

Federal Court



Cour fédérale

**Date: 20110708**

**Docket: IMM-5056-10**

**Citation: 2011 FC 846**

**Ottawa, Ontario, July 8, 2011**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**SAMIRAH MOHAMED NEHEID  
SWALHA AMER SALMIN**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. INTRODUCTION**

[1] This judicial review concerns serious erroneous translation of Swahili which led to adverse credibility findings and the dismissal of the underlying refugee claim.

## II. BACKGROUND

[2] The Applicant, a 50 year old citizen of Kenya, and her 22 year old daughter claimed refugee protection based principally on fear of persecution arising from the involvement of the Applicant's son in a political opposition group.

[3] The Immigration and Refugee Board's (Board) negative decision turned on credibility:

The PC's oral testimony was evasive and at times incoherent. The panel takes into account the difficulty of testifying through an interpreter, the nervousness of the claimants and the gender *Guidelines* in assessing the credibility of both claimants. In the case of the PC's testimony, the panel has considered her oral testimony in the context of her low level of education and sophistication. However, even by giving the benefit of the doubt to the PC with regards to the manner in which she testified at the hearing, the panel finds that, on a balance of probabilities, the PC would not be at risk if she is to return to Kenya or that she had been targeted by the police because of her son's alleged involvement in the ODM.

[4] The Board made numerous references to the Applicant's testimony and her failure to provide coherent evidence or her failure to explain herself when questioned. The Board likewise found the Applicant's daughter lacking in credibility.

[5] In its conclusion the Board repeated that core elements of the claim lacked credibility.

## III. ANALYSIS

[6] The essential issue in this judicial review is denial of procedural fairness. That issue is subject to the correctness standard of review and where breach of fairness is found, except in the

rarest of cases, the decision will be set aside (*Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, [2003] 1 SCR 539).

[7] In *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, the Court of Appeal set the requirement that interpretation must be “continuous, precise, competent, impartial and contemporaneous”.

[8] A fair reading of the transcript of the hearing discloses that interpretation was a problem. The Board was clearly frustrated by what they heard through the interpreter. The Applicant and her daughter were likewise frustrated and perplexed by the translation and the Board’s reaction.

[9] Justice Lemieux in *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1161 at para. 3, summarized the relevant principles applicable to translation issues:

- 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.

[10] The Respondent's position in this matter rests mainly on the failure of the Applicant to raise the translation issue sufficiently. While waiver is a principle applicable to translation rights, it is, as Justice Lemieux observed, a question of fact in each case whether it is reasonable to raise a complaint about the adequacy of translation.

[11] In this case there was clear indication that translation was a problem. The daughter attempted to raise the issue twice and was ordered to be quiet. The objection may not have been phrased as directly but given the dependent position an applicant is in before the Board, and the total dependency of counsel on the translation, it is not reasonable to expect the Applicant to have done more.

[12] The Respondent's procedural point cannot stand in the way of fairness and established translation errors which were material to the decision.

[13] The Applicant provided an expert opinion of Hussein Tamini, an apparently highly qualified English-Swahili translator and teacher, who outlined the full extent of the discrepancies and problems of this translation. They are multiple and significant.

The Respondent has submitted no evidence to rebut the Tamini affidavit.

[14] Therefore, the Court finds that there was a breach of fairness by reason of unreasonable translation which was material to the Board's decision.

[15] It is impossible to know from this record whether the translator is generally not sufficiently versed in the languages to be a translator. The Court would expect the Board to consider that matter and if the translator is found not to be qualified, the Board would consider what impact that matter would have had in other cases.

#### IV. CONCLUSION

[16] This judicial review will be granted, the Board's decision quashed and the matter referred back for a new determination before a differently constituted panel. There is no certified question.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the application for judicial review is granted, the Board’s decision is quashed and the matter is to be referred back for a new determination before a differently constituted panel.

“Michael L. Phelan”

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Judge

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

**DOCKET:** IMM-5056-10

**STYLE OF CAUSE:** SAMIRAH MOHAMED NEHEID  
SWALHA AMER SALMIN

and

THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 5, 2011

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

**DATED:** July 8, 2011

**APPEARANCES:**

Mr. Raoul Boulakia FOR THE APPLICANTS

Ms. Margherita Braccio FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

MR. RAOUL BOULAKIA FOR THE APPLICANTS  
Barrister & Solicitor  
Toronto, Ontario

MR. MYLES J. KIRVAN FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Toronto, Ontario