the *Condon* and *Matenga* framework is entirely applicable to this case and –

ELIAS CJ:

If we got to the position of saying that there was –

SOLICITOR-GENERAL:

A breach.

ELIAS CJ:

– an unfairness in trial, then the conviction can't stand.

SOLICITOR-GENERAL:

Correct.

TIPPING J:

Short of that it is presumably the Crown's stance that even if there's a breach short of impinging on fair trial rights, the Crown would seek to uphold the conviction either on the basis that the breach didn't cause any miscarriage or if it did, it wasn't a substantial miscarriage?

SOLICITOR-GENERAL:

Correct. Yes. I hope I made that really clear.

TIPPING J:

Yes, I just wanted to make absolutely sure we were on the same wavelength. But you accept that analysis?

SOLICITOR-GENERAL:

Yes, I do, yes. Unless there are any other questions then I will resume my seat.

ELIAS CJ:

Thank you, Mr Solicitor. Thank you, Mr Stevens.

MR STEVENS QC:

Thank you, Your Honour. I can be particularly brief in my response. My learned friend said, in relation to the section 24(g) right, the appellant has not shown that he could not understand. My submission is, is that's not an issue because it was accepted by the Crown at the trial, and in the Court of Appeal, that the appellant needed an interpreter. My learned friend has taken –

TIPPING J:

I'm sorry, I don't want to, I don't understand that. It's accepted he needed an interpreter but it's not accepted that the interpreter failed to render him able to understand. I think you're attacking the Crown in the wrong place, Mr Stevens.

MR STEVENS QC:

Yes, I'm referring to that because my learned friend was asked by the Chief Justice about the question of understanding and the use of that word in section 24(g) and my submission is that doesn't arise because there was no question about whether there was a need for an interpreter. So that's the sole point I'm making there. My learned friend referred to all the passages in –

ELIAS CJ:

I'm sorry, are you saying that the section 24(g) understanding requirement is spent once an interpreter, once it's acknowledged an interpreter is required that there is a conclusion one can draw that he doesn't understand?

MR STEVENS QC:

No, I'm saying that, in terms of the right, he has the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in Court.

YOUNG J:

That may be a shades of grey issue, mightn't it?

MR STEVENS QC:

Well, it could be –

YOUNG J:

Some people will want, who speak no English, will want the whole lot translated in very much the manner we've been dealing with. Someone who speaks pretty good English, but not technical English, may be content to have intermittent assistance as and when he or she requires it.

MR STEVENS QC:

Sure. But the point here is that this appellant did need the services of an interpreter. That was accepted in the District Court and that was accepted by the Crown in the Court of Appeal.

TIPPING J:

And they're still accepting it here.

MR STEVENS QC:

Yes, so –

TIPPING J:

I don't know what this point's all about.

MR STEVENS QC:

It's just a, it's a response to – well, I'll move on to the – and indeed, I'm not able to resist returning to it for one final observation, in the written submissions, there's extensive treatment of the problem that can arise where a person can understand some English in an informal setting but in the formal setting their understanding is much more limited.

So, moving on from there, my learned friend has referred to the passages in the evidence where the witnesses were told by counsel to speak slowly to aid the interpreter. The appellant's response on that point is that that is not sufficient, there must be some means of ensuring compliance other than saying to the witness, "you must speak slowly". But I've made that point in the submissions I made this morning, so I don't need to develop that any further.

My learned friend says the prosecutor says in his affidavit that the trial moved at a very slow pace so as to enable the interpreter to keep up. That, to my respectful submission in reply, does not mean that the interpreter was adequately keeping up.

The point was made by my learned friend that the Supreme Court in *Tran* had said that Courts were not to be treated as mind readers and, as I understood my learned friend, he was saying that in the context of the Court being able to determine whether the interpreting was adequate. In point of fact, in *Tran* the comment was made in the context of the requirement for an interpreter, page 33 of *Tran*. It said the safer course will always be to request an interpreter. "While Courts must be alert to signs which suggest that an accused may have language difficulties, they are not and cannot be expected to be mind readers. Where the right has not been invoked by the accused or by counsel there maybe factors that are weighed against the accused if, after sitting quietly throughout the trial, the issue of interpretation is suddenly raised for the first time on appeal." My submission is that what the Supreme Court are talking about there is the situation where an accused doesn't say anything about requiring an interpreter then, after the case is concluded, suddenly says for the first time, "Hey, I needed an interpreter," which is quite different, in my submission, from the situation where inadequacies in the actual interpretation are an issue. My learned friend said that Mr Qerenso volunteered he was bound by the code of ethics of the Australian Association of Translators and Interpreters. He may have considered that he was bound, but he would have been complying voluntarily because he was not a member of that Association or any other professional body and, as I submit in my written submissions, there would be very few professions where voluntary compliance was considered to be adequate.

BLANCHARD J:

Is it suggested that he's behaved unethically?

MR STEVENS QC:

No, I – no, I'm not suggesting that –

BLANCHARD J:

Isn't that a bit of a red herring?

MR STEVENS QC:

Well, the argument was that membership is necessary to ensure compliance with ethics and ethics could extend over quite a wide field…

BLANCHARD J:

But what breach of ethics has he committed?

MR STEVENS QC:

Well, only of the code of ethics, so I can't really address that.

BLANCHARD J:

Well, why are you raising it?

MR STEVENS QC:

Well, I'm raising it because it's not really an argument to say that he considered himself to be bound by a code of ethics when, in fact, he's not a member or any organisation that can ensure compliance.

TIPPING J:

Well, any such thought is quite inconsistent with the Court of Appeal's findings. So I honestly –

ELIAS CJ:

This is really directed at the qualification point that you made.

MR STEVENS QC:

Yes, indeed, yes.

Finally, my learned friend says that Mr Qerenso maintained that he was speaking loudly enough to be heard, and that he doesn't accept he was whispering. He accepts, however, that he couldn't be heard by others in the courtroom, and that's at page 406, the notes of evidence taken in the Court of Appeal, the question, line 1, "Were you told not to interpret for everyone in the courtroom and simply to confine the interpretation to the two accused?" Answer, "Yeah, so I interpret to them only," and then page 12, the penultimate line, "I was not told that I should interpret for the whole people in the courtroom."

TIPPING J:

Well, he clearly didn't.

MR STEVENS QC:

No.

TIPPING J:

The issue is whether that mattered.

MR STEVENS QC:

Indeed, and I've addressed the Court on that, and I'm simply responding to the point that my learned friend has made in that context.

TIPPING J:

Then why do you say it matters?

MR STEVENS QC:

Everyone in the courtroom needed to hear so that the prerequisite for effective consecutive interpreting was in place and observed, so that English speakers knew when to continue.

Your Honours, they are my submissions in response, thank you.

ELIAS CJ:

Thank you, Mr Stevens. Thank you, counsel, for your submissions in this matter. It's one of some general importance, so we've appreciated the way you've addressed us and we'll reserve our decision.

COURT ADJOURNS:3.29 PM