Federal Court  Cour fédérale

Date: 20141030

Docket: IMM-1017-14

Citation: 2014 FC 1029

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 30, 2014

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ANTOINETTE GOMA BOUANGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a citizen of the Republic of Congo [Congo]. In the affidavit produced in support of this application for judicial review, she reiterates the principal facts that were related in greater detail in the Basis of Claim form and accompanying letter.

[2] Essentially, the applicant claims to have worked in the Congo for several years for General Jean François Ndeuguet [General], Director-General of the Congolese police. In early 2012, she purportedly witnessed the General rape her husband's niece. After having promptly told the General's wife what she had seen, she states that the following day she was taken to a police station where she was tortured and raped. She would remain in detention in a residence [TRANSLATION] "guarded by Zairians" for four months before being transferred to the Mandibou police station, where she suffered mistreatment. Fortunately, the following day she met an officer who was a friend of her uncle who would help her escape. Later, she went into hiding in her hometown of Nkengue, while during this period her uncle made plans to help her leave the country. At the end of January 2013, they travelled to the Democratic Republic of the Congo [DRC] so that the applicant could obtain a visa from the U.S. embassy. The two returned to Nkengue, where four months elapsed before her departure for the United States, on June 4, 2013. It was on September 20, 2013, that the applicant arrived in Canada, where her half-sister lives, and claimed refugee protection.

[3] The applicant is currently challenging the legality of a decision by the Refugee Protection Division [panel] of the Immigration and Refugee Board, dated January 16, 2014, which rejected her claim for refugee protection by reason of various issues related to credibility and to the existence of subjective fear that were noted by the panel in its decision.

[4] Before me, the applicant reiterated the complaints expressed in her written memorandum regarding the poor quality of the translation provided by the interpreter at the hearing before the panel. The issue as to whether such a failure is fatal and whether it resulted in the denial of her

right to a full hearing must be determined on a correctness standard of review, as it is a matter of procedural fairness (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[5] It should be recalled that the hearing before the panel was held by videoconference in Edmonton and Calgary. Proceedings were conducted in English – a language the applicant does not understand. The applicant was represented at the hearing by an Anglophone counsel who did not understand French. He had been assigned the case only a few days prior to the hearing, because up to that point she had not been able to obtain counsel from Legal Aid to assist her with her claim for refugee protection. Nevertheless, all of the applicant's previous proceedings before the panel (including the refugee protection claim) had been in French: this was because the applicant's half-sister – who speaks and understands French – had helped the applicant file her claim for refugee protection. The panel retained the services of an interpreter who translated, over the telephone, from Kikongo to English and vice versa. After the decision was issued, the applicant retained another counsel – Mylène Barrière, who has since been replaced by Annick Legault – to represent her in this application for judicial review.

[6] Efforts were undertaken to obtain an audit report of the interpretation of the hearing by Ms. Barrière from numerous translation firms and from the offices of Citizenship and Immigration Canada [CIC]. As it turned out, the only professional interpreter qualified to translate from Kikongo to English that she was able to find was the same interpreter who had provided translation at the hearing. Ms. Barrière thus turned to the services of Jean-Daniel Mboungou – who is an accredited interpreter with both the panel and CIC – to translate into

French everything that was said at the hearing that was not in French. Given that Mr. Mboungou is not fluent in English, Ms. Barrière also enlisted the services of Wilfried Mayala, who is not an accredited interpreter but who is fluent in English and Kikongo, to verify the content of a preliminary transcript. Ms. Barrière, Mr. Mboungou and Mr. Mayala met later to revise the transcript and interpretation audit report; the applicant filed the audit report with the Court as Exhibit C of the affidavit of Wilfried Mayala.

[7] At the hearing before me, counsel for the respondent did not reiterate the arguments in his written memorandum to the effect that the Court should assign no probative force to the translation audit report (allegedly because Mr. Mayala is not a qualified interpreter or because the manner in which the report was prepared could raise doubts about the independence of the translator and accuracy of the report). Regardless, after examining the affidavits produced by the applicant, I find that the audit report must be admitted into evidence – the undersigned being also satisfied that the circumstances surrounding the fashioning of the report do not pose a problem in this matter. Moreover, I assign considerable weight to its contents. In this case, the respondent produced no evidence refuting the audit report. As such, I have reviewed the entire hearing transcript reproduced in the certified tribunal record in light of the audit report to determine whether, in fact, the interpretation provided at the hearing on November 19, 2013, was adequate under the circumstances.

[8] First, it should be noted that the right to the assistance of an interpreter for a party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted, is constitutionally protected under 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 (U.K.)*, 1982, c. 11). The case law of this Court recognizes that the translation provided by the interpreter need not be "perfect"; it must, however, be "adequate". It should be said in passing that no proof of actual prejudice is required for the Court to return the matter for redetermination. What is important is that the judge is satisfied that the claimant did not benefit from "precise, continuous, competent, impartial and contemporaneous interpretation" at the hearing, and that they did not waive their right to receive the assistance of an interpreter (*Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191). See also: *Sayavong v Canada (Minister of Citizenship and Immigration)*, 2005 FC 275 at para 1 (Lutfy C.J.); *Singh v Canada (Citizenship and Immigration)*, 2010 FC 1161 at para 3 (Lemieux J.); *Mohamed Neheid v Canada (Citizenship and Immigration)*, 2011 FC 846 at para 9 (Phelan J.); *Zaree v Canada (Citizenship and Immigration)*, 2011 FC 889 at paras 8 and 11 [*Zaree*] (Martineau J.); *Mah v Canada (Citizenship and Immigration)*, 2013 FC 853 at paras 22-23 (Gleason J.); *Batres v Canada (Citizenship and Immigration)*, 2013 FC 981 at para 13 (McVeigh J.).

[9] Second, the *Immigration and Refugee Board of Canada Code of Conduct for Interpreter Service Contractors*, to which all interpreters who work for the Immigration and Refugee Board must adhere, clearly sets out at Rule 2 that if an interpreter believes that he or she is unable to competently interpret or translate what was stated in the source language into the target language, the interpreter must inform the panel without delay. In addition, Rule 3 provides that interpreters must: "faithfully and accurately interpret or translate what is stated in the source language into the target language, having regard primarily to meaning and secondarily to style,

without any paraphrasing, embellishment, omission, explanation, or expression or opinion, using the same person as in the source language and the closest natural equivalent to the source language". The Board's *Interpreter Handbook* adds that interpreters have a responsibility to interpret accurately, which means interpreting exactly what has been stated and to correct any errors immediately. The interpreter must also inform the panel if the person who is the subject of the proceeding does not understand a question asked during the hearing.

[10] In this case, it is clear from the audit report and the panel's decision that the numerous issues with the translation at the hearing may have had an overall influence on the applicant's credibility. For the present purposes, it is not necessary to quote at length all of the examples found in the audit report. Suffice it to say that there are numerous instances in which the interpretation was neither faithful to the Kikongo, nor to the English. Moreover, on occasion, and without any indication to the panel, the interpreter – who was from the DRC – had to resort to a language other than Kikongo in order to communicate with the applicant. That language was Lingala, which was used at various times, given that the applicant did not always understand him. Indeed, it should be understood that the Kikongo in Brazzaville (Congo) is not exactly the same as the Kikongo from the DRC. Furthermore, the interpreter was summarizing, paraphrasing, condensing and exaggerating what was said, in addition to concealing the errors and omissions in his translation. If we compare the hearing transcript with the audit report submitted by the applicant, one can clearly see that the words used by the interpreter did not adequately reflect what was stated by either side at the hearing.

[11] Before me, counsel for the respondent acknowledged that the interpreter's translation had not always been adequate and that this may have negatively influenced the assessment of the applicant's credibility and subjective fear. Still, she argues today that the lack of an adequate translation is not determinative because the applicant failed to complain about the poor quality of the interpretation at the earliest possible opportunity, which the applicant obviously disputes. Armed with evidence in hand, the applicant's learned counsel argues that one need only read the audit report to see that her client stated that she could not understand the interpreter on numerous occasions. The problem lies with the fact that he would often inaccurately translate what she had stated. Moreover, the applicant did in fact try to tell the panel that perhaps the interpreter was having difficulty understanding her story, but the panel decided to stop her. When the applicant was later able to make comments, the interpreter changed the meaning, the result being that the panel never knew that the applicant had raised the interpretation issues.

[12] There is one constant that emerges from the case law cited by both parties. What is paramount in a hearing – the consequences of which affect the life and safety of a refugee claimant – is to ensure that there is mutual linguistic understanding. In this regard, the issue as to whether it was reasonable to expect that a complaint be filed before the panel is a question of fact which must be assessed on a case-by-case basis. In *Zaree*, above, this Court stated:

> [9] In practice, translation problems may be apparent and easily detectable during the hearing; this is the case when the errors committed occur initially, meaning that they appear in the refugee claimant's mother tongue, which the refugee claimant can detect when he or she is communicating with the interpreter. However, translation problems may also occur later on: the interpreter may fully understand and speak the refugee claimant's mother tongue, but may improperly translate his or her account into the language of the hearing. This situation is more harmful and translation problems may not be detected at the hearing by a refugee claimant who does not

> speak, or who understands very little of, the language of the hearing (English or French). In such cases, it is unreasonable to expect him or her to have complained of flawed translation at the hearing.

[13] In this case, I am satisfied that a serious breach of procedural fairness has occurred. At the same time, I dismiss any claim on the respondent's part to the effect that the applicant failed to raise a timely objection to the poor quality of the translation at the hearing. Not to belabour the point, but consider that it is apparent that throughout the hearing not only did the applicant have difficulty understanding the interpreter, and sought to raise the issue, but the panel itself did not always seem to understand what the applicant was trying to say. This was demonstrated by the fact that on several occasions the panel or the applicant noticed translation errors, including the instance in which the interpreter added the month of November to a date (when the applicant had only indicated the day) (interpretation audit report at pages 282 and 283 of the applicant's record) and another instance in which he had failed to translate everything the applicant had stated and the panel had to ask him to translate her full response (interpretation audit report at page 296 of the applicant's record). One cannot attribute any fault to either the applicant or her counsel, who did not understand Kikongo or Lingala. Lastly, the extent of the translation errors was not always apparent, and it was only after the hearing that the applicant was able to see that the interpreter had made major errors in translating both her testimony as well as the questions of the panel.

[14] In conclusion, the applicant was denied her right to a full hearing before the panel. The application for judicial review shall therefore be allowed and the matter referred back for

redetermination by a different decision-maker. Both counsel agree that this matter raises no serious question of law.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application is allowed. The decision dated January 16, 2014, is set aside and the matter referred back to the panel for redetermination of the refugee protection claim following a new hearing before a different decision-maker. No question is certified.

"Luc Martineau"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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