

Federal Court



Cour fédérale

Date: 20120209

Docket: IMM-4837-11

Citation: 2012 FC 193

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, February 9, 2012

Present: The Honourable Mr. Justice Shore

BETWEEN:

**SECHAN YOON
JISEOK YOON
JIWON YOON
JIN KYUNG KIM**

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I Introduction

1. The RPD occupies a privileged position as a tribunal of fact. It has the opportunity to hear claimants and to listen to them in order to pinpoint the crux of the claim, the basis of the story they relate to the panel.

2. An interpreter does exceptional work in that he or she must translate every nuance of the claimants' statements to the panel. In addition, claimants have the right to be heard 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 (UK)*, 1982, c 11 [Charter]. However, it may happen that an inadequate interpretation results in the panel losing the advantage it derives from the hearing, that is, listening to the claimants in order to properly assess their fear.

3. The testimony of refugee claimants already requires that the administrative tribunal be receptive to the various nuances in their statements that directly result from their experiences and are based on their own perceptions. Thus, the interpreter plays a crucial role in assisting the panel in its task of actively listening to claimants. As explained in the Immigration and Refugee Board's *Interpreter Handbook* at page 35:

During a hearing before the RPD, refugee claimants are requested to tell the panel what has led them to claim refugee status. In having to provide details about their circumstances, claimants often have to recall very sensitive and emotional moments of their life, about which they may find it difficult to speak. In those instances, your ability to demonstrate professionalism will inspire greater confidence and help facilitate a free-flowing exchange between the panel and the claimant. [Emphasis added]

4. Ensuring that the entire case or the full picture of a narrative is understood requires a clear, accurate, comprehensible translation. Without this, the panel may not be able to adequately assess the credibility of a narrative. Moreover, reasoning that shows a lack of credibility would be called into question by a translation that does not correctly reflect a claimant's testimony.

II Legal proceeding

5. This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] dated June 13, 2011, which determined that the applicants are neither Convention refugees as defined in section 96 of the IRPA nor persons in need of protection under section 97 of the IRPA.

III Facts

6. The principal applicant, Sechan Yoon, his wife Jin Kyung Kim, and their children Jiseok Yoon, who is 15, and Jiwon Yoon, 17, are citizens of South Korea.

7. Sechan Yoon, his wife and their children claim that they fear the senior leaders of the JMS church, a religious sect [sect] founded by Jung Myung Seok in 1980. Because they left the sect, they were referred to as “traitors.”

8. Jying Kyung Kim joined the sect when she was still a student. She says that she was sexually assaulted by the religious leaders of the sect while completing her post-secondary studies. She is afraid that the same thing will happen to her daughter should they return to South Korea.

9. Sechan Yoon joined the sect in 1993 and worked for it in 1999 as a parking lot operator and as manager of gambling activities from October 2005 to October 2007. He was convicted three times for his actions on behalf of the sect. He was convicted twice of fraud and insolvency because of significant debts he incurred for the benefit of the sect and was imprisoned, then convicted a third

time when he was arrested with other members of the sect for gambling. His last prison stay was October 15, 2007, to June 30, 2008.

10. Sechan Yoon and his wife argued about the place of the church in their life. Jying Kyung Kim left the family in November 2007 to live on her own. She continued to work for the sect. The couple's two children went to live with her husband's parents. Their mother telephoned them once a month.

11. Sechan Yoon gradually pulled away from the sect in 2005. He says that it was difficult for him to find employment because of his criminal record. In 2008, he worked for a flower grower and claims that members of the sect showed up at his workplace. After that event, the owner asked him to leave.

12. Sechan Yoon and his children arrived in Canada on July 30, 2009. On August 5, 2009, they claimed refugee protection.

13. Having reconciled with her husband, Jying Kyung Kim arrived in Canada on December 18, 2009, and claimed refugee protection on December 22, 2009.

IV Decision that is the subject of this application for judicial review

14. The RPD determined that the applicants were not credible for the following reasons:

(a) The principal applicant testified at the hearing that representatives of the sect had come to his workplace to threaten him, which is why he lost his employment. However, he did not mention this in his Personal Information Form [PIF].

(b) The applicant's testimony contradicted information in his PIF as to the number of months he had worked for the flower grower.

(c) The documentary evidence reveals that the senior leaders of the sect were convicted of sexual assault, which shows that South Korea is capable of protecting its citizens. The applicants could therefore file a complaint.

(d) There is no evidence that the applicants' daughter, now aged 17, was a follower of the sect or that she had been targeted by members of the sect because the young woman always lived at the same place and walked to school.

(e) The applicants did not submit any evidence showing that the members of the sect were pursuing them. In fact, they had not been threatened since 2008 even though the principal applicant's father had difficulty obtaining proof of membership for the applicants from the sect. He had to say that the applicants were in China and would be returning soon.

(f) The threat that the principal applicant claims to have received in 2009 about the risk of his children being kidnapped did not coincide with his initial statements. Moreover, this

risk did not amount to persecution because the applicant testified that it was the practice of the sect to make children work during the summer selling flowers and cashews without pay.

(g) The RPD was unable to identify the applicants' actual place of residence because Ms. Kim did not ask for a new household register card when she moved.

(i) The principal applicant had always lived at the same place and never attempted to flee from the sect.

15. The RPD applied the guidelines during Ms. Kim's testimony about her alleged sexual assaults. Her husband was not present when she testified. These incidents were not mentioned in her PIF because she did not want her husband to know about them.

16. The RPD also found that an internal flight alternative [IFA] was available in the cities of Changwon or Pusan. The RPD rejected the applicant's submission that their household register card would enable members of the sect to find them. The RPD was also of the view that there was no evidence that the sect would be interested in seeking them out should they return. The RPD found that it would not be unreasonable for the applicants to relocate to the suggested IFA's despite the applicant's criminal record and despite the fact that Ms. Kim was being trained as a chef in Canada.

V Issue

17. The primary issue is as follows:

Did the interpretation errors during the hearing breach section 14 of the Charter and the principles of procedural fairness during the hearing?

VI Relevant statutory provisions

18. The following provisions of the IRPA apply to this case:

Convention refugee

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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(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

Person in need of protection

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

Définition de « réfugié »

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) 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) 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.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son

have a country of nationality, their country of former habitual residence, would subject them personally

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

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

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

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

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

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

(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) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(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

(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.

Personne à protéger

(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.

VII Position of the parties

19. The applicants maintain that the translation problems with the interpreter designated by the RPD are responsible for the RPD's findings on the lack of credibility. Since the applicants do not speak French, an interpreter was present at the hearing to translate from French to Korean and from Korean to French. At the hearing, another interpreter was present, Ki-Chan Yune, who had translated the family's documents on its arrival in Canada.

20. The applicants submit that Mr. Yune noted a number of irregularities in the translation, that the applicants had difficulty understanding the questions and that the interpreter had problems following the proceeding. The applicants informed the RPD during the hearing of possible translation problems, but the RPD refused to change interpreters because the applicants had admitted that they understood the interpreter's Korean. The applicants state, however, that they were unable to evaluate the interpretation at the time.

21. The applicants argue that the interpreter's corrections and the numerous questions clarifying the applicants' testimony prevented the applicants from setting out the basis of the claim in fairness.

22. The applicants say that they had the right to a precise, impartial and contemporaneous interpretation of their testimony by a competent person in accordance with section 14 of the Charter. Therefore, the RPD erred by refusing to adjourn the hearing or to change interpreters despite the obvious translation problems.

23. The applicants introduced into evidence an affidavit of Mr. Yune, who reviewed the transcript of the hearing and identified the primary interpretation problems that affected the heart of the applicants' narrative.

24. Furthermore, the applicants maintain that the IFA suggested by the RPD is unreasonable because the RPD did not refer to the documentary evidence. The applicants also argue that the translation problem tainted the RPD's reasoning on the possibility of finding the applicants through the household registry card.

25. The respondent maintains that the applicants did not object to the interpreter's work when they had the opportunity to do so. On two occasions, they confirmed that they understood the interpreter.

26. In addition, the applicants take the position that the Court should assign no probative value to the affidavit of the interpreter, Mr. Yune, because he is a friend of the applicants and is therefore not impartial. Moreover, he only criticized the choice of certain words. In this regard, the respondent submits that section 14 of the Charter does not require a perfect translation.

27. Second, the applicants' lack of credibility is not solely attributable to the translation since the RPD also noted inconsistencies and implausibilities in the applicants' testimony.

28. Third, the respondent states that the IFA suggested by the RPD is reasonable because the applicants did not adduce evidence that it would be possible for the sect to find them in the cities of refuge contemplated by the RPD, as shown by its reasons for decision.

VIII Analysis

Did the interpretation errors during the hearing breach section 14 of the Charter and the principles of procedural fairness during the hearing?

29. The standard of review for this question is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

30. The interpretation of the applicants' testimony during the hearing is at issue here. The Court made the following comments about the ramifications of interpretation problems in *Huang v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 326:

[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.

31. In this case, the Court is relying on Mr. Yune's affidavit, the only evidence in the record that takes into consideration the interpretation problems caused by the translation at the hearing. In fact, he translated the documents in the tribunal record [TR] for the applicants. Although Mr. Yune could not act as an accredited interpreter before the RPD, it was not established that his affidavit was not probative or that Mr. Yune was biased.

32. The Court notes from the partial transcript of the hearing that significant interpretation errors occurred during the applicants' testimony. By way of example, the applicant stated that he had been employed by the flower grower for only a few months, but the interpreter's answer did not reflect that (Applicant's Record [AR] at page 165). The applicant's incorrectly interpreted statement was repeated in the RPD's decision at paragraph 10 of its decision and undermined the applicant's credibility.

33. The exchanges between the RPD and the applicant on the issue of the household registry as a means of finding the applicants are also worrisome. In fact, the transcript shows that the applicant did not understand the panel's question and that the interpreter changed the date in his translation from French to Korean (AR at page 170). Furthermore, Ms. Kim clearly stated that living somewhere other than the registered address did not pose a legal problem, which the interpreter translated as not being mandatory (AR at page 171).

34. The RPD determined that the applicants were not credible with respect to the requirement to register the residence because Ms. Kim's name was on the household register card despite the fact that she no longer lived with the applicants (RPD decision at paragraph 19).

35. A review of the transcript shows unequivocally that the RPD did not grasp certain nuances of the applicant's testimony because of the interpretation errors in the translation. The Court has set out here just some examples of the many obvious discrepancies between what the applicants said and what was translated for the RPD during the translation. This tainted the RPD's reasoning with respect to both the assessment of subjective fear and the determination of the IFA.

36. Furthermore, the following exchange is problematic and shows that the translation caused problems during the hearing:

[TRANSLATION]

BY THE PRESIDING MEMBER (to the witness)

- O.K. That's not the question. My question is: how long have you been afraid of those 200 people? As of what date?

BY THE WITNESS (to the presiding member)

- Because --- I was sent to prison ---

BY COUNSEL (to the presiding member)

- I have to intervene because it seems that there is no ---

BY THE PRESIDING MEMBER (to the interpreter)

- I don't know whether it's an interpretation problem or an evasion problem, but this isn't working. What question did you ask the claimant?

BY THE INTERPRETER (to the presiding member)

- No. I asked what you said. How long? What date ---

(TR at pages 329-330)

37. The hearing was adjourned for a few minutes, counsel for the applicants spoke with the interpreter who was observing, Mr. Yune, and then advised the RPD of the possible translation problems:

[TRANSLATION]

BY COUNSEL (to the presiding member)

- I don't know whether that's what caused the misunderstanding. Mr. Yune says that the complete question was not translated. Only how long have you been afraid was translated but not as of what date and tell us the date, the month, the year. I don't know if they feel at ease. We can continue like this but if ---

BY THE PRESIDING MEMBER (to counsel)

- Yes, but this man has been an official interpreter here for a number of years so I trust him.

BY COUNSEL (to the presiding member)

- Perfect.

BY THE PRESIDING MEMBER (to the witness)

- We'll continue. I'm asking this question for the fourth time. The question is ---

INTERPRETER (to the presiding member)

- I explained to them because it's a bit difficult for me because I don't know their story.

BY THE PRESIDING MEMBER (to the witness)

- But that's normal. That's normal. Usually the interpreters do not know the claimants. O.K. So, I'm going to ask the question for the last time. The question is: how long, as of what date, have you been afraid of these 200,000 believers?

(TR at pages 331-332)

38. However, it was only after the hearing that the applicants became aware of the extent of the interpretation problems. Justice Simon Noël's reasoning in *Umubyeyi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 69 applies to this case:

[10] In this case, the affidavit evidence is sufficient to establish a concern of the adequacy of the translation at the Board hearing. Understandably, there is a high evidentiary threshold to establish that the Applicant waived her right to a fair interpretation, and there is nothing to indicate that she did indeed waive her right (*Thambiah v Canada (Minister of Citizenship and Immigration)*, 2004 FC 15; *Sherpa*, above). In any event, even if mistranslation could be reasonably apparent during the hearing itself, as it was in *Elmaskut v Canada (Minister of Citizenship and Immigration)*, 2005 FC 414, the matter can be sent for redetermination before the Board.
[Emphasis added]

39. The Court cannot find that the applicants waived their Charter right. The Court concedes that under section 14 of the Charter the translation need not be perfect; however, the translation problems dealt with the key elements of the claim and had a negative influence on the RPD's assessment of the applicants' subjective fear.

40. This is especially important since the RPD based its decision on the applicants' lack of credibility and the implausibilities in their story, notably by finding a lack of subjective fear and an IFA.

41. After a new hearing, the RPD's reasoning could lead to the same finding of lack of credibility, but, nevertheless, this new hearing is essential to ensure that the translation does not cast doubt on the RPD's potential reasoning.

42. For all the foregoing reasons, the RPD's decision is set aside, the application for judicial review is allowed and the case is remitted for reconsideration by a differently constituted panel.

JUDGMENT

The Court orders that the application for judicial review is allowed.

No question of general importance is certified.

“Michel M.J. Shore”

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4837-11

STYLE OF CAUSE: SECHAN YOON ET AL v MCI

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: February 9, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: February 9, 2012

APPEARANCES:

Angelica Pantiru FOR THE APPLICANTS

Émily Tremblay FOR THE RESPONDENT

SOLICITORS OF RECORD:

Angelica Pantiru FOR THE APPLICANTS
Montréal, Quebec

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Montréal, Quebec