Federal Court  Cour fédérale

Date: 20150224

Docket: IMM-4987-13

Citation: 2015 FC 235

Ottawa, Ontario, February 24, 2015

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

KHOSROW BIDGOLI
AND
SOHEILA POUZESHI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] Khosrow Bidgoli [the Male Applicant] and Soheila Pouzeshi [the Female Applicant] are a husband and wife from Iran. They have applied for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board] dated June 28, 2013 [the Decision]. Their application, which was made pursuant to subsection 72(1) of the

Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA], alleges that there was a failure to provide them with adequate interpretation services.

[2] For the following reasons, the application will be allowed.

The Facts

[3] In Islamic year 1350, while the Male Applicant was returning home from his military base, he rescued a woman who was being beaten by two Hezbollahis. As a result, he was detained for 10 days and given three months extra military service.

[4] In June 2008, the Male Applicant helped copy flyers for Hamid, the son of a friend. Thereafter, Hamid was arrested and detained for four months.

[5] In 2009, the Male Applicant actively campaigned for progressive candidates and he participated in demonstrations. On June 16, 2009, Hezbollahis beat him with electric cables. However, he continued to attend more demonstrations.

[6] In June 2011, the Applicants applied for visas to Canada to visit. In October 2011, the visas were issued and the Female Applicant left Iran. One month later, the Male Applicant joined his wife in Canada. Both Applicants testified that they intended to return to Iran when they came to Canada as visitors even though the Female Applicant had secretly worshipped as a Christian in 2004 and 2005.

[7] In January 2012, while the Applicants were in Canada, the Male Applicant received a call from his brother informing him that Hamid had again been arrested and had implicated the Male Applicant. His brother informed him that regime agents had come to both the Applicants' house and to the Male Applicant's mother's house looking for the Applicants.

The Decision

[8] The Decision was based on numerous negative credibility findings which are not challenged in this application.

The Issues

[9] Against this background, the issues are:

1. Must the Applicants show that errors in interpretation were material or prejudicial in the sense the Board relied on them to their detriment?
2. Were there non-trivial errors in interpretation?
3. Can the Applicants be said to have waived their rights?

Issue 1 – Must the Applicants show that errors in interpretation were material or prejudicial in the sense that Board relied on them to their detriment?

[10] In her decision in *Huang v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 456, Madam Justice Snider found that errors in interpretation had been made. In this regard, she said at paragraph 16:

> 16. …These errors are not trivial or immaterial; they go to the very essence of the rejection of the [refugee] claim. In this case,

> the Board relied, at least in part, on the errors of translation to support its conclusion that the Applicant was not credible. The main reason why the Board rejected the Applicant's claim was this negative credibility finding.

[11] In her decision at paragraph 8, Madam Justice Snider noted that in *R. v. Tran*, [1994] 2 S.C.R. 951 and in *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 916, the Supreme Court of Canada and the Federal Court of Appeal had decided that an applicant was not required to show that an interpretation error had caused actual prejudice. Nevertheless, as the above passage shows, she appeared to base her decision on the fact that prejudice had been established.

[12] The difficulty is that Madam Justice Snider's decision has subsequently been used as authority for the proposition that, although actual prejudice need not be shown, errors in interpretation must be material. In my view, this is a questionable proposition because, in the context of interpretation errors, "material" and "prejudicial" appear to have been given the same meaning; that is, a negative impact on the Board's decision. The line of cases which have adopted this proposition include: *Roy v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 768; *Yousif v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 753; *Sherpa v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 267; and *Batres v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 981.

[13] However, in *Mah v. Canada (Minister of Citizenship and Immigration)*, [2013] F.C.J. No. 907, Madam Justice Gleason concluded at paragraph 26, correctly in my view, that "once an applicant establishes that there was a real and significant translation errors, he or she is not

required to also demonstrate that the error underpinned a key finding before the RPD decision can be set aside".

[14] The Supreme Court of Canada's decision in *Tran* discussed the *Charter* right to interpretation at paragraph 74. There, the Court says:

> 74 Section 14 guarantees the right to interpreter assistance without qualification. Therefore, it would be wrong to introduce into the assessment of whether the right has been breached any consideration of whether or not the accused actually suffered prejudice when being denied his or her s. 14 rights. The Charter in effect proclaims that being denied proper interpretation while the case is being advanced is in itself prejudicial and is a violation of s. 14. Actual resulting prejudice is a matter to be assessed and accommodated under s. 24(1) of the Charter when fashioning an appropriate and just remedy for the violation in question. In other words, the "prejudice" is in being denied the right to which one is entitled, nothing more.

[15] The Supreme Court does indicate at paragraph 11 of its Decision that it is speaking only of a Criminal law context. It says:

> 11 At the outset, I would like to make it very clear that the discussion of s. 14 of the Charter which follows relates specifically to the right of an accused in criminal proceedings, and must not be taken as necessarily having any broader application. In other words, I leave open for future consideration the possibility that different rules may have to be developed and applied to other situations which properly arise under s. 14 of the Charter -- for instance, where the proceedings in question are civil or administrative in nature.

[16] However, the application of *Tran* in the immigration context has been considered. In *Mohammadian*, the Federal Court of Appeal made it clear in paragraph 4 that prejudice need not

be shown when translation errors are considered in the context of hearings before the Immigration and Refugee Board.

Issue 2 – Where there non-trivial errors in interpretation?

[17] The Applicants have filed an affidavit, dated August 22, 2013, and sworn by Leila Heidari-Faroughi. She is a certified translator. Her affidavit appends the entire transcript of the hearing before the Board but focuses on the following errors:

- In answering the Board's question about her fear, the Female Applicant said that she is afraid because her husband is being sought and because that means the authorities are looking for her as well. However, the translation was that the authorities were looking for him as well. As interpreted, the answer made no sense.

- The Male Applicant testified that an event occurred in 1981. However, the interpreter translated the year as 1980.

- While the Male Applicant was testifying about a contrast between demonstrations in Iran and Canada, the interpreter failed to provide accurate translations about whether the Applicants took pictures of themselves at demonstrations in Iran.

[18] In my view, these errors were serious in the sense that the Applicants' versions of events and the information they wished to convey were not accurately communicated to the Board.

[19] In contrast, other errors were not serious; for example, the Male Applicant said someone had a "stroke" and the interpretation was "heart attack".

[20] However, my review of the entire transcript shows that the Applicants did not receive the continuous, precise and competent translation to which they were entitled.

Issue 3 – Can the Applicants be said to have waived their rights?

[21] The Male Applicant spoke limited English and his counsel spoke limited Farsi. The transcript shows that, although the Male Applicant said he needed the translation, he was able to answer simple questions without waiting for the interpretation. However, I am satisfied that he required translation for the more complex questions, and the Female Applicant required translation throughout.

[22] There were times when the Male Applicant and his counsel were aware that the interpreter had calculated dates incorrectly when moving from the Islamic to the Gregorian calendar.

[23] In addition, it is clear that the Applicants' counsel identified some issues with interpretation. At page 52 of the transcript, Counsel refers in closing submissions to "…problems in interpretation…" as a reason for asking the Board not to conclude that the Applicants were untruthful. Nevertheless, the Board in paragraph 11 of the Decision, incorrectly states that "no objections were raised about the quality of the interpretation". In these

circumstances, the Applicants cannot be said to have waived their right to interpretation as the issue was raised before the Board.

Conclusions

[24] The interpretation errors were serious in that the meaning of the Applicants' evidence was distorted. As well, the right to interpretation was not waived. Although the errors were not material/prejudicial in the sense that they caused the Board to reach the negative credibility determinations which resulted in the refusal of the Applicants' refugee claims, there is no requirement for such materiality or prejudice. Accordingly, the application will be allowed.

Certified Question

[25] The Applicants proposed a question for appeal but, in view of their success on this application, it need not be addressed.

ORDER

THIS COURT ORDERS that

1. The application is allowed;
2. The Board's Decision is quashed; and
3. The Applicants' refugee claim is referred back for re-determination by a different panel of the Board with the assistance of a different interpreter.

"Sandra J. Simpson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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