Federal Court  Cour fédérale

Date: 20190531

Docket: IMM-2078-18

Citation: 2019 FC 776

Ottawa, Ontario, May 31, 2019

PRESENT: Mr. Justice Pentney

BETWEEN:

MARWEN YAKOUBI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Marwen Yakoubi is a citizen of Tunisia who came to Canada in April 2017 on a business visitor visa, which was valid for six months. When his visa expired he did not leave Canada and, in February 2018, he married a Canadian citizen. Both the Applicant and his wife say they were advised by counsel that he did not have to leave Canada despite the expiry of his visa, as long as they filed an application for permanent residence on the basis of spousal sponsorship.

[2] However, before the sponsorship application was filed, the Respondent's officials received a tip that the Applicant was working illegally at a restaurant. Officers observed him working there, wearing an employees' uniform and entering the premises through a door marked "employees only." The Applicant was arrested by Enforcement Officers (the Officers) working for the Canada Border Services Agency (CBSA).

[3] One of the Officers (hereafter referred to as the "Arresting Officer") interviewed the Applicant and then prepared an inadmissibility report pursuant to subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] on the basis that the Applicant had overstayed his visa. The Arresting Officer also decided that a second inadmissibility report should be prepared because the Applicant had been working without a permit. The Arresting Officer recommended that the Applicant be released on conditions, and also that an exclusion order be made against the Applicant based on the overstay of his visa. Following a further interview with a different Enforcement Officer, an exclusion order was issued against the Applicant on the basis of the overstay report.

[4] The Applicant seeks judicial review of all three reports; these proceedings have been consolidated and this decision deals with all three matters.

[5] This case turns on the question of whether a fair process was followed when the Applicant was questioned, and reports were prepared leading to the issuance of an exclusion order against him. A key question is whether he obtained the effective assistance of counsel during this process, and core to that is whether he was provided with adequate translation services.

[6] For the reasons that follow, I am allowing this application for judicial review, on the basis that proof of adequate translation services is lacking, and therefore it is not possible to conclude that the Applicant received adequate assistance of counsel.

II. Issues and Standard of Review

[7] The Applicant has raised a number of issues relating to procedural fairness, including the denial of his right to counsel and the inadequacy of the translation.

[8] I find that these issues are intertwined, since in the circumstances of this case the Applicant could only obtain adequate legal representation with the assistance of a translator. In my view, this case turns on the question of whether the Applicant was treated fairly, and in particular whether he received adequate and appropriate assistance from the translator in relation to his access to counsel, and whether his right to assistance of counsel was respected. This case turns on the particular circumstances and evidence before the Court.

[9] Both the right to a translator and the right to the assistance of counsel upon arrest or detention are rights under the *Canadian Charter of Rights and Freedoms* [the *Charter*]. The standard of review of an issue involving *Charter* rights and procedural fairness is correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 58.

[10] The traditional standard of review analysis is somewhat awkward when it is applied to questions of procedural fairness, as explained by Justice Rennie in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 50-56 [*Canadian Pacific*

Railway]. The question of deference is not applicable. The standard which comes closest to describing the approach supported by the jurisprudence is that of "correctness."

[11] I would adopt the following statement of the law from that decision, which is particularly apt in this case:

> [54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at para. 20) that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.

III. Analysis

[12] There are two key questions relating to the fairness of the procedure followed in this case: (i) did the Applicant receive adequate and appropriate translation assistance; and (ii) did the Respondent meet its obligations in regard to the Applicant's right to counsel?

[13] As I mentioned above, I find that there is overlap between the two issues, since if the Applicant did not receive adequate translation assistance, he was thereby denied the right to effective assistance of counsel, and his rights under the *Charter* were not respected. That, in and of itself, is generally sufficient to amount to a denial of procedural fairness. In view of the overlap in the issues, I will address them together, following a brief summary of the law that applies to each.

A. *The Law on Adequacy of Translation Services*

[14] The basic principles applicable to the effectiveness of translation in the immigration and refugee context were set out in *Mohammadian v Canada (Citizenship and Immigration)*, 2001 FCA 191 [*Mohammadian*]. Justice Judith Snider elaborated on this, and described the scope and importance of the right to counsel in this context in *Huang v Canada (Citizenship and Immigration)*, 2003 FCT 326 at para 8 [*Huang*]:

> The Applicant has a right, under section 14 of the *Charter*, to continuous, precise, competent, impartial and contemporaneous interpretation. The Applicant is not required to show that he has suffered actual prejudice as a result of the breach of the standard of interpretation in order for this Court to interfere with the decision of the Board (*Mohammadian v. Canada (Minister of Citizenship and Immigration*), [2001] 4 F.C. 85 (C.A.), leave to appeal dismissed, [2001] S.C.C.A. No. 435 (QL); *R. v. Tran*, [1994] 2 S.C.R. 951).

[15] An Applicant is expected to raise concerns or objections about the quality of interpretation or translation at the earliest possible opportunity. And, as noted by Justice Michael Phelan in *Xu v Canada (Citizenship and Immigration)*, 2007 FC 274 at para 12 [*Xu*], the burden is on the applicant to show that on a balance of probabilities, mistranslation occurred.

[16] Justice François Lemieux provided the following summary of the guiding principles in respect of a claim of inadequate interpretation at a hearing in *Singh v Canada (Citizenship and Immigration)*, 2010 FC 1161, at para 3 [*Singh*]:

> [3] Both counsel agree the question of the quality of the interpretation is governed by the Federal Court of Appeal's decision in *Mohammadian v. Canada (MCI)*, 2001 FCA 191, [2001] F.C.J. No. 916, applying the Supreme Court of Canada's decision in *R. v. Tran*, [1994] 2 S.C.R. 951. In my view, the

> principles enunciated in *Mohammadian* may be briefly summarized as follows:
>
> > a. The interpretation must be precise, continuous, competent, impartial and contemporaneous.
> >
> > b. No proof of actual prejudice is required as a condition of obtaining relief.
> >
> > c. The right is to adequate translation not perfect translation. The fundamental value is linguistic understanding.
> >
> > d. Waiver of the right results if an objection to the quality of the translation is not raised by a claimant at the first opportunity in those cases where it is reasonable to expect that a complaint be made.
> >
> > e. It is a question of fact in each case whether it is reasonable to expect that a complaint be made about the inadequacy of interpretation.
> >
> > f. If the interpreter is having difficulty speaking an applicant's language and being understood by him is a matter which should be raised at the earliest opportunity.
>
> [Emphasis in original.]

[17] While the Applicant does not need to show actual prejudice due to translation errors, the error needs to be material: *Mah v Canada (Citizenship and Immigration)*, 2013 FC 853 at para 26; *Siddiqui v Canada (Citizenship and Immigration)*, 2015 FC 1028 at para 68).

B. *The Law on the Right to Counsel*

[18] An individual arrested or detained by the state has the right to access to a lawyer without delay, and to be informed of that right, pursuant to section 10(b) of the *Charter*. The Supreme Court of Canada has found that this right encompasses three obligations on the part of the state: (i) to inform the person detained of these rights, and of the existence and availability of legal aid

and duty counsel; (ii) to provide a reasonable opportunity to exercise the right if the person expresses a desire to do so (unless the situation is urgent and dangerous); and (iii) to refrain from eliciting evidence from the detainee until she or he has had a reasonable opportunity to exercise the right (*R v Bartle*, [1994] 3 SCR 173, at pp. 191-92; *R v Willier*, 2010 SCC 37 at para 29 [*Willier*]).

[19] The application of the right to counsel in the context of the administration of *IRPA* is nuanced, and need not be explored in detail here. The law is summarized in *Rodriguez Chevez v Canada (Citizenship and Immigration)*, 2007 FC 709 at para 11:

> While there is no right to counsel *per se* at an immigration assessment (*Dehghani v. [Canada] (Minister of Employment and Immigration*), [1993] 1 S.C.R. 1053), where a person's liberty is significantly constrained, for instance over a period of days, he or she has the right to retain and instruct counsel without delay, and to be informed of that right (*Dragosin v. Canada (Minister of Citizenship and Immigration*) 2003 FCT 81, [2003] F.C.J. No. 110 (QL); *Huang v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 149, [2002] F.C.J. No. 182 (QL); *Chen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 910, [2006] F.C.J. No. 1163 (QL).

[20] There are many dimensions to the right to counsel. In this case, the key aspect relates to the state's obligations to facilitate access to counsel, which may include providing a second opportunity to either consult further with the same lawyer, or to contact another one. This is explained in *Willier*:

> [42] As noted, s. 10(b) aims to ensure detainees the opportunity to be informed of their rights and obligations, and how to exercise them. However, unless a detainee indicates, diligently and reasonably, that the advice he or she received is inadequate, the police may assume that the detainee is satisfied with the exercised right to counsel and are entitled to commence an investigative interview….

[21] A further dimension of the obligation to facilitate access to counsel is the obligation to arrange for translation or interpretation services where the individual requires it in order to have a meaningful exchange with counsel (see *Alvarez Vasquez v Canada (Pubic Safety and Emergency Preparedness)*, 2018 FC 1083, for a recent case dealing with this circumstance).

IV. Discussion

[22] There are two intertwined branches to the Applicant's argument about procedural fairness. First, the Applicant argues that he was not treated fairly because he did not receive adequate translation assistance – and this includes his interactions with the lawyer, as well as his interactions with the Officers during the interviews, as well as his overall understanding of the process. Second, the Applicant submits that he did not receive adequate assistance from counsel, and when he indicated that the consultation with the lawyer had been inadequate his complaints were ignored by the Officers. The Applicant submits that, considered together, these failings amount to a breach of procedural fairness.

[23] The Applicant says he was not provided with adequate translation because the person hired by the Respondent did not speak the Tunisian dialect of Arabic, and thus the Applicant was unable to communicate with him and to understand the proceedings. The Applicant originally argued that he did not receive translation services at all when he had his brief telephone consultation with the lawyer that the Respondent contacted for him after he was arrested and detained, but later admitted that he had been quite stressed after his arrest and it is possible that the translator arrived prior to his telephone call with the lawyer. The Applicant maintained

throughout that he was unable to communicate effectively with the translator, and thus, also with the lawyer.

[24] Because of these difficulties, the Applicant says he was unable to understand the proceedings. He says that immediately after the telephone call, he told the Arresting Officer that he had not been able to communicate with the lawyer, and asked to be able to speak with another lawyer. The Applicant also says that he advised the Arresting Officer of his difficulty understanding the translator.

[25] This is contradicted by the evidence of the Respondent, which takes the form of sworn affidavits from the Arresting Officer and the other Enforcement Officer who conducted the exclusion interview. The Arresting Officer states that immediately upon the arrest of the Applicant he was offered the services of a translator, and that the Arresting Officer personally selected a translator who could speak the Tunisian dialect of Arabic, as well as French. The Arresting Officer further states that the Applicant was read a form entitled "Notice of rights conferred pursuant to the *Canadian Charter of Rights and Freedoms* and of the *Vienna Convention* in case of arrest or detention pursuant to section 55 of the *Immigration and Refugee Protection Act*."

[26] A key aspect of the contradiction in the evidence relates to the Applicant's interactions with the lawyer. The Applicant says that once he said he wanted to speak with a lawyer, one of the Officers contacted someone whom he presumes to have been a lawyer. In this regard, there is no dispute that the Respondent met its first obligation under the right to counsel: the Applicant

was advised of his rights and of the availability of counsel if he did not have a specific lawyer he wished to contact.

[27] Questions arise, however, given the absence of any information about the person contacted by the Officer. There is no affidavit from the Officer who arranged the call; it is said that the Officer contacted a lawyer from "Urgence Avocat Immigration" but there is no record in the evidence before the Court of the name of that person, nor indeed that the conversation was actually with a lawyer. The Applicant states that he does not have that person's name or any other information about the individual with whom he spoke by telephone. The Applicant says that he cannot confirm that this person was, in fact, a lawyer.

[28] Second, the Applicant states that he had a very brief and unsatisfactory interaction with this person, and that he did not receive any advice as to what his rights were or what he should do. He originally stated that this was conducted entirely in French and without the assistance of a translator. Later he has admitted to some doubt whether the translator participated in that telephone call. The Applicant has consistently maintained, however, that the entire conversation with the person said to be a lawyer was conducted in French, and nothing was translated. The Applicant states that immediately following this telephone call, he advised the Arresting Officer that he did not receive advice from the lawyer and asked to speak to a different lawyer.

[29] The Respondent's version of events is entirely different. They say that a translator capable of speaking the Tunisian dialect of Arabic was hired, and that after an initial interaction with the Applicant, the translator and the Applicant both confirmed to the Arresting Officer that they were able to understand one another. When the Applicant asked to speak to a lawyer, an

Officer contacted a duty counsel in urgent immigration matters, and that the Applicant had a conversation with that lawyer for approximately ten minutes, with the assistance of the translator. The Arresting Officer did not inquire about the substance of that conversation, since it is subject to solicitor-client privilege.

[30] The Arresting Officer states that following the telephone call, the Applicant complained that the lawyer did not speak Arabic, and that he did not know anything about the case. The Arresting Officer states that he told the Applicant "this was the reason why we hired the interpreter." Further, the Arresting Officer states that "[t]he interpreter informed me that there had been no translation issues during the conversation."

[31] The Respondent argues that the Applicant's evidence about what transpired is not credible, because it is directly contradicted by the Officers' affidavits, which should be preferred since "the officer is presumed to be a disinterested party within the context of immigration proceedings" (citing *Sulaiman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 832 at para 12 [*Sulaiman*]).

[32] In the circumstances of this particular case, and in light of the evidence filed by both parties in this application, I am not satisfied that the Applicant received procedural fairness. I begin by recalling that the core of the task is to ask "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*per Canadian Pacific Railway* at para 54).

[33] Here, there were important consequences for the Applicant arising from this process – not the least was the issuance of an exclusion order that would bar him from re-entering Canada for one year, unless he obtained a special authorization. A practical consequence of the exclusion order is that the Applicant would be forced to live apart from his wife, unless she chose to leave Canada to join him. I would also note that the Applicant had been arrested, and he was detained throughout the day. The affidavit of the second Officer makes clear that the Applicant was only "released" once he signed the documents at the end of the second interview. The Applicant says he was told that he should sign the forms if he wanted to go home, and that if he did not cooperate he would be placed in jail. The Applicant's wife says she was told that the Applicant was arrested and might be deported that day. It is not disputed that throughout the interactions on that day, the Applicant remained in detention. There was no apparent urgency to complete the process; there is no allegation that the Applicant ever presented any sort of security risk, and he was, in any event, in detention throughout the relevant period.

[34] In the particular circumstances of this case, I find the Applicant was denied procedural fairness because the evidence is lacking in regard to the translation services, there is no proof that he was, in fact, able to consult with a lawyer, and once he complained that he had not received assistance from the person at the legal clinic, the Officers did nothing else to enable him to obtain adequate legal assistance.

[35] In relation to the translation services, I am not satisfied that the Applicant received the "continuous, precise, competent, impartial and contemporaneous interpretation" to which he was entitled by law (*Huang* at para 8). In *Mohammadian*, the Court noted that the underlying

principle is that of "linguistic understanding," and this does not demand that the translation achieve perfection.

[36] In this case, I find that the evidence of the degree of difficulty communicating with the lawyer, and with the translator, is sufficient to amount to a denial of procedural fairness.

[37] In particular, the following evidence give rise to serious concerns about whether the Applicant's *Charter* rights were respected:

- The Applicant says that the translator was unable to speak Tunisian Arabic, and thus they were not able to communicate effectively. The Arresting Officer says he personally selected a translator who is able to communicate in that dialect, but the Officer does not provide any evidence about how he knew of the translator's capabilities. The only evidence in the record states that the translator is qualified to translate from Arabic, there is no mention of Tunisian Arabic;
- There is no affidavit from the translator, and no evidence that the Arresting Officer is personally capable of speaking or understanding either Arabic, or the Tunisian dialect of Arabic. All of the forms attesting that the translator was able to interact effectively with the Applicant were completed by the Arresting Officer, since it appears the translator was present by telephone rather than in person, and no follow-up appears to have been done to obtain the translator's signature or attestation on any of the documentation;
- The Applicant says that the discussion with the person said to be a lawyer was conducted entirely in French, and that even if the translator participated in the telephone call, no translation was, in fact, done. The Respondent denies this, but did not file any evidence from the translator;

- The Officer who arranged the contact with the lawyer did not provide an affidavit, and there is no other evidence to confirm the name of the individual with whom the Applicant spoke, or to confirm that this person is a lawyer;
- The Applicant says that he complained to the Arresting Officer immediately following this conversation; the affidavit of the Arresting Officer confirms that the Applicant expressed his concerns about the consultation, however, nothing further was done to either allow the Applicant to have a further conversation with that person, or to consult with another lawyer. It appears that the complaint of the Applicant was simply ignored.

[38] The Respondent submits that where the sworn evidence of the Applicant is directly contradicted by the sworn evidence of the Officers, the evidence of the Officers should be preferred because they are presumed to be "disinterested" parties in the context of the immigration process (*Sulaiman* at para 12).

[39] Each case will turn on its particular facts, and I begin by underlining that my findings in this case are rooted in the particular circumstances of this case. In addition, I would make two observations. First, the primary evidence for the Respondent on the key points comes from the Arresting Officer, who conducted the surveillance, arrest, and questioning of the Applicant. It is not in any way a challenge to the professionalism or competence of the Arresting Officer, or other officers, to suggest that where better evidence, from a more objective, qualified and independent source is apparently easily available, such evidence should be provided.

[40] In *Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 [*Cabral*], Justice Gleason noted at paragraph 28, that where an officer's notes relate to an investigative interview,

"an investigation is being conducted, evidence is being taken and there is no collateral guarantee of authenticity as the declarant may well be motivated to record the interview in a manner that buttresses his or her decision." In *Cabral*, the point was made that such notes should be accompanied by an affidavit from the officer, so that the statements in the notes can be tested by cross-examination (see also *Canada (Citizenship and Immigration) v Vujicic*, 2018 FC 116). That is not the problem here. Rather, the concern is more about the limits as to what the Officers can state, in contrast to the translator.

[41] These concerns are particularly acute where key evidence from the officer is hearsay. In this case, for example, the Arresting Officer's evidence about what the translator said to him after the Applicant complained about his inability to communicate with the lawyer is hearsay, and the Respondent did not make submissions on why it should be accepted under the principled approach adopted by the Supreme Court of Canada (*R v Bradshaw*, 2017 SCC 35).

[42] Second, there are obvious limits as to what the Officers can attest to, since there is no indication that either of them speaks Arabic or Tunisian Arabic. They are simply not in a position to provide direct evidence about the key interactions with the translator and the lawyer. As noted previously, there is no indication why an affidavit from the translator was not provided. The Respondent is correct to state that they do not, and should not, have any record of the substance of the conversation between the Applicant and the lawyer, because that is obviously subject to solicitor-client privilege. However, there is no explanation why a record of the name of the lawyer who was contacted by the Officer was not maintained. This information would have at least provided assurance that the person the Applicant was put in contact with was actually a lawyer.

[43] Furthermore, the Respondent does not have any record of the interactions between the Applicant, the translator, and the Officers, other than the Officers' notes and affidavits.

[44] It is worth noting that when the Applicant was invited to another interview to receive the second inadmissibility report, the Officer involved expressly contacted the Immigration Consultant retained by the Applicant to ask him to provide translation services for the Applicant. The Respondents do not dispute that the Applicant required translation.

[45] To summarize, the evidence is inexplicably lacking on a number of key points: there is no evidence to confirm the translator's linguistic capabilities, or to attest to the fact that the interactions with the Applicant were effective; there is no digital or other recording of the events that could be verified by another qualified person; there is no evidence that the person at the legal clinic contacted by the Officer was a legal counsel, and no independent evidence that the interaction with the Applicant and the translator was effective. Finally, there is no evidence that the Officers took any steps to address the complaint of the Applicant immediately following his discussion with the person said to be the lawyer. In the context where an individual subject to immigration enforcement and potential exclusion from the country is subject to arrest and detention by state authorities, thus triggering the fundamental rights protected by the *Charter*, this is simply not good enough.

[46] This is not the first time that the Court is faced with the difficulty caused by the absence of any independent record of the events. As Justice Phelan noted in *Xu* at paragraph 14: "in not having some form of objective record of what was actually said in the interview, the process is open to attack. In a world of digitalized recording, it might be possible to avoid these types of

issues completely" (see also *Gharzeldin v Canada (Citizenship and Immigration)*, 2018 FC 841 at para 7).

[47] I would adopt these comments. It is neither necessary nor appropriate to impose an undue burden on the Respondent in regard to record-keeping for all interactions where translation or interpretation services are required. However, the situation where a person is subject to arrest or detention by an Enforcement Officer engages important *Charter* rights, and like other enforcement agencies, the CBSA may find it worthwhile to enhance its capacity to demonstrate that effective translation services were, in fact, provided to an applicant, in case a dispute such as this arises later.

[48] The Respondent submitted that even if a breach of the Applicant's *Charter* right to counsel is found, no remedy should be provided unless the Applicant can demonstrate substantive evidence of prejudice (citing *Gennai v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 8 at paras 17-18 [*Gennai*]). The *Gennai* case involves a factual context which is completely different from this case, and in particular that the applicants in that case never advised the officer that they had retained counsel. The Applicants were also not arrested nor detained. In *Gennai*, Justice Sandra Simpson found that there had been no breach of a *Charter* right. This should be contrasted with the rulings in *Huang*, *Mohammadian*, and *Singh*, to the effect that an applicant need not demonstrate actual prejudice where a breach of the *Charter* right to interpretation has occurred.

[49] Furthermore, I would reject this argument in the circumstances of this case, given the doubts which arise from the lack of evidence of whether the Applicant was ever advised by

counsel of his rights. The Applicant submits that had he received competent advice, he could have advanced a refugee claim during the interview, thus avoiding the issuance of the exclusion order. This appears to be a substantial prejudice that may have arisen because the Applicant did not receive effective assistance of counsel.

V. Conclusion

[50] For these reasons, the application for judicial review is granted and the matter is remitted back to another officer for re-determination, following an interview in which the Applicant is provided with “continuous, precise, competent, impartial and contemporaneous” translation services, as well as the effective assistance of counsel if he so chooses, in accordance with these reasons.

[51] The parties did not propose a question of general importance for certification, and I find that none arises in this case.

JUDGMENT in IMM-2078-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, and the matter is remitted back for reconsideration by a different officer. The Applicant is to be granted another interview, at which he is to be provided with "continuous, precise, competent, impartial and contemporaneous" translation assistance, as well as the effective assistance of counsel if he so chooses, in accordance with these reasons.

2. The style of cause is amended, on consent of the parties, with immediate effect. The Respondent in this matter is the Minister of Public Safety and Emergency Preparedness.

3. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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