CACC 320/2016

[2020] HKCA 184

**in the high court of the**

**hong kong special administrative region**

**court of appeal**

criminal appeal no 320 of 2016

(on appeal from hccc NO 84 of 2016)

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###### BETWEEN

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| HKSAR | | | Respondent |
| and | | |  |
| GUTIERREZ ALVAREZ Keishu Mercedes | | | Applicant |
|  |

Before: Hon Poon CJHC, Lam VP and Macrae VP in Court

Dates of Hearing: 6 and 7 November 2019

Date of Judgment: 25 March 2020

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| J U D G M E N T |

Hon Macrae VP (giving the Judgment of the Court):

1. On 6 October 2016, the applicant was unanimously convicted before Barnes J (“the judge”) and a jury of a single count of trafficking in a dangerous drug, namely 1,995 grammes of a solid containing 1,664 ‍grammes of cocaine, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap ‍134. On the same day, she was sentenced to 25 years’ imprisonment. She now appeals against both conviction and sentence. On 7 November 2019, we reserved judgment in this matter and said we would hand down our judgment and the reasons therefor in due course.

Procedural history

1. Original perfected grounds of appeal against conviction were filed on 14 March 2017 by the applicant’s then leading counsel, Mr **‍**Gerard ‍McCoy SC. Perfected grounds of appeal against sentence **‍**were subsequently filed on 11 April 2018 by Mr McCoy, with **‍**him **‍**Ms **‍**Denise Souza. Amended perfected grounds of appeal against **‍**conviction were filed by the same leading and junior counsel on 27 **‍**October **‍**2017. There were three amended perfected grounds of appeal against conviction. First, it was averred that the judge wrongly refused to grant the applicant a permanent stay of proceedings (Ground 1). Secondly, it was alleged that the applicant’s counsel at trial (not Mr McCoy or Ms Souza) had failed to cross-examine, and the judge had failed to sum **‍**up to the jury adequately, in respect of certain failings of Customs **‍**& **‍**Excise officers when investigating the applicant’s case (Ground 2). Thirdly, it was complained that the applicant’s legal representatives at trial did not give the applicant adequate or sufficient advice to enable her to make an informed decision as to whether to give evidence at trial (Ground **‍**3).
2. In view of the applicant’s complaints against her legal representatives at trial, elaborated upon by way of affidavit filed on 9 **‍**November 2017 (“the applicant’s 1st affidavit”), the Court copied the **‍**applicant’s 1st affidavit to both trial counsel and solicitor on 14 **‍**December **‍**2017 to enable them to file evidence in reply. On 16 **‍**January 2018, the Court directed that the amended perfected grounds of appeal against conviction, filed on 27 October 2017, be further copied to the legal representatives at trial, giving them leave to file further evidence in reply.
3. By way of a Memorandum of counsel, dated 6 March 2019, Mr McCoy sought to file re-amended perfected grounds of appeal against conviction of the same date. In his re-amended perfected grounds of appeal of the same date, the three amended perfected grounds of appeal remained unaltered but a new ground was added, alleging that the applicant did not receive a fair trial as a result of the lack of a dockside audio recording of the interpreter’s translation of proceedings to the applicant (Ground 4).
4. On 31 May 2019, in light of the new ground of appeal, the Court directed that two *amici curiae* be appointed to assist the Court in respect of Ground 4 only; and that the appeal be set down for a 4-day hearing. On 14 June 2019, the Court also directed that the re-amended perfected grounds of appeal against conviction and a further affidavit of the applicant, filed on 27 May 2019 (“the applicant’s 2nd affidavit”), be copied to the legal representatives at trial to enable them to file further evidence in response.
5. On 22 July 2019, the Court directed the respondent to write to the appropriate Registries of the criminal courts in the United Kingdom (England and Wales), Australia (New South Wales and Victoria), New **‍**Zealand, Canada (British Columbia and Ontario) and Singapore to ascertain the practice and procedure in those jurisdictions for recording proceedings at trial where a defendant speaks a language other than the language of the court and has been provided with an interpreter for the purposes of his/her trial. The Court wished to know, in particular, whether, in addition to the official record of proceedings, there is any record kept of what is said between the interpreter and the defendant in the defendant’s language whilst the defendant is in the dock. These particular common law jurisdictions were selected as the ones where defendants speaking a language other than the language of the court were more likely to be encountered in the daily practice of the courts[[1]](#footnote-1).
6. We are grateful to Mr Johnny Mok SC, with him Mr Ned Lai and Ms Cherry Ho, on behalf of the respondent, for undertaking this task. As a result, replies from all the various Registries concerned were obtained prior to the hearing of the appeal and duly served upon all parties. We shall refer to the responses from these jurisdictions when we consider Ground 4.
7. Before addressing the grounds of appeal, we shall set out details of the prosecution case and the trial so far as they may be relevant to our consideration of this appeal.

The prosecution case

1. On 9 August 2015, the applicant, a Spanish-speaking Venezuelan national, arrived at Hong Kong International Airport from São **‍**Paulo in Brazil, via Abu Dhabi in the United Arab Emirates, and passed through the ‘green’ channel with packets of cocaine, the subject matter of the indictment, strapped to the lower parts of her legs. Upon arrest, she said that she did not know what it was that was strapped to her legs.
2. The prosecution contended that the applicant had declined to participate in a controlled delivery operation and had made no mention by that stage of the duress that she was allegedly acting under.
3. On the following day, a video-recorded interview (“VRI”) was conducted by Customs & Excise officers with the applicant. During that interview, the applicant claimed that she had been tricked into leaving her home in Venezuela for Brazil in the belief that she had been offered a job there in advertising. However, when she arrived in Brazil, she was taken to meet an African male and thereafter detained against her will, during which time she was threatened, beaten and raped. She was then told to take some “stuff” to Hong Kong under threat that her family in Venezuela, including her 3‑year old child, would be killed if she did not cooperate.

The course of the trial

1. Before the empanelment of the jury, counsel acting on behalf of the applicant at trial mounted an application for a permanent stay of proceedings, on the basis that a fair trial was not possible; or, alternatively, that to continue with the proceedings would be an abuse of process, amounting to an affront to the public conscience. Evidence was adduced by the prosecution and the defence, although the applicant did not herself give evidence on the issue. The judge ruled against the applicant on the stay application and, following the jury’s verdict on 6 October, reduced the reasons for her decision into writing on 12 October 2016.
2. On 27 September 2016, the jury were empanelled and the case proceeded to trial. Again, following the prosecution evidence on the general issue, the applicant did not testify but relied on what she had said in her VRI in support of her contention that she was acting under duress at the time she committed the offence.
3. In her VRI, the applicant explained that she held a university degree in advertising. She claimed that she had been offered through the Internet a job in advertising and marketing in Brazil. Accordingly, she left her home country of Venezuela on 19 June 2015 to travel overland to Boa Vista in Brazil. From there, she took a domestic flight to São Paulo in Brazil, where she was met by an African male who conveyed her to the house of another African male called Mikael. The applicant said she was detained by Mikael at his house for a month and a half, where she was ill‑treated, relieved of her telephone, beaten and frequently raped. She was told that she was to be sent to Hong Kong and that, if she did not go, her family members, whose address Mikael had obtained, would be killed.
4. On 1 August 2015, the applicant was made to go to Paraguay, since, because of the closure of the Customs office when she had entered Brazil, her passport had not been stamped. On her return from Paraguay to Brazil, the drugs wrapped in plastic were strapped to her legs and the applicant was given an air-ticket for Hong Kong via Abu **‍**Dhabi, and some money as expenses. She was also given the details of the hotel she should go to upon arrival in Hong Kong, where someone would come to retrieve the packets. She was told she would be watched from her arrival at Hong **‍**Kong International Airport until her arrival at the hotel. She was not offered any reward for doing as instructed: her reward would be her freedom and the lives of her family. She was also provided with a false air-ticket to show, should she be stopped and questioned, that she had a return ticket for Venezuela.
5. During the VRI, the applicant was asked by Customs & Excise officers about the messages in her mobile telephone. In particular, she was asked about one message, which she confirmed she had sent to Mikael from her mobile telephone on 7 August 2015, and which read “I am on the plane. I am fine. And you?”[[2]](#footnote-2). Her explanation for this message was that Mikael had asked her to write a message to him once she was on board the aeroplane, “as if it was for a boyfriend”[[3]](#footnote-3).
6. The applicant was further asked in the VRI whether she had ever tried to report the fact that she was being forced to bring drugs to Hong **‍**Kong to the police. She said she did not do so out of “fear for my family”, given that Mikael was a very dangerous man whose power reached several parts of the world[[4]](#footnote-4).
7. Although the applicant had made reference to carrying “drugs” in earlier parts of the VRI[[5]](#footnote-5), this may have been because by the time of her interview, she obviously knew that the contents of the packets strapped to her legs were dangerous drugs. She certainly made clear towards the end of the VRI, when specifically asked, that she only knew what she was being asked to do was illegal, but she did not know the contents of the packets when they were strapped to her legs[[6]](#footnote-6). She reiterated that she had been kidnapped and forced to carry the items[[7]](#footnote-7).
8. Although the applicant elected not to give evidence before the jury, she did call two defence witnesses. The first was the Spanish interpreter, who was retained by Customs & Excise to translate for the applicant upon her arrest at the airport on 9 August 2015. She testified that the applicant had shown her purplish bruising on one of her legs at that time. The second witness was the Consul General for Venezuela in Hong **‍**Kong, who first saw the applicant in prison on 13 **‍**August 2015. On that occasion, she observed fading, yellowish-green bruising on both of the applicant’s arms and legs. She was also able to testify as to the optional nature of stamping passports of travellers between Venezuela and Brazil. The witness further confirmed that the applicant had no criminal record in Venezuela.
9. In addressing the various grounds of appeal, which are now put forward by Mr Robert Pang SC, with him Ms Souza and Mr **‍**Kim **‍**McCoy, we propose to deal with Ground 4 first since, if it were correct and the applicant was thereby deprived of a fair trial, it would be determinative of the appeal. Moreover, it was dealt with at the inception of the appeal by the parties, given that the *amici curiae* were concerned only with this ground of appeal. The other grounds will then be addressed in order.

Ground 4

1. Mr Pang argues that the applicant did not receive a fair trial because there was no dockside recording of what the Spanish interpreter said to her when interpreting the proceedings. There are two aspects to this complaint. First, it is contended that it was vital for the applicant to be provided with a full and accurate record of what was interpreted to the applicant in Spanish by the court-appointed Spanish interpreter, so that she could effectively participate in those proceedings and give informed instructions to her counsel and solicitor on all matters, including her election as to whether to give evidence or not. Without such a record of what passed between the interpreter and the applicant, this Court is said to have no means of verifying whether the interpretation was in fact correct, and no conclusive way, therefore, of determining whether she had a fair trial. This may be termed ‘the systemic challenge’ point.
2. Secondly, it is contended that the Spanish interpreter’s interpretation was in fact deficient. No complaint is made as to the Spanish interpreter’s ability to communicate with the applicant in communicable, intelligible Spanish, nor is there any dispute about her professionalism, willingness and impartiality in performing her task. In the applicant’s 2nd affidavit, the applicant acknowledged as much:

“I was able to understand her spoken Spanish well and she appeared, to the extent that I could see, a sufficiently qualified Spanish interpreter. She was professional, and tried her best to assist me in the English to Spanish interpretation.”

1. Nevertheless, the applicant went on:

“There were, however, many occasions throughout the trial proceedings when I became concerned that I was not being provided with a proper, accurate and full interpretation of everything that was said in the course of the trial proceedings.”

She then referred to a number of instances during the proceedings when the interpreter allegedly had difficulty following and interpreting the submissions of counsel and the exchanges between judge and counsel. There were occasions when there were lengthy submissions, yet the translation only came through in short sentences. On other occasions, the interpreter would translate sections of what was being said, then stop for some time before interpreting further sections, resulting in fragmented and incoherent translation. During the pre‑trial proceedings, and in the early days of the trial, the applicant said that she would sometimes seek clarification from the interpreter or ask her to repeat things. Although the interpreter tried her best to assist the applicant, such clarification made it difficult for the interpreter to keep up with the on**‑**going proceedings. Accordingly, the applicant said she stopped interrupting the interpreter.

1. Because the interpretation was sometimes fragmented and incoherent, the applicant said that she also tried to listen to the English. However, her English was not proficient enough to follow the proceedings, while it proved difficult and distracting to try and listen to two languages at the same time. She had particular difficulty during the judge’s directions to the jury; for example, with technical legal terms such as ‘duress’.
2. The applicant said there were many other instances which caused her to think that she was not getting a full and accurate interpretation of the proceedings. This added to her stress and anxiety, since she wanted to make sure that she understood everything in order to be in a position to give full instructions to her solicitor and counsel, and to give evidence fully understanding the evidence that was against her. This may be termed ‘the defective interpretation’ point. However, as we shall see, although there are two aspects to Ground 4, there is a measure of overlap between the two because a consideration of the principles in respect of the systemic challenge also involves an assessment of whether, and to what extent, there was in fact any defective interpretation.
3. In light of the systemic challenge by the applicant, we directed the respondent, before the hearing of the appeal, to make a written approach to the Registries of certain specified common law jurisdictions, in order to ascertain the practice of their respective courts in recording proceedings where a defendant speaks a language other than the language of the court, and has been provided with an interpreter for the purposes of his/her trial; and to find out, in particular, whether in addition to the record of proceedings, there is any record kept of what is said between the interpreter and the defendant in the dock.
4. The answers from these jurisdictions may be summarised as follows:

(1) The practice and procedure in all jurisdictions for recording trial proceedings (in circumstances where an interpreter is provided to assist a defendant who does not speak and understand the language of the court) is similar to that which operates in Hong Kong, namely:

1. Proceedings in open court are audio-recorded;
2. A transcript of the proceedings is transcribed in the language of the court;
3. If there is any issue on appeal as to interpretation, it is addressed by the party making an application for access to the sound recording, and putting on affidavit the complaint as to the translation made by the interpreter.

(2) With the sole exception of New Zealand, no other record, apart from the official record of proceedings, is made of any communication between the interpreter and the defendant in the dock.

1. We have been greatly assisted in this matter by the *amici* ***‍****curiae*, Mr Benjamin Yu SC and Ms Maggie Wong SC, to whom we are indebted for their researches across a number of common law jurisdictions. It is common ground, among all parties, that the common law right to interpretation has long been regarded as an essential component of a defendant’s right to a fair trial. Giving the judgment of the Privy Council in *Kunnath v The State*[[8]](#footnote-8), Lord Jauncey of Tullichettle held:

“It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant: *Lawrence v The King* [1933] AC 699, 708, *per* Lord ‍Atkin. As their Lordships have already recorded, the basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so upon what matters relevant to the case against him: *Rex v Kwok Leung* [1909] 4 HKLR 161, 173-174, *per* Gompertz J, and *Rex v Lee* ***‍****Kun* [1916] 1 KB 337, 341, *per* Lord Reading CJ. A **‍**defendant who has not understood the conduct of proceedings against him cannot, in the absence of express consent be said to have had a fair trial.”

1. The common law right has now been given a higher constitutional imperative in Hong Kong by virtue of Article 11(2)(a) and (f) of section 8 of the Hong Kong Bill of Rights Ordinance, Cap 383 (“BORO”). However, as Mr Yu and Ms Wong point out, neither BORO, nor the comparable Articles of the International Covenant on Civil and Political Rights, which applies to Hong Kong by virtue of Article 39 of the Basic Law, encompass the right of a defendant to demand a recording of the trial proceedings, let alone a dockside translation of exchanges between an interpreter and the defendant, as a component of the right to a fair trial. Furthermore, Articles 10 and 11(2)(f) of BORO do not guarantee a system of translation verification.
2. That there is an absence of such a guarantee does not diminish the importance of an adequate standard of interpretation being rendered to a defendant who is not conversant with the language of the court. As the Supreme Court of New Zealand put the matter in *Abdula v R*[[9]](#footnote-9):

“That standard must reflect the accused person’s entitlement to full contemporaneous knowledge of what is happening at the trial. Interpretation will not be compliant if, as a result of its poor quality, an accused is unable sufficiently to understand the trial process or any part of the trial that affects the accused’s interests, to the extent that there was a real risk of an impediment to the conduct of the defence. This approach maintains and demonstrates the fairness of the criminal justice process which is necessary if it is to be respected and trusted in our increasingly multicultural community. Trial judges should at all times be alert to the quality of interpretation; certain omissions and irregularities may thereby be sufficiently avoided or mitigated. Where compliance is challenged, the cumulative effect of deficiencies in the interpretation must be evaluated, in the overall context of the trial, to determine whether its standard was, nevertheless, such that there was compliance with the accused’s rights. That is a matter for judicial assessment in every case.”

1. In the result, the New Zealand Court dismissed the appeal[[10]](#footnote-10):

“Having regard to all the evidence and circumstances, and bearing in mind that the standard to be met is high but not one of perfection, we do not accept that the appellant has shown that the interpretation provided at his trial fell below the standard required by the Bill of Rights Act. The preponderance of the evidence rather points strongly to the appellant having been provided with an interpreter who met his need sufficiently to understand the nature and detail of the case against him. There is no appearance of any instance of misinterpretation that resulted in the appellant being left with an inadequate understanding of what was being said at the trial. His failure to raise any matter indicates that the accused understood sufficiently what was being said, was able to follow the trial and, in conjunction with counsel, was able to make intelligent decisions concerning his defence. At the hearing in this Court, counsel was unable to point to any way in which errors or omissions in interpretation might have impeded the conduct of the appellant’s defence at his trial.”

A number of important matters of principle emerge from these and other passages in *Abdula*, as well as from other authorities in this area, which we consider relevant to the enquiry before us.

1. First, the test for determining whether interpretation complies with a defendant’s right to have interpretation under section 24(g) of the Bill of Rights Act 1990 in New Zealand, which is *in pari materia* with **‍**Article 11(2)(f) of BORO, Article 6(3)(e) of the Human **‍**Rights **‍**Act, 1998 in the United Kingdom and section 14 of the **‍**Canadian Charter of Rights and Freedoms (“the Charter”), is whether the interpretation is **‍**sufficient to safeguard the fairness of the trial by giving the defendant **‍**an **‍**adequate understanding of the case against him, so as to enable **‍**him **‍**effectively to put forward his defence. Article 2(8) of Directive **‍**2010/64/EU of the European Parliament and of the Council of 20 **‍**October **‍**2010 on the right to interpretation and translation in criminal proceedings accords with this functional standard:

“Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.”

1. Secondly, sufficiency does not mean perfection. The essential focus in respect of a complaint about interpretation is not so much on what is interpreted, but on whether what was interpreted gave the defendant an adequate understanding of the proceedings to enable him effectively to play his part in them. As the Supreme Court of Canada in *R v Tran*[[11]](#footnote-11) noted:

“… it is important to keep in mind that 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 constitutionally guaranteed standard of interpretation to be one of perfection”.

The Court in *Abdula*, in agreeing with this passage from *Tran*, made the obvious point that “interpretation during a trial is a spontaneous process which allows the interpreter minimal opportunity for reflection”[[12]](#footnote-12).

1. Thirdly, it is for the appellant to show that the standard of interpretation fell below the standard required, and impacted on either his understanding of the case or his conduct of his defence. The Court in *Abdula* later explained[[13]](#footnote-13):

“There is a direct conflict between the evidence of the interpreter and the appellant, supported by his partner, who was in court during the trial, over whether the interpreter spoke too quietly in a situation where he was interpreting for two accused (whisper interpreting), and over the extent of effective interpretation and repetition when there was over-speaking by counsel and witnesses. We accept that there were some occasional difficulties of this kind during the trial. The issue is whether, bearing in mind what was done to counter them, their extent was such that it might have caused the appellant to fail to understand any part of the proceedings. It is for the appellant to establish on the balance of probabilities that this was the case.”

1. This standard would also appear to have been accepted by the Court in *Tran*, which stipulated that “the claimant of the right must show, assuming it is not a case of complete denial of an interpreter but one involving some alleged deficiency in the interpretation actually provided, that there has been a departure from the basic, constitutionally guaranteed standard of interpretation”[[14]](#footnote-14). The Court went on to hold that the onus of establishing a breach of section 14 of the Charter “falls on the party asserting the violation and the standard of proof is one of balance of probabilities”[[15]](#footnote-15).
2. It is to be noted, however, that when later summarising the position, the Court in *Tran* held[[16]](#footnote-16):

“In assessing whether there has been a sufficient departure from the standard to satisfy the second stage of inquiry under s. 14, the principle which informs the right - namely, that of linguistic understanding - should be kept in mind. *In other words, the question should always be whether there is a possibility that the accused may not have understood a part of the proceedings by virtue of his or her difficulty with the language being used in court*.” (Emphasis supplied)

1. If there be an apparent inconsistency between the consideration of *a possibility* that the defendant may not have understood something, and establishing it on *the balance of probabilities*, we respectfully prefer the *Abdula* test that the appellant must show, as a result of the poor quality of the interpretation, that there was “a real risk” of his defence being impeded[[17]](#footnote-17).
2. This brings us to the fourth matter to be derived from *Abdula* and other authorities. In impugning the standard of interpretation required under section 24(g) of the New Zealand Act, the Court considered, as we have just noted, that it was necessary for the defendant to show a “real risk of an impediment to the conduct of the defence”. In *Kamasinski v Austria*[[18]](#footnote-18), which has been described in the European jurisprudential context as “the leading judgment on this subject”[[19]](#footnote-19), the European Court of Human Rights determined that it would not find a breach of Article **‍**6(3)(e) of the Convention unless it was substantiated as a matter of evidence that the applicant was in fact unable, because of deficient interpretation, either to understand the evidence being given against him or to have witnesses examined or cross-examined on his behalf[[20]](#footnote-20).
3. In this regard, the Scottish Court of Criminal Appeal in *Lee v HM* ***‍****Advocate*[[21]](#footnote-21) considered that an ***‍***appellant should satisfy an appellate court that, as a result of misinterpretation, he *might have* *been* prejudiced:

“For the court to entertain a complaint of this kind, it must be satisfied that the appellant might have been prejudiced by his lack of understanding (*Erkurt v Higson*[[22]](#footnote-22), para 8; *Mikhailitchenko v Normand[[23]](#footnote-23)*, Lord Justice-Clerk (Ross), p **‍**1140). There is nothing substantial to indicate that this appellant might have suffered prejudice.”

1. In *Tran*, however, Lamer CJ, on behalf of the Court, was emphatic that he did not regard actual prejudice, or its possibility, to be a relevant consideration[[24]](#footnote-24):

“In my view, it is crucial that, at the stage where it is being determined whether an accused’s s. 14 rights were in fact violated, courts not engage in speculation as to whether or not the lack of or lapse in interpretation in a specific instance made any difference to the outcome of the case. To second-guess the defence’s strategy in a particular case, or to ponder the utility of proper interpretation, is an inherently dangerous exercise. It is impossible to know for sure what would have happened if an accused had been provided with full and contemporaneous interpretation of the proceeding in question. For example, one can never really know what might have been triggered in an accused’s mind had he or she received the interpretation to which he or she is entitled under s. 14 of the *Charter*.”

1. The point was re-iterated later in his judgment[[25]](#footnote-25):

“For the Court of Appeal to say after the fact that the poor interpretation received by the appellant made no difference to the outcome of the case is, in my opinion, to engage in the kind of second guessing and speculation which I have suggested is inappropriate in determining whether there has been a breach of s. 14 of the *Charter*. Irrespective of whether the interpreter’s evidence actually affected the appellant’s right to full answer and defence, something we cannot know with certainty, the appellant was entitled under s. 14 to hear fully and contemporaneously what was being said on the topic of his weight.”

1. With respect, we think this is going too far, and we respectfully prefer the approach approved in *Abdula* and *Lee v HM* ***‍****Advocate*[[26]](#footnote-26). To ignore the need for even *potential* prejudice to be shown seems to us to run the risk of creating a presumption of an unfair trial from the mere fact of inadequate interpretation. Moreover, it ought to be perfectly possible and feasible in most cases for an applicant to tell an appellate court, having looked at the appeal papers with the benefit of legal advice and a translator, what it was that was not translated or mistranslated, or what it was that he did not understand, that so affected the way he in fact conducted his defence[[27]](#footnote-27). This counter-argument, which we believe to be correct, was rejected by the Court in *Tran*[[28]](#footnote-28):

“In addition, I note that the Court of Appeal treated the lack of an affidavit from the appellant indicating that he had not understood Mr. Nguyen’s evidence as being of some relevance. This point was picked up on by counsel for the Crown who argued before this Court that, in light of the fact that the appellant apparently understood some English, he was under an obligation to show that he did not actually understand what had been said while Mr. Nguyen was on the witness stand. I cannot accept this argument. It seems to me that, once an accused is found by a trial judge to be in need of the assistance of an interpreter, as was found here, the accused should be presumed to be in need from that moment on. Therefore, the assumption should be that, but for the proper assistance of an interpreter, the accused will not understand the proceedings.”

1. Again, with respect, to assume that a deficiency in translation *per se* renders the trial unfair, without considering how that deficiency has, or *may have*, impacted, on the defendant’s understanding of the proceedings in a material way so as to imperil his right to a fair trial, is a principled but absolutist position. Moreover, it is an abdication of a function which the appeal courts should normally be perfectly equipped to address and resolve by way of evidence.
2. Our view supports the fifth matter which we derive from *Abdula* and *Lee v HM Advocate*. The consequences of any deficiency must be looked at in the overall context of the particular trial and the issues it raises. In this regard, it may be noted that *Abdula* and *Tran* concerned different types of attack on the interpretation provided to the defendant at trial. In *Tran*, the concern was the accuracy of the translation of the evidence of the Crown witness Nguyen, in respect of what was characterised by the Court as “vital testimony” on “a topic of considerable importance to the appellant – namely, the issue of identification upon which his entire defence was built”[[29]](#footnote-29).
3. *Abdula*, however, was not, as leading counsel for the Crown in that case rightly argued[[30]](#footnote-30), a *Tran*-type case. In *Tran*, the Court was concerned with the accuracy of interpretation on the vital issue of identification. In *Abdula*, there was no actual evidence of any inaccuracy in interpretation at all: the complaint concerned the qualification of the interpreter and the manner of his interpretation. As the Court found[[31]](#footnote-31):

“Finally, it is relevant to whether the accused comprehended what was being said in court that this was a straightforward trial in which the issues were clear and no doubt well understood by the appellant at the outset. The appellant of course understood English to some extent.

……

There is no appearance of any instance of misinterpretation that resulted in the appellant being left with an inadequate understanding of what was being said at the trial. His failure to raise any matter indicates that the accused understood sufficiently what was being said, was able to follow the trial and, in conjunction with counsel, was able to make intelligent decisions concerning his defence. At the hearing in this Court, counsel was unable to point to any way in which errors or omissions in interpretation might have impeded the conduct of the appellant’s defence at his trial.”

1. In *Lee v HM Advocate*, the Court similarly observed[[32]](#footnote-32):

“The case against the appellant came primarily in the form of the testimony of the complainer, a doctor speaking to injuries and some of the complainer’s friends referring to events in the nightclub, texts and related matters. There was no technical evidence. It reflected, according to his own trial counsel, what had been anticipated in advance and discussed pre-trial. The appellant’s position had been communicated to his legal advisors and it was, in due course, put to the witnesses where required. At no point did the appellant identify anything specific that he either did not follow or had been unable to deal with. The appellant elected not to give evidence, apparently well in advance of trial, so there is no issue in relation to his ability to present his account adequately to the jury. In these circumstances, it is impossible to perceive any unfairness such as would be conducive to a miscarriage of justice.”

1. We should observe that this passage from *Lee v HM Advocate* has been cited **‍**with approval by this Court in its recent decision in *HKSAR v Apelete* ***‍****(No* ***‍****2)*[[33]](#footnote-33), where a similar attack was made at appeal on the quality of interpretation provided to a defendant at trial. The Court in *Apelete* ***‍****(No****‍*** *2)* held[[34]](#footnote-34):

“We are quite satisfied that the applicant before us understood what Ms X was saying, whether by listening to the English used in court or the Ewe interpretation of that English in what was a very simple, straightforward and short case. Indeed, he never raised any complaint during the trial with his counsel or the court that he did not understand the proceedings and, in particular, Ms **‍**X’s evidence.”

1. Accordingly, in assessing a complaint about the quality of interpretation at trial, an appellate court must have regard to the overall context and circumstances of the trial, the complexities of the evidence, the essential issues in the case and how any alleged deficiencies in translation may have borne, or impacted, on those issues. It is not enough simply to make vague assertions about the quality of interpretation and how it might have been improved.
2. This leads to the sixth point which emerges from *Abdula* and the other kindred authorities. One of the factors which the Court in *Abdula*, *Lee v HM Advocate, Kamasinski* and *Apelete (No 2)* considered of significance was the absence of any complaint by the defendant or his counsel at trial in respect of the interpretation provided to him. In *Abdula*, the Court held[[35]](#footnote-35):

“The other circumstance which provides assistance in resolving the conflict in the evidence is the absence of any objection during the hearing to the interpretation, which would have drawn to the Judge’s attention that the appellant was having difficulty understanding what was said. …… The logical inference from his silence is that at the time the appellant was satisfied with the level of understanding that the interpretation provided for him.”

1. In *Lee v HM Advocate*, where there had at least been an initial concern raised by counsel about the interpreter, the Court noted that no further complaint was made by the defendant in the course of the evidence, the speeches of counsel or the summing-up[[36]](#footnote-36):

“If there had been any continuing difficulty with the interpreter, the appellant could have drawn that to the court’s attention, through his representatives. On the basis that the minute of 25 **‍**June 2014 records that any issue with the interpretation would be re-visited at lunchtime ‘if need be’, in the absence of any further complaint, the judge was entitled to assume that any issue had resolved itself and that there was no ongoing difficulty.”

This passage from *Lee v HM Advocate* was cited with approval in *Apelete (No 2)*[[37]](#footnote-37).Similar reasoning was adopted in *Kamasinski*[[38]](#footnote-38).

1. Somewhat surprisingly, the Court in *Tran* did not address this particular point at all, notwithstanding that the Court of Appeal of **‍**Nova ‍Scotia, from which the appeal had emanated, had noted that “no **‍**objection was taken at trial to the adequacy of the translation”[[39]](#footnote-39). However, plainly from the tenor of the Supreme Court’s judgment in *Tran* and the important principle with which the Court was concerned in the context of the Charter, it cannot have been troubled by the failure of the appellant, whether by himself or by counsel, to make any complaint about the interpretation provided to him, during the currency of the trial.
2. The seventh point which emerges from these authorities is that it is relevant to consider at what part or section of the proceedings the complaint of deficiency in interpretation is directed and its significance to the particular issues in the case. As the Court of Final **‍**Appeal in *HKSAR v Chan* ***‍****Ka* ***‍****Chun*[[40]](#footnote-40)has stated:

“Whether a mistranslation leads to unfairness in a trial, however, will necessarily depend on the nature and context of the mistranslation and its importance to the issues in the particular case.”

1. The Court in *Tran*, whilst accepting that “it will not be every deviation from the protected standard of interpretation which will constitute a violation of s. 14 of the Charter”, held that the appellant must establish the lapse in interpretation was “in respect of the proceedings themselves, thereby involving the vital interests of the accused, and was **‍**not merely in respect of some collateral or extrinsic matter, such **‍**as **‍**an **‍**administrative issue relating to scheduling”[[41]](#footnote-41). It went on to acknowledge[[42]](#footnote-42):

“The need to distinguish between material and immaterial parts of proceedings when protecting an accused’s right to be present and to have the assistance of an interpreter is a constant refrain in the case law.”

1. It would seem that the Court in *Tran* adopted the position that provided the deficiency in interpretation occurred during the proceedings themselves, the vital interests of the accused were thereby engaged. The demarcation the Court drew between “proceedings” and “administrative” or “scheduling” hearings is certainly clear-cut, but we wonder, with respect, if such a categorisation is too rigid to cater for all circumstances. Certainly, it is consistent with the Court’s imprecation against speculating as to how the deficiency may have affected a defendant’s vital interests, and its view that prejudice, or the risk of prejudice, need not be shown.
2. However, there are some parts of the evidence in a trial which may not, in the overall context of that trial, be material or significant to the issues before the jury: for example, the cross-examination of a witness, or the submissions of co‑counsel, in a co-accused’s *voir dire*; evidence relating to a matter which is either not in issue or not significant; or expert evidence which does not impinge on the issue of guilt. We wonder how deficiencies in translation of prosecuting counsel’s opening address, which is not evidence, in respect of matters of evidence about which the defendant would be fully cognisant before the trial began, or legal argument or rulings in the course of evidence as to questions which are leading or evidence which is hearsay, can necessarily be said to affect his vital interests. That said, we acknowledge that they might be said to affect his vital interests if a defendant moulds his defence or evidence to cater for his understanding of the case against him, as articulated by prosecuting counsel in his opening address, which then changes as the case develops.
3. The question of whether deficiencies in interpretation of a summing-up can realistically affect a defendant’s vital interests is more controversial. The Court in *Tran* would plainly find that it would. We respectfully prefer to think that it depends. In *HKSAR v* *Moala Alipate*[[43]](#footnote-43), the Court, in distinguishing the decision in *R v Grejlal Recica*[[44]](#footnote-44), where the English Court of Appeal was not prepared to find that the failure to translate the summing‑up, *inter alia*, was a breach of Article 6 of the European Convention of Human Rights sufficient to allow the appeal, said:

“That, of course, is not to say that when determining whether a breach of the right to a fair trial has taken place regard should not be had to what it is that has not been translated. But the fact that it is only a part of the summing-up, or is only a direction on the law or is only a speech by counsel does not mean that, by reason of that fact alone, there cannot be a breach of the art.11(2)(f) right. It will of course depend upon the particular circumstances of the case. The art.11(2)(f) right extends to and encompasses all elements of the trial which affect the defendant’s interests. But, that is a quite separate issue from whether any failing in the interpretative process has resulted in an unfair trial.”

1. In so saying, the Court was making the point that simply because what is not interpreted, or what is misinterpreted, is part of the summing-up, or a direction on the law or a speech by counsel, does not mean that there must necessarily be a breach of Article 11(2)(f) of BORO. The onus remains firmly on the applicant to demonstrate what of the interpretation is deficient, how it may have impinged on the conduct of his defence and how, ultimately, it affected the fairness of the trial. In any event, it is not said in the present case that there was no interpretation of the summing-up; and nor has there been any attempt to identify anything specific in the summing-up that was not interpreted, or was misinterpreted, save, perhaps, for the legal definition of ‘duress’[[45]](#footnote-45), which thereby imperilled the fair trial of the applicant.
2. Finally, and flowing from this particular issue, it should not be forgotten that in most contested cases, the defendant will be legally represented. That is not, of course, a conclusive answer to a complaint of a deficiency in interpretation, which is a right belonging to the defendant, not his legal representatives. However, the person who will generally be most concerned with, for example, the terms of a ruling on a matter of law or the content of a summing-up, and the person best equipped to deal with any issues arising from them, will be the defendant’s counsel. Again, this proposition is not infallible, for it is not unknown for defendants to notice mistakes or omissions, particularly in a judge’s recitation of the evidence before a jury, which counsel may not. That is why we prefer to say that much depends on the circumstances and context of the alleged non-interpretation or misinterpretation. It is for the applicant to establish how he was, or may have been, affected by the deficiency in translation.
3. On this issue, Mr Mok helpfully drew our attention to the decision of the European Court of Human Rights in *Stanford v The* ***‍****United* ***‍****Kingdom*[[46]](#footnote-46), which held:

“Finally it must be recalled that the applicant was represented by a solicitor and counsel who had no difficulty in following the proceedings and who would have had every opportunity to discuss with the applicant any points that arose out of the evidence which did not already appear in the witness statements. Moreover, a reading of the transcript of the trial reveals that he was ably defended by his counsel and that the trial judge’s summing-up to the jury fairly and thoroughly reflected the evidence presented to the court.”

1. It may also be noted that the European Court went on to find that the local Court of Appeal “could not reasonably have been expected in the circumstances to correct an alleged shortcoming in the trial proceedings which had not been raised before the judge”[[47]](#footnote-47). In *Stanford*, which we acknowledge was not an interpretation case, there had been a deliberate decision by counsel, who was said to have had long experience of conducting criminal trials[[48]](#footnote-48), not to raise with the judge the issue of the defendant’s difficulties in hearing the complainant’s evidence in a rape and kidnapping trial, for fear that the jury might regard his moving too close to her in the court room as an attempt to intimidate her, consistent with the allegations against him[[49]](#footnote-49). Nevertheless, the case illustrates the point that, even though a defendant may not hear (and consequently understand) the evidence against him, he is represented by counsel acting on his behalf, who is in a position to discuss any developments in the evidence which may not have been anticipated.
2. Mr Mok has urged us not follow *Tran*. However, it must be acknowledged that there is much to recommend the principled reasoning of the Court in *Tran*, and much that is relevant to our circumstances in this jurisdiction. Nevertheless, the approach of the Canadian Supreme Court is an absolutist one, which reflects the primacy of the Charter in that jurisdiction. We respectfully prefer the more practical and less theoretical application of the relevant principles, as illustrated by the judgments in *Abdula*, *Lee v HM Advocate* and *Kamasinski*.
3. In considering the approach of other jurisdictions to the issue of interpretation, we should also make these points, which derive from our own experience in this jurisdiction. Unlike the United Kingdom, Australia, New Zealand and Canada, but like Singapore, Hong Kong has, for obvious cultural and historical reasons, a long tradition of court interpretation. It is not that many years ago that all cases in the criminal courts of this jurisdiction, from murder and rape in the High Court to hawking and littering in the magistrates’ courts, were dealt with in English through a court interpreter. Whilst the number of cases dealt with in English has decreased, and those in Chinese correspondingly increased, throughout all tiers of the criminal court system, Hong **‍**Kong still has a highly developed and experienced interpretation section within the Judiciary Administration. Interpreters form an obviously vital component of a court system, where the English and Chinese languages have been declared, by virtue of section 3(1) of the Official Languages Ordinance, Cap 5 “to be the official languages of Hong **‍**Kong … for court proceedings”; which enjoy, according to section **‍**3(2), “equal status” and “equality of use”.
4. The quality of interpretation in our courts from Chinese into English and *vice versa* is exceptional and rightly regarded, particularly in the High Court and Court of Appeal, as of the highest quality by those judges and practitioners fluent in both languages. In our judgment, we must proceed on the assumption that a professionally appointed interpreter has accurately and faithfully interpreted whatever he or she is required to interpret unless a defendant or appellant can demonstrate otherwise. It should be remembered that the more experienced an interpreter, as they will necessarily be in the High **‍**Court, the more familiar will the interpreter also be with the procedures, practices and language of the court, including the standard directions that are routinely given by judges to juries. We acknowledge that occasionally mistakes are made, but we are not prepared to presume any deficiency in interpretation unless it is properly established, and unless it can be demonstrated that the fairness of the trial has been thereby compromised.
5. We accept that interpreters translating from other languages than Chinese into English and *vice versa* are not full-time employees of the Judiciary administration. Nevertheless, those translating in the High ‍Court are, in the case of the more frequently encountered languages, also very experienced and accomplished interpreters. Provided that the interpreter is skilled in the language spoken or understood by the defendant, we must also proceed on the basis that his or her interpretation is accurate and faithful until shown otherwise. The burden is again on the applicant to demonstrate on the balance of probabilities that any deficiencies on the interpreter’s part fell short of the standard expected of the interpreter so as to imperil the fair trial of the accused.
6. It is here that we should make an important and obvious point about the Court’s decision in *Moala*. That was a highly exceptional, if not unique, case in which the language spoken by the defendant was extremely rare in Hong Kong; which was no doubt why the interpreter, who was otherwise working as a professional rugby player and coach in Hong Kong, had been approached to consider providing his services. When examined on oath before the Court of Appeal, however, the interpreter concerned conceded that he could only interpret 20-30% of the summing-up but, further, that his fluency in the appellant’s language was only about 70%, while his ability to translate Tongan into English was perhaps about 50-60%. In other words, the interpreter admitted that he did not fully translate the proceedings into a language, of which he accepted he was not himself a fluent, native speaker.
7. Although he had had no previous experience of acting as a court interpreter, he explained that he initially believed that he was capable of interpreting into Tongan and was influenced by the fact that there was no one else in Hong Kong able to perform the function, in respect of a defendant who had been in custody for some time. It was only later that he came to realise that there was a lot more to interpretation than he had first appreciated. It was hardly surprising in those circumstances, and on the evidence it heard, that the Court found that the appellant had not had a fair trial. *Moala* was such a singular case, in terms of the evidence the Court heard and the concessions it received from the interpreter himself, that we do not see how it has very much application to the instant case, in which we have not even heard from the Spanish interpreter.
8. We also wish to make the point that interpretation is an art and not simply a matter of word for word translation. Grammatical structures in Latin-based languages generally make it easier to translate literally, directly and accurately as between them. That is not so easy as between an Asian language such as Chinese and English, and *vice versa*, where grammar and the structure of sentences may be very different. Sometimes, if a translation is too literal, the true meaning may be lost. I **‍**can **‍**myself recall presiding over a trial at first instance, in which counsel put to a Cantonese‑speaking witness that she was shedding “crocodile tears” for the defendant. The interpreter translated the phrase by using the Cantonese idiom “貓哭老鼠”[[50]](#footnote-50). The translation was not accurate or precise in the sense of a literal or direct translation of the words used by counsel. Yet it conveyed exactly the meaning of the question to the Cantonese-speaking witness and jury. For the point of court interpretation is to ensure that the hearer sufficiently understands what is meant by the speaker. Literal, direct or word‑for-word translation may at times fall short of achieving that end. As the New Zealand Court of Appeal acknowledged in *Fungavaka v R*[[51]](#footnote-51):

“…it may be the case that an entirely accurate translation fails to adequately convey the meaning of evidence, reflecting the reality that interpreting is an art and not a science”.

1. Furthermore, the Court in *Tran* cautioned against examining interpreted evidence microscopically for inconsistencies, observing that the standard for ‘on the spot’ oral interpretation will tend to be lower than translation of a written text “where reaction time is usually greater and where conceptual differences which sometimes exist between languages can be more fully accommodated and accounted for”[[52]](#footnote-52).
2. Whilst it would usually be necessary to convey an important witness’s evidence to a defendant as accurately and faithfully as possible, even where it may be rambling and obtuse, we are not prepared to say that a summary or narration of evidence, or of a submission or of an exchange between counsel and the judge, must *ipso facto* fall short of the standard required of interpretation. Some submissions can be very repetitive: indeed, in the present case, the judge was moved to tell trial counsel on several occasions during his submissions on the stay application not to make the same point over and over again[[53]](#footnote-53), culminating in her eventually asking him to sit down and not “just keep on repeating the same thing”[[54]](#footnote-54). Other submissions may, on occasion, be difficult to understand even by someone speaking the same language. What is necessary is that the point being made is sufficiently understood by the receiver of the translation. Nor are we prepared to be drawn on the relative merits of “simultaneous” as against “consecutive” interpretation. Much will depend on what is being translated and the abilities of the interpreter. What is important is that the interpretation be contemporaneous.
3. In terms of the challenge advanced, the applicant faced an indictment containing a single count of trafficking in a dangerous drug. Since she did not dispute the voluntariness of her VRI, in which she said that she knew what she was being forced to carry strapped to her legs was something illegal but did not know what it was[[55]](#footnote-55), the issues for the jury were, as the judge explained at the outset of her summing-up[[56]](#footnote-56): firstly, whether she knew that what she was bringing into Hong Kong were dangerous drugs; secondly, whether she was acting under duress when she did so. These were relatively straightforward factual issues for the jury in a trial in which the evidence before them lasted a mere two days. Moreover, the directions of law which bore on those issues were standard and correct, and no complaint is made about them in this appeal.
4. Of course, there were other legal issues canvassed before the judge, the most significant being the application for a permanent stay, which took some five days of evidence and submissions prior to the empanelment of the jury, the ruling being given on the sixth day. Nevertheless, it was a relatively short trial, with two essential issues: knowledge and duress. Neither issue would have been difficult for the applicant to appreciate and the interpreter to understand.
5. The applicant was represented throughout the trial by counsel and solicitor, who are both extremely experienced criminal practitioners in these courts. She also had the benefit of another Spanish interpreter assigned by the Director of Legal Aid, who was present at the trial throughout to assist both herself and her legal team. No complaint was ever made to the judge about the difficulties which, it is now said, were being experienced by the applicant with the interpreter appointed by the court. In any event, there is on this issue a dispute, since trial counsel categorically denies that the applicant, or anyone else, ever raised any complaint or concern about the court interpretation[[57]](#footnote-57); on which matter the solicitor agrees[[58]](#footnote-58). It is not, we think, necessary to resolve this dispute because nowhere has the applicant attempted to say what it was that the interpreter appointed by the court either failed to interpret, or misinterpreted, so as to affect the way she conducted her defence in a detrimental way.
6. We do not accept that, in order to demonstrate an alleged deficiency in interpretation, the applicant needs, as a matter of right or practical necessity, a transcript of what passed between her and the interpreter in Spanish. There is an official record of court proceedings, kept in accordance with section 79 of the Criminal Procedure Ordinance, Cap 221. In the present case, that official record of proceedings is in English. The applicant has appeared before this Court with fresh instructing solicitors and new counsel, who are assisted by a different Spanish interpreter, on the instructions of the Director of Legal Aid. The defence have been provided with whatever official English transcript of the evidence and submissions they have requested and we can properly assume that the material parts of that transcript have been gone through by the applicant with the benefit of her new interpreter[[59]](#footnote-59). Yet neither the applicant by way of affidavit, nor Mr Pang by way of submission, has been able to point to any specific aspect of the proceedings that was not interpreted, or was misinterpreted, to the applicant leading her not to understand, or to misunderstand, that part of the trial, thereby affecting the way she conducted her defence to her detriment. Nor, as we have said, have we heard from the interpreter at trial on the general matters about which complaint is made.
7. An authority we have found of some interest in this regard, which was drawn to our attention by Mr Yu and Ms Wong, and which accords with the way we look at this issue before us, is the decision of the Court of Appeal for British Columbia in *R v Titchener*[[60]](#footnote-60). In that case, the complainant and another Crown witness at trial were deaf. They communicated their evidence under oath by way of sign language, which was interpreted into English by a court interpreter skilled in sign language. However, no video recording was made of the two witnesses when they gave their evidence. The appellant argued on appeal that the absence of such a video rendered the record deficient, thus entitling him to a new trial.
8. Of this argument, Ryan J, giving the judgment of the Court in *Titchener*, held[[61]](#footnote-61):

“In my view the record of the evidence of (the complainant) and (the Crown witness) consists of the words of the interpreter. It is those words the court examines as part of meaningful appellate review. The interpreter must be considered to have provided an accurate interpretation unless the appellant can demonstrate that he or she did not.

The appellant’s response is that without a video recording he cannot be expected to be able to establish on appeal that the interpretation is inaccurate. This is only a valid complaint if what he is looking for is a latent defect, that is, a problem unknown to him at the time of the trial and thus discoverable only after viewing a video recording after the trial has concluded. In the ordinary case, and this may be one of them, problems with interpretation are apparent at trial. The symptoms are well‑known - discussions back and forth between the interpreter and the witness, none of which is put into the language of the court; short interpretations of what appear to be lengthy answers by the witness and the like. When this occurs it is open to the appeal court to determine whether the trial judge has effectively resolved the issues.

Of course there may be unknown problems with the interpretation but vigilance should be taken to expose them during the trial. Steps may be taken such as allowing the witness and the interpreter to interact before evidence is given to make sure they understand one another; examining the credentials of the interpreter if necessary; and providing for concurrent control of the first interpreter by having a second one present. If thought feasible, the trial judge could order a video recording to permit a review of the evidence during the trial to ensure its accuracy. On the other hand, none of these steps need be taken if the court and counsel are satisfied that an accurate interpretation can be and is being done at trial.

In my view, it is not an impediment to this appeal that a video recording was not made of the witnesses who testified in sign language. It is a counsel of perfection to claim that an appellant suffers an injustice if he or she cannot, after a trial, review a video recording to find shortcomings in interpretation that with care could have been detected at trial.” (Original emphasis)

1. The decision in *Titchener* also reinforces the point that it is incumbent on the defence to raise these matters at trial, so that steps can be taken to remedy them, there and then. It is plainly unsatisfactory and unfair to the interpreter, as well as the legal representatives at trial, to raise the matter for the first time at an appeal, sometimes years after conviction, when memories of what happened and what was said at trial will have faded or disappeared. If there is a valid complaint, it should be raised as soon as possible so that it can be addressed. In *Apelete (No 2)*, for example, the trial judge had, on being informed of purported difficulties in understanding between the defendant and the court-appointed Ewe interpreter, arranged for two interpreters to be present at the next hearing, and for there to be interaction between them and the defendant before trial so that he could decide which of the two he was “more comfortable with”[[62]](#footnote-62). The judge also gave directions to both counsel to keep their questions simple[[63]](#footnote-63). A judge can only take these initiatives if he or she believes there may be difficulties or problems between the interpreter and the applicant, or if the applicant, the interpreter, counsel or solicitor brings such difficulties to the attention of the court. In the present trial, no one ever did. The first time the matter was raised with any court was in the applicant’s re-amended grounds of appeal against conviction dated 6 ‍March 2019, precisely two years and 5 **‍**months after her conviction. It is noteworthy that no complaint was made about any deficiencies in interpretation in the applicant’s amended grounds of appeal, filed on 27 ‍October 2017; or in the applicant’s 1st affidavit, filed on 9 ‍November ‍2017[[64]](#footnote-64).
2. There is one other important matter to emerge from the judgment in *Titchener*. Since the recorded words of the interpreter formed the official court record, the Court cited two ways in which the accuracy of such interpretation would be safeguarded in that jurisdiction: first, by requiring interpreters to be accredited by a recognised institution; secondly, by requiring the interpreter to take an oath[[65]](#footnote-65). In Hong Kong, the interpreter’s section of the Judiciary Administration ensures that there is a unit within the court system of very skilled, competent and experienced full-time, and where necessary part-time, interpreters for criminal trials. Accreditation is not an issue in this jurisdiction where interpretation forms such an integral part of our very system of justice.
3. As for the taking of oaths, part-time interpreters are required to take an oath in front of the judge before they commence their duties; as the interpreter did in the present case. For an interpreter translating from a Chinese dialect into English, and *vice versa*, the oath (with appropriate modifications for an affirmation) would be in the following terms, in accordance with section 5(1) (or, for affirmations, section 7(3)) of the Oaths and Declarations Ordinance, Cap 11:

“I (name in full), swear by Almighty God that I am well acquainted with the (X) dialect(s) of the Chinese language and the English language and that I will well and truly interpret and make explanations to the Court of all such matters and things as shall be required of me to the best of my skill, ability and understanding.”

The oath is, of course, appropriately modified where the languages involved are a non-Chinese dialect or language, such as French or Spanish, and English.

1. It is the common experience of all judges that interpreters, whether they be full-time members of the Judiciary Administration, or engaged part-time, will, and do, whenever they feel it necessary, ask a witness or the judge or counsel to repeat something that is not clear or may have been missed, consistent with the importance and solemnity of their duty or oath. As with jurors taking oaths, we must proceed on the basis that the interpreter has been faithful to his or her oath until it can be demonstrated otherwise.
2. What we have been told by the applicant is that, in terms of language ability, the applicant understood the Spanish interpreter at trial perfectly well, and that the interpreter was professional and did her best to assist the applicant. The case before us is not a *Tran* case; and it is certainly not a *Moala* case.
3. We wish to make clear that the practice in other jurisdictions is not conclusive in answering the systemic challenge in this case. What it does show, however, is that the United Kingdom, Australia, Canada and Singapore are not troubled by the absence of a record of what passes between an interpreter and the defendant in the dock; notwithstanding the application in some of those jurisdictions of constitutional guarantees of the right of interpretation in criminal trials. The same may be said of European jurisprudence.
4. The exception is New Zealand, and it is here that we should say something of the singular approach in that jurisdiction as to how interpreters should carry out their task. The Court, at the conclusion of its judgment in *Abdula*, addressed what might be considered “best practice” in the process of court interpretation. The final measure suggested was that[[66]](#footnote-66):

“… an audio recording should be made of all criminal trials in which there is an interpreter providing assistance for an accused person. The recording, which would be transcribed or released to the parties only by order of the court if and when necessary, would be the appropriate and best means of resolving issues arising on appeal about the accuracy and general competence of interpretation”.

1. Although a separate recording of what passes between the interpreter and the defendant may be considered “best practice” in the New **‍**Zealand context, we do not think that such a practice is either a functional necessity, nor should it be viewed as a *sine qua non* of a fair trial of the accused, in Hong Kong. A record of an interpreter’s translation to a defendant in the dock is not required under any constitutional or human rights instrument; nor, for that matter, is a verbatim recording of proceedings. What is required is that the interpretation be of sufficient quality for the defendant to be able to understand the proceedings and conduct his defence effectively.
2. Whilst we do not in any way intend by our remarks to denigrate or diminish the standard and ability of interpreters in other jurisdictions, Hong Kong has, as we have pointed out, a long history and experience of court interpretation, traditionally between English and Chinese, but in more recent years involving other languages as well. Judiciary interpreters have been an established and important element of the Operations Division of the Judiciary Administration, and a familiar and integral part of the legal landscape in Hong Kong, in particular criminal proceedings, for very many decades. They form a highly organized, efficient and experienced body of fully employed interpreters within this jurisdiction. Part-time interpreters engaged in High Court trials and appeals are also very experienced and accomplished interpreters, particularly in languages commonly encountered in that tier of the court system.
3. The onus is, as we have said, firmly on an applicant to demonstrate what the defective interpretation was, how it impeded the applicant’s understanding of the proceedings and how it may have affected the conduct of his or her defence resulting in an unfair trial. The one particular the applicant has identified, which she claims she did not understand at the time, was the concept of ‘duress’. The applicant avers that her difficulty with this term occurred during the judge’s summing-up[[67]](#footnote-67). Leaving aside the issue of whether this alleged deficiency can be said to have affected the vital interests of the applicant, when it arose during the summing-up after the evidence was closed, the applicant has not explained how her supposed inability to understand the judge’s direction on this matter, which was in complete conformity with Direction 49 of the Specimen Directions on Jury **‍**Trials promulgated by the Hong Kong Judicial Institute, and about which direction no complaint is made in this appeal, could in any way have affected the way she conducted her defence, thus depriving her of a fair trial. It would defy belief that the applicant did not understand the concept of ‘duress’ and what it entailed at law, when her whole defence was founded upon it.
4. Such other particulars as the applicant has given of unclear, broken, incoherent or interrupted translation, resulting in her feelings of anxiety, confusion and concern that she was not getting a full and accurate interpretation of proceedings, remain vague and amorphous assertions, for which she has not attempted to identify what she did not understand of any particular aspect or part of the proceedings, and how it affected the conduct of her defence. As we have pointed out, the applicant has accepted that the Spanish interpreter assigned to her, whose spoken language she understood perfectly well, was professional and tried her best to assist her.
5. There is no basis for us to find that the interpretation given to the applicant at trial fell short of the required standard, thus causing her to have an insufficient understanding of the proceedings, so as to affect the way she may have conducted her defence. Nor are we remotely persuaded that any of the alleged deficiencies, even if we were to accept them in their entirety, which we do not, come anywhere near to establishing that she did not have a fair trial. We are confident that the applicant was represented by competent counsel and solicitor, and that she would have well understood the issues at stake at her trial.
6. We reject this ground of appeal.

The application for stay (Ground 1)

1. Four witnesses were called by the prosecution on the stay application: a Senior Inspector of the Customs & Excise Department, who dealt with whether the applicant had offered to take part in a controlled delivery operation, as well as with his response to the assertions she had made about Mikael during her VRI; the doctor who had examined the applicant upon her admission to prison upon remand; a Senior Inspector of the Customs & Excise Department, who dealt with the lack of response from the Drug Enforcement Administration of the United States, following the request for information from the Customs & Excise Department in respect of the applicant’s assertions in her VRI; and the Spanish interpreter, who acted as interpreter between Customs & Excise officers and the applicant, and who testified as to what the applicant had said in respect of the controlled delivery, as well as the applicant’s physical condition on 9 ‍August 2015.
2. With the court’s leave, the defence called the Consul General for Venezuela in Hong Kong concerning the physical condition of the applicant when she saw her on 13 August 2015.

The defence submission on the application to stay

1. Trial counsel contended that the applicant would not be able to have a fair trial, since it was impossible for a Hong Kong jury to assess the political, social and economic conditions in either Venezuela or Brazil, so as to decide why the applicant may have done what she did[[68]](#footnote-68). He questioned how the jury could determine whether the applicant could or should have informed the police in Abu **‍**Dhabi as to her predicament; how they could assess the effect of the alleged violence on the applicant over and above the threat to her family; and how such threats and violence would operate on a reasonable person of the applicant’s age and sex.
2. Trial counsel further complained that the authorities in Hong **‍**Kong had failed to arrange for a full and proper medical examination of the applicant to confirm, if possible, whether the applicant had been raped or subjected to other violence. He submitted that the prosecution had no evidence to refute or rebut the applicant’s description of duress.
3. On the abuse of process limb of the application, trial counsel argued that the applicant’s description in her VRI was consistent with the ‘identifiers’ of human trafficking listed in the *Statement of Prosecution Policy and Practice* of the Department of Justice: namely, there was a threat of force, an actual use of force, an abduction and a deception by tricking the applicant into leaving her home and travelling to Brazil. Yet, the authorities in Hong Kong did not take swift and appropriate action which would or could have confirmed what the applicant was saying, so as to comply with the international standard for combating human trafficking.

The prosecution submission on the application to stay

1. The prosecution argued that the real issue was whether the defendant’s claims as to what compelled her to bring dangerous drugs into Hong Kong were credible and whether such compulsion would substantiate the defence of duress. It was submitted that a Hong Kong jury was capable of assessing the credibility and reliability of the defendant’s evidence based on their general knowledge and ordinary experience of life. The defence contention amounted effectively to a criticism of the inadequacy of the entire system of trial by jury, which had operated in Hong **‍**Kong for well over a century. Exception was taken to the defence relying on assertions in the VRI, which were either contentious or self-serving, and on materials, including documents from the BBC on the standard and standing of the police in Brazil and Venezuela, without any proper evidential basis.
2. It was submitted that the applicant had made assertions in her VRI, which were not supported by evidence; consequently, her claim to be a victim of human trafficking was not a credible one.

The judge’s reasons for decision on the stay application

1. The judge referred to the legal principles advanced in *HKSAR v Ng* ***‍****Chun* ***‍****To Raymond & Anor*[[69]](#footnote-69),citing *HKSAR v Lee Ming Tee and ‍Anor*[[70]](#footnote-70) and *HKSAR v Lee Ming Tee & Securities and Futures ‍Commission*[[71]](#footnote-71),governing applications for stay. Despite the “impassioned plea” of trial counsel, the applicant had not given evidence to confirm the **‍**contents of her VRI, so that her evidence could be tested by cross‑examination[[72]](#footnote-72). Moreover, the applicant had made no reference in her VRI to the standard of policing in either Venezuela or Brazil, nor had she given any explanation as to why she had made no report to anyone before arriving in Hong Kong.
2. The judge did not accept that a Hong Kong jury would not be able to fully understand the applicant’s predicament, nor did she find the absence of any medical report material, since it was not the applicant’s case that she had been raped recently, nor had she made any complaint of being raped to the doctor who examined her upon her admission to prison.
3. The judge did not accept that there was no evidence to refute or rebut the applicant’s claims, since there were several inherent improbabilities and contradictions in her account. Nor did the judge accept that the alleged failure of the investigating team to confirm or refute the applicant’s assertions in a timely fashion would result in the applicant not receiving a fair trial. She found there was no misconduct or abuse of process on the part of the investigating team and declined to stay the proceedings*.*

The judge’s refusal to stay proceedings (Ground 1)

1. This ground is predicated on the assumption that the applicant’s assertions about her kidnapping and rape, resulting in her being forced to commit a crime she would not otherwise have committed, were credible. Since they were credible, the prosecution had a duty to investigate her claims. If there was a failure to do so, the court should have stayed the proceedings as an abuse of the process of the courts.
2. The difficulty with this argument, and the assumption which underlies it, is that the prosecution did not regard the applicant’s claims as credible; and nor did the judge. Moreover, the applicant declined to give evidence on the stay application, leaving the judge to determine the issue on the applicant’s bare assertions in her VRI, without them ever being given on oath or tested in cross-examination. In a lengthy 31-page written Reasons for Decision delivered after the conclusion of the trial, the judge expressly found the applicant’s claims not credible[[73]](#footnote-73). Indeed, during trial counsel’s submission of ‘no case to answer’ on 30 ‍September ‍2016, the judge had explicitly said, at one stage of the argument:

“COURT : You might – well, it’s for your client to decide what she wants to do, but I will tell you at this stage, because that will be in my judgment in the stay proceedings **–** but the reporters better not say this part because that would be something to do with that one **–** that *I accept the prosecution submission that her claim is not a credible one*.” (Emphasis supplied)

1. Nevertheless, the question of duress was one ultimately for the jury. At the outset of her summing-up, the judge told the jury that the issues they had to decide were twofold: first, “whether the defendant knew she was bringing in dangerous drugs into Hong Kong, not just illegal stuff, she knew that it was dangerous drugs; secondly, whether what the defendant has said during the video-recorded interview is true, or may be true, that she was forced against her will to bring the dangerous drugs into Hong Kong”[[74]](#footnote-74). The jury were later expressly directed[[75]](#footnote-75):

“If the account given by the defendant during the video-recorded interview is true, or may be true, then the defendant is not guilty. If you entirely reject her account given in the video-recorded interview, that does not mean automatically that she is guilty, because that does not relieve the prosecution of the burden of making you sure that the defendant is guilty.”

1. Clearly, the jury did not accept the applicant’s case that she was acting under duress. Indeed, the judge made that very observation when sentencing the applicant[[76]](#footnote-76):

“By their verdict, the jury had obviously unanimously decided that the prosecution have proved that duress does not apply in this case. The fact that the jury did not take very long to return their verdict would also indicate that they did not find the defendant’s account believable.”

1. We see no reason to disagree with the views of the prosecution, the assessment of the judge or the verdict of the jury. The judge has set out in commendable detail her reasoning in her Reasons for Decision on the application for stay, and we agree that such were the inherent improbabilities and contradictions in the applicant’s assertions that this was not a credible claim. The applicant never testified about these matters and the judge cannot be faulted in declining to criticise the conduct of the prosecution; or in her refusal to stay proceedings on the basis of the material before her.
2. Mr Pang relied on two authorities for the proposition that there was nevertheless a duty on the prosecuting authority to investigate the applicant’s assertions once they had been made. In *ZN v Secretary ‍for ‍Justice (No 2)*, Zervos J (as he then was) had noted at first instance:

“Curiously, it is acknowledged in the respondent’s submissions that even though the HKSARG is not subject to any applicable international treaty obligations in relation to human trafficking, it is nevertheless committed to dealing with human trafficking and is guided by the definition of human trafficking under art.3 of the Palermo Protocol in doing so. The definition attempts to cover all forms or circumstances by which trafficking of persons occurs for the purpose of exploitation.”

1. From the decision of the English Court of Appeal in *R v Joseph (Verna)*[[77]](#footnote-77), Mr Pang extracted two principles which could be derived from the English authorities:

“… (ii) In a case where (a) there was reason to believe the defendant who had committed an offence had been trafficked for the purpose of exploitation, (b) there was no credible common-law defence of duress or necessity but (c) there was evidence the offence was committed as a result of compulsion arising from trafficking, the prosecutor has to consider whether it is in the public interest to prosecute (see *R v M (L)*[[78]](#footnote-78), at para 10.)

(iii) The court’s power to stay is a power to ensure that the state complied with its international obligations and properly applied its mind to the possibility of not ‍imposing penalties on victims. If proper consideration had not been given, then a stay should be granted, but where proper consideration had been given, the court should not substitute its own judgment for that of the prosecutor: see *R v M (L)*, at para 19.”

1. With respect to this argument, as was subsequently pointed out by the Court of Appeal in *ZN v Secretary for Justice*[[79]](#footnote-79), the **‍**People’s **‍**Republic of China (“PRC”) has declared that the Palermo **‍**Protocol, with its wide definition of human trafficking, does not apply to Hong Kong, a reservation whose implications had not been adequately addressed by the court at first instance. Accordingly, as Mr **‍**Mok submitted, that somewhat limits the application of European jurisprudence to the issue before the Court.
2. In relation to the duty to investigate, the Court in *ZN v Secretary for Justice*, *per* Cheung CJHC[[80]](#footnote-80), adopted, *mutatis mutandis*, what was said by the European Court of Human Rights in *Rantsey v Cyprus and Russia*[[81]](#footnote-81), with the *caveat* that human trafficking does not come within the protection against slavery and servitude under Article 4 of BORO. The European Court premised the duty to investigate in a way which is more circumscribed than Mr Pang’s formulation. It held[[82]](#footnote-82):

“… In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the state authorities were aware, or ought to have been aware, of circumstances giving rise to *a credible suspicion* that an identified individual had been, or was at real and immediate risk of being … exploited within the meaning of … [Article 4 of BORO]”. (Emphasis supplied)

This holding was not touched upon by the Court of Final Appeal in its most recent judgment in *ZN* ***‍****v* ***‍****Secretary for Justice & 3 others*[[83]](#footnote-83), since no issue as to the investigative duty arose when the case was argued before it.

1. The pertinent aspects of the Court of Final Appeal’s decision, for our purposes, are that the Palermo Protocol does not apply to the Hong ‍Kong Special Administrative Region, and “it would be inappropriate to give a ‘backdoor’ application to a treaty which the PRC has expressly declared should not apply to Hong Kong”[[84]](#footnote-84); and, further, that the protection against slavery and servitude under Article 4 of BORO, “does not contain a prohibition against human trafficking either generally for exploitation or specifically for forced or compulsory labour”[[85]](#footnote-85).
2. We are satisfied that the present case does not even arrive at the question of whether the alleged treatment of the applicant could amount to “human trafficking”, within or without the meaning of Article 4 of BORO, because there was no *credible* case that the applicant was ever a victim of such trafficking. In our judgment, following an extensive review of the evidence and circumstances before her, and in the absence of any *credible* claim of duress or human trafficking, the judge properly resolved the application for a stay on the well‑established principles enunciated in *HKSAR v Lee Ming Tee (No 1)* and *HKSAR v Lee Ming Tee (No 2)*. In our judgment, there is no substance whatsoever in the complaint under Ground 1.

The failure of counsel to cross-examine (Ground 2)

1. Mr Pang accepts that the complaint under this ground cannot be elevated to a complaint of flagrant incompetence on its own; indeed, the amended and re-amended perfected grounds of appeal do not make any such allegation. The complaint, such as it is, is that trial counsel did not cross‑examine (in the presence of the jury), on matters which had been elicited in cross**‑**examination of PW2 during the *voir dire* (in the absence of the jury). These matters are said to have been vital to the issue of the credibility of PW2 and the applicant.
2. Enquiries have been made of trial counsel as to why he did not cross-examine on these matters, and his answer is that since the applicant’s defence was disclosed in her VRI, which was essential to her defence, it would not have helped her cause to discredit the conduct of that interview by attacking the interviewer on what he regarded to be peripheral issues. He emphasised that how he chose to tackle the witness was a matter of tactics within his discretion as counsel.
3. It may be that fresh counsel looking at the case through the prism of an appeal believes that he would have done what trial counsel decided he would not do, had he been conducting the trial. In the absence of a complaint of flagrant incompetence as to the course trial counsel took, which thereby undermined the fair trial of the applicant, we do not see how this matter can be taken very far at all; as Mr Pang recognised in argument ***‍***before us. In the seminal decision of the Court of Final Appeal in *Chong* ***‍****Ching ‍Yuen v HKSAR*[[86]](#footnote-86), the following passage from the judgment of ***‍***the Court of New **‍**South Wales in *R v Birks*[[87]](#footnote-87) was adopted by Sir ***‍***Thomas ***‍***Eichelbaum NPJ[[88]](#footnote-88):

“As a general rule, a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted. Decisions as to what witnesses to call, what witnesses to our score not to ask, what lines of argument to pursue and what points to abandon, are all matters within the discretion of counsel and frequently involve difficult problems of judgment, including judgment as to tactics. The authorities concerning the rights and duties of counsel are replete with emphatic statements which stress both the independent role of the barrister and the binding consequences for the client of decisions taken by a barrister in the course of running a case.”

Sir Thomas concluded[[89]](#footnote-89):

“It follows, almost inevitably, that ordinarily, a tactical decision by counsel which, in hindsight, ought to have been made differently, will not provide any ground for appeal, any more than if such decision had been made by the defendant personally. Nor will other forms of mere error of judgment.

Nevertheless, the courts have recognized that in some exceptional instances, an error of sufficient proportion and consequence will enable the court to intervene and avert the miscarriage of justice.”

1. We do not see that the complaint made in the case before us comes anywhere near the sort of exceptional circumstances which might cause this Court to impugn the course taken by trial counsel, thereby justifying its intervention in order to avert a miscarriage of justice. Trial counsel has explained why he did what he did and we do not see that he can be faulted in the decision he took for the reasons he explained, even if another counsel, who was not involved in, or familiar with, the dynamics of the trial, may have taken a different view on appeal. There is no merit in this ground.

The failure to advise (Ground 3)

1. Although there is, again, no averment in the amended or re‑amended perfected grounds of appeal that trial counsel was flagrantly incompetent in the advice he gave (or did not give) to the applicant so as to enable her to make an informed decision whether or not to give evidence, the clear implication is that he effectively failed to advise her that she *must* give evidence in order to have any chance of establishing her defence of duress. Instead, it is alleged that counsel wrongly advised her that she could do no better than the account she had already given in her VRI, without warning her that what she had said in her VRI had not been the subject of cross**‑**examination and would carry comparatively less weight than evidence given under oath; thereby imperilling her right to a fair trial.
2. On the question of what the applicant was told by her counsel, there is a clear issue between the parties, with trial counsel, supported by his instructing solicitor, emphatically refuting the applicant’s allegation and saying that he repeatedly advised the applicant that she *must* give evidence and that she could not rely on what she had said in the VRI alone. He maintains that he understood the applicant would be giving evidence and was shocked to learn of her sudden change of mind over the weekend.
3. In resolving this dispute, we note that the applicant did not testify on the stay application, which might at least be consistent with her not wanting to give evidence on the general issue either. No complaint is ***‍***made about that earlier decision. Furthermore, the applicant acknowledged that on Monday 3 October 2016, which is the day on which the applicant would have begun her evidence had she elected to testify, she met with her solicitor in the morning prior to the arrival of counsel and informed him, in her own words, that she “was scared and nervous about being subjected to cross-examination”, and that she did not want to give evidence[[90]](#footnote-90). She thereafter signed a short statement, in English and Spanish, to the effect that she had been informed of her rights and decided not to give evidence. While this is obviously consistent with her own decision formed over the weekend not to give evidence, it is nevertheless alleged that neither counsel nor solicitor ever advised her that she “must give evidence in order to prove (her) case on the defence of duress”[[91]](#footnote-91); nor was she told “that the standard direction to be given by the judge to the jury in summing up is that they might afford less weight to VRI evidence that was not tested by cross‑examination”[[92]](#footnote-92).
4. Trial counsel lays some stress on the fact that, following the close of proceedings in the morning of Friday 30 **‍**September ‍2016, there had been a conference in the cells between the applicant, the solicitor and himself. Although the applicant was to give her final decision on the following Monday, trial counsel was “100% sure” after the conference that the applicant would be ***‍***testifying. However, when he arrived in court on Monday 3 ***‍***October ***‍***2016[[93]](#footnote-93), he was “shocked” to discover that she had changed her mind[[94]](#footnote-94). It was in those circumstances, and with a jury waiting in the wings for the trial to resume, that he asked the judge to stand the case down for about an hour until 12 noon in order to take instructions. The official log kept by the judge’s Clerk confirms that trial counsel made his application for an adjournment to take instructions at 11:05 am on 3 ***‍***October 2016. This was granted by the judge. The jury were accordingly called into court at 11:09 am and released by the judge until 12 noon. The court resumed at 12:03 pm when trial counsel announced, following his conference with his client, that the applicant would not be giving evidence.
5. The request for a significant adjournment in the morning of Monday 3 October 2016, when counsel and the judge would have known that the jury were waiting to hear from the defence, only really makes sense if trial counsel was, as he says he was, “shocked and concerned by (the applicant’s) change of mind”[[95]](#footnote-95) since Friday about giving evidence, and wished to hold an urgent conference with her to confirm her instructions. We have obtained the official transcript of what trial counsel said to the judge at 11:05 am on Monday 3 October 2016, which does not form part of the appeal bundle, but the relevant parts of which we now reproduce.
6. After apologising for being delayed by a matter in another court earlier that morning, trial counsel explained to the judge:

“… unfortunately, I haven’t been able to speak to the defendant this morning. We had a long conference on Friday after we rose. She wants to talk to me again. This is really important and I don’t – I’m not prepared to talk to her in court.”

When the judge asked what the current position was, trial counsel responded:

“So I would like to have some time this morning to go down and talk to her again. She is very scared about giving evidence. I mean I will be frank it’s a different language, different culture and these court proceedings is (*sic*) not even anywhere near the same as they do in Venezuela. They don’t have juries. They just have judges sitting there and so on. She wants to talk to me about various things.

Where we left it on Friday I thought she probably would give evidence. Now, I’m not so sure but nevertheless I want to talk to her. Like a lot of people, she really wants as far as it is possible for me to make the decision for her, but I cannot do that.”

When he returned from his conference with the applicant, trial counsel told the judge at 12:03 **‍**pm:

“The position is the defendant doesn’t feel able to give evidence. She has elected not to go evidence.”

1. Allowing for the fact that trial counsel was suitably circumspect about giving too positive an answer to the judge’s question about the current position until he had spoken to his client, this exchange is in our view entirely consistent with trial counsel’s account to this Court of his dealings with the applicant, and confirms the particular lengths to which he went to prepare an obviously nervous client for her election whether or not to give evidence. It confirms that he was left with the distinct impression following their Friday conference that the applicant would be giving evidence, but that over the weekend she had changed her mind. Trial counsel was rightly concerned enough by this development to wish to go down to the cells and discuss the matter further with her. The impression we have formed is not of counsel abdicating his responsibility to his client, still less discouraging her from giving evidence or failing properly to advise her, but rather trying his level best to make sure that she understood fully what was at stake, whilst acknowledging that the final decision was hers.
2. We have noted another matter in the course of our analysis of the relevant evidence on this issue, although its significance was not addressed by the parties. In both the amended and re-amended perfected grounds of appeal filed by Mr Pang’s predecessor as leading counsel on the applicant’s behalf, specific reference (with page citations) was made to an exchange between trial counsel and the judge in the morning of Friday 30 ***‍***September 2016, during his submission of ‘no case to answer’. We must assume that the applicant is conversant with the transcript and translation of these exchanges, since it has been specifically cited in her grounds of appeal as from 9 October ‍2017, more than two years prior to the hearing of this appeal. The exchanges between the court and trial counsel are explicit on the very matters which the applicant says she was never advised by her counsel[[96]](#footnote-96):

“COURT: So that (duress) becomes a live issue. At the moment I don’t know whether your client is going to give evidence or not, it’s up to her to decide. *But if she, at the end of the day, decides not to give evidence it’s still a live issue, I agree, but on the other hand though it would be untested and* ***‍****evidence that is just her assertion without any cross‑examination.*

DEFENCE COUNSEL: Well…

COURT: So that had to be brought to the attention of the jury, *but I will direct them because it’s in the standard direction if all a defendant said is relying on a caution not substantiated by that defendant, on oath, in front of a jury, not cross-examined, that fact would be brought to the attention of the jury. They decide what weight they want.* Of course, it’s still evidence. They are still entitled to say, ‘Right, even though she had never come to the witness-box to confirm it, I still believe her. I still think that what she said may be true’. That’s fine. So that is the situation. …” (Emphasis supplied)

1. When, a little later, trial counsel suggested that the prosecution had not rebutted the applicant’s claim of duress, the judge countered[[97]](#footnote-97):

“COURT: But how can I decide at this stage now just on the evidence before me and in her case *it is mere assertion*? It still amounts to *mere assertion not tested* and the prosecution made it quite clear they don’t accept what she said.” (Emphasis supplied)

1. Towards the end of these exchanges, the judge reiterated the point[[98]](#footnote-98):

“COURT: But I am just saying that if at the end of the day she elects not to give evidence and just relies on the video recorded interview, *I will be duty-bound to give that direction to the jury how to deal with a mixed statement but not given in evidence, not confirmed in evidence and not tested by cross-examination*.

I am just letting you know beforehand that *I will follow the instructions in the directions* to do it, because it will be unfair to let the jury just think that it’s the same as any other piece of evidence, *because it is important that if your client does elect not to give evidence it had not been tested by the prosecution, right?*” (Emphasis supplied)

1. If it were the applicant’s case that these exchanges were never interpreted to the applicant, one would have expected her to say so explicitly in an affidavit by reference to this very episode in the transcript, given that the exchanges have been referenced in her grounds of appeal and must have been translated to her by her new legal team, with the assistance of a Spanish interpreter appointed by the Director of Legal Aid. However, we have already addressed the matter under Ground 4 of whether the interpretation provided to the applicant at the trial was sufficient, and we have absolutely no doubt that these statements from the judge were sufficiently communicated to the applicant through the court interpreter. Yet, the applicant was in these passages hearing directly (and repeatedly) from the judge as to the directions she would be giving to the jury and the way they should treat the applicant’s answers in the VRI. It defies belief, therefore, that she could not have known of the differences between the weight that might be attached to assertions in the VRI and evidence given under oath, because that is what the judge herself made clear, several times. Nevertheless, despite that knowledge, the applicant decided not to give evidence.
2. We might add that trial counsel himself would have assumed that these exchanges were also being translated to the applicant in the dock, and that the applicant would be hearing from the judge herself that she would be directing the jury that it was a matter for them as to what weight they attached to assertions made in the VRI, which had neither been made on oath nor subjected to cross-examination; and, further, that even if she decided not to give evidence, duress was a still a live issue. Indeed, at the end of the exchange, immediately after the judge had ruled against the defence on the ‘no case to answer’ application, trial counsel thanked the judge for the indication she had given, “because that makes my job of advising her much clearer and easier – well, not easier but clearer”[[99]](#footnote-99).
3. We do not accept that the applicant did not receive appropriate advice as to whether or not she should give evidence and the consequences of her decision. We are confident that trial counsel properly advised his client on the issue, which was prefaced and fortified by what the judge herself said in exchanges with counsel on the previous Friday before her election on the following Monday. We do not accept that the applicant’s decision in respect of giving evidence was uninformed, or that there can be any criticism of counsel or solicitor involved.
4. We would make one final observation on this matter. In dealing with Ground 1, we noted another exchange between the judge and trial counsel during the application of ‘no case to answer’, where the judge indicated that she agreed with the prosecution’s submissions that “(the ***‍***applicant’s) claim is not a credible one”[[100]](#footnote-100). That exchange took place in the morning of Friday 30 September 2016, at about 10:15 am. By Monday 3 October 2016, the applicant had apparently resolved that she would not be giving evidence. To what extent her decision may have been influenced by the judge’s comment, we cannot say and the matter has not been adverted to in the applicant’s affidavits. However, one interpretation would be that the applicant took a not unrealistic view over the weekend that she was better off with the VRI presenting her defence of duress as well as it could be presented before the jury, without the risk of it being undone by cross-examination.
5. We find no substance in Ground 3. Accordingly, having rejected all four grounds of appeal, we refuse the applicant leave to appeal against conviction and dismiss her appeal. We now turn to consider her application for leave to appeal against sentence.

Appeal against sentence

1. The applicant received a sentence of 25 years’ imprisonment. In her perfected grounds of appeal against sentence filed on 11 April 2018, two grounds were put forward: first, that the judge had failed to take into account as a mitigating factor that the applicant had offered assistance to the authorities (Ground 1); secondly, that no consideration had been given for the applicant’s lesser involvement in the offence (Ground 2).
2. We can dispose of Ground 2 very quickly because the argument has been rather overtaken by events, in particular the decision of this Court in *HKSAR v Kilima Abubakar Abbas*[[101]](#footnote-101), delivered on 18 ***‍***September 2018. Among other things, the decision settled the question of at whom the sentencing guidelines in cases such as *R v Lau* ***‍****Tak* ***‍****Ming & another*[[102]](#footnote-102), *Attorney General v Pedro Nel Rojas*[[103]](#footnote-103) and *HKSAR v Abdallah*[[104]](#footnote-104) were directed. The Court has definitively restated, following a long line of earlier appellate authority, that such guidelines are intended for traffickers at the lowest level of involvement, namely, couriers and storekeepers[[105]](#footnote-105).
3. The evidence in the present case established, at the very least, that the applicant was a courier, although her journey had apparently commenced on 19 June 2015 when she travelled from Venezuela to Brazil, thence on 1 August to Paraguay and back to Brazil, where she collected 1,664 grammes of cocaine narcotic, before flying via Abu Dhabi to Hong Kong, where she was arrested some 7 weeks later on 9 ‍August ‍2015. The judge’s adoption of a starting point of 23 ‍years’ imprisonment, which was at the lowest level of the applicable range of sentences available under the *Abdallah* guidelines, cannot be criticised; nor can the enhancement of 2 years’ imprisonment for the international element involved, by bringing such a significant quantity of dangerous drugs over the border into Hong Kong[[106]](#footnote-106).
4. As for the suggestion in Ground 1 that the applicant had offered assistance to the authorities, this was predicated on the claim that she had offered information and assistance primarily in relation to the person who had allegedly kidnapped her and forced her to traffic in the drugs in question, an assertion which neither the judge nor the jury found credible. Such “information” as she purported to give was of no practical assistance to anyone.
5. Mr Pang recognised the difficulty he had with both grounds of appeal against sentence but urged upon the Court that, even if human trafficking could not be made out as a matter of law, it was within our power to take into account that the applicant had been “exploited” by others higher up the chain of command. However, as we have said, the guidelines apply to couriers. Nor do we accept that she was exploited. The applicant was an obviously intelligent, mature woman and mother, who had been educated to university level. We are of the view that she knew exactly what she was doing when she trafficked a large quantity of cocaine across the world from South America, through the Middle East, to Hong Kong. At no stage along the way, did she ever shrink from the enormity of what she was doing, or ask for assistance from any authority or anyone else, even when she was intercepted and subsequently arrested at Hong Kong International Airport.
6. The application for leave to appeal against sentence must also be refused and the appeal dismissed.

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| (Jeremy Poon)  Chief Judge of the High Court | (M H Lam)  Vice President | (Andrew Macrae)  Vice President |

Mr Johnny Mok SC, counsel on fiat, Mr Ned Lai SADPP and Ms ‍Cherry ‍Ho SPP (Ag), of the Department of Justice, for the Respondent

Mr Robert Pang SC, Ms Denise Souza and Mr Kim McCoy, instructed by Robinsons, Lawyers, assigned by the Director of Legal ‍Aid, for the Applicant

Mr Benjamin Yu SC and Ms Maggie Wong SC, *amici curiae*

1. In all the selected jurisdictions, save Wales and British Columbia, the language of the court is English. In Wales, the language of the court is English or Welsh. In British Columbia, a defendant can be tried for a criminal offence under the Criminal Code in English or, since 1 **‍**January **‍**1990, in French: *Bessette v Attorney General of British Columbia* (2017) BCCA 264. [↑](#footnote-ref-1)
2. AB, p 337 Entry 1284. [↑](#footnote-ref-2)
3. AB, p 337 Entry 1291. [↑](#footnote-ref-3)
4. AB, pp 339 Entry 1335 – 341 Entry 1354; pp 344 Entry 1390 – 345 Entry 1408. [↑](#footnote-ref-4)
5. AB, p 301 Entry 626; p 318 Entry 922; p 319 Entry 927 – 928. [↑](#footnote-ref-5)
6. AB, p 347 Entry 1439 – 1440. [↑](#footnote-ref-6)
7. AB, p 350 Entry 1480. [↑](#footnote-ref-7)
8. *Kunnath v The State* [1993] 1 WLR 1315, at 1319D –F. [↑](#footnote-ref-8)
9. *Abdula v R* [2012] 1 NZLR 534, at [43]. [↑](#footnote-ref-9)
10. *Ibid.*, at [59]. [↑](#footnote-ref-10)
11. *R v Tran* [1994] 2 SCR 951, at 987. [↑](#footnote-ref-11)
12. *Abdula*, at [40] – [41]. [↑](#footnote-ref-12)
13. *Ibid.*, at [54]. [↑](#footnote-ref-13)
14. *Tran*, at 979. [↑](#footnote-ref-14)
15. *Tran*, at 980. [↑](#footnote-ref-15)
16. *Tran*, at 990 **–** 991. [↑](#footnote-ref-16)
17. *Abdula*, at [43]. See also *Fungavaka v R* [2017] NZCA 195, at [23]. [↑](#footnote-ref-17)
18. *Kamasinski v Austria* (1991) 13 EHRR 36 (ECHR). [↑](#footnote-ref-18)
19. See *ECHR case-law on the right to language assistance in criminal proceedings and the EU response*, by James Brannan, Translator, European Court of Human Rights. [↑](#footnote-ref-19)
20. *Kamasinski*, at [84]; see also *Abdula*, at [35]. [↑](#footnote-ref-20)
21. *Lee v HM Advocate* [2016] HCJAC 39, at [39]. [↑](#footnote-ref-21)
22. *Erkurt v Higson* 2004 JC 23; 2004 SLT 21; 2004 SCCR 87. [↑](#footnote-ref-22)
23. *Mikhailitchenko v Normand* 1993 SLT 1138; 1993 SCCR 56. [↑](#footnote-ref-23)
24. *Tran*, at 994 – 995. [↑](#footnote-ref-24)
25. *Ibid.*, at 1005. [↑](#footnote-ref-25)
26. It may be noted that *Tran* was referred to by the Court in *Lee v HM Advocate* at [36]. [↑](#footnote-ref-26)
27. See, by way of example, [124] *infra*. [↑](#footnote-ref-27)
28. *Tran*, at 1005 – 1006. [↑](#footnote-ref-28)
29. *Tran*, at 1003 – 1004. [↑](#footnote-ref-29)
30. See the summary of leading counsel’s argument in *Abdula*, at 538 – 539. [↑](#footnote-ref-30)
31. *Abdula*, at [58] – [59]. [↑](#footnote-ref-31)
32. *Lee v HM Advocate*, at [35]. [↑](#footnote-ref-32)
33. *HKSAR v Apelete (No 2)* [2019] 5 HKLRD 602. [↑](#footnote-ref-33)
34. *Ibid*., at [92]. [↑](#footnote-ref-34)
35. *Abdula*, at [56]. [↑](#footnote-ref-35)
36. *Lee v HM Advocate*, at [39]. [↑](#footnote-ref-36)
37. *Apelete (No 2)*, at [93]. [↑](#footnote-ref-37)
38. *Kamasinski*, at [83]. [↑](#footnote-ref-38)
39. *Tran*, at 959. [↑](#footnote-ref-39)
40. *HKSAR v Chan Ka Chun* (2018) 21 HKCFAR 284, at [22]. [↑](#footnote-ref-40)
41. *Tran*, at 991. [↑](#footnote-ref-41)
42. *Ibid.*, at 992. [↑](#footnote-ref-42)
43. *HKSAR v Moala Alipate* [2019] 3 HKLRD 20. [↑](#footnote-ref-43)
44. *R v Grejlal Recica* [2007] EWCA Crim 2471, at [14] – [15]. [↑](#footnote-ref-44)
45. See [85] *infra*. [↑](#footnote-ref-45)
46. *Stanford v The United Kingdom*, Application No 16757/90 (23 February 1994), at [30]. [↑](#footnote-ref-46)
47. *Ibid.*, at [31]. [↑](#footnote-ref-47)
48. *Ibid.*, at [27]. [↑](#footnote-ref-48)
49. *Ibid.*, at [13]. [↑](#footnote-ref-49)
50. The idiom would be translated, literally, as “the cat weeps [over] the rat/mouse.” [↑](#footnote-ref-50)
51. *Fungavaka v R* [2017] NZCA 195, at [25]. [↑](#footnote-ref-51)
52. *Tran*, at 987 – 988. [↑](#footnote-ref-52)
53. AB, p 187O – T; p 193A **–** E; p 195P **–** Q; p 196G **–** H; p 200G; p 201A **–** B. [↑](#footnote-ref-53)
54. AB, p 200Q **–** R. [↑](#footnote-ref-54)
55. AB, p 347, Entry 1439 **–** 1340. [↑](#footnote-ref-55)
56. AB, pp 10R **–** 11B. [↑](#footnote-ref-56)
57. Trial counsel’s 3rd affirmation, filed 27 June 2019, para 2. [↑](#footnote-ref-57)
58. Trial solicitor’s 3rd affidavit, filed 28 June 2019, para 1. [↑](#footnote-ref-58)
59. The applicant’s present firm of solicitors were assigned by the Director of Legal Aid on 26 July ‍2017. [↑](#footnote-ref-59)
60. *R v Titchener* (2013) BCCA 64. [↑](#footnote-ref-60)
61. *Ibid.*, at [30] **–** [33]. [↑](#footnote-ref-61)
62. *Apelete (No 2)*, at [54]. [↑](#footnote-ref-62)
63. *Ibid.*, at [56]. [↑](#footnote-ref-63)
64. In his Memorandum of counsel of 6 March 2019, Mr McCoy SC acknowledged that Ground 4 had “arisen as a result of a recent Criminal Appeal, *HKSAR v Moala Alipate*, CACC 135/2017, which was heard before this Court on 26 February 2019”, and in which he had also been leading counsel. [↑](#footnote-ref-64)
65. *Titchener*, at [22] **–** [26]. [↑](#footnote-ref-65)
66. *Abdula*, at [60]. [↑](#footnote-ref-66)
67. The applicant’s 2nd affidavit, filed on 27 May 2019, para 8(f). [↑](#footnote-ref-67)
68. On the fairness of the trial, the judge specifically referred, at [6] of her Reasons for Decision, dated 12 October 2016, to counsel’s submission on the matter:

    “… to put the matter succinctly; realistically it is impossible for a Hong Kong jury, even with the fairest and clearest of directions, to be able to judge whether [the applicant’s] description of how and why she came to Hong Kong carrying a large amount of cocaine is even possibly true. It is hard to see how a Hong Kong jury, using their everyday experience of Hong Kong, can assess the situation in Venezuela and in Brazil to decide what had happened to [the applicant]. Because the situation in the case is so far outside of the everyday experiences of a Hong Kong jury, it is impossible or virtually impossible for them to assess what a ‘reasonable person’ would do or not do in the situation she found herself in? It might be that expert testimony on human trafficking will assist them but, even then, it is hard to see how they can relate that to [the applicant] without some actual experience or basic knowledge of human trafficking, drug trafficking, and the norms, customs, legal, economic and political situation in Venezuela and Brazil.” [↑](#footnote-ref-68)
69. *HKSAR v Ng Chun To Raymond & Anor* [2013] 5 HKC 390. [↑](#footnote-ref-69)
70. *HKSAR v Lee Ming Tee & Anor* (2001) 4 HKCFAR 133 at 150C **–** H, commonly referred to as *HKSAR v Lee Ming Tee (No 1)*. [↑](#footnote-ref-70)
71. *HKSAR v Lee Ming Tee & Securities and Futures Commission* (2003) 6 HKCFAR 336, commonly referred to as *HKSAR v Lee Ming Tee (No 2)*. [↑](#footnote-ref-71)
72. Reasons for Decision, dated 12 October 2016, at [29]. [↑](#footnote-ref-72)
73. Reasons for Decision, at [76] and [82]. [↑](#footnote-ref-73)
74. AB, pp 10S **–** 11B. [↑](#footnote-ref-74)
75. AB, p 13N **–** Q; see also p 34K **–** M. [↑](#footnote-ref-75)
76. AB, p 56C **–** E. [↑](#footnote-ref-76)
77. *R v Joseph (Verna)* [2017] 1 WLR 3153, at [20]. [↑](#footnote-ref-77)
78. *R v M(L)* [2011] 1 Cr App R 12. [↑](#footnote-ref-78)
79. *ZN v Secretary for Justice* [2018] 3 HKLRD 778. [↑](#footnote-ref-79)
80. *Ibid.*, at [190]. [↑](#footnote-ref-80)
81. *Rantsey v Cyprus and Russia* (2010) 51 EHRR 1, at [286] **–** [288]. [↑](#footnote-ref-81)
82. *Ibid.*, at [286]. [↑](#footnote-ref-82)
83. *ZN v Secretary for Justice & 3 others* (Unrep., FACV No 4 of 2019, 10 January 2020). [↑](#footnote-ref-83)
84. *Ibid.*, at [50]. [↑](#footnote-ref-84)
85. *Ibid.*, at [85]; see also [80]. [↑](#footnote-ref-85)
86. *Chong Ching Yuen v HKSAR* (2004) 7 HKCFAR 126. [↑](#footnote-ref-86)
87. *R v Birks* (1990) 48 A Crim R 385, at 390. [↑](#footnote-ref-87)
88. *Chong Ching Yuen*, at [47]. [↑](#footnote-ref-88)
89. *Ibid.*, at [48] **–** [49]. [↑](#footnote-ref-89)
90. The applicant’s 1st affidavit, filed on 9 November 2017, para 7. [↑](#footnote-ref-90)
91. The applicant’s 1st affidavit, para 9. [↑](#footnote-ref-91)
92. The applicant’s 1st affidavit, para 11. [↑](#footnote-ref-92)
93. Trial counsel arrived in court slightly late on 3 October 2016 due to an engagement before another judge, for which he had been granted a dispensation by Barnes J. [↑](#footnote-ref-93)
94. Trial counsel’s 1st affirmation, filed on 22 December 2017, para 3; his 2nd affirmation, filed on 9 ***‍***November 2018, para 1. [↑](#footnote-ref-94)
95. Trial counsel’s 2nd affirmation, para 1; although counsel appears to have confused the dates as 3 ***‍***and ***‍***6 October 2016 when they were, in fact, 30 September and 3 October. The summing-up and verdict were delivered on 6 October 2016. [↑](#footnote-ref-95)
96. AB, p 358M **–** U. [↑](#footnote-ref-96)
97. AB, p 360D **–** E. [↑](#footnote-ref-97)
98. AB, pp 362Q **–** 363B. [↑](#footnote-ref-98)
99. AB, p 363D **–** E. [↑](#footnote-ref-99)
100. See [100] *supra*; AB, p 359K **–** L. [↑](#footnote-ref-100)
101. *HKSAR v Kilima Abubakar Abbas* [2018] 5 HKLRD 88. [↑](#footnote-ref-101)
102. *R v Lau Tak Ming & another* [1990] 2 HKLR 370. [↑](#footnote-ref-102)
103. *Attorney General v Pedro Nel Rojas* [1994] 2 HKCLR 69. [↑](#footnote-ref-103)
104. *HKSAR v Abdallah* [2009] 2 HKLRD 437. [↑](#footnote-ref-104)
105. *Kilima*, at [46] *per* Lunn VP, [73] *per* Macrae VP and [146] *per* McWalters JA. [↑](#footnote-ref-105)
106. *Abdallah*, at [42] **–** [43]. [↑](#footnote-ref-106)