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HUMAN RIGHTS COMMITTEE
Eighty-eighth session
(16 October to 3 November 2006)

DECISION

Communication No. 1154/2003

Submitted by:	Katsuno, Masaharu et al. (represented by counsel, Mr. Tobin)
Alleged victims:	The authors
State party:	Australia
Date of communication:	21 January 2002 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 30 January 2003 (not issued in document form)
Date of adoption of Decision:	31 October 2006

* Made public by decision of the Human Rights Committee.

Subject matter: Alleged unfair trial due to inadequate translation

Procedural issues: None

Substantive issues: Unfair trial, failure to be informed of arrest and the reasons for arrest, inadequate facilities to communicate with counsel, failure to be tried in their presence, compelled to testify against themselves, failure to obtain the attendance of witnesses under the same conditions as witnesses against them,, inadequate assistance of interpreter.

Articles of the Covenant: 2; 9, paragraph 2; 14, paragraphs 1, 2 and 3 (a), (b), (d), (e), (f) and (g); and 26.

Articles of the Optional Protocol: 2, and 5, paragraph 2(b)

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-eighth session

concerning

Communication No. 1154/2003[*]

Submitted by:	Katsuno, Masaharu et al. (represented by counsel, Mr. Tobin)
Alleged victims:	The authors
State party:	Australia
Date of communication:	21 January 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2006

Adopts the following:

DECISION ON ADMISSIBILITY

1. The authors of the communication are Masaharu Katsuno, Mitsuo Katsuno, Yoshio Katsuno, Chika Honda and Kiichiro Asami, all Japanese nationals, who, at the time of submission of the communication, were detained at various correctional centers in Australia. They have all since been released. They all claim to be victims of violations of article 2; article 9, paragraph 2; article 14, paragraphs 1, 2 and 3 (a), (b), (d), (e), (f) and (g); and article 26, of the International Covenant on Civil and Political Rights. They are represented by counsel, Mr. James Tobin.

[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.
Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in adoption of the Committee's decision.

Facts as presented by the authors

2.1 On 17 June 1992, the authors were arrested at Melbourne airport on arrival from Kuala Lumpar, and were charged with the importation of heroin for commercial purposes. During their interrogation by a customs officer at the airport and subsequent interrogation by a federal police officer, the interpretation provided was allegedly inadequate. For this reason, they did not realize that they were under arrest and that their statements could be used against them later. Chika Honda and Mitsuo Katsuno, allege that they did not have counsel present during their interrogation, as the way in which the interpreter translated this right was incomprehensible.

2.2 Between 9 November and 7 December 1992, the authors were committed for trial at the Melbourne Magistrates' Court. Between March and May 1994, they were tried together by a jury at the County Court in Melbourne. On 28 May 1994, they were found guilty as charged. Yoshio Katsuno was sentenced to 25 years imprisonment and the others were each sentenced to 15 years imprisonment.

2.3 At trial the prosecution alone could examine a list of "unsuitable jurors". That is, jurors who are not disqualified from jury service but who have criminal records or are known to be "antagonistic towards police". The trial was conducted with nationwide media coverage, which described each of the authors derogatively as a "yakuza"; a word normally used to describe those belonging to Japanese organized crime groups.

2.4 Two other Japanese women, who were arrested with the authors at the airport, were allowed to return to Japan. It is alleged that they were threatened by the police that if they returned to Australia they would be arrested and prosecuted, with the result that their evidence was not available to the authors at trial.

2.5 The authors appealed to the Court of Appeal of the Supreme Court of Victoria. On 15 December 1995, only Yoshio Katsuno's appeal was allowed. His conviction was set aside and a new trial ordered. On 12 November 1996, his new trial took place at the Melbourne County Court and a guilty verdict was returned against him. On 23 December 1997, an application for leave to appeal to the Court of Appeal of the Supreme Court of Victoria was dismissed. In September 1999, an application for leave to appeal to the High Court of Australia was denied.

2.6 The authors allege that, throughout the legal process, they were provided with inappropriate and unqualified interpreters. They submit information on the alleged deficiencies in interpretation throughout the proceedings, including a report, prepared by interpretation experts, which identifies the following deficiencies: wrongly or very inaccurately interpreting the investigator's questions and/or the author's answers; failing to interpret questions asked by the investigator; arbitrarily asking his or her own questions to the authors; providing answers that the authors simply did not give; providing erroneous explanations to the investigator about the social meaning of Japanese terms; providing answers in English whose grammar and syntax was highly deficient, and in some cases unintelligible; engaging in long exchanges in Japanese with the authors, in which the investigator did not participate, and then simply summarizing, often inaccurately, what had

transpired; inability to translate essential legal terms. According to the authors, all these deficiencies constitute breaches of widely accepted principles of professional ethics of interpreters.

2.7 The authors were only provided with one interpreter between them during the trial and they allege that there was no coordination between the main interpreter and the other two interpreters who relieved her. Thus, there was no consistency in the translation of difficult terms. Consultations between the authors and their lawyers before and after the trial were difficult because the interpreters left the courtroom immediately after each day of hearings, and there was insufficient legal aid to cover such meetings.

2.8 The authors allege that there was no possibility to resolve problems of cultural difference. Such cultural differences made it difficult for them to protest against unfairness during the pre-trial and trial proceedings, and may have played a role in their failure to protest aggressively their innocence, something considered inappropriate in Japan, but considered a sign of guilt in the State party.

The complaint

3.1 The authors claim that they have exhausted domestic remedies. On the inadequacy of interpretation, they concede that counsel wrongly agreed at trial that the interpretation was accurate and did not raise the issue on appeal but claim that "this is due to the Australian government's failure to have in place an adequate system to assure proper interpretation". They did not become aware of the deficiencies in interpretation until 2001, when experts examined the transcripts. In their view, problems of interpretation are not matters discernible by lawyers, as their detection and assessment requires specialized knowledge of the languages in questions. Even if counsel had been able to perceive the seriousness of the problem, they would not have had the means to hire the appropriate specialists.

3.2 The authors claim that inadequate interpretation services provided during the investigation interviews, and the evidentiary use of the transcripts of these interviews at trial, unfairly damaged their credibility, amounting to a failure to ensure equality before the courts and a fair and public hearing, under article 14, paragraph 1.

3.3 They claim that as they did not know that they were under arrest and that their statements might subsequently be used against them, they were denied the right to be informed of the nature and cause of the charge against them, under articles 9, paragraph 2 and 14, paragraph 3(a).

3.4 Chika Honda and Mitsuo Katsuno claim that, as they were not provided with counsel during their police interrogation, their rights under article 14, paragraph 3 (d), and paragraph 1 were violated. They add that, as the absence of counsel is likely to result in a suspect testifying against himself/herself, the failure to inform them of their right to counsel during the interrogation also amounts to a violation of their right against self-incrimination, under article 14, paragraph 3 (g).

3.5 They claim that inadequate interpretation services provided for the trial, due to poor staffing, mismanagement and lack of professional conduct, amounted to a denial of their right to the free assistance of an interpreter, under article 14, paragraph 3(f). They claim that as they were only allocated one interpreter between them for their trial they could not communicate with counsel, in violation of article 14, paragraph 3 (b).

3.6 They claim that their rights under article 14, paragraph 3(d) were violated, as mere physical presence in the court room cannot be equated with "linguistic presence". The latter, they argue, entails the ability to confront witnesses, communicate with counsel and assist him/her in their defense.

3.7 They claim that the two potential Japanese witnesses would have been too afraid to return to the State party given the threats made against them. This situation allegedly amounted to a violation of the authors' rights under article 14, paragraph 3(e), to obtain witnesses under the same conditions as witnesses against them.

3.8 They claim that, as there was no system in place to resolve problems of cultural difference, they were discriminated against, in contravention of their rights under articles 2 and 26, on grounds of language.

3.9 They claim that insufficient financial assistance provided by the State party prevented them from having access to proper interpretation services and to communicate with their counsel, in violation of their rights to equality before the court and a fair hearing, under article 14, paragraph 1, and to equality before the law and equal protection of the law, under article 26.

3.10 As the authors were tried together, they could not fully defend their own interests at trial, in violation of article 14, paragraph 1. They claim that where the problems of interpretation were pervasive but poorly understood, a single trial for all authors made it more difficult for each to communicate with counsel and to understand what was happening in court.

3.11 They claim that the process of selecting the jury contributed to an unfair trial as the prosecution alone had had an opportunity to examine the list of "unsuitable jurors", thus violating the principle of equality of arms, pursuant to article 14, paragraph 1.

3.12 Finally, the authors claim that high media coverage of their case contributed to the unfairness of the trial, thereby violating article 14, paragraph 1.

State party's submission on admissibility and the merits

4.1 On 15 April 2003, the State party informed the Committee that Masaharu Katsuno, Mitsuo Katsuno and Kiichiro Asami had been released on parole on 6 November 2002 and Chika Honda was released on parole on 17 November 2002. Yoshio Katsuno was also released. Their releases were authorised by the Attorney General, and they were immediately returned to Japan.

4.2 On 28 July 2004, the State party contested the admissibility and merits of the communication. It submits that the communication is inadmissible for failure to exhaust domestic remedies and refers to the authors' failure to raise the issues of the alleged inaccuracy of transcripts of interviews and poor interpretation services at trial or on appeal. It contests the contention that it does not have an effective system to ensure the provision of adequate interpretation services, and submits that a regulatory body to ensure the availability and competence of interpreters was established in the form of the National Accreditation Authority for Translators and Interpreters Ltd (NAATI). This authority requires a minimum standard of professional practice to be accredited at the translator and/or interpreter level. The interpreters provided for the authors' trials were at the appropriate translator and interpreter, or "Level 3", standard.

4.3 According to the State party, the right of an accused in a criminal trial to the services of an interpreter is a well-entrenched principle within its legal system. The courts may stay proceedings where it appears that an abuse of process will result in an unfair trial. Similarly, where a person believes that they were denied these rights, they may appeal their conviction on these grounds. This remedy was available to the authors. Despite appealing their convictions on a number of other grounds, with the exception of Yoshio Katsuno, none of them raised the issue of inaccurate interview transcripts or of inadequate interpretation services at the 1995 appeal. The authors' counsel would have been alerted to the possibility of raising the issues on appeal as they were brought up by Yoshio Katsuno.

4.4 The State party submits that the authors and their counsel appear to have been alerted to the issues raised in this communication during the authors' trial, as the accuracy of the original interview transcripts was questioned at the committal hearing at the Melbourne Magistrate's Court. Thus, many of the transcripts that were introduced as evidence at trial had been corrected by independent and competent interpreters. Interpretation services were provided to assist the authors for the duration of the trial. Concerns regarding whether Mitsuo Katsuno and Kiichiro Asami were adequately informed of their rights under Part 1C of the Crimes Act 1914 (Cth), similar to the allegation under article 14, paragraph 3(d), were also raised at the committal hearing.

4.5 It was open to authors' counsel to challenge the admissibility of the Australian Federal Police (AFP) records of interview at the authors' trial. As this did not occur, the videotapes of each of the interviews were played in full to the jury at trial and the jurors were provided with interview transcripts to assist them. The failure to question the admissibility of the interview transcripts suggests that authors' counsel wanted these transcripts to be admitted as evidence. Given that the authors did not testify at trial, the interview transcripts were the only means by which their own version of events was put before the jury.

4.6 With regard to the alleged inadequacy of interpretation services, the State party submits that the authors were at all times at liberty to express to the court or to their counsel their inability to understand what was happening during the trial. At no time were such concerns raised. An alternative remedy the authors could have pursued was to complain to the Commonwealth Ombudsman about the conduct of the investigating officers from the AFP. Under section 31 of the Complaints (AFP) Act 1981 (Cth), the Ombudsman may investigate a complaint made by any

person concerning the actions of an AFP member. The Ombudsman could have ordered that some remedial action be taken in the case of the authors if it was found that an AFP's conduct was "unreasonable, unjust, oppressive or improperly discriminatory".

4.7 If the Committee considers that the communication is not inadmissible as a whole, the State party requests that the Committee dismiss the claims with regard to an impartial tribunal and inadequate legal aid funding, under article 14, paragraph 1, and the claims under article 2, article 9, paragraph 2, article 14, paragraph 3(a), (b), (e), and (g) and article 26, as inadmissible, on the ground that the authors have failed to substantiate these allegations. It adds that the allegations under articles 14, paragraph 3(a), (b), (e) and (g) fall outside the scope of the Covenant and are thus inadmissible *ratione materiae*.

4.8 On the merits, as to the claim that interpretation services during the pre-trial investigation were inadequate, the State party affirms that competent interpreters were present at all interviews with the authors. When the translation of these interviews was questioned during the committal hearing errors were corrected, and the amended interview transcripts were accepted as accurate by authors' counsel. In the State party's view, the standard of interpretation expected by the authors is unattainably high, given the nuances in translation that will inevitably occur in the translation from one language to another. It argues that the standard provided to the authors was in conformity with the standard set out by the ECHR in *Kamasinski v. Austria*[1]. The AFP officers, the DPP and the judge and jury would have been aware that the English text of the transcripts was not the exact dialogue of the authors. It is submitted, therefore, that grammatical errors in the English text would not have influenced the jury in the manner that the authors claim.

4.9 The State party submits that the system used in the authors' trial was for a single interpreter to simultaneously translate the proceedings into a microphone. Each of the accused was provided with a headset through which he or she could hear the interpreter's translation of the proceedings. Thus, while only a single interpreter was used at the trial, each accused could hear everything in the court room as it was being said. This system was used following the direction of one of the authors' counsel to the DPP, who indicated a preference for the system of a single interpreter and in particular for the same interpreter that was used during the committal hearing and the trial. The DPP also complied with the authors' request to engage the services of a particular interpreter for Yoshio Katsuno's retrial. During the trial, the authors and their counsel indicated that they were happy with the system of interpretation and that the performance of the court interpreter was acceptable. The interpreter remained after the day's hearing and no concerns were raised by the author or counsel. Indeed, the authors and their counsel actually complemented the interpreter on her performance.

4.10 The State party contests the claim that the media publicity surrounding the trial, and the domestic law regarding jury empanelment, resulted in a violation of the obligation to be impartial. No evidence regarding the nature of this publicity was raised at trial.

[1] Application No. 1783/82, [76], [11]-[12].

4.11 According to the State party, the jury empanelment process is a fair system designed to create an impartial tribunal in the case of a criminal trial. Australia recalls the Committee's jurisprudence that it is for the State party to review the application of domestic law, unless it is evident that the application was manifestly arbitrary or amounted to a denial of justice.[2] The Committee similarly holds that the appellate courts of States parties to the Covenant are responsible for the evaluation of facts and evidence in a particular case, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge clearly violated his obligation of impartiality.[3] In any event, the practice that the authors complain of did not affect their trial as the list of disqualifying jurors provided to the prosecution was not actually used by the DPP in the authors' trial.[4] The State party notes that in accordance with section 39 of the Juries Act 1967 (Vic), the authors each had the right to challenge peremptorily four potential jurors.

4.12 As to the allegation under articles 26 and 2, since cultural differences were not taken into account during the trial, and as insufficient financial legal aid was provided, the State party submits that the authors were subject to the same laws and treated in the same manner as any other accused in similar circumstances. It provided interpreters at all stages of the proceedings and individual representation during the trial in order to correct the cultural and linguistic differences of the accused and to allow them equal opportunity to defend themselves. They have not provided any evidence to demonstrate in what way inadequate legal aid funding to assist with interpretation contributed to discrimination in this regard.

4.13 The State party submits that Kiichiro Asami was sufficiently informed of the reasons for his arrest in compliance with article 9, paragraph 2. This allegation is inconsistent with article 14, paragraph 3 (a), and no evidence was provided to support an allegation under this provision. It denies the allegation that neither Chika Honda nor Mitsuo Katsuno were informed of their right to counsel. The translation of this right by the interpreter was sufficient to convey the meaning of this right to them. Both authors were legally represented at trial and on appeal, suggesting that they were aware and ultimately informed of their right to legal representation. The State party denies that the same authors were denied their rights under article 14, paragraph 3(g). Not only is the allegation purely hypothetical, as the authors never actually did confess, but jurisprudence on this article suggests that some positive form of compulsion would be required for a finding of a violation.

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[2] Dole Chadee et al. v Trinidad and Tobago, communication No. 813/1998, adopted on 29 July 1998.

[3] Kelly .v Jamaica, communication No. 253/1987, adopted on 8 April 1991.

[4] The State party refers to the discussion of this matter by His Honour Judge Byrne, where he noted that the practice of providing a list of disqualifying jurors was established in Australia to enable the Crown to empanel a jury that is impartial and indifferent to the cause to be tried. His Honour considered that: [T]he Crown cannot be expected to exercise its right to achieve that object [of securing an impartial and indifferent jury] without knowledge which informs the exercise of the right. It is to that end that the practice of providing information of "non-disqualifying convictions" to the prosecution has developed *R v Su & Ors,* above n 53, 32.

4.14 As to the allegation that they were denied their right to obtain testimony of witnesses under the same condition as those against them, the State party rejects the allegation as inadmissible, since it refers only to the possibility of the authors' rights being violated and not of any actual violation. In any case, there was no violation of article 14, paragraph 3(e), as the authors had the same opportunity as the defence to call the witnesses in question but chose not to do so. The appellate court considered this issue and found no miscarriage of justice.

The authors' comments on the State party's submission

5.1 On 24 December 2005, the authors reiterated their previous claims and added the following elements on admissibility. They submit that the central issue is that inaccurate interpretation fundamentally tainted the pre-trial questioning by the police, unfairly undermining their credibility. They submit that counsel did not oppose the admission of the records of interviews because they did not know the extent of the interpretation problems at that time. While counsel was aware that smooth communication between the authors and the police was not taking place, it was not possible for them to know that the problem was due to the inadequacy of the interpreters.

5.2 The authors deny that Yoshio Katsuno formally raised the issue of poor interpretation as a ground of appeal but claim that it arose during his appeal in the context of a claim on the voluntariness of his admissions made during an interview with the AFP. As to the possibility of complaining to the Ombudsman, it is argued that such a remedy cannot be considered effective. The authors were prevented from expressing to the court or to their counsel that they were unable to understand what was happening at trial, due to cultural and linguistic obstacles, poor interpretation, and an unfamiliar legal system.

5.3 With respect to the State party's arguments on the merits, they provide detailed reasons on why the current case differs from that of *Kamasinski v. Austria,* (para. 4.8), including the fact that in the current case there were indications that the accused was unable to understand the questions put to him. During the committal hearing, one of the officers admitted that there were times when it appeared that Mr. Asami did not understand what was being put to him.

5.4 According to the authors, during the trial, they asked one of the substitute interpreters to request that the main interpreter be replaced, on account of her habit of summarising rather than translating everything said, her refusal to stay back at the end of the day's hearing and an alleged conflict of interest that arose as a result of her friendship with the prosecutor. The authors deny the State party's claim that any errors in interpretation were only minor and refer to the detailed analysis provided by the authors in three reports. They deny that such errors could have been "corrected" after the committal hearing. While admitting that counsel had in fact indicated a preference for a single interpreter for the trial, according to the authors, international best practice is to provide multiple-defendants trials with more than one interpreter. As to the failure to call the two witnesses from Japan, the authors reiterate that during the preliminary hearing, the prosecutor indicated that if they returned to the State party, he would have them arrested, which, would have made it impossible to call them to testify.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

6.2 As to the requirement to exhaust domestic remedies, the Committee notes that the majority of the claims are based on the allegation that from the time of the authors' arrest until their conviction, the interpretation provided by the State party was so inadequate as to result in numerous violations of their rights under article 9 and article 14. The Committee observes that, except for claims relating to the calling of witnesses (14, paragraph 3(e)) and the empanelment of the jury (14, paragraph 1)**,** none of these claims were raised on appeal. It notes the argument that neither the authors nor their counsel could have been aware of the extent of the interpretation deficiencies at the time, and that it was only in 2001 (seven years after conviction), that they realized the extent of the problem. The Committee observes, however, and it remains uncontested, that the authors were concerned about the quality of the interpretation already during the committal hearing (para. 5.3) as well as during the trial (para. 5.4). Thus, their argument that they were unaware of the problem until 2001 is not corroborated. In any event, for the purpose of exhaustion, the Committee considers that it was the authors' and their representatives' responsibility to ensure that they had the relevant facts and arguments at their disposal for the purposes of their appeal. Their failure to procure expert information prior to their appeal, but only seven years after their trial, does not absolve the authors from the requirement to exhaust available domestic remedies. Accordingly, the Committee finds this claim inadmissible, under article 5, paragraph 2 (b), of the Optional Protocol.

6.3 As to the claim relating to the empanelment of the jury, in alleged violation of article 14, paragraph 1, the Committee notes that this issue was raised on appeal and that the Court of Appeal considered it in detail. It also notes that, as argued by the State party and as evidenced in the appeal proceedings, the list of disqualified jurors provided to the prosecution was not actually used by the Director of Public Prosecution in the authors' trial. The Committee finds, therefore, that the authors have failed to substantiate this claim, for purposes of admissibility, under article 2, of the Optional Protocol.

6.4 The Committee finally notes the authors' claim, under article 14, paragraph 3 (e), that if certain witnesses had been requested to return to Australia to testify at their trial, they would have refused for fear of being arrested following such threats made by Australian police before their return to Japan. However, having examined the proceedings, the Committee notes that the issue of these witnesses was considered in depth by the Court of Appeal, which had been requested, on behalf of the respondents and the applicants, to proceed on the hypothesis that the witnesses were willing to attend. It also notes that the argument on appeal related to an alleged miscarriage of justice due to the prosecution's failure to call these witnesses and not to an argument that their failure to return for the hearing was the result of police threats. The Court found that, as the prosecution had reasonably concluded that the witnesses concerned were co-conspirators with the

accused, it did not think that a miscarriage of justice resulted from the prosecution's decision to make the witnesses available to be called by the defense (by providing money for their return) but not itself call them. Indeed, the authors have not disputed that they could have called the witnesses in question themselves. For these reasons, the Committee considers that the authors have failed to substantiate their claim, for purposes of admissibility. Accordingly, it finds this claim inadmissible under article 2 of the Optional Protocol.

6.5 As to the claims under article 26, that the authors were discriminated against as there was no system in place to resolve problems of cultural difference, and that they were denied equality before the law and equal protection of the law as they were provided with insufficient legal aid, the Committee considers that the authors have failed to substantiate these claims for purposes of admissibility. Accordingly, these claims are inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

a) That the communication is inadmissible under article 2 and article 5, paragraph 2(b), of the Optional Protocol.

b) That this decision shall be communicated to the authors and to the State party.

[Adopted in English, French, Russian and Spanish, the English text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]
