Date: 20090316

Docket: IMM-3259-08

Citation: 2009 FC 267

Ottawa, Ontario, March 16, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JANGMU SHERPA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to s. 72 (1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (Act) for judicial review of a decision of a Board of the Refugee Protection Division of the Immigration Refugee Board (Board), dated June 27, 2008 (Decision), that refused the Applicant's application to be deemed a Convention refugee or person in need of protection under section 96 and section 97 of the Act.

BACKGROUND

[2] The Applicant is a 30-year-old female citizen of Nepal who arrived in Toronto on September 8, 2006 to seek refugee protection. The Applicant claimed to have a well-founded fear of persecution in Nepal at the hands of the Maoists. She claimed that if she returned to Nepal the Maoists would seriously harm, attack, abduct, or possibly kill her for her refusal to join their cause.

[3] The Applicant claims that her troubles with the Maoists began in May 2003, when they began coming to her family's grocery store in the village of Garma, Nepal. During these visits, she says the Maoists demanded that she and her brother join their cause. They also demanded money from the Applicant and her brother, which their mother paid.

[4] In March 2005, the Applicant married a man from her village and the couple moved to Katmandu where they opened a grocery store. The Applicant gave birth to a daughter in December 2005. In August 2006, four individuals, identifying themselves as Maoist guerrillas, came to the Applicant's home in Katmandu to take her to join their liberation army forces. They told the Applicant that, if she refused, her family would be in danger and she would be punished according to Maoist laws, or killed. They also threatened to kidnap her infant daughter. As well, they said that if the Applicant attempted to inform the security forces of their visit she would be in great danger. The Applicant was given one month to join the Maoist cause.

[5] The Applicant and her husband arranged for her to travel to Canada with the help of an agent. She arrived in Canada on September 8, 2006. Her husband remained in Katmandu with their daughter. The Applicant made a refugee claim on October 2, 2006. She claims that she was ill upon arriving in Canada and could not immediately claim refugee protection upon entering the country. She stayed at the home of a friend until she recovered.

[6] The Applicant's hearing took place on December 20, 2007 and was conducted in English and Nepali. An interpreter assisted the Applicant because she speaks and understands very little English.

DECISION UNDER REVIEW

[7] The Board held that the Applicant was not a Convention refugee or a person in danger of torture, or a person who faces a risk to life, or a risk of cruel and unusual treatment or punishment in Nepal.

[8] The Board found that both a subjective and objective well-founded fear of persecution were missing from the Applicant's claim. The Board noted that the Applicant traveled to Canada on September 7, 2006, arrived on September 8, 2006, but waited until October 2, 2006 to make a claim. The Applicant stated that she waited to make her claim because she had left her child with her husband and she was in discomfort from not feeding the baby. So she stayed with a friend and did not find out about making a refugee claim from her friend till she was better. The Board did not

accept this explanation and reasoned that, if the Applicant’s fear was well-founded, the first thing she would have done would be to determine the process to guarantee her safety and make a claim at the first opportunity.

[9] The Board relied upon *Djouadou v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1568 (F.C.T.D.) for the proposition that the Board is entitled to take into account a delay in claiming refugee status. Delay is an important factor to be considered, albeit not a determinative one. The Board also cited *Huerta v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 271 (F.C.A.) for the proposition that delay in making a claim for refugee status is not a decisive factor in itself. It is, however, a relevant element that should be taken into account in assessing the actions of a claimant.

[10] The Board identified credibility as a key issue in this claim and relied upon *Maldonado v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 72 (F.C.T.D.) for the proposition that the sworn testimony of an applicant is presumed to be true, unless there is a valid reason to doubt its truthfulness. The Board had credibility concerns with the Applicant’s evidence because of discrepancies between her Personal Information Form (PIF) and her oral evidence. The Board stated that “[e]ven taking into account the claimant’s level of education, and the stress of the hearing room the claimant’s testimony was vague and evasive, with questions having to be repeated.”

[11] The Board pointed out that the Applicant testified at the hearing that the Maoists had made five or six visits to the store before they went to her house in August 2006, and that they had discovered where she lived because they had followed her home. However, the Applicant had not mentioned these visits to the store, nor the Maoists following her home, in her PIF. The Applicant responded that she had forgotten this while writing her PIF. Also at the hearing, the Applicant claimed that the Maoists had asked her for money, or recruitment to their cause, while in her PIF she had said that they came to her house and demanded that she join, but had made no mention of the extortion. Again the Applicant claimed she had forgotten. The Applicant stated in her PIF that the Maoists had threatened that she would be punished according to Maoist law if she did not comply with their demands. She testified that they said they would kill her if she did not comply. Again, there was no mention of a threat to her life in her PIF. The Board went on to point out that the Applicant had testified that the Maoists followed her home but she had not seen them follow her home. She said that she recognized one of the Maoists from her home village. In her PIF, she did not state that she recognized one of the Maoists from her home village.

[12] The Applicant explained that she does not speak English and she did not know what was written in her PIF; the interpreter told her to keep the story short. The Board made negative inferences from these omissions because the Applicant had an interpreter and the instructions were read to her. She was asked to list all of the significant events and reasons that led to her claim for refugee protection in Canada. The Board pointed out that the Applicant had signed her PIF and had ample time for amendments before her hearing. When the Applicant was asked at the hearing if the contents of her PIF had been interpreted to her, she swore to the accuracy of the contents.

[13] The Board did not accept the Applicant's explanation at to why there were omissions from her PIF. It found the evidence contradictory and consistent with the "claimant attempting to keep straight manufactured events." The Board found the Applicant's evidence untrustworthy and lacking in any credibility. It concluded on a balance of probabilities that the incidents never occurred.

[14] The Board relied on documentary evidence which indicated that, in spite of the peace agreement signed in November 2006 between the government of Nepal and Maoists forces, extortions and abductions have been a problem in Nepal. However, police authorities are aware of this and there were no reports of extortion following the peace agreement. The Board held that the documentary evidence supports the contention that the Maoists have made a particular effort to appeal to women and to recruit them as active participants in the movement. However, the Board took the position that it had already established a negative credibility finding, so it would be unreasonable to conclude that the Maoists would be so interested in the Applicant (who has no political profile) that they would use their resources to track her down in Katmandu.

[15] The Board noted that the Applicant had applied for a Canadian visa in July 2005. The Applicant also traveled to Canada with an agent in September 2006. The Board held that the Applicant's desire to live in Canada was not motivated by fear but by a wish to seek a better life.

ISSUES

[16] The Applicant raises the following issues:

1) Did errors in the interpretation provided at the hearing deny the Applicant a fair hearing and violate her rights under section 14 of the *Canadian Charter of Rights and Freedoms*?

2) If yes, did the Applicant waive her right to the assistance of an interpreter by making no objection at the hearing to the quality of the interpretation given?

STATUTORY PROVISIONS

[17] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or

(iii) la menace ou le risque ne

incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	**(2)** A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[18] The following provisions of the Charter are applicable in these proceedings:

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.	**14.** La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète.

STANDARD OF REVIEW

[19] The Applicant submits that, pursuant to section 14 of the Charter, she has a right to continuous, precise, competent, impartial and contemporaneous interpretation at a hearing before a board: *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 371 (F.C.T.D.) (*Mohammadian*) and *Huang v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 326 (*Huang*) at paragraph 8. I note that for interpretation to be considered as meeting the standard, it must be established that the Applicant understood the interpretation and adequately expressed him or herself through the interpreter: *Xie v. Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 336 (F.C.A.).

[20] The Applicant also submits that an applicant is not required to show they have suffered actual prejudice as a result of a breach of the required standard of interpretation for the court to interfere with a decision and that the applicable standard of judicial review is correctness: *Khalit v. Canada (Minister of Citizenship and Immigration)* 2007 FC 684 (*Khalit*) at paragraph 7. I note that whether an applicant's right to a fair hearing was breached is subject to review on a correctness standard: *Rafipoor v. Canada (Minister of Citizenship and Immigration)* 2007 FC 615.

[21] With regard to translation errors, I rely on *Singh v. Canada (Minister of Citizenship and Immigration)* 2007 FC 267 for the standard of review on this application:

> A. *Translation*
>
> **16** The adequacy of the interpretation provided goes to the fairness of the hearing; therefore, no pragmatic and functional analysis is

> required. It is for the Court to determine whether the hearing was conducted in accordance with both the requirements of procedural fairness. Per *Saravia v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1296; [2005] F.C.J. No. 1575.

[22] In relation to the second issue of whether their was a waiver of the Applicant's right to object to the interpretation at the hearing, I rely on *Quiroa v. Canada (Minister of Citizenship and Immigration)* 2005 FC 271 at paragraph 14:

> **14** The Court also held that complaints about the quality of interpretation must be made at the first reasonable opportunity. In instances where the applicant is aware that there is a difficulty with the interpreter, it is reasonable to expect the applicant to object immediately. In *Mohammadian*, at trial, [2000] 3 F.C. 371, Pelletier J. (as he then was) held at paragraph 28:
>
>> 28. It will be a question of fact in each case whether it is reasonable to expect a complaint to be made. If the interpreter is having difficulty speaking the applicant's own language and being understood by him, this is clearly a matter which should be raised at the first opportunity. On the other hand, if the errors are in the language of the hearing, which the applicant does not understand, then prior complaint may not be a reasonable expectation.
>
> This was affirmed by the Federal Court of Appeal in *Mohammadian*, *supra*, at paragraph 19:
>
>> ... in my view, therefore, Pelletier J. did not err in determining that the applicant has waived his right under section 14 of the Charter by failing to object to the quality of the interpretation at the first opportunity during the hearing into his claim for refugee status.
>
> Accordingly, the applicant had an obligation to object to the quality of the interpretation at the first reasonable opportunity.

ARGUMENTS

The Applicant

Error in interpretation

[23] The Applicant relies upon *Khalit* at paragraph 11 where it was held that when errors of interpretation occur during a hearing, the Board's decision regarding an applicant's credibility cannot be based on the Applicant's testimony at the hearing. The Applicant submits that the interpretation provided to the Applicant at the hearing in the present case fell "below the standard articulated in the jurisprudence" as it was "not continuous, precise or competent." The Applicant points to several instances where the interpreter inaccurately translated her answers and explanations, as well as adding words she had not said. There were also several questions that were inaccurately interpreted to the Applicant.

[24] The Applicant also points to the fact that on 270 occasions the interpreter used English rather then Nepali words when interpreting to the Applicant what had been said in the hearing room. The interpreter also acknowledged during the hearing that the Applicant was having difficulty understanding her because they were from different localities and had different accents.

Waiver of right to assistance of interpreter

[25] The Applicant submits that she did not waive her right to the assistance of an interpreter by not objecting at the hearing to the quality of the interpretation. She relies again upon *Khalit*, at

paragraph 11, which states that interpretation does not always need to be the subject of an objection at the hearing. The threshold for waiver is high and a complainant cannot reasonably be expected to object at a hearing if interpretation errors are in a language which he or she does not understand: *Thambiah v. Canada (Minister of Citizenship and Immigration)* 2004 FC 15 and *Huang* at paragraph 9.

[26] The Applicant says that it was not until after the hearing that she became aware of the interpretation errors the way those errors altered the content of her testimony. She submits that it was not reasonable to expect her to have raised the interpretation problems at the hearing. The problem was the interpreter's incorrect translation from English to Nepali and from Nepali to English. The Applicant speaks and understands very little English and could not be expected to recognize errors in the interpreter's translation. Consequently, there was no waiver by the Applicant of her interpretation rights.

The Respondent

Credibility

[27] The Respondent submits that the Board noted a number of implausible and/or inconsistent statements made by the Applicant under oath and made a negative credibility finding. The Respondent says that the Board is entitled to decide adversely on an applicant's credibility based on contradictions and inconsistencies in the applicant's story as well as between an applicant's story and other evidence before the board: *Sheikh v. Canada (Minister of Employment and Immigration)*,

[1990] 3 F.C. 238 (F.C.A.); *Leung v. Canada (Minister of Employment and Immigration)*, [1990] F.C.J. No. 908 (F.C.A.); *Alizadeh v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 11 (F.C.A.); *Ankrah v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 385 (F.C.T.D.); *Oduro v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 560 (F.C.T.D.).

[28] The Respondent submits that a review of the reasons reveals that the Board provided an explanation as to why it found the Applicant's testimony implausible in certain fundamental areas. None of the analysis in the Respondent's view is "so unreasonable as to warrant…intervention": *Aguebor* . The Respondent also points out that the Applicant has failed to demonstrate to the Court that the inferences drawn by the Board were not reasonably open to it on the record: *Aguebor*.

[29] The Respondent says that in order for a panel to be satisfied that evidence is credible or trustworthy, it must be satisfied that it is probably so, not just possibly so: *Orelien v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 592 (F.C.A.).

Error in interpretation

[30] The Respondent submits that in the absence of any objection to the adequacy of the interpretation services provided to the Applicant, or any link between the alleged improper translation and the alleged misunderstanding of the Applicant's evidence, the Applicant has not established that her right to an interpreter pursuant to s. 14 of the Charter and the Act was infringed

or denied: *Mosa v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 348 (F.C.A.) and *Tung v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 292 (F.C.A.).

[31] The Respondent relies upon *Mohammadian v. Canada (Minister of Citizenship and Immigration)* 2001 FCA 191 at paragraphs 13 and 19, where the quality of interpretation was inadequate and the litigation revolved around whether the applicant in that case had waived his right to use inadequate interpretation as a basis for judicial review when he had made no objection to the quality of the interpretation at the hearing. The Court of Appeal addressed the issue as follows:

> 13. As the point at issue was free of authority, Pelletier J. was left to determine whether or not the R. v. Tran, supra, test for waiver could be appropriately assimilated to a proceeding before the Refugee Division. In the end Pelletier J. chose to apply a different test. He was of the view that waiver results if an objection to the quality of interpretation is not raised by the claimant at the first opportunity during the hearing. His conclusion on this aspect of the case appears at paragraphs 27- 29 of his reasons, where he stated:
>
> > 27. For these reasons, I find that some but not all elements of the Tran decision apply to proceedings before the CRDD. The framework for analysis as to whether a s. 14 violation has occurred, the elements of the standard of interpretation to be expected and the absence of a requirement for proof of prejudice as a condition precedent to gaining access to the Court's remedial power are applicable to refugee proceedings. However, complaints about the quality of interpretation must be made at the first opportunity, that is, before the CRDD, in those cases where it is reasonable to expect that a complaint be made.
> >
> > 28. It will be a question of fact in each case whether it is reasonable to expect a complaint to be made. If the interpreter is having difficulty speaking the applicant's own language and being understood by him, this is clearly a matter which should be raised at the first opportunity. On

> the other hand, if the errors are in the language of the hearing, which the applicant does not understand, then prior complaint may not be a reasonable expectation.
>
> 29. In this case, I find that the question of the quality of the interpretation should have been raised before the CRDD because it is obvious to the applicant that there were problems between him and the interpreter. His affidavit refers to the difficulty he had in understanding the interpreter and says that at times he did not understand what was being said. This is sufficient to require him to speak out at the time. His failure to do so then is fatal to his claim now. The applicant's assertion that he did not know he could object to the interpreter is not credible given that the first hearing was adjourned because he and the interpreter could not communicate. Clearly, the CRDD has shown it was alive to the issue of interpretation. As a result, I do not have to engage in an analysis of whether all the elements of Tran have been met since, even if they have, the applicant's failure to make a timely complaint in the circumstances where it was reasonable to expect him to do so means that relief is not available to him.

…

19. As I have indicated, in light of his experience at the very first sitting of the Refugee Division the appellant appears to have been well aware of his right to the assistance of a qualified interpreter. When his conduct during the whole of the third sitting and for some time afterward is weighed with his undoubted knowledge of his right, it is difficult to construe that conduct as other than a clear indication that the quality of interpretation was satisfactory to him during the hearing itself. In my view, therefore, Pelletier J. did not err in determining that the appellant had waived his right under section 14 of the Charter by failing to object to the quality of the interpretation at the first opportunity during the hearing into his claim for refugee status.

[32] The Respondent points out that the Applicant has conceded the following in her Memorandum of Fact and Law:

> During the hearing, the Applicant had concerns regarding the quality of the interpretation provided to her. The Applicant observed that the interpreter seemed to be nervous and confused at several points during the hearing. The Applicant was also concerned because the interpreter used many English (rather than Nepali) words when translating to the Applicant.

[33] The Respondent contends that if this is accurate then the Applicant was cognizant of the problems with the quality of the interpretation at the hearing and decided to proceed without raising an objection. It was only after her claim was rejected that she attempted to use the quality of interpretation as a basis for obtaining leave for judicial review.

[34] The Respondent submits that when the Board found contradictions between the Applicant's testimony and the statements she made in her PIF narrative, it presented those contractions to the Applicant to give her an opportunity to respond. The Applicant responded by stating she had forgotten to mention that specific fact in her PIF narrative but remembered the fact at the hearing. The Applicant was found not to be credible because her testimony was not in harmony with what she stated in her PIF narrative and not because of inadequate interpretation.

ANALYSIS

[35] In *Mohammadian* at paragraph 2, the Federal Court of Appeal held that section 14 of the Charter applies to proceedings before the Board and that:

a. The interpretation provided to the refugee claimant must be continuous, precise, competent, impartial and contemporaneous;

b. The refugee claimant need not show that he has suffered actual prejudice as a result of a breach of the standard of interpretation before the Court can interfere with the CRDD's decision; and,

c. Complaints about the quality of interpretation must be made at the first opportunity, that is, before the CRDD.

[36] Towards the end of the hearing in the present case the interpreter made the following statement:

> I want to mention one thing. Because her accent is very different from ours and ours is (inaudible) cast is different, so there is - - that's where maybe she is not understanding. Just to clarify, that's true that our accent is different. Maybe that is the reasons she is not understanding.

[37] Notwithstanding this statement, Applicant's counsel did not object to the interpretation at the hearing. Nor did the Presiding Member halt the proceedings.

[38] The statement could, read out of context, mean either that the Applicant had a general problem in understanding what she was being asked, or it could mean that she did not understand a particular question.

[39] My review of the transcript suggests to me that the interpreter is referring to a particular question. The question was "How did she find out [the Applicant's sister] that Maoists were looking for you?" which was put to the Applicant by the Presiding Member.

[40] This is the question that caused the Applicant's counsel to interject and say:

> I think the question needs to be asked again. I don't know if it was interpreted right or it wasn't understood properly, but …

[41] This is also the question that the Tribunal Officer has in mind when he says "I think there was one too many pronouns," and it is what the Presiding Member is referring to when he says "She doesn't understand the interpreter. Okay, well – "

[42] It is also clear that the Presiding Member has the same specific question in mind when he says to the Tribunal Officer "If you could maybe help me out then and ask the question in a better way than I asked it then."

[43] So it seems clear that, at the hearing itself, neither the Presiding Member or Applicant's counsel felt that there were any translation problems that would cause them to call for a halt to the proceedings. It is also clear that the interpreter was only referring to a specific question when she said "she is not understanding."

[44] The problems raised in this application were discovered after the Decision was rendered and Applicant's counsel hired Binod Thapa, who is proficient in both English and Nepali, to review the audio recording of the hearing. Binod Thapa concluded that "numerous errors of interpretation were made at the hearing before the Board." Those errors have now been placed before the Court.

[45] The evidence before me suggests that, although she had some concerns about interpretation at the hearing, the Applicant felt she could understand the Interpreter sufficiently to continue and that he was competent. Both the Applicant and her counsel were certainly aware at the hearing that some English words were used by the Interpreter, but they made no objection and chose to continue. It was only after seeing the review by Binod Thapa that the Applicant understood the discrepancies.

[46] It is also obvious that no one else at the hearing, including the Presiding Member or Applicant's counsel, could have understood the extent of the translation difficulties. So it is hardly surprising that they both decided that the hearing could continue.

[47] So the issue for the Court is what, if anything, should be done about this matter now that the translation difficulties have come to light.

[48] It is clear that the general negative credibility finding that is the basis of the Decision was based upon differences between the Applicant's PIF and her testimony at the hearing.

[49] Present counsel are in agreement that the discrepancies pointed out by Binod Thapa are not materially connected to the credibility findings that underlie the Decision. However, Applicant's counsel points out that there were a significant number of discrepancies and that the Applicant's difficulty in understanding the questions that were put to her may have influenced the Member's findings concerning credibility:

> A number of discrepancies between the Personal Information Form and the claimant's oral evidence were not resolved in the claimant's

> favour. Even taking into account the claimant's level of education, and the stress of the hearing room, the claimant's testimony was vague and evasive, with questions having to be repeated.

[50] Counsel's point is that the Applicant might well have appeared vague and evasive, and asked for questions to be repeated, because she did not understand what she was being asked.

[51] Notwithstanding this concern, it would appear that, at the hearing, both the Presiding Member and Applicant's counsel felt that the Applicant's account of the principal events supporting her claim had been communicated. If they had not felt that then, presumably, they would have raised the concern and made a decision about whether to continue the hearing.

[52] The problem in the present case is different from the one that confronted Justice Lemieux in *Chen v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 308. At paragraph 12 of *Chen*, Justice Lemieux explained as follows:

> The transcript clearly reveals that, at the beginning of the hearing, there was a serious problem in the communications between the applicant and the interpreter. Everyone was aware of it: the panel members, counsel, the applicant and the interpreter. It required immediate resolution and it was the presiding member who had the responsibility to clear it up.

[53] In the present case, no one at the hearing appears to have understood that there was a significant problem, including the Applicant and her counsel.

[54] The basis of Justice Lemieux's decision in *Chen* to set aside the tribunal's decision because of translation problems is found in the following paragraphs:

> **14** In my view, the problems of communications with the interpreter were of such a nature as to have prevented the applicant from telling his story. This is not a case like *Banegas v. Minister of Citizenship and Immigration*, [1997] F.C.J. No. 928, IMM-2642-96, June 30, 1997, McGillis J., where specific errors of interpretation were under review and were found not to be prejudicial.
>
> **15** This case is one where there was a fundamental flow of communications between the applicant and the interpreter during a substantial part of the hearing.
>
> **16** Counsel for the respondent urged that problems were resolved after he switched in Mandarin.
>
> **17** While communications did appear to improve, I am not satisfied the improvement repaired the initial blockage which was substantial and central to the applicant's story.

[55] In the present case, my review of the transcript and the translation problems leads me to conclude that, although there may have been many errors in translation, they were not of such a nature as to prevent the Applicant from telling her story, particularly as regards those aspects of her claim that led to the discrepancies between her PIF and her testimony at the hearing and which are the basis of the Presiding Member's negative credibility finding. Counsel for the Applicant concedes that, notwithstanding the position taken in the Applicant's written argument, he cannot point to any particular errors in translation that go to the credibility concerns addressed by the Presiding Member.

[56] For this reason, I think the Respondent is correct to say that when the Board found contradictions between the Applicant's testimony at the hearing and statements that she had made in her PIF narrative, it presented the contradictions to the Applicant in order to give her an opportunity to respond. She responded by stating that she had forgotten to mention the specific fact in her PIF

narrative, but she remembered it at the hearing. This was not a situation where the Applicant claimed she had provided a response that addressed the Board's concern, but that the interpreter failed to accurately express the Applicant's words. The evidence indicates that, whatever problems were present at the hearing with regard to the interpretation services, the Applicant was found not to be credible not because of inadequate interpretation at the hearing, it was because the Applicant provided testimony that was not in harmony with what she stated in her PIF narrative. The interpretation problems did not impact this central credibility issue. She was not prejudiced in her ability to address those credibility concerns.

[57] I cannot say, then, that the Applicant's Charter rights were breached in this case. The Applicant argues that she is not required to show that she has suffered actual prejudice as a result of the breach of the "continuous, precise, competent, impartial and contemporaneous standard" for the Court to interfere with the Decision. However, my review of the record suggests that the Applicant was able to communicate the basis of her claim through the Interpreter who was sufficiently precise and competent to convey her words on the material points of concern, even if there were many other inaccuracies.

[58] In arguing that prejudice is not required for the Court to interfere, the Applicant relies upon *Djalabi* at paragraph 7; *Mohammadian*; and *Huang* at paragraph 8.

[59] In the *Huang* decision, however, Justice Snider appears to be of the view that the errors in translation must be material:

> **16** Therefore, there is evidence that the interpreter made errors in translation. Unlike in *Basyony v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 427 at paragraph 8 (T.D.) (QL), this is not a matter of "differences in nuance between what is said in one language and its translation into another". These errors are not trivial or immaterial; they go to the very essence of the rejection of the 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. It is my view that the Applicant was denied his right under section 14 of the Charter to continuous, precise, competent, impartial and contemporaneous interpretation. Since the Applicant's credibility was the determinative issue in this case, this is sufficient to allow this application for judicial review.

[60] There have also been other cases before this Court where it has been found that faulty translation does not amount to a breach of procedural fairness if the errors are not material to the outcome of the case. See, for example, *Nsengiyumva v. Canada (Minister of Citizenship and Immigration)* 2005 FC 190 at paragraph 16 and *Banegas v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 928 at paragraph 7.

[61] In the present case, the Applicant concedes that the errors cannot be connected to the basic findings on credibility that are based on discrepancies between her PIF and her evidence at the hearing. The errors in translation do not "go to the very essence of the rejection of the claim."

[62] Had the errors in this case been material to the main ground of the Decision I do not think that the Applicant was in a position to object at the hearing. My review of the record suggests to me that no one at the hearing, including the Applicant and her counsel, could have appreciated the

errors that were made. They only became apparent when the recording became available and comparisons were made.

[63] However, I cannot say that the errors altered the Applicant's testimony concerning the issues that ground the Decision. The translation was far from perfect, but not on material points and the hearing was not unfair in so far as the Applicant was able to understand and provide answers on the real points of concern.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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