

# ***Procedural Fairness – cases involving people from a culturally and linguistically diverse background<sup>1</sup>***

## **COAT Victoria Chapter Conference 22 April 2016 Tribunals, Boards and Panels – Issues of Procedural Fairness**

*John Billings, Senior Member, AAT, Migration and Refugee Division*

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### **Overview**

1. In 2007, then as a member of the Federal Court, French CJ addressed the 25<sup>th</sup> AIJA Conference *Cultures and the Law*. Early in his remarks he noted that '[t]he administration of justice is informed by the ideal of equality before the law'.<sup>2</sup> Where the decision-maker and a person affected by the decision do not have the same cultural and linguistic background, special care is required to ensure that justice is done, and the requirements of procedural fairness take on special characteristics.
2. In the context of cases before tribunals that involve people from a CALD (culturally and linguistically diverse) background, this paper -
  - considers the meaning of culture
  - considers the main rules of procedural fairness
  - discusses specific problems that relate to credibility assessments
  - suggests various measures to help safeguard against unfairness
  - discusses ways that tribunal members can build cultural competence.<sup>3</sup>

### ***The acronym CALD, culture, and cultural diversity in Australia***

3. The ECCV (Ethnic Communities Council of Victoria) has this definition:

Culturally and linguistically diverse is a broad and inclusive descriptor for communities with diverse language, ethnic background, nationality, dress, traditions, food, societal structures, art and religion characteristics.

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<sup>1</sup> I acknowledge the assistance of Legal Officers Jason Cabarrus, Director, and James English, Legal Officer, in identifying relevant migration and refugee judgments.

<sup>2</sup> French, Justice Robert *Speaking in tongues courts and cultures* [2007] FedJSchol 18 ('French J, 2007') [http://www.austlii.edu.au/cgi-bin/sinocrch.cgi?query=%5B2007%5D+FedJSchol+18&results=50&submit=Search&mask\\_world=&mask\\_path=&callback=on&method=auto&meta=%2Fau](http://www.austlii.edu.au/cgi-bin/sinocrch.cgi?query=%5B2007%5D+FedJSchol+18&results=50&submit=Search&mask_world=&mask_path=&callback=on&method=auto&meta=%2Fau)

<sup>3</sup> The paper is not intended solely or even especially for members who sit in the MRD (Migration and Refugee Division) of the AAT although most of the case references are drawn from that jurisdiction. Rather, it is intended for members of any tribunal who may have cases involving people from a CALD (culturally and linguistically diverse) background. For MRD members considerations of procedure necessarily involve the procedural code under Part 5 Division 5 and Part 7 Division 4 the *Migration Act 1958* concerning the entitlement to a hearing and how the Tribunal must deal with information that is adverse to an applicant's case, but also with the entitlement to an interpreter: see ss366C and 417. The paper does not address those considerations, nor does it attempt to reconcile relevant provisions in the Migration Act with the common law. The paper simply aims to focus on general principles and practicalities.

This term is used broadly and often synonymously with the term 'ethnic communities'. CALD is the preferred term for many government and community agencies as a contemporary descriptor for ethnic communities.

CALD people are generally defined as those people born overseas, in countries other than those classified by the Australian Bureau of Statistics (ABS) as 'main English speaking countries'. The set of main English speaking countries other than Australia used by the ABS comprises: Canada, the Republic of Ireland, New Zealand, South Africa, the United Kingdom (England, Scotland, Wales, Northern Ireland) and the United States of America<sup>4</sup>.

4. I note that his definition has CALD people as those born overseas. The definition would therefore exclude indigenous Australians and person born in Australia to one or more parents born overseas. The discussion in this paper is not restricted in this way. For convenience, I use the acronym CALD broadly.

#### *Can culture be defined?*

5. In his paper delivered at the 2007 AIJA Conference French J, as he then was, considered the definition of culture, saying:

A broad sociological definition taken from the Macquarie Dictionary has 'culture' as:

The sum total of ways of living built up by a group of human beings, which is transmitted from one generation to another.

It is also used to describe the behaviours, beliefs and values of human societies. The idea of culture as encompassing not only 'the specific and variable cultures of different nations and periods, but also the specific and variable cultures of social and economic groups within a nation' occurred in the late 18th century. This development broadened the idea of culture so that the term sub-culture or cultures within a culture could be used. This extended concept led to a concept of culture as 'any set of shared signifying practices – practice by which meaning is produced, performed, contested or transformed'. It is premised according to cultural study scholars, on shared meaning. It is said to be 'concerned with issues that revolve around shared – perhaps hegemonic – social meanings. That constitutes the variety of ways in which we make sense of the world ...'<sup>5</sup>

6. Another presenter at the same conference noted that 'culture' is multifaceted, often changing and that it incorporates contradicting elements.<sup>6</sup>
7. In a paper delivered in 2015 at the AIJA Conference *Cultural Diversity and the Law* French CJ quoted a writer who noted that culture 'is remade continually and its content is dynamic, often contested and heterogeneous'. The writer also noted that culture 'is not definitive of a person's identity or conduct' and that identity and

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<sup>4</sup> Glossary of terms, Ethnic Communities Council of Victoria – [www.eccv.gov.au](http://www.eccv.gov.au)

<sup>5</sup> French J, 2007

<sup>6</sup> The Hon Justice Robert Torres *The Challenges of Cultural Diversity* 25<sup>th</sup> AIJA Conference 2007 <http://www.aija.org.au/ac07/Papers/Torres%20PPT.pdf>

conduct can also be connected to 'psychology, class, ethnicity, religion, language, race, gender, sexuality, ability and age in specific historical, social and political contexts'.<sup>7</sup>

8. We can speak of organisational or professional culture. In this sense organisations - courts and tribunals (of the various kinds that exist) - have cultures as do professionals - judges, tribunal members, and court and tribunal administrators. Rarely will parties to proceedings share that culture.<sup>8</sup>
9. It is important to recognise that just as there is diversity between cultures there is diversity within cultures.<sup>9</sup> So it will rarely be enough to consider, for instance, the country from which (or the region in the country from which) a person originates, or simply what the person's ethnic or religious or social group may be. Depending on the context, beyond other obviously important attributes of age, gender and sexual orientation, the circumstances in which a person present in Australia left their place of origin, or the number of generations of the person's family that have already been in Australia, may be important. And as one writer has put it, culture 'is not a static or easily isolated set of values or [behaviours] and may vary by education or class background'.<sup>10</sup>
10. To make an obvious point, generalisations are dangerous. Depending on the issue to be determined, the important consideration may be merely the extent to which, if any, cultural background determines the individual's behaviours. Further, care must always be taken to distinguish any characteristic that may be of legal relevance from 'any characteristic that is without legal relevance'.<sup>11</sup>

#### *Cultural diversity in Australia*

11. MRD members (that is members of the AAT who sit in the Migration and Refugee Division) come into contact with CALD people regularly. The people may be already in Australia or they may be offshore, giving evidence by telephone. Rarely will they be indigenous Australians, unless an indigenous person sponsors a non-citizen or a visa. Frequently, there will be an interpreter. Members of other tribunals stand a very high chance that they too will frequently come into contact with CALD people, though they may be people who have lived in Australia for years.
12. For the MRD the relevant context includes cases where persons from another country claim to be a refugee or otherwise to be a person to whom Australia owes protection obligations. In migration, there are issues of marriage and other partner relationships, family relationships including adoption (which sometimes may mean adoption according to custom), age, and even time (that is, the calendar that is used). For other tribunals the contexts can also be many and varied. Common to all

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<sup>7</sup> Chief Justice Robert French AC *Equal Justice and Cultural Diversity* ('French CJ 2015) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj14mar15.pdf>

<sup>8</sup> To some extent an exception may be disciplinary proceedings involving legal practitioners

<sup>9</sup> See French J 2007 at [49]

<sup>10</sup> See French J 2007 at [49]

<sup>11</sup> <http://www.flcourts.org/core/fileparse.php/243/urlt/RecognizingEliminatingBias.pdf>

jurisdictions is the need for a person to be able to tell their story and for that to be properly understood and properly evaluated.

13. The Australian Bureau of Statistics reports that at 30 June 2015 28.5% of Australia's estimated resident population was born overseas<sup>12</sup>. At the 2011 census 26.2% of Victorians were born overseas, in more than 200 countries; 46.8% were either born overseas or had at least one parent born overseas; 23.1% spoke a language other than English at home; and 67.7% identified with one of 135 faiths.<sup>13</sup>

### ***Procedural fairness***

14. As we know, the application of the rules of natural justice, or procedural fairness, and the content of the rules will depend on a number of factors. Whether the proceeding is adversarial (as many tribunals' proceedings are) or non-adversarial (as MRD proceedings are) is particularly important. Procedural fairness consists of three rules: the hearing rule; the bias rule; and the evidence rule. Put simply, the hearing rule requires that a person who will be adversely affected by a decision be given an opportunity to present their case, be told the substance of any case to the contrary, and be given an opportunity to respond to that. The bias rule concerns actual bias and apprehended bias. The test for apprehended bias is whether a hypothetical fair-minded lay observer, properly informed as to the nature of the proceedings or process, might reasonably apprehend that the decision-maker might not have brought an impartial mind to making the decision. The evidence rule requires that the decision be based upon logically probative evidence rather than mere speculation or suspicion.
15. I deal with the first two rules and, in relation to the second rule - the bias rule - focus on apprehended bias.

### ***The hearing rule and CALD people***

16. Professor Sandra Hale, an academic who specialises in languages and linguistics, makes the point that 'when one participant cannot understand or be understood, it is the legal process itself that suffers and justice cannot be done.'<sup>14</sup>
17. The first question is whether the person needs an interpreter. If the person does need an interpreter, has a suitable interpreter been retained? Depending on the case, suitability may not be just a matter of competency in the language (or dialect) but, for instance, the interpreter's gender, religious background or ethnic group.<sup>15</sup>
18. The judgment of Kenny J in *Perera v MIMA* [1999] FCA 507 contains a comprehensive consideration of the issues that typically arise and is cited in cases where the quality of interpretation is in issue.<sup>16</sup> *Perera* concerned an applicant for refugee status. His first language was Sinhalese. In written material under

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<sup>12</sup> <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3412.0>

<sup>13</sup> <http://www.multicultural.vic.gov.au/population-and-migration/victorias-diversity/2011-census-a-snapshot-of-our-diversity>

<sup>14</sup> Hale *The need to raise the bar: court interpreters as specialised experts* (2011) 10 TJR 237 at 238.

<sup>15</sup> See *Applicants M16 of 2004 v MIMIA* (2005) 148 FCR 46.

<sup>16</sup> See, for instance, *SZRMQ v MIBP* [2013] FCAFC 142, and *VWFY v MIMIA* [2005] FCA 1723, discussed below.

consideration he had declared that he could speak, read and write English. An interpreter assisted at the hearing<sup>17</sup>. In his application for judicial review, the applicant said in effect that his English was not proficient and that problems of interpretation led to the result that the Tribunal affirmed the decision of the Minister's delegate to refuse him a visa.

19. The following is a summary of the main principles enunciated and comments made by Kenny J in the context of the *Migration Act 1958*:

- There must be a 'meaningful opportunity to be heard'.
- An applicant who is not proficient in English is effectively unable to exercise the right to give evidence unless an interpreter assists.
- The Tribunal is unable to give the applicant an effective opportunity to appear before it to give evidence unless it provides an interpreter.
- A direction that communication be had through an interpreter properly extends to the whole of the hearing. That is, it is not limited to the applicant's evidence.
- The function of an interpreter in the Tribunal is to place the non-English speaker as nearly as possible in the same position as an English speaker.
- Perfect interpretation may be impossible. Very rarely is there an 'exact lexical correspondence' between the two languages being used<sup>18</sup>. No matter how accurate the interpretation is, the words of the interpreter are not the applicant's words. Nor is the style, the syntax, or the emotion the applicant's. There are words that are culturally specific and so are incapable of being translated. Nevertheless, while a particular interpretation may not be perfect it may be acceptable for the Tribunal's purposes.
- It is not every departure from the standard of interpretation that prevents a person from giving evidence before the Tribunal. The departure must relate to a matter of significance for the applicant's claim or the Tribunal's decision.

20. (In *Perera* Kenny J reviewed the transcript of the tribunal hearing. Her Honour noted in particular that the applicant's evidence as interpreted was repeatedly unresponsive to the questions asked by the Tribunal and was at times incoherent and inexplicably inconsistent with other evidence given. Her Honour concluded that there was a departure from the standard of interpretation that related to matters that were significant for the applicant's claim or the Tribunal's decision).

21. As noted, in *Perera* the applicant had declared that he could speak, read and write English. On the question whether he actually needed an interpreter, Kenny J quoted these remarks by Kirby J:

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<sup>17</sup> There were issues also about accreditation which are not discussed in this paper. Regarding accreditation, see generally the website of the NAATI (National Accreditation Authority for Translators and Interpreters) <https://www.naati.com.au/>

<sup>18</sup> For illustrations of this point see Hale *The need to raise the bar: court interpreters as specialised experts* at 238

The mere fact that a person can sufficiently speak the English language to perform mundane or social tasks or even business obligations at the person's own pace does not necessarily mean that he or she is able to cope with the added stresses imposed by appearing as a witness in a court of law. ... The words which come adequately in the relaxed environment of the supermarket disappear from recollection. The technical expressions cannot be recalled, if ever they were known. The difficulties cause panic. A relationship in which the speaker is in command ... is quite different from a potentially hostile environment of a courtroom. There, questions are asked by others, sometimes at a speed and in accents not fully understood.<sup>19</sup>

22. Kenny J also made comments about the potential impact that poor interpretation may have on the assessment of credibility<sup>20</sup>, a matter to be discussed below.

23. In *VWFY v MIMIA*<sup>21</sup>, a decision of Finkelstein J, the overall quality of the interpretation resulted in a breach of the hearing rule. His Honour noted various concerns, such as non-responsiveness (ie. the apparent answer to a question other than the one asked); evident difficulty in communication; the applicant correcting the interpreter in English; and instances of the interpretation being incomplete or cut off by the member. The applicant sometimes spoke at length, but the shortness of translation was considered to be such that it could not possibly have conveyed all that the applicant said. There was a lack of continuity at other times - for instance where the interpreter did not interpret exchanges between the Tribunal and the applicant's representative, even where the adviser was purporting to state the applicant's position on a material point as the representative understood the applicant's position to be.

24. Finkelstein J noted that there are difficulties for the court on review but made this comment:

My general impression is that no one error or deficiency is so severe as to show that the interpreter or the interpretation was of such poor quality that the appellant was effectively deprived of his right to appear. But, when one steps back and looks at the hearing as a whole and asks whether the appellant received a fair hearing, I think the answer is that he did not. The combination of insufficient and incomplete translations, as well as the clear factual errors on the part of the interpreter, which the appellant was fortunately able to correct in some instances, suggests that the appellant had no real opportunity to express himself and fully answer questions put to him by the tribunal. This fails to achieve the tribunal's objective of providing a fair and just hearing.<sup>22</sup>

25. There are many other cases to illustrate the general point. In *SZGWN v MIAC* [2007] FMCA 1748 there was said to be inadequate interpretation, leading to the conclusion that the applicant was not given a fair hearing because he was, in effect, prevented

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<sup>19</sup> *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75 at 77-8. *MZYJW v MIAC* [2011] FMCA 534 is an example of a court deciding that a person actually did not need interpreter. In applying for judicial review the applicant claimed that he was unable to put his case before the Tribunal. The court considered what transpired and concluded that he engaged sufficiently in English so that he did have a 'real hearing'. The court also noted that he had not requested an interpreter.

<sup>20</sup> *Perera* at [49]

<sup>21</sup> [2005] FCA 1723

<sup>22</sup> At [27]

from giving relevant evidence.<sup>23</sup> However, not all errors in interpretation will lead to the same result. For instance, in *SZUEW v MIBP* [2016] FCCA 378 the court considered 51 claimed errors in interpretation but found that only two of them had the consequence that the applicant could not put before the Tribunal the matters that he wanted to.

### *The bias rule and CALD people*

26. Actual bias may be rare. It is more helpful to discuss apprehended bias, remembering that the test is whether a hypothetical fair-minded lay observer, properly informed as to the nature of the proceedings or process, might reasonably apprehend that the decision-maker might not have brought an impartial mind to making the decision.
27. I say something about non-adversarial proceedings before discussing adversarial proceedings.
28. In the MRD's non-adversarial proceedings it is the responsibility of the member not only to elicit the evidence but also to test it. A member must be careful about how he or she goes about that.
29. In *Re Refugee Review Tribunal; ex parte H* [2001] HCA 28 the High Court found apprehended bias where, as the Court described the RRT member's conduct, the member constantly interrupted the applicant and challenged his truthfulness and the plausibility of his account of events.

Where, as in the present case, credibility is in issue, the person conducting inquisitorial proceedings will necessarily have to test the evidence presented - often vigorously. Moreover, the need to ensure that the person who will be affected by the decision is accorded procedural fairness will often require that he or she be plainly confronted with matters which bear adversely on his or her credit or which bring his or her account into question. Similar questions by a judge in curial proceedings in which the parties are legally represented may more readily give rise to an apprehension of bias than in the case of inquisitorial proceedings.

Where, however, parties are not legally represented in inquisitorial proceedings, care must be taken to ensure that vigorous testing of the evidence and frank exposure of its weaknesses do not result in the person whose evidence is in question being overborne or intimidated. If that should happen, a fair-minded lay observer or a properly informed lay person might readily infer that there is no evidence that the witness can give which can change the decision-maker's view.

In the present case, a fair-minded lay observer or a properly informed lay person, in our view, might well infer, from the constant interruptions of the male [applicant's] evidence and the constant challenges to his truthfulness and to the plausibility of his account of events, that there was nothing he could say or do to change the Tribunal's preconceived view that he had fabricated his account of the events upon which he based his application for a protection visa. In other words, a fair-minded lay observer

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<sup>23</sup> *SZGWN v MIAC* [2007] FMCA 1748 at [34]. *SZUEW v MIBP* [2016] FCCA 378

or a properly informed lay person might well apprehend bias by the Tribunal against the male [applicant]. And because the female [applicant's] application stood or fell with his, a fair-minded lay observer or a properly informed lay person might, in our view, form the same view in her case.<sup>24</sup>

30. Hearings conducted by video link involve additional problems for all participants: see further below.<sup>25</sup>
31. The style of questioning adopted by the member in *ex parte H* would cause problems even if the tribunal member and the applicant had the same cultural and linguistic background. The cultural difference would complicate matters, if only because of the risk of the witness being overborne or intimidated by someone seen as an authority figure or at least a person who belongs to the dominant culture. Just as a member needs to be aware of how they perceive a witness, the member needs to try to be aware how the person perceives him or her, while also keeping in mind the hypothetical fair-minded lay observer.
32. Adversarial proceedings involve some different considerations. The High Court noted in *ex parte H*, in the passage quoted earlier, that questions of the kind asked by the RRT member in that case, if asked by a judge in (adversarial) proceedings in which the parties are legally represented, may more readily give rise to an apprehension of bias.<sup>26</sup>
33. French CJ in his 2015 paper referred to remarks made by von Doussa J that are also of interest.

The justice process assumes an 'equality of arms' between the parties. Inequality arising from ignorance, language difficulty, misunderstanding, ill-health or from poor communication distorts a balanced outcome.

It is part of a judge's function to ensure, as far as possible, that there is equality between the parties to litigation. At times this requires careful and sympathetic assessment of the potential disadvantage suffered by a party, and intervention to achieve a fair balance. None of this is possible unless the judge in a particular case is made aware of, or recognises, factors that might produce inequality.<sup>27</sup>

34. There is an interesting paper that the JCCD (Judicial Council on Cultural Diversity) has made available. According to its website, the JCCD is a body that 'cultural diversity leadership for Australia's judicial system'.<sup>28</sup> The paper was produced by Florida Supreme Court Standing Committee on Fairness and Diversity. The Florida

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<sup>24</sup> *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 at [28]-[32].

<sup>25</sup> See *AZAEY v MIBP* [2015] FCAFC 193

<sup>26</sup> *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 at [28]-[32]

<sup>27</sup> French CJ 2015 at pp. 12-13.

<sup>28</sup> For a description of the work of the JCCD see Martin CJ *Judicial Council on Cultural Diversity*, March 2015, [http://www.supremecourt.wa.gov.au/files/Speeches\\_Cultural%20Diversity%20and%20the%20Law%20Conference%20-%20Access%20to%20Justice%20in%20Multi-Cultural%20Australia%20by%20the%20Hon%20Wayne%20Martin%20AC,%20Chief%20Justice%20of%20Western%20Australia.pdf](http://www.supremecourt.wa.gov.au/files/Speeches_Cultural%20Diversity%20and%20the%20Law%20Conference%20-%20Access%20to%20Justice%20in%20Multi-Cultural%20Australia%20by%20the%20Hon%20Wayne%20Martin%20AC,%20Chief%20Justice%20of%20Western%20Australia.pdf)



judges have declared that eliminating any bias a judicial officer may have requires awareness, openness and practice.<sup>29</sup>

35. Another overseas court has called for decision-makers to '[r]ecognize that it is impossible to escape the receipt of misinformation (or stereotypes) about different cultures'.<sup>30</sup> While it may be impossible for decision-makers to escape receiving misinformation about different cultures, Tribunal members may take some comfort in the important distinction that the Law makes between predisposition and pre-judgment. In a *Canadian Case R v S (RD) L'Heureux-Dubé and McLachlin JJ* said:

It has been observed that the duty to be impartial 'does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge, is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind'.<sup>31</sup>

### **Assessing credibility**

36. Fairness in procedure is not the whole point of the rules of procedural fairness: giving effect to the rules of procedural fairness increases the prospect of the decision-maker arriving at the correct decision (or the correct or preferable decision where that is required). Arriving at the correct decision frequently involves making fair and justifiable assessments of credibility. Assessing the credibility of CALD persons can have special challenges.
37. While it is during the hearing that a member will observe the person giving evidence, even before a hearing commences a member may begin thinking about a party's credibility - if, for instance, there appear to be significant inconsistencies in the written material submitted. Ordinarily, the member will be considering credibility very closely while the hearing is in progress and at the later stage of deliberation. The Florida judges caution against 'bias in chambers' – before a hearing has begun or after it has concluded<sup>32</sup>.

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<sup>29</sup> *Recognising and Eliminating Bias from Court operations*  
<http://www.flcourts.org/core/fileparse.php/243/urlt/RecognizingEliminatingBias.pdf> - accessible via the Resources pages on the website of the (Australian) Judicial Council on Cultural Diversity <http://www.jccd.org.au/resources/>

<sup>30</sup> The Hon Justice Robert Torres *Judges Checklist: Reducing the Influence of Cultural Misinformation*  
<http://www.aija.org.au/ac07/Papers/Torres.pdf>

<sup>31</sup> [1997] 3 SCR 484 AT 533-4, cited by the Hon John Dyson Heydon AC QC in the Royal Commission into Trade Union Governance and Corruption:  
<https://www.tradeunionroyalcommission.gov.au/Hearings/Documents/2015/Evidence31August2015/ReasonsforRulingonDisqualificationApplicationdated31August2015.pdf>

<sup>32</sup> *Recognising and Eliminating Bias from Court operations*  
<http://www.flcourts.org/core/fileparse.php/243/urlt/RecognizingEliminatingBias.pdf> -

38. For a very long time courts have considered the proper scope of referring to a person's demeanour when assessing his or her credibility. Kirby J has said -

There is a growing understanding, both by trial judges and appellate courts, of the fallibility of judicial evaluation of credibility from the appearance and demeanour of witnesses in the somewhat artificial and sometimes stressful circumstances of the courtroom. Scepticism about the supposed judicial capacity in deciding credibility from the appearance and demeanour of a witness is not new. In [1924] Atkin LJ remarked that 'an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour'.<sup>33</sup>

39. The issue of demeanour takes on particular importance in the present context. Kenny J's further observations in *Perera* are instructive for cases where there is an interpreter:

A witness whose answers appear to be unresponsive, incoherent, or inconsistent may well appear to lack candour, even though the unresponsiveness, incoherence or inconsistencies are due to incompetent interpretation. In the present case, the incompetence of the interpretation cannot have assisted the Tribunal in making a reliable finding about the applicant's credit. It may well be that, by resting its findings as to credit on answers that were poorly interpreted, the Tribunal failed to take advantage of its opportunity to see and hear the witness.<sup>34</sup>

40. Kenny J also quoted these remarks of Gray J in *Kathiresan v MIMA*<sup>35</sup>

In an area in which cross-cultural communications occur, there is danger in giving too much rein to the 'subtle influence of demeanour'. The work of tribunals operating under the Act is such an area. The dangers of attempting to assess the truthfulness of witnesses by reference to their body language, where different cultural backgrounds are involved, are well-known. ... The problem is exacerbated even more when evidence is given by way of an interpreter. Judging the demeanour of the witness from the tone of the interpreter's answers is obviously impossible. Judging the demeanour of the witness from the witness's own answers in a foreign language would require a high degree of familiarity with that language and the cultural background of its speakers. It is all too easy for the 'subtle influence of demeanour' to become a cloak, which conceals an unintended, but nonetheless decisive bias ...

41. The MRD has *Guidelines on the Assessment of Credibility*. These are some of the main points in the *Guidelines* that are relevant in the present context:

- Members need to be mindful of the difficulties of assessing oral evidence provided through an interpreter.

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<sup>33</sup> Kirby J in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* [1999] HCA 3 at [4] citing Atkin L.J. in *Societe D'Avances Commerciales (Societe Anonyme Egyptienne) v Merchants' Marine Insurance Co (The 'Palitana')* (1924) LI L Rep 140 at 152. Compare the recent observations by the High Court in *MIBP v MZARH* [2015] HCA 40 especially at [41] and [44]. In that case there was unfairness because the applicant was denied the chance to demonstrate that he was doing his best to give truthful evidence.

<sup>34</sup> *Perera* at [49]

<sup>35</sup> [1998] FCA 159

- Members need to be mindful that a person may be anxious or nervous due to the environment of a hearing and the significance of the outcome. A person from a different social and cultural environment may experience bewilderment and anxiety. The educational, social and cultural background of a person may affect the manner in which a person provides his or her evidence and the depth of understanding of particular concepts. A person may have had traumatic experiences or be suffering from a disorder or illness which may affect his or her ability to give evidence, his or her memory or ability to observe and recall specific events or details. There may also be mistrust in speaking freely to people in positions of authority.
- All claims, particularly those of a sensitive nature, should be carefully considered in a respectful and culturally sensitive way.
- The tribunal should exercise care if it makes adverse credibility findings based on demeanour. A person's demeanour may be affected by any number of factors and circumstances ... The tribunal should also be aware of the effect of cultural differences on demeanour and oral communication. The tribunal should exercise particular care if it relies on demeanour in circumstances where a person provides oral evidence through an interpreter ...<sup>36</sup>

42. Clearly, much of what appears in the *Guidelines* is derived from what the courts have said. Over and above the statements by courts quoted earlier there is, for instance, this statement, made in a case where the fact that the hearing was conducted via video link caused additional difficulties:

Obviously it would be unsatisfactory for any tribunal ... to purport to ground an adverse finding on the credit of that person by reference to demeanour alone. Reliance upon demeanour as a determinant of credibility requires the exercise of great care, even by the most experienced arbiters of fact, and it may be unsafe to do so where the witness provides evidence in a foreign language and the tribunal receives only the interpreter's understanding of the witness's account ... That impediment is compounded where the witness is not before the tribunal in person and is able to be observed by the tribunal only as a part-image on a video-screen through a transmission that is not instantaneous and may suggest hesitation on the part of the witness. It becomes an unreliable guide if demeanour alone is relied upon to ground an adverse finding on the credit of the witness ...

If demeanour is relied upon by a tribunal as the reason for discarding an applicant's claims and the tribunal fails to identify how the demeanour of the applicant caused the tribunal to conclude that part, or all, of the evidence of the applicant should be discarded, that course may, in some cases, lead to an argument that the tribunal carried out its decision-making function arbitrarily or capriciously.<sup>37</sup>

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<sup>36</sup> AAT Migration and Refugee Division Guidelines on the Assessment of Credibility. The Guidelines are publicly accessible: <http://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Assessment-of-Credibility.pdf>

<sup>37</sup> *WAEJ v MIMIA* [2003] FCAFC 188 at [17]-[18].

### ***What can be done to safeguard against unfairness***

43. The following discussion is based on the premise that a 'meaningful opportunity to be heard' requires action on the part of tribunal members, but also tribunal administrations, at various stages of the process.

#### *Before hearings*

- Make adequate inquiries as to whether a person requires an interpreter, noting the language and dialect, if relevant, and any preference, for example relating to the gender of the interpreter (or member, if relevant).<sup>38</sup>
- Be conscious that cultural reasons may actually inhibit a person who needs an interpreter from requesting one.<sup>39</sup>
- Check the qualifications of the interpreter.
- In making arrangements for a suitable interpreter, have regard to the nature and complexity of the case.
- Allow adequate hearing time bearing in mind the nature and complexity of the case and the fact that there will be an interpreter.
- Brief the interpreter so as to indicate the likely nature of terminology to be involved in the case.
- If the person is to give evidence on oath, ensure that proper arrangements are made for that.<sup>40</sup>
- Prior to the hearing it is a good idea for the member to identify the name and title by which the person should be addressed. Remember that the family name may not appear last. It is also a good idea to practise pronouncing names that are long or otherwise difficult to pronounce before the hearing begins. Writing the name down phonetically and having that in front of you should help. At the hearing you can ask the person and so make sure you have got it right. If there is a bench clerk or hearing attendant, you can ask him or her to confirm the correct pronunciation with the person and with you before you enter the hearing room.

#### *When receiving oral evidence*

44. There can be no exhaustive list of things to keep in mind when receiving oral evidence from a CALD person. What follows is drawn many from sources such as the ECCV and various health and mental health websites listed at the end of the paper.

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<sup>38</sup> See, for instance, *Applicants M16 of 2004 v MIMIA* (2005) 148 FCR 46 and *MZZFU v MIPB* [2014] FCCA 212

<sup>39</sup> See the discussion by Perry J in *Working with interpreters: Judicial Perspectives* [2015] FedJSchol 5  
<http://www.austlii.edu.au/au/journals/FedJSchol/2015/5.html>

<sup>40</sup> See further *Working with interpreters: Judicial Perspectives* [2015] FedJSchol 5  
<http://www.austlii.edu.au/au/journals/FedJSchol/2015/5.html>

- Body language, like written and spoken language, frequently differs between cultures.
- A smile, a nod, a 'yes' may not mean what you think it means. Be mindful of the phenomena of 'gratuitous concurrence' and suggestibility.<sup>41</sup>
- Looking down or looking away may indicate something other than evasiveness or unresponsiveness.<sup>42</sup>
- Persons used to storytelling or giving a 'free report' may be disadvantaged by the way evidence is taken (especially under cross-examination or when questions in the nature of cross-examination are being asked) where it interrupts or disturbs the flow of the story or even prevents parts of the story being told.
- Silence can be part of the storytelling. Silence may indicate something other than evasiveness or unresponsiveness. In the person's culture it may be considered impolite to respond to a question immediately.
- There could even be laughter that seems 'inappropriate'.<sup>43</sup>
- A person's culture (and personal or family history) may affect the person's attitude to perceived authority figures (such as tribunal members) or to actual or perceived members of the dominant culture (such as tribunal members).
- The person's culture may severely inhibit discussion of certain topics, such as the mental health of the person or a family member.
- Any form of intimidation must be avoided and care needs to be taken to ask questions in a form that is fair.<sup>44</sup>

45. Members should, incidentally, be mindful of the limits on the role of the interpreter when it comes to explaining the impact of culture on the way evidence is presented.<sup>45</sup>

*Some points about communicating with CALD persons especially through an interpreter*

46. The CALD person may or may not need an interpreter. What follows should be considered bearing that in mind. This advice is similarly drawn from a range sources including a checklist for AAT members.
- It is your role, and not the interpreter's, to conduct the hearing. This means for instance that you, and not the interpreter, should explain terms or summarise or clarify points.
  - Speak in the first person and make sure the interpreter does too.

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<sup>41</sup> See eg. French CJ 2015

<sup>42</sup> See French J 2007 at [41]

<sup>43</sup> See Lesley Hunt *Cross Cultural Issues Implications for Procedural Fairness*, 20 AIAL Forum, March 1999 13-21.

<sup>44</sup> See *ex parte H*, cited above, and, for an example of the form of questions considered unfair, *Kaur v MIBP* [2015] FCA 1.

<sup>45</sup> See Interpreter Policies, Practices and Protocols in Australian Courts and Tribunals A National Survey, AIJA 2011 at 44-46. Also, regarding expert witnesses on culture, see The Hon Justice Robert Torres *Use of Experts: Recommended Guidelines* <http://www.aija.org.au/ac07/Papers/Torres.pdf>

- Face the person – not the interpreter (though bearing in mind comments above about whether the person makes eye contact with you or not).
- Direct your questions and statements to the person, not to the interpreter, and encourage the person to address you.
- Speak in a way that is consistent and measured, taking care to enunciate clearly and to separate words. It is helpful for there to be one idea per sentence.
- Clearly signal a change in topic.
- Summarise regularly.
- Allow the interpreter to interpret at regular, short intervals for all present, including you. Indicate that the interpreter should signal if a pause is needed.
- Even if the person's answer does not seem relevant to the question you asked, don't cut the interpreter off. The interpreter must interpret everything that is said.
- If the interpreter needs to clarify what the person has said, the interpreter should first seek your permission.
- The interpreter must not answer questions for the person or give the person advice.
- The interpreter should not be allowed to proffer explanations or clarifications concerning the evidence to you (for instance, in relation to matters to do with culture) without first seeking your permission.<sup>46</sup>
- Make sure that the interpreter has adequate breaks.
- For CALD persons of particular backgrounds (ie. some European backgrounds), English words deriving from Latin may be easier to interpret and understand.
- Use simple English. If possible, avoid acronyms, legalese, technical terms, slang, and difficult conceptual terms.
- Recognise the difficulties for interpreters. Be mindful that there may be special difficulties presented by the way languages work.<sup>47</sup>
- Be mindful that a witness who feels unable to tell story their own way may be disadvantaged by that.
- 'Closed' questions can be very unhelpful.
- Do not think that raising your voice will somehow help a person whose first language is not English understand what you are saying.

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<sup>46</sup> See *Interpreter Policies, Practices and Protocols in Australian Courts and Tribunals A National Survey*, ALJA 2011 at 44-46.

<sup>47</sup> The article by Hale *The need to raise the bar: court interpreters as specialised experts* contains a number of examples.

### *When considering the evidence*

47. Members should be mindful in particular of the risk of ‘bias in chambers’ and the hazards of assessing credibility with reference to demeanour.

### ***Building cultural competence***

48. It is not surprising that the *International Framework for Tribunal Excellence* and similar frameworks used by tribunals refer to cultural competence as an important competence.<sup>48</sup>
49. Building cultural competence will help members safeguard against unfairness. What follows draws on some of the literature that suggests ways to build cultural competence.
50. It is generally recognised that developing cultural competence is a shared endeavour for members, administrators and their organisations.<sup>49</sup>
51. Cultural competence ‘[c]ombines general knowledge about various cultures with specific information provided by an individual who identifies with the culture ... Cultural competence is not a one-time, finite achievement. It is a process that is applied in every case (usually many times) to ensure impartiality of the judge and analysis of ... facts and circumstances ...’<sup>50</sup>
52. In his 2007 paper, French J observed that many judicial officers have had a range of experiences with people and groups outside their own culture but that experience, however broad, is no substitute for ‘an informed awareness which not only enables us to regard diversity from within our occupational world, but to stand outside that world and see how it fits into the larger society.’<sup>51</sup>
53. Building cultural competence has been said by various commentators to require:
- Personal and professional commitment
  - Self-knowledge
  - Self-awareness
  - Modesty and respect
  - Understanding of the concept of culture
  - Knowledge of cultures and practices<sup>52</sup>

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<sup>48</sup> <http://www.coat.gov.au/images/downloads/INTL%20COAT%20FRAMEWK%20TRIB%20April%202014.pdf>

<sup>49</sup> See eg. Family Court of Australia *Multicultural Plan* - <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/multicultural-plan>

<sup>50</sup> Torres: <http://www.aija.org.au/ac07/Papers/Torres%20PPT.pdf> (underlining in original)

<sup>51</sup> French J 2007

<sup>52</sup> See Brettel Dawson *Addressing Social and Cultural Diversity in Judicial Process – Putting Ourselves in Context*, AIJA 25<sup>th</sup> Annual Conference Cultures and the Law <https://www.aija.org.au/ac07/Program.pdf>

54. More specific advice is contained in an overseas publication discussed at the 2007 AIJA conference entitled *Judges Checklist: Reducing the Influence of Cultural Misinformation*<sup>53</sup>: The advice is, first, to recognise that it is impossible to escape the receipt of misinformation (or stereotypes) about different cultures. The advice is then to examine generalisations you hear; examine your own beliefs; educate yourself in a wide range of ways about other cultures; and, even, '[r]each beyond your comfort level to converse with a person who identifies with a different culture'.
55. In the Florida judges' publication referred to earlier, the authors note that eliminating bias takes awareness, openness and practice. They say that the key is treating all people with respect and consideration and regardless of 'any characteristic that is without legal relevance'<sup>54</sup>. Giving advice on achieving bias-free communication, they make these recommendations, among others:
- Avoid stereotyping.
  - Identify people by characteristics (eg. race, gender) only when relevant.
  - Be aware that language to some people has questionable connotations (ie. what may not be offensive to you may be to someone else).
56. There is also the general recommendation made by the Florida judges that judicial officers should avoid becoming overworked. The judges say that it could lead to lead to (undesirably) quick and easy methods of resolving disputes.<sup>55</sup> That is sound general advice. Making an assessment of credibility based on the demeanour of a CALD person, for instance, might be quick and easy but unfair and wrong. The recommendation seems especially important for members hearing cases involving CALD people, as hearings involving interpreters generally take longer than other cases and, for additional reasons, the cases may involve a greater degree of difficulty.
57. A final though by no means 'throw away' remark is that the further recruitment of CALD members and staff for tribunals will likely contribute a good deal to the building of cultural competence.

## **Conclusion**

58. Among other attributes, knowledge of the law and a commitment to justice are necessary for tribunal members to comply with the rules of procedural fairness and to make sound, just decisions. Where cases involve CALD people, cultural competence is a further essential attribute. Building cultural competence does not come to an end. Building cultural competence begins with self-awareness closely followed by personal and professional commitment to learn and to keep learning.

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<sup>53</sup> The Hon Justice Robert Torres *Judges Checklist: Reducing the Influence of Cultural Misinformation* <http://www.aija.org.au/ac07/Papers/Torres.pdf>

<sup>54</sup> <http://www.flcourts.org/core/fileparse.php/243/urlt/RecognizingEliminatingBias.pdf>

<sup>55</sup> <http://www.flcourts.org/core/fileparse.php/243/urlt/RecognizingEliminatingBias.pdf>



### **Some resources**

Australian Bureau of Statistics

<http://www.abs.gov.au/websitedbs/censushome.nsf/home/quickstatscob?opendocument&navpos=220>

Ethnic Communities' Council of Victoria <http://www.eccv.org.au/>

Federation of Ethnic Communities Councils of Australia <http://fecca.org.au/>

Judicial Council on Cultural Diversity <http://www.jccd.org.au/>

Victorian Multicultural Commission <http://www.multicultural.vic.gov.au/>

Victorian Transcultural Mental Health <http://www.vtmh.org.au/>

Settlement Council of Australia <http://www.scoa.org.au/>