

Federal Court



Cour fédérale

**Date: 20110301**

**Docket: IMM-1146-10**

**Citation: 2011 FC 243**

**Ottawa, Ontario, March 1, 2011**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**ZAINAB KAMARA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (the Board), dated February 1, 2010, wherein the Board refused to overturn a decision by a visa officer denying permanent residence to the applicant's husband as a member of the family class.

[2] The applicant requests an order quashing the decision of the Board and remitting the matter back for redetermination by a newly constituted panel.

### **Background**

[3] Zainab Kamara (the applicant) was born on December 25, 1983. She is a citizen of Sierra Leone. The applicant's first language is Creole. She understands some spoken English but cannot read English.

[4] According to the applicant, she met Ibrahim Jalloh (Mr. Jalloh) in 1994 in Sierra Leone. She fled Sierra Leone to Guinea due to warfare while Mr. Jalloh remained in Sierra Leone. The applicant returned to Sierra Leone only once, six months prior to leaving for Canada. Although her testimony is somewhat unclear, the applicant asserts that she saw Mr. Jalloh in person at that time. The applicant became pregnant by another man in Guinea before coming to Canada. She ultimately gave birth to her daughter in Canada. In 2001, the applicant was granted Convention refugee status in Canada. The applicant had a proxy marriage with Mr. Jalloh in 2004.

[5] In 2006, Mr. Jalloh applied for permanent residence in Canada under subsection 12(1) of the Act as the spouse of the applicant. He was interviewed by a visa officer in Accra, Ghana on March 13, 2008. The visa officer found that Mr. Jalloh and the applicant did not have a *bona fide* relationship and that it was a relationship of convenience for the sole purpose of gaining status under the Act.

[6] The applicant appealed the visa officer's decision to the Board. A hearing was scheduled for November 16, 2009 but was adjourned because of an inability to contact an interpreter.

[7] On January 25, 2010, the appeal hearing went ahead. At the hearing, the applicant was represented by unpaid counsel who was neither a lawyer nor a member of the Canadian Society for Immigration Consultants.

[8] A Creole-English interpreter was provided for the hearing via telephone. The applicant answered questions posed to her in both Creole and English. She states in her affidavit that she believed that she had a duty to attempt to answer in English.

[9] After a break, the Board contacted Mr. Jalloh as a witness for the applicant. The connection with the interpreter was lost after Mr. Jalloh had answered several questions. The Board tried unsuccessfully to reconnect with the interpreter. The Board asked the applicant if she wanted to proceed for the questioning of Mr. Jalloh without an interpreter.

### **Board's Decision**

[10] The Board ultimately concluded that the applicant's marriage to Mr. Jalloh was not genuine.

[11] The Board found that the applicant was not a credible witness. Her testimony lacked detail, she was evasive and hesitant. By way of example, the Board referred to a response given by the applicant when she was asked to specify the date when she last sent money to Mr. Jalloh. She first

stated that it was in 2009 and then said that it was somewhere between 2006 and 2009. The Board found this undermined her credibility.

[12] The Board found that Mr. Jalloh was effective in his communication in English and his testimony was more responsive and clearer than the applicant's.

[13] The Board found that the applicant's evidence suggested that her relationship with Mr. Jalloh was one that stopped and was re-established after the applicant's daughter was born, rather than the on-going relationship that the applicant alleged.

[14] The Board found that neither party demonstrated substantial knowledge of the other. Mr. Jalloh did not know the name of the applicant's daughter's school or the grade she was in. The applicant had not told Mr. Jalloh that she had changed jobs to a better paying position as a care aide. The Board found that the lack of sharing coupled with the lack of substantial knowledge of each other and the applicant's evasive testimony undermined credibility of the claim of a genuine marriage.

[15] The Board found that when asked why the applicant did not sponsor Mr. Jalloh until after she had been in Canada for two years, the applicant answered that it was because she was not financially secure. Mr. Jalloh answered that it was because he was not financially secure. In addition, the applicant also testified that she sent Mr. Jalloh \$100 to \$200 per month. The Board found that this financial burden would have been lifted if the applicant had sponsored Mr. Jalloh

earlier. The Board found that the explanation for delay was not consistent between the applicant and Mr. Jalloh and was therefore not credible.

[16] The Board also found that the fact that the applicant had not seen Mr. Jalloh in nine years, even though she was earning sufficient income to visit him in Ghana, undermined the claim that it was a genuine marriage.

[17] Based on the above findings, the Board concluded that the applicant had not proven that her marriage to Mr. Jalloh was genuine or that it was not entered into primarily to acquire any status or privilege under the Act.

### **Issues**

[18] The following are the issues:

1. What is the appropriate standard of review?
2. Did the absence of continuous interpretation breach the duty of fairness owed to the applicant?

### **Applicant's Written Submissions**

[19] The applicant submits that her right to a fair hearing was denied because of the absence of continuous interpretation. She submits that the standard of review is correctness.

[20] The applicant answered some questions in English and others in Creole. She had trouble expressing herself in English but submits that the Board allowed her to proceed in English as she saw fit.

[21] The applicant submits that her counsel at the time was not experienced and did not know she could object to the applicant responding in English.

[22] The applicant submits that she did not realize the harm that declining to use the interpreter would have on the presentation of her case until she received the reasons for the decision. The effect of not using an interpreter was never explained to her.

[23] The applicant submits that a duty of fairness analysis must consider the choices of procedures made by the Board. The applicant submits that the Board did not follow its procedures regarding interpretation set out in the Immigration Division Guide. The applicant submits that the Board did not determine whether the applicant had sufficient command of English to allow the hearing to proceed without an interpreter. Ultimately, the Board must decide whether there should be interpretation and although the applicant spoke in English voluntarily, it was the Board's duty to constantly evaluate whether she required the assistance of an interpreter.

[24] The applicant submits that there was no legally valid waiver of the right to interpretation because she did not have full knowledge of the rights that interpretation was enacted to protect and knowledge of the effect of the waiver.

[25] The applicant submits that the hearing should not have continued without interpretation.

[26] The applicant submits that the responses that she and Mr. Jalloh gave were affected by the lack of interpretation. Because the Board based its decision on these responses, the decision must be sent back to a newly constituted panel for redetermination.

### **Respondent's Written Submissions**

[27] The respondent submits that there was no breach of the duty of fairness by allowing the applicant to testify, at times, in English. The applicant testified in English less than one quarter of the time. In addition, of the portions of the applicant's testimony that the Board referred to in its decision, only one was in English. As such, the facts do not support the assertion that the English testimony was problematic or was the cause of the Board's concerns about the applicant's lack of credibility and full answers.

[28] The respondent submits that the applicant was well aware of her right to the assistance of an interpreter because the hearing had been previously adjourned for lack of an interpreter.

[29] The respondent submits that the Board put the applicant on notice about the need to provide full, complete answers. The applicant cannot now submit that she did not understand the importance of providing complete and detailed answers simply because she testified in English some of the time.

[30] The respondent submits that the applicant was required to raise any concerns about the language of the proceedings at the first opportunity. The applicant implicitly waived her right to interpretation because she had the interpreter available to her and chose not to use it, without any suggestion that there was a problem with the interpretation. The applicant also expressly waived her right during her testimony.

[31] The respondent submits that the questioning of Mr. Jalloh without an interpreter was initiated by the applicant's counsel and then continued with consent of the applicant's counsel when the Minister's counsel began to ask questions of Mr. Jalloh. In addition, the applicant and her counsel from the hearing aver in their affidavits that they did not object to continuing without an interpreter because they wanted to avoid another delay, thus acknowledging that they knew they could object and chose not to.

[32] Finally, the respondent submits that the Board member was aware of and sensitive to language issues throughout the proceedings. He advised the applicant to wait for the interpretation to finish before answering to make sure that she fully understood. He also clarified the applicant's responses several times to ensure that she had been understood.

[33] Based on these submissions, there was no breach of the duty of fairness, according to the respondent.



## **Analysis and Decision**

### [34] **Issue 1**

What is the appropriate standard of review?

The question of adequate interpretation raises issues of procedural fairness. The Supreme Court of Canada has limited the standards of review for administrative decisions to correctness and reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 45). However, despite the changes, the Supreme Court left the standard of review for questions of procedural fairness intact (see *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 43). As such, the question of whether an applicant's right to a fair hearing has been breached remains to be reviewed on the standard of correctness.

### [35] **Issue 2**

Did the absence of continuous interpretation breach the duty of fairness owed to the applicant?

In *R. v. Tran* (1994), [1994] 2 S.C.R. 951, [1994] S.C.J. No. 16, the Supreme Court of Canada considered the application of section 14 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) to the trial of a criminally accused. Section 14 states that:

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.

[36] Chief Justice Lamer held in *Tran* above, that the criteria used to determine whether the standard of interpretation required by section 14 of the *Charter* was met “. . . include, and are not

necessarily limited to, continuity, precision, impartiality, competency and contemporaneousness” (at paragraph 57). The Chief Justice said of continuous interpretation that, “. . . breaks in interpretation and/or summaries of the proceedings have usually not been viewed in a favourable light” and should not be “encouraged or allowed” (at paragraphs 58 and 60).

[37] These markers of adequate interpretation are accepted for proceedings at the Immigration and Refugee Board (see *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] 4 F.C. 85 at paragraph 4). Accordingly, the Guide to Proceedings before the Immigration Division states in Chapter 6.1 that “the right to the assistance of an interpreter requires that all that is said during the proceeding must be interpreted.”

[38] The applicant is only concerned in this case that the interpretation was not continuous. Not all of the questions posed to the applicant were translated into English and the applicant answered some questions directly in English. In addition, after the connection with the interpreter was lost, the applicant’s witness, Mr. Jalloh, was asked questions and testified entirely in English. As such, there was not continuous interpretation during the applicant’s hearing.

Did the applicant waive the right to interpretation?

[39] The applicant submits that she felt required to respond to questions in English. She further submits that her counsel, during the hearing, was inexperienced and did not know that she could object to the applicant testifying in English. She submits that there was no valid legal waiver

because she did not have full knowledge of the rights that interpretation was enacted to protect and she did not understand the effect that waiver would have on those rights.

[40] In *Tran* above, following *Korponoy v. Canada (Attorney General)*, [1982] 1 S.C.R. 41, the Supreme Court held that a valid waiver of a procedural right must be “. . . clear and unequivocal and must be done with full knowledge of the rights the procedure was enacted to protect and the effect that waiver will have on those rights” (at paragraph 78). The Court further added that waiver of the rights in section 14 of the *Charter* requires that the waiver be made personally and that the Court must be satisfied that “nature of the right and the effect on that right of waiving it have been explained to the accused” (at paragraph 78).

[41] I have reviewed the transcript of the hearing and I have come to the conclusion that the applicant did not make an informed waiver of her right to continuous interpretation. She originally, at the adjournment of the hearing, had informed the member that an interpreter was required. I cannot understand how this would change at the reconvened hearing.

[42] There are so many inconsistencies in the transcript of the hearing, I cannot know what the decision of the Board may have been had continuous interpretation been present.

[43] As a result, I find that there has been a breach of procedural fairness and the application for judicial review must be allowed.

[44] The applicant has proposed serious questions of general importance for my consideration for certification. I am not prepared to certify any question as the questions raised are not serious questions of general importance that would be dispositive of the appeal.

**JUDGMENT**

[45] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

“John A. O’Keefe”

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Judge

## ANNEX

**Relevant Statutory Provisions**

*Immigration and Refugee Protection Act, R.S. 2001, c. 27*

<p>12.(1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.</p>	<p>12.(1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.</p>
<p>72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.</p>	<p>72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.</p>
<p>162.(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.</p>	<p>162.(2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.</p>

Guide to Proceedings before the Immigration Division, Chapter 6, Language of Proceedings and Interpreter

**6.1 INTRODUCTION**

The considerations of natural justice referred to in subsection 162(2) of the Act

**6.1 INTRODUCTION**

Les considérations de justice naturelle prévues au paragraphe 162(2) de la Loi exigent, entre

require, among other things, that the Immigration Division make arrangements to ensure that the person concerned understands the proceeding and can express himself or herself at the hearing. This explains the importance of holding the hearing in the official language (English or French) spoken by the person concerned or, if this is not possible, of providing him or her with an interpreter. In addition, the Charter provides for the right of any person to use the official language of his or her choice in court and the right to the assistance of an interpreter, the latter right is also provided for by the *Canadian Bill of Rights*.

...

## 6.2 GENERALLY

...

However, in order for the hearing to be held in accordance with the principles of natural justice and the fundamental rights of the parties, the **member must verify** that the choice of the official language for the hearing has been acted upon and that an interpreter has been provided if one is needed. If an interpreter is provided, the member must ensure that the interpretation is adequate. As the Supreme Court of Canada held in *Tran*, "[...] The principle underlying all of the interests protected by the right to interpreter

autres, que la Section de l'immigration prenne les dispositions nécessaires afin que la personne en cause comprenne la procédure et puisse s'exprimer au cours de l'audience qui la concerne, d'où l'importance de tenir l'audience dans la langue officielle (le français ou l'anglais) que la personne en cause maîtrise ou, à défaut, de lui fournir les services d'un interprète. En outre, la Charte énonce le droit de chacun d'employer la langue officielle de son choix devant les tribunaux et le droit à l'assistance d'un interprète, ce dernier étant également prévu par la *Déclaration canadienne des droits*.

...

## 6.2 GÉNÉRALITÉS

...

Cependant, afin de tenir l'audience dans le respect des principes de justice naturelle et des droits fondamentaux des parties, le **commissaire doit vérifier** que le choix de la langue officielle dans laquelle doit se dérouler l'audience soit indiqué et, s'il y a lieu, que les services d'un interprète soient fournis. Le cas échéant, il doit s'assurer que les services de l'interprète sont adéquats. Comme l'a énoncé la Cour suprême du Canada dans l'arrêt *Tran*, «[...] le principe qui sous-tend tous les intérêts protégés par le droit à l'assistance d'un

assistance under s. 14 is that of linguistic **understanding**." [our emphasis]

**At the hearing, the member deals with the issues of the language of the proceeding and the need for an interpreter at the same time.**

At the outset of the hearing, the member must ensure that the person concerned has a sufficient command of the language in which the hearing is to take place. If the person does not, the member must change the language of the proceeding [see 6.3 – Language of the proceeding] or request an interpreter to interpret from one official language to the other. If the member finds that the person does not have a sufficient command of either official language, the member must call for an interpreter to interpret from the language of the proceeding into the first language of the person concerned and vice versa [see 6.4 – Interpreter].

...

## **6.4 INTERPRETER**

### **6.4.1 Determining whether an interpreter is needed**

...

Even when an interpreter is present at the beginning of the hearing, a change of interpreter

interprète, que garantit l' art. 14, est la **compréhension** linguistique. »

À l'audience, les questions de la **langue de la procédure** et du **besoin des services d'un interprète sont traitées en même temps par le commissaire**. Dès le début de l'audience, celui-ci doit s'assurer que la personne en cause maîtrise suffisamment la langue dans laquelle l'audience doit se dérouler, à défaut de quoi, il doit changer la langue de la procédure [voir 6.3 - Langue de la procédure] ou exiger l'assistance d'un interprète, qui interprétera, selon le cas, d'une langue officielle à l'autre ou, de la langue de la procédure à la langue maternelle de la personne en cause et vice-versa, si le commissaire estime que la personne ne maîtrise pas suffisamment l'une ou l'autre des langues officielles [voir 6.4 - Services d'un interprète].

...

## **6.4 SERVICES D'UN INTERPRÈTE**

### **6.4.1 Processus de détermination du besoin des services d'un interprète**

...

Même si l'interprète est présent au début de l'audience, un changement d'interprète peut



may be necessary if there are interpretation problems. The member must remain alert to detect any interpretation problem that may arise and should not hesitate to adjourn the hearing to change the interpreter if necessary [see also 6.6.4 – Quality of the interpretation]. When the first language of the person concerned is neither English nor French and the hearing proceeds without an interpreter anyway, the member must constantly ensure during the course of the hearing that the person does not require the assistance of an interpreter.

In short, even if the matter of the assistance of an interpreter is, in principle, settled at the outset of the hearing, the member must continue to be vigilant throughout the entire hearing when the language of the proceeding is not the first language of the person concerned.

### **6.5 DUTY TO PROVIDE AN INTERPRETER**

No provision of the Act deals specifically with the assistance of an interpreter. However, in order to comply with the principles of natural justice and the right to the assistance of an interpreter that is guaranteed by the Charter and by the *Canadian Bill of Rights*, the Division must provide an

s'avérer nécessaire si la communication est problématique. Le commissaire doit demeurer vigilant afin de déceler tout problème d'interprétation qui pourrait survenir et ne pas hésiter à ajourner l'audience pour changer d'interprète s'il le faut [voir également 6.6.4 - Qualité de l'interprétation]. Lorsque la langue maternelle de la personne en cause n'est ni le français, ni l'anglais et que l'audience procède néanmoins sans interprète, le commissaire doit, au cours de l'audience, veiller constamment à ce que la personne n'ait pas besoin de l'assistance d'un interprète.

En bref, même si la question de l'assistance d'un interprète est, en principe, réglée dès le début de l'audience, le commissaire doit demeurer vigilant pendant toute la durée de l'audience lorsque la langue de la procédure ne correspond pas à la langue maternelle de la personne en cause.

### **6.5 OBLIGATION DE FOURNIR LES SERVICES D'UN INTERPRÈTE**

Aucune disposition de la Loi ne traite précisément de l'assistance d'un interprète. Cependant, afin de respecter les principes de justice naturelle et le droit à l'assistance d'un interprète, garanti par la Charte et par la *Déclaration canadienne des droits*, la Section doit fournir les services

interpreter when it thinks that one is needed. Rule 17 governs the practice and procedure of the Immigration Division when an interpreter is required.

d'un interprète lorsqu'elle estime que ceux-ci sont nécessaires. L'article 17 des Règles régit la procédure et la pratique de la Section de l'immigration lorsque les services d'un interprète sont requis.

...

...

### 6.5.5 Witnesses

Whether they are called by the person concerned or by the Minister's counsel, **witnesses have the right to the assistance of an interpreter if they do not have a command of the language of the proceeding.** It is rare for witnesses to need an interpreter. If one is necessary, the **Division must provide an interpreter** at the request of either party.

### 6.5.5 Témoins

Les **témoins**, qu'ils soient appelés par la personne en cause ou le conseil du ministre, **ont le droit à l'assistance d'un interprète s'ils ne maîtrisent pas la langue de la procédure.** Il est très rare que les témoins aient besoin des services d'un interprète. Le cas échéant, la **Section doit fournir les services d'un interprète** sur demande de l'une ou l'autre des parties.

...

...

### 6.6.2 Waiver of the right to an interpreter

Occasionally, the person concerned may prefer to proceed without an interpreter, even though he or she has difficulties with English or French. When the person's language deficiencies are not significant, his or her decision to go ahead without an interpreter may be accepted. However, if the lack of interpretation will adversely affect the smooth conduct of the hearing and the panel's ability

### 6.6.2 Renonciation au droit à un interprète

Parfois, la personne en cause peut déclarer qu'elle préfère poursuivre sans interprète, malgré qu'elle ait des difficultés avec le français ou l'anglais. Lorsque les lacunes linguistiques de la personne sont faibles, il faudrait accepter la décision de celle-ci de poursuivre sans interprète. Toutefois, si le commissaire est d'avis que l'absence d'interprétation nuit au bon déroulement de l'audience et à

to make a decision in the case, the member can be expected to request the services of an interpreter. **In all cases, the person concerned must fully understand his or her right to the assistance of an interpreter.**

la capacité du tribunal de rendre une décision appropriée dans l'affaire, il devrait imposer les services d'un interprète. **Dans tous les cas, il importe que la personne en cause comprenne pleinement son droit à l'assistance d'un interprète.**

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1146-10

**STYLE OF CAUSE:** ZAINAB KAMARA  
- and -  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Winnipeg, Manitoba

**DATE OF HEARING:** September 15, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT OF:** O'KEEFE J.

**DATED:** March 1, 2011

**APPEARANCES:**

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