Federal Court  Cour fédérale

Date: 20130809

Docket: IMM-8571-12

Citation: 2013 FC 853

Ottawa, Ontario, August 9, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

HO JAE MAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the August 7, 2012 decision of the Refugee Protection Division of the Immigration and Refugee Board [the RPD or the Board] finding the applicant to be neither a Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. For the reasons that follow, I am granting this application because the applicant was denied adequate translation at his hearing.

Background

[2] The applicant claims to be from the Democratic People's Republic of Korea (North Korea). He alleges that his father was sent to prison as a political dissident and never seen again. The applicant also alleges that he, himself, was detained for six months after discussing a South Korean political pamphlet with friends. After his release from detention, the applicant claims to have illegally crossed the border from North Korea and gone to China, where he worked illegally for a period of time. He alleges that during this period his wife and child disappeared and claims they cannot be found. Fearing to return to North Korea or to remain illegally in China, he came to Canada with the help of a smuggler and made a refugee claim several days after arrival. He had no documentation to establish his identity as a North Korean, which the Board noted is typical of claimants from that country.

[3] The Board rejected the applicant's claim based on credibility. The RPD did not believe that the applicant was from North Korea due to inconsistencies between his story and the documentary evidence, implausibilities in his claim and contradictions between the applicant's oral testimony before the Board and what was contained in either the narrative to his Personal Information Form or the IMM 5611 form ("Claim for Refugee Protection in Canada") that was completed when he first made his refugee claim. The Board also noted that the applicant used South Korean pronunciations for some words and then corrected himself, which the it concluded indicated the applicant likely was not from North Korea and was attempting to mislead the Board in that regard.

[4] At several points during the hearing, applicant's former counsel intervened to correct the translator and expressed concerns with the accuracy of the translation. The transcript reveals that

counsel spoke Korean. Counsel did not seek to have the hearing stopped nor to have a new translator appointed, and it appears from the transcript that the translator corrected many (if not all) of the errors pointed out by counsel. However, as is now evident, counsel did not identify all of the errors in translation at the hearing.

[5] In this regard, the applicant has filed an affidavit from Ms. Hae-Jah (Helen) Pak, a certified interpreter and translator, who has been accredited by the Immigration and Refugee Board to translate between Korean and English. In her affidavit, Ms. Pak deposes that she listened to the tape of the hearing and that there were several errors in the translation in addition to those noted by applicant's former counsel during the hearing, including errors made in respect of points upon which the Board premised its credibility determinations. Ms. Pak also deposes that she could not tell from the tape whether the applicant used the South Korean pronunciation the Board member accused him of, but did note that at other points it was the translator who substituted the South Korean pronunciation of names that the applicant had pronounced with a North Korean accent.

Points in issue

[6] In this application, the applicant raises several arguments, but only one needs to be addressed, namely the claim that the errors in interpretation undermine the RPD's core credibility findings and that the decision should accordingly be set aside.

[7] The respondent argues on this point that the applicant has waived his right to challenge the accuracy of the translation as he did not raise the errors he now relies on during the hearing before the RPD and that in any event the translation errors are immaterial and should not provide a basis

for intervention. The respondent asserts in this regard that the multiple other bases offered by the Board provided more than ample reason to reject the applicant's claim, principally because his version of events is implausible. The respondent notes that the country documentary evidence before the Board on North Korea establishes that the country is a highly controlled and militarized society, where movement from place to place is difficult, if not impossible, where detainees suspected of dissent are not typically released and where the border with China is heavily guarded. The respondent argues that in the face of this evidence, the RPD's finding that the applicant's story lacked credibility is reasonable. The respondent also challenges the admissibility of the affidavit of Ms. Pak, arguing that as the applicant waived his right to contest the adequacy of translation, the affidavit should be rejected.

Admissibility of Ms. Pak's Affidavit

[8] Contrary to what the respondent asserts, the issue of whether the applicant waived his right to interpretation is unrelated to the admissibility of the affidavit. Where inadequacy of translation before the Board is alleged, the claim is one of a breach of procedural fairness. It is well-established that evidence that was not before the tribunal is admissible before this Court on judicial review to either establish or refute a claimed violation of procedural fairness (*Slaeman v Canada (Attorney General)*, 2012 FC 641 at paras 14-19; *Ochapowace First Nation v Canada (Attorney General)*, 2007 FC 920 at para 9). Thus, Ms. Pak's affidavit is properly before me.

Adequacy of Translation

[9] Turning to the central issue – the claimed inadequacy of translation – as a question of procedural fairness no standard of review is applicable to determine if the applicant's rights were

violated due to faulty translation at the hearing before the RPD. It is for me to decide whether there has been a violation of the applicant's procedural fairness rights (*Khosa v Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12 at para 43; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100).

[10] Section 14 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*] applies to proceedings before the RPD and provides the right to adequate translation. The section states in relevant part that "[a] party […] in any proceedings who does not understand or speak the language in which the proceedings are conducted […] has the right to the assistance of an interpreter." This right has been interpreted in the immigration context as guaranteeing refugee claimants the right to interpretation that is "continuous, precise, competent, impartial and contemporaneous" (*Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 at para 4 [*Mohammadian*]). The Federal Court of Appeal indicated in *Mohammadian*, however, that perfection is not the standard for translation and that a contextual assessment must be undertaken to determine whether the standard was met in a particular set of circumstances (at paras 6-7).

[11] In *Mohammadian*, even though there were errors in translation, the Court found the applicant had waived his right to challenge the adequacy of the translation because he had not raised the issue before the Board but could have done so. The evidence in that case demonstrated that the applicant was aware of the problems with the adequacy of the translation when he was before the Board, but instead of raising a concern chose to remain silent. In finding him to have waived his right to contest the adequacy of the translation, the Court of Appeal held that a claimant must raise

inadequate translation issues at the first available opportunity, and because Mr. Mohammadian had failed to do so, the doctrine of waiver prevented him from arguing that the translation was inadequate in his judicial review application (at para 19).

[12] The case law of this Court applying the principles from *Mohammadian* has focused principally on two issues: first, whether claimants have waived their right to challenge the adequacy of translation and, second, whether the errors made need be – or were – material to the outcome of the decision. Here, both issues arise.

Has the applicant waived his right to challenge the adequacy of the translation?

[13] Insofar as concerns waiver, in *Mohammadian* the Federal Court of Appeal determined that the principles applicable in the criminal context to determine whether an accused has waived his or her right to competent translation are inapplicable in refugee hearings. In *R v Tran*, [1994] 2 SCR 951 at 996-997, 117 DLR (4th) 7 [*Tran*], the Supreme Court of Canada held that in the criminal context, "waiver […] has to be clear and unequivocal and must be done with full knowledge of the rights the procedure was enacted to protect and the effect that waiver will have on those rights." In *Mohammadian*, on the other hand, the Court of Appeal held that waiver of the right to object to inadequate translation may be inferred from conduct in refugee cases, noting that the volume of workload before the Board necessitates a more flexible approach to waiver than that which is applied in the criminal context.

[14] Subsequent cases have found waiver to occur in situations where refugee claimants (or counsel) are aware of the problems with translation, but do not raise them with the Board (see e.g.

Rafipoor v Canada (Minister of Citizenship and Immigration), 2007 FC 615 at para 9 [*Rafipoor*]; *Nsengiyumva v Canada (Minister of Citizenship and Immigration)*, 2005 FC 190 at paras 14-15 [*Nsengiyumva*]).

[15] On the other hand, where the evidence demonstrates the lack of such awareness, then the opposite conclusion has been reached (see e.g. *Yoon v Canada (Minister of Citizenship and Immigration)*, 2012 FC 193 at paras 38-39 [*Yoon*]; *Zaree v Canada (Minister of Citizenship and Immigration)*, 2011 FC 889 at para 8 [*Zaree*]; *Ahamat Djalabi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 684 at paras 16-17; *Huang v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 326 at para 10, 231 FTR 61; see also *Umubyeyi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 69 at para 10 [*Umubyeyi*]).

[16] Here I am faced with a situation where it is not entirely clear whether the problems with the translation that are raised before me were evident to counsel at the refugee hearing. As noted, the applicant's former counsel spoke Korean and was able to highlight several problems with the translation, but did not raise the translation errors that the applicant now asserts. The parties each argue that inverse inferences should be drawn from these circumstances: the respondent submits that I should presume awareness of the errors because counsel spoke Korean and the applicant submits I should presume the converse as one would assume that if the former counsel had known of the errors now raised, she would also have mentioned them.

[17] I believe that the applicant's inference is the more appropriate as it would have been illogical for counsel to have raised some but not all of the errors made by the translator during the

hearing. However, it is not necessary to resort to an inference to decide whether the doctrine of waiver applies in this case as the issue can be decided based on the burden of proof.

[18] In this regard, when one recalls the nature of the doctrine and the holding in *Mohammadian*, it becomes apparent that waiver is a defence to a claimed right. It is therefore incumbent on the party that claims the doctrine applies to establish the facts necessary for its application (see generally *Snell v Farrell*, [1990] 2 SCR 311 at 321; Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, *The Law of Evidence in Canada*, 3d ed (Markham, Ont: LexisNexis, 2009) at s 3.13; Kevin P McGuinness & Linda S Abrams, *The Practitioner's Evidence Law Sourcebook* (Markham, Ont: LexisNexis, 2011) at 305). Here, therefore, it was the respondent's burden to establish the facts necessary for the application of the doctrine of waiver – namely knowledge of the errors by applicant's former counsel. The respondent has not done so, and, therefore, waiver does not apply.

[19] This case is similar to *Zaree* and *Yoon*, relied on by the applicant. In those cases, like here, the applicant or their counsel had objected to some translation errors before the RPD, but sought to raise additional errors on review. My colleagues, Justices Shore and Martineau, found they were entitled to do so as there was no proof that they were aware of the errors they raised before the Court when they were before the Board and, therefore, the doctrine of waiver did not apply.

[20] The respondent argues that the opposite conclusion was reached by my colleague, Justice Scott, in *Mowloughi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 662 in the face of identical facts. While it is true that Justice Scott found that Mr. Mowloughi ought to have raised

the issues before the Board (arguably absent any proof that he was aware of them), the decision does not turn on this point but, rather, on the fact that the errors in question in that case were not material. Thus, in my view, the more relevant authorities are *Zaree* and *Yoon*. In light of them and the other reasons set out above, I find that the doctrine of waiver is inapplicable in this case.

Are the errors in translation serious enough to warrant setting the decision aside?

[21] As noted, the respondent additionally argues that even if the doctrine of waiver is inapplicable, the applicant's claims regarding inadequacy of translation should nonetheless be rejected because the errors made are not material because there were other bases upon which the Board reasonably premised its negative credibility findings.

[22] I cannot accept this argument for two reasons. First, in light of the holding in *Mohammadian*, it is far from certain that translation errors need to be material, in the sense of being intertwined with key findings that cannot be excised from an RPD decision, in order to support a successful claim for judicial review. Second, and more importantly, even if such materiality is required to set aside an RPD decision, it exists in this case as several of the Board's key findings on which it premised its negative credibility determination *were* based on faulty translation of the applicant's testimony.

[23] Insofar as concerns the first point, in *Mohammadian*, through its answer to one of the certified questions, the Federal Court of Appeal held that an applicant need not be prejudiced by a translation error for an award to be set aside if the applicant establishes there were errors in the translation and has not waived his or her right to complain about them. In my view, this holding

establishes that an error need not be central to a key portion of the Board's decision to warrant a decision's being overturned. Thus, materiality of the sort asserted by the respondent in this case is not required before a decision can be set aside due to inadequate translation. It is, however, always incumbent on an applicant to establish such inadequacy.

[24] In order to do so, the claimed error must be more than trifling. As noted, in *Mohammadian* the Court of Appeal held that it is only necessary that an adequate translation be provided and hence trivial imperfections in translation do not violate section 14 of the *Charter*. This Court has often applied this principle and held that trifling inconsistencies do not amount to a failure of adequate translation. For example, in *Sohal v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1175 [*Sohal*], Justice Harrington stated at paras 22 and 23:

> [22] While, on reflection, the English could have been better, I agree with the IAD that the language was satisfactory and did not prejudice Mr. Sohal in any way. Let me give but one example. Mr. Sandhu said in his affidavit at point 25 s.:
>
> > Also, during the questioning of the Claimant, the word 'evidence' is consistently misinterpreted as 'proof" when there is a specific and exact Punjabi word available.
>
> [23] This surely is a distinction without a difference. […]

The errors made in this case are not of this ilk but, rather, involve significant discrepancies and thus *Sohal* and cases like it are inapplicable.

[25] Where a significant translation error is made, the case law of this Court is divided on whether the discrepancies in translation need to be made in respect of central points in the RPD's reasoning in order to provide grounds for setting an RPD decision aside (some cases holding that

such materiality is required, see e.g. *Rafipoor* at para 10, *Nsengiyumva* at para 16; *Yousif v Canada (Minister of Citizenship and Immigration)*, 2013 FC 753; and other cases holding the opposite, see e.g. *Zaree* at paras 8, 11 and *Umubyeyi* at para 9).

[26] As already discussed, I believe the second line of cases to be in accordance with the approach mandated by the Federal Court of Appeal in *Mohammadian*. Thus, in my view, once an applicant establishes that there was a real and significant translation error, he or she is not required to also demonstrate that the error underpinned a key finding before the RPD decision can be set aside.

[27] In the present case, even if I were not of this view, the decision would nonetheless be set aside because three of the translation errors involved central points in the Board's credibility analysis. Thus, regardless of which line of authority is applied, this application for judicial review must be granted as the errors in translation were made in respect of portions of the applicant's testimony that the Board used to ground its negative credibility determination.

[28] In this regard, the translator first mistranslated the applicant's evidence as to how he was able to evade the guards at the border. He actually testified that he waited until they were out of sight and earshot, but his evidence was initially incorrectly translated as being that he waited until a shift change. The translator later then partially referred to the correct translation when subsequent questions were asked by the panel member and the RPD found this to give rise to shifting testimony, when it did not. The RPD relied on these mistranslations as key points in its credibility analysis as is evident from the following portion of the decision:

> The panel also finds the claimant's testimony around the issue of shift change evolved as he provided it. The claimant testified that he waited for shift change to cross the river. Later in his testimony, he stated that he listened to the sound of guards on horseback and he crossed when no guards were around. When asked to explain his different responses (waited for shift change to cross; and cross when no one was around) the claimant indicated that he did not testify that he waited for shift change. The panel verified the recording of the hearing and finds that the claimant did indicate that he waited for shift change in order to cross the river. The panel finds the inconsistent testimony related to his crossing of the river, and the claimant's insistence that he did not say that he waited for shift change to cross, undermined the credibility of the claimant's allegations that he crossed the river, and further undermined his credibility as a witness. The panel finds the claimant's testimony related to his travel to China was not plausible and therefore undermined the credibility of his allegations and his claim to being a citizen of North Korea who escaped into China.

[29] The unchallenged evidence of Ms. Pak establishes that this passage is underpinned on a faulty interpretation as she deposes that the applicant did not offer shifting explanations for this portion of his claim. The RPD, therefore, based its finding on the faulty translation.

[30] Similarly, the RPD made an implausibility finding regarding the applicant's claim to have attended university that was premised on an incorrect translation. In the decision, the Board noted that the documentary evidence established that children of incarcerated dissidents are denied access to higher education in North Korea. However, the translator mis-interpreted the applicant's evidence on this point. Ms Pak deposes that the applicant claimed merely to have attended an agricultural school, not a university or college. This distinction is relevant to the Board's implausibility finding as what the applicant said occurred is not necessarily contradicted by the documentary evidence.

[31] Finally, the errors made by the translator in pronouncing "Ls" in Korean names were also material to the Board's decision. The Board premised its negative credibility determination in large part on the finding that the applicant used the South Korean pronunciation of "Lee" but then switched to the North Korean pronunciation. The translator at the hearing said that this had occurred – but she has been shown to have had considerable difficulty in translating and Ms. Pak deposed that the translator mistranslated other names with the "L" sound in them, herself incorrectly using the South Korean pronunciation when the applicant had not done so. Thus, the basis for the Board's finding that the applicant changed his pronunciation of the "L" sound to try to falsely tailor a North Korean accent is undercut.

[32] Given that the Board relied in considerable part upon these findings for its conclusion that the applicant was not credible, these errors in translation were material. Thus, even if translation errors must have been made in respect of evidence that the Board relies on to ground its decision before a decision will be set aside due to a breach of procedural fairness, such errors exist here. Therefore, there was a violation of the applicant's *Charter* right to adequate translation, which necessitates the RPD's decision being set aside and the applicant's refugee claim being remitted to another panel member for a re-determination based on an adequate translation.

[33] No question was proposed for certification under section 74 of the IRPA and none arises in this case as, in my view, the Federal Court of Appeal has settled the applicable law in *Mohammadian* and, to a large extent, my conclusions rest on the particular facts of the case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted;
2. The August 7, 2012 decision of the RPD is set aside and the applicant's claim for protection shall be remitted to a different RPD member for re-determination;
3. No question of general importance is certified under section 74 of the IRPA; and
4. There is no order as to costs.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Belinda Bozinovski	FOR THE APPLICANT
Jocelyn Espejo-Clarke	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bozinovski, Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney, Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT