Federal Court  Cour fédérale

Date: 20120206

Docket: IMM-2124-11

Citation: 2012 FC 159

Ottawa, Ontario, February 6, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SAYEDA HASINA KHATUN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee RPD, dated 8 February 2011 (Decision). In the Decision, the RPD refused the Applicant's claim for protection under section 96 and subsection 97(1) of the Act.

BACKGROUND

[2] The Applicant is a 63-year-old citizen of Bangladesh. She is a widow and has seven children, three of whom live in the UK.

[3] In her PIF, the Applicant says that from 2005 to June 2006, she lived in Canada on a visitor's visa. On 11 April 2006, she was issued a visitor's visa for the UK in Ottawa which was valid until October 2006. Her passport was stamped on 22 May 2006 at Heathrow Airport, in London, UK. The record does not show how or when she travelled from the UK to Bangladesh. On 20 June 2006 she says that terrorist leaders Montu and Shiraz Mia (Terrorists) came to her house in Bangladesh with several other people. They threatened the Applicant, demanding money or they would interfere with the marriage of her daughter, which was scheduled for early August 2006. At the hearing into her claim, the Applicant said the Terrorists ransacked her house, but she did not mention this in her PIF narrative. The Applicant gave the Terrorists some money she had received from the sale of land her husband had left her when he died. Though she initially wanted to pursue a complaint with the police, her children told her to not pursue the matter so that the wedding could proceed.

[4] On 15 January 2007, the Terrorists returned and demanded that she give them some of her properties. They gave her six months to comply. The Applicant went to the police, but they refused to enter a complaint because the terrorist leaders were powerful. The police advised her to contact her Member of Parliament (MP), which she did on 26 January 2007. He said he could not help her because the Terrorists were powerful.

[5] On 12 June 2007, the Terrorists came to her house again and demanded she sell them some of her properties. When she refused, they threatened her. She became anxious and saw a doctor. On 20 April 2008, the Terrorists came back to her house with weapons and asked her to sign documents transferring her land to them. She fainted and, when she came to, they said they would return in a month. After this incident, the Applicant went to the police again, but they would not help her. Because she was afraid, she went to Dhaka, Bangladesh on 3 May 2008, to hide at her daughter's house. On 25 May 2008, the Terrorists came to her son's house in Dhaka. The next day the family decided the Applicant should leave Bangladesh, so they obtained visas for her to travel to Canada and the UK. She went to the U.K. on 16 July 2008. There, her children (who are UK citizens) did not encourage her to seek asylum, and she did not know how to do this herself. She stayed in the UK for five months without claiming asylum until she left the UK in December 2008.

[6] The Applicant arrived in Canada on December 15, 2008 and claimed protection on 23 December 2008. Before the hearing, the Applicant attended an interview with Dr. J. Pilowsky, a clinical and rehabilitation psychologist. Dr. Pilowsky produced a report (Pilowsky Report) which indicated that the Applicant had a number of psychological issues arising from her experiences in Bangladesh. Dr. Pilowsky's interview was conducted with the aid of the Applicant's daughter as an interpreter and the Applicant submitted the Pilowsky Report to the RPD to support her claim.

[7] The Applicant also submitted a letter from Harun Al-Rashid, an advocate and president of the Brahmanbaria District branch of the Bangladesh Nationalist Party in Brahmanbaria District, Bangladesh (Rashid Letter). This letter purports to confirm that the Applicant was harassed by terrorists.

[8] The RPD heard the Applicant's claim on 13 January 2011. At the hearing, the Applicant, her counsel, the RPD and an interpreter were present. After a break in the hearing, the Applicant complained about the quality of the interpretation. The RPD continued with the hearing, using the same interpreter, but suggested to the Applicant's counsel that she have an audit done of the translation.

[9] At the end of the hearing, the RPD asked Applicant's counsel if she intended to have a translation audit done. She replied that she did, so the RPD gave her three weeks to obtain a recording of the hearing, have the audit done, and provide written submissions. The Applicant did not have an audit done but provided written submissions on 2 February 2011. In her written submissions, the Applicant requested an extension of time to have the audit completed. The RPD denied this request. The RPD considered the evidence before it and made its Decision on 8 February 2011. The RPD notified the Applicant of its decision by letter dated 2 March 2011.

DECISION UNDER REVIEW

[10] The RPD first set out the Applicant's allegations and found she had established her identity based on her Bangladeshi passport and Canadian visa. The RPD said that the determinative issues in her claim were credibility and state protection. The RPD said that it had considered all of the evidence and submissions, the Applicant's post-hearing submissions, and the IRB Chairperson's Guidelines, entitled *Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Guidelines).

Interpretation

[11] The RPD noted that after the afternoon break at the hearing, Applicant's counsel had indicated that the quality of interpretation was inadequate. The Applicant's daughter, who was attending the hearing, had told counsel that there were errors in the translation. No one had raised any issue with the translation up to that point. The Applicant had said at the beginning of the hearing that she understood the interpreter and the interpreter had confirmed that she understood the Applicant.

[12] During the hearing, counsel requested a translation audit. The RPD agreed to give the Applicant three weeks to have the audit done and submit it with her post-hearing submissions but she did not provide the audit in those submissions. With the post-hearing submissions, she asked for additional time to provide the audit, but the RPD denied the request. The RPD noted this request was made in counsel's post-hearing submissions on the afternoon of the due date set at the hearing.

[13] The RPD noted the specific problems counsel asserted with the interpretation: the interpreter used the third person instead of the first person; she apparently confused "2006" with "2007" on one point; and there was an issue concerning the Pilowsky Report. The RPD said that counsel had agreed that the third person issue was stylistic and not significant. It also said that it did not use the confused date in any credibility assessment it made. With respect to the Pilowsky Report, the RPD said that if an error did occur, it was of no significance because the RPD made no negative inference from the discussion of this report in its analysis of the Applicant's credibility.

[14] The RPD found that it was satisfied that any interpretation difficulties, if there were any, did not hinder its ability to properly gauge the Applicant's credibility.

Credibility

Inconsistencies in Testimony

[15] The RPD noted that during the hearing, the Applicant provided unreliable testimony and blamed this on her poor memory. The RPD noted that the Pilowsky Report said she suffered from a wide array of psychological and mental problems, including problems with her memory.

[16] The RPD found that the Applicant was able to testify adequately, although she appeared to tire later on in the afternoon. The RPD also noted that she may have had some minor memory issues, so it could ascribe some of the problems in her testimony to memory problems. However, the RPD noted that the Applicant had prepared her PIF with the assistance of counsel and had affirmed that her PIF was complete, true and correct. The RPD said the Applicant had to take responsibility for her evidence as a whole.

[17] The RPD found the Applicant's evidence, including her oral testimony, was not credible. It noted several major concerns.

Oral Testimony and PIF

[18] The Applicant was asked to provide a copy of her husband's death certificate and will, but at the hearing, she said her home had been ransacked by the Terrorists and the documents lost. She had not mentioned the ransacking of her home in her PIF narrative. Because she did not mention this until the hearing, the RPD found this was an embellishment. She also wrote in her PIF that Harun Al-Rashid was her MP when she sought his assistance after the January 2007 incident. At the hearing, she said he stopped being an MP before January 2007. When asked why she wrote to him

if he was not her MP, she said that she could not remember and it might have been an error between her and counsel. Her counsel had nothing to say on this point.

Oral Testimony and IMM 5611 Form

[19] In the form filled out when she initially made her claim (IMM 5611), the Applicant said that the Terrorists were from the JMB terrorist organization. At the hearing, she said they were not aligned with any group and were simply extortionists.

Obtaining the Rashid Letter

[20] The Applicant testified that her son had sent her the Rashid Letter. She also provided a courier envelope at the hearing in which she said the Rashid Letter had been sent to her. That envelope indicated that Mr. Rashid was the sender.

PIF and the Rashid Letter

[21] The Rashid Letter said the Applicant's properties were captured by terrorists. Her PIF narrative, however, said there were threats to take her property and she was forced to sell some of it.

Conclusions on Credibility

[22] The RPD found the Applicant had not adequately explained the inconsistencies it had noted in her testimony. These defects led the RPD to draw negative inferences as to her credibility. Further, because her testimony as to how she received the Rashid Letter was inconsistent, because her PIF and the Rashid Letter were inconsistent, and because she could not establish that Mr. Rashid was who he said he was, the RPD found the Rashid Letter was not genuine. The RPD noted

documentary evidence before it, IRB Response to Information Request BGD1035323.E, which said that fraudulent documents are readily available in Bangladesh. It found that she had submitted a fraudulent document which led the RPD to draw a serious negative inference as to credibility.

[23] The RPD also said that a medical report the Applicant had provided to support her claim – from Dr. Faraya Alamgir, a physician in Dhaka, Bangladesh (Alamgir Report) – did not mention the threats she faced. When asked why, the Applicant blamed the omission on Dr. Alamgir's memory loss. The RPD did not accept her explanation, found that the note was not genuine, and drew a serious negative inference as to the Applicant's credibility.

[24] The RPD drew a further negative inference from her failure to claim asylum in the UK, noting that the UK is a signatory to the 1951 *Convention Relating to the Status of Refugees* and the 1967 *Protocol Relating to the Status of Refugees*. The Applicant had testified that she was busy with her family and that she did not ask about asylum when she was in the UK. She also said that people told her she was old and could not claim by herself. Though she was not any younger when she came to Canada, she said that her family and the Bengali community had helped with her claim. The RPD said claimants are expected to claim at the earliest opportunity, rejected the Applicant's explanation, and found that she did not truly fear persecution in Bangladesh. It said that she chose Canada because she preferred to be near her daughter here, rather than with her children in the UK.

[25] The RPD also gave examples of evidence from which it had not drawn negative inferences. First, the RPD said that, at the end of the hearing, it had asked the Applicant if she had previously applied for immigration to Canada and she said she did not remember. The RPD accepted that she may have been tired, frustrated, and discouraged at the end of the hearing and may have been in such a poor mental state that she could not answer a simple question.

[26] The RPD also did not make a negative inference from the discrepancy between her PIF and the Pilowsky Report. The Applicant told Dr. Pilowsky that her servants were harassed by the Terrorists but had not mentioned this in her PIF. She was unable to explain this discrepancy, but had said she could not remember. This was one area where counsel had said at the hearing that poor interpretation skewed the Applicant's responses. The RPD said it did not make a negative inference on this point; it said that it was giving the Applicant the benefit of the doubt after these final questions by the RPD even though the Applicant appeared able to properly answer questions from her counsel.

No Corroborating Evidence

[27] The RPD pointed out that it is entitled to make negative inferences as to credibility from the lack of corroborating evidence and drew three negative inferences as to credibility from the Applicant's inability to produce documents which would corroborate her story.

[28] First, the Applicant could not provide documentary evidence of the sale of her home. She claimed she was forced to sell some of her property to pay the Terrorists. Though she said it was possible to get documents from a land registry which would document the sale, the Applicant had not provided this evidence in post-hearing submissions.

[29] Second, the RPD asked the Applicant to confirm her assertion that the Terrorists were well known in her area. She said there were lots of news reports about them in her area but she was unable to provide any supporting evidence to the RPD at the hearing or in her post-hearing submissions.

[30] Third, the RPD asked if the Applicant could provide independent documentary evidence that Harun Al-Rashid was actually a former MP. She could not, but the RPD noted that it would not have expected her to have that information available at the hearing. Even so, the Applicant did not submit documents corroborating this allegation with her post-hearing submissions, even though the RPD identified this issue at the hearing.

[31] On the whole, the RPD found the Applicant's evidence was not credible and was insufficient to support her claim for protection.

State Protection

[32] The RPD noted that *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, establishes that refugee protection is a surrogate for the home state's protection and can only be properly sought after a claimant has first sought the protection of her home state. *Ward* also teaches that there is an underlying presumption that a state can protect its citizens which can only be rebutted by clear and convincing proof to the contrary. Further, *Carillo v Canada (Minister of Citizenship and Immigration)* 2008 FCA 94 establishes that the evidence a claimant offers to rebut the presumption must be relevant, reliable and convincing and must satisfy the decision-maker, on a balance of probabilities, that state protection is inadequate.

[33] The RPD found that, after she was first threatened by the Terrorists, the Applicant did not complain to the police. She said she thought that if she gave the Terrorists money that they would leave her alone. She admitted that this was her mistake and that she should have reported the incident to the police.

[34] The RPD found that the Applicant had not attempted to access the protection of her state at the most critical point in her narrative. The reason she gave for not doing so – to keep the Terrorists from stopping her daughter's wedding – was insufficient justification for failing to notify the police of the threats she faced.

[35] The Applicant claimed she had reported the January 2007 incident to the police, but the RPD found she could not document this. She also claimed the police did nothing, issued no report, and told her to go to her MP. Because the RPD found the Rashid Letter was not genuine, it found she did not go to the MP as she said she did.

[36] The Applicant also said she went to the police after the June 2007 incident and, at the hearing, the RPD pointed out that she had not indicated this in her PIF. She then said she was confused, but that she remembered going to the police twice. The RPD accepted that the Applicant may have been confused about this and did not draw any negative inferences as to credibility from her late addition of the story about going to the police in June 2007. However, the RPD found that the result was that she did not go to the police, which was evidence she did not seek state protection.

[37] Finally, the RPD noted the Applicant said she went to the police after the April 2008 incident, but her son did not report the May 2008 incident to the police. The Applicant could not provide documentation of the April 2008 visit to the police because they did nothing and gave her nothing. When the RPD asked why she went to the police after they failed to protect her before, she said she hoped things would change. The RPD found this was a reasonable response (see paragraph 38 of the Decision.)

[38] Given the other concerns in regard to credibility and the Applicant's failure to document any of her two alleged reports to the police, the RPD found she had not reported anything to the police. It also noted the Applicant did not provide or specifically identify any documentary evidence that would indicate that the police in Bangladesh would not be willing and able to adequately protect someone like her from extortionists.

[39] The RPD found that the claimant had not made efforts to engage the protection of her own state before coming to Canada and that she had failed to provide clear and convincing evidence that state protection would not have been adequate if she had pursued it. Since state protection was available to her, the Applicant could not have a well-founded fear of persecution, nor could she be a person in need of protection.

STATUTORY PROVISIONS

[40] The following provisions of the Act are applicable in this proceeding:

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	b) soit, si elle n'a pas de nationalité et se trouve hors du

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

…

…

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 incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(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) 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.

ISSUES

[41] The Applicant raises four issues in this case:

1. Whether the RPD denied her procedural fairness by providing inadequate interpretation;
2. Whether the RPD's reasons were adequate;
3. Whether the RPD' credibility finding was reasonable;
4. Whether the RPD's state protection finding was reasonable.

STANDARD OF REVIEW

[42] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[43] On the first issue, the Federal Court of Appeal, in *Mohammadian v Canada (Minister of Citizenship and Immigration*) 2001 FCA 191 held at paragraph 4 that the factors for assessing accurate translation in a criminal context, enunciated by the Supreme Court of Canada in *R. v Tran*,

[1994] 2 SCR 951, applied to immigration proceedings. In *Singh v Canada (Minister of Citizenship and Immigration)* 2010 FC 1161, at paragraph 3, Justice François Lemieux summarized the factors 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.

[44] The adequacy of translation is an issue of procedural fairness. As the Supreme Court of Canada held in *Khosa*, above, at paragraph 43, issues of procedural fairness are evaluated on a standard of review of correctness. The standard of review on the first issue is correctness.

[45] In *Aguebor v Canada (Minister of Citizenship and Immigration)*, [1993] FCJ No 732 (FCA) the Federal Court of Appeal held that the standard of review on a credibility finding is reasonableness. Further, in *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773, at paragraph 21, Justice Max Teitelbaum held that findings of credibility are central to the RPD's finding of fact and are therefore to be evaluated on a standard of review of reasonableness. In *Wu v*

Canada (Minister of Citizenship and Immigration) 2009 FC 929, Justice Michael Kelen held at paragraph 17 that the standard of review on a credibility determination is reasonableness. The standard of review on the third issue is reasonableness.

[46] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, the Supreme Court of Canada held at paragraph 14 that the adequacy of reasons is not an independent ground for quashing a decision. Rather, the reasons given are to be evaluated along with the outcome in an organic process designed to determine if the result is within the range of acceptable outcomes. So long as the reasons, supplemented by the record, show that the outcome was reasonable, they will be adequate.

[47] In *Carillo*, above, the Federal Court of Appeal held at paragraph 36 that the standard of review on a state protection finding is reasonableness. This approach was followed by Justice Leonard Mandamin in *Lozada v Canada (Minister of Citizenship and Immigration)* 2008 FC 397, at paragraph 17. Further, in *Chaves v Canada (Minister of Citizenship and Immigration)* 2005 FC 193, Justice Danièle Tremblay-Lamer held at paragraph 11 that the standard of review on a state protection finding is reasonableness. The standard of review on the fourth issue is reasonableness.

[48] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that

it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

ARGUMENTS

The Applicant

The RPD Provided Inadequate Interpretation

[49] The Applicant says that she could not understand all the questions she was asked at the hearing and that she told the RPD about the problem. Prior to the hearing, the Applicant was assessed by Dr. Pilowsky who identified a myriad of mental health and memory issues. The Applicant says that the inadequate interpretation added to her confusion, memory loss and feeling of anxiousness.

[50] The Applicant’s counsel brought the translation problem to the RPD’s attention after she told him that she was having trouble understanding the interpreter. Though she objected to the proceedings taking place and requested the services of a proficient interpreter, the RPD refused her request and completed the hearing with the same interpreter it had started the hearing with. She says she has not waived her right to adequate interpretation and that she was denied her right under section 14 of the Charter to continuous, precise, competent, impartial and contemporaneous interpretation.

[51] The errors in interpretation went to the very essence of the RPD’s rejection of the Applicant’s claim. The RPD relied, at least in part, on the translation errors to support its conclusion that she was not credible. As the main reason the RPD rejected her claim was its finding that she

was not credible, her right to procedural fairness was breached, so the Decision must be reconsidered.

The RPD's Credibility Finding was Unreasonable

[52] The RPD failed to take the Applicant's psychological state into account when it assessed her credibility. The Applicant says that the Pilowsky Report indicated that she suffers from post-traumatic stress disorder and requires treatment by a mental health professional. That report includes evidence which was relevant to the RPD's credibility determination and which it did not consider:

a. She suffers from depression, cognitive difficulties, nightmares, anxiety and other health issues;
b. She suffers from psychological distress marked by post-traumatic anxiety and depression, and is unable to relax even though she uses medication;
c. She uses Novolin, Hyzaar, PMS-Clonazepam, Novofine, Teva-Raberprazole, and Apo-Metformin to treat her psychological conditions;
d. Her symptoms adversely impact her immediate cognitive functioning and she has problems with memory and concentration.

[53] The Applicant argues that, because the RPD accepted that she suffered from chronic post-traumatic stress disorder, it was obligated to consider the impact of this condition on the quality of her evidence.

[54] The Applicant relies on *Min v Canada (Minister of Citizenship and Immigration)* 2004 FC 1676 for the proposition that where there is medical evidence before the RPD that might explain

shortcomings in a claimant's testimony, the RPD must consider and give appropriate weight to that evidence. She says *Singh v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 963 [*Singh* 1] teaches that it is an error for the RPD to base its decision on a discrepancy between information given at the port of entry and information given later in the process without taking into account the evidence of her psychological state.

[55] Simply referring in the Decision to the Pilowsky Report was not sufficient. The RPD was required to consider whether the Applicant's psychological circumstance might help explain any omissions, lack of details, or confusion about events. These were the exact cognitive errors referred to in the Pilowsky Report. The Applicant points to *Rudaragi v Canada (Minister of Citizenship and Immigration)* 2006 FC 911 to support this position.

[56] In this case, the RPD's treatment of the Pilowsky Report was unreasonable. The RPD accepted she had difficulty testifying on some points because she could not remember some things, but also found she was not credible with respect to other testimony and because she could not remember. This inconsistent treatment of her condition was unreasonable. The RPD failed to consider whether the Applicant's documented and accepted medical state may have led to reluctance on her part to reveal all of the details of the torture and persecution referred to in her PIF. This failure renders the Decision unreasonable.

[57] The Applicant also points to *Fidan v Canada (Minister of Citizenship and Immigration)* 2003 FC 1190 where Justice Konrad von Finckenstein had this to say at paragraph 12:

> In this case, credibility was also the "linchpin" to the RPD's Decision. Nonetheless, the RPD failed to indicate, how, if at all, the psychological report was considered when making its credibility finding. The RPD was obliged to do more than merely state that it had "considered" the report. It was obliged to provide some

> meaningful discussion as to how it had taken account of the applicant's serious medical condition before it made its negative credibility finding. The failure to do so in this case constitutes a reviewable error and justifies the matter being returned to a newly appointed RPD.

[58] The Applicant says that the principle Justice von Finkenstein enunciated in *Fidan* applies in her case. The RPD's negative credibility finding was central to its Decision and it did not adequately consider how her medical condition affected her behaviour when it made its credibility finding. This error means that the Decision must be returned for reconsideration.

The RPD's State Protection Finding was Unreasonable

[59] The Applicant further says that the RPD's finding that she did not rebut the presumption of state protection cannot stand because it was based upon an unreasonable credibility finding. The RPD did not make any connection between the grounds she advanced to support her claim and the evidence that had been recited or the conclusion that it reached. The RPD only provided a summary of country conditions regarding the availability of state protection in Bangladesh, but provided no analysis in support of the conclusion it ultimately reached. She notes that in *Derivishi v Canada (Minister of Citizenship and Immigration)* 2006 FC 354 Justice Carolyn Layden-Stevenson said at paragraphs 21 and 22 that

> Merely stating the evidence of the parties and stating a conclusion does not constitute adequate reasons. A decision maker must set out the findings of fact and the principal evidence upon which these findings were based. The reasoning process followed must be delineated: *Via Rail Canada Inc. v. Lemonde*, [2001] 2 F.C. 25 (F.C.A.) at para. 22.
>
> The applicants are entitled to the benefit of the officer's reasons as to why they failed to rebut the presumption of state protection on the evidence they adduced (which was apparently accepted by the officer). … [T]he application for judicial review will be allowed.

[60] Here, the RPD erred when it made only a cursory reference to the risk in this application and did not consider the totality of the evidence, particularly the evidence going to the Applicant's mental state. She says there is no indication the RPD considered the persecution that she suffered or looked at her particular situation. Based on the evidence set before the RPD, this oversight amounts to an error in law.

The Respondent

Interpretation

[61] The Respondent says the Decision clearly shows that the Applicant was given the opportunity to have an audit of the hearing done and have that audit considered before the RPD made its final decision. The Applicant failed to take advantage of this opportunity and has failed to provide a reasonable explanation for this failure, so there is no procedural fairness issue in this case.

Assessment of the Evidence

[62] The RPD considered the Pilowsky Report and applied the Guidelines when it heard and determined this case. While the Guidelines are important to assist the RPD in understanding the effects of persecution on women, they cannot cure major credibility problems in a witness's evidence. Further, the RPD was not obligated to excuse inconsistencies and other problems with the Applicant's evidence simply because she has a psychological condition. A psychological report cannot act as a cure-all for all the deficiencies in a claimant's evidence. The Court should defer to the RPD, since the appropriate weight to be given evidence is within the RPD's jurisdiction.

[63] The Supreme Court of Canada has clearly said that deference is to be afforded to credibility findings made by the trier of fact who has had the opportunity to hear oral evidence first-hand. In *R v Gagnon* 2006 SCC 17, the Supreme Court of Canada held at paragraph 20 that

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

[64] In this case, the RPD gave reasons for finding that the Applicant's evidence lacked credibility and its conclusions were open to it on the evidence. None of the Applicant's arguments show a palpable and overriding error and the Applicant has not shown any reason for this Court to interfere with the RPD's Decision in this case.

ANALYSIS

[65] The Applicant makes a series of allegations of reviewable error that are not borne out by an objective reading of the Decision. Indeed, some of the Applicant's argument contains serious inaccuracies about what the record shows. For the reasons that follow, I conclude the RPD afforded sufficient procedural fairness to the Applicant and that the RPD's credibility findings and findings regarding state protection are reasonable.

Fairness with Respect to Interpretation

[66] The Applicant is correct in stating that questions of adequate interpretation raise issues of procedural fairness. This means that the appropriate standard of review on this issue is correctness.

[67] The Applicant submits that she was not afforded the appropriate level of procedural fairness. She says she did not receive adequate interpretation but it seems to me that the RPD thoroughly and fairly addressed this issue in its Decision. It noted that, after the afternoon break, counsel indicated that the Applicant's daughter spoke to him and indicated that the quality of interpretation was inadequate. The RPD also noted in the Decision that neither the RPD, counsel, the interpreter or the Applicant brought up any issue regarding the interpretation until that point in the proceedings.

[68] The Applicant now submits that "[e]ven though the counsel objected to the proceedings taking place – he continued with the hearing." The Applicant also submits that "[t]he applicant's counsel brought to the attention of the RPD member that there were problems with the interpretation and requested services of a proficient interpreter." From these submissions it appears she is alleging that her counsel requested both that the hearing stop and that a new interpreter be assigned. After reviewing the transcript, I do not think this is the case.

[69] The following passage from the transcript is rather lengthy (see page 261 of the CTR). However, much, if not all of it, is relevant to the issue at hand: whether the RPD adequately addressed the Applicant's concerns about the adequacy of the interpretation and afforded her appropriate procedural fairness on this issue.

> **COUNSEL FOR CLAIMANT [CC]:** I just have a preliminary issue to deal with. I have some concerns about the quality of interpretation, with all due respect to the interpreter ---
>
> **MEMBER [M]:** Okay.
>
> **CC:** --- that has been provided. The Claimant's daughter who speaks English brought to my attention two, although she said there were others but she couldn't remember them because she wasn't documenting them.
>
> **M:** M'hm.

CC: She said in a couple of occasions, the years were not translated correctly. For example, 2006 was said instead of 2007. The other one had to do with what was being asked by the Member just before -- just before we broke and that had to deal with the question concerning Dr. Pilowski's report apparently was translated as did the servants harass her, meaning the Claimant and that's obviously not what's written -- I know that's not what the Member said and it's not what's written in the PIF and that is a fairly serious error.

The other concern I had which I didn't state, although it was apparent during the course of the translation, is that the interpreter was talking in the third person pretty much the whole time.

M: M'hm.

CC: And I don't think that's -- maybe I ought to have brought that. I was letting that slide but I don't think that that's appropriate because interpretation, as I'm sure the Member knows, according to the Federal Court should be contemporaneous and ---

M: Adequate.

CC: --- adequate.

M: It's the test.

CC: Yes. And I have concerns whether or not there may have been other errors which we're not aware of.

M: Are you making a formal motion?

CC: Yes.

M: Okay. Nothing was indicated in the first part of the hearing as to any issue with the interpretation. The two issues that you mentioned I understand that there's some confusion from time to time and I can certainly, you know, separate just what may be a slight confusion or temporary confusion over a year from any potential serious credibility issue.

I'm confident that -- I mean it's my impression so far that the interpretation has been adequate. So at this point I would have to say no to -- to your -- well, you haven't asked for anything in particular but for any ---

CC: Well, I would ask that the -- that -- I would ask that the recording that the -- that the proceedings be audited by another interpreter to ensure that ---

M: Well, then you're free to request the tape and to ---

CC: Okay. Well, I'm just -- okay.

M: Yeah, you're free to request the tape and then if you want, I guess you might as well do post-hearing submissions in writing rather than orally. So at that point perhaps you can, you know, listen to the tape or have an audit done and if you think that there's a -- if it reveals some other issues, then put it in your submissions and I will evaluate it at that time.

CC: Okay. Well, ---

M: But right now my impression is so far that interpretation has been adequate.

CC: The interpreter should not be speaking in the third person. That's not -- I think that's inappropriate.

M: Okay. How would that -- what do you mean by that?

CC: Well she says she went to her son, not like my son. I asked my son. Her son asked.

M: Okay. I don't think that leads to any misunderstanding by me as to the gist of the testimony. I think that's stylistic and I don't think that derogates from the adequacy at least apparently for me so far of the quality of interpretation.

CC: Okay. So I just want to make it clear that I'm, you know, formally putting the objection on the record to the quality of interpretation because I'm sure as the Member is aware I'm obligated to put that objection on the record as soon as I'm aware of it. Otherwise, I may be precluded from raising it in later proceedings if that's necessary.

M: Okay. Does that indicate you were not aware of it until -- during the first part of the hearing?

CC: I wasn't aware that there were those translation errors until the daughter spoke to me in the break.

M: Yeah, okay.

CC: I was willing to let the third person slide because, as the Member says, it may not necessarily affect your understanding of what Ms. Khatun is saying.

M: All right.

CC: But I mention that only because I think that's part of the bigger picture. I mean if that's going on and there are other errors going on, then I think that I'm obligated to bring that -- I'm obligated to raise that.

M: So you have done. And you have done so now. You complied with your obligations.

CC: Thank you.

M: You're welcome.

[70] In my view, after reading the transcript, Applicant's counsel did not request that the hearing be stopped or that a new interpreter be provided. What is apparent from the transcript is that the Applicant raised an objection to the interpretation and made a request for an audit of the translation.

[71] It is clear that the RPD considered counsel's request. The RPD stated that the Applicant could order a tape of the hearing and decide whether or not to have an audit done. The RPD stated that counsel could then put any concerns regarding the translation into written post-hearing submissions.

[72] The following exchange further demonstrates that the RPD was alive to the interpretation issue by providing the Applicant with the requested amount of time in order to conduct the audit and make submissions:

CC: I don't have any further questions.

> **M:** Okay. So are you going to actually do that interpreter audit as you suggested?
>
> **CC:** I am, yes.
>
> **M:** All right. So I would suggest that you do any submissions at that time, okay?
>
> **CC:** That's fine.
>
> **M:** All right. How long do you need?
>
> **CC:** Three weeks because I have to do the audit.
>
> **M:** Three weeks, all right.
>
> **CC:** Well, yeah ---
>
> **M:** I have a calendar. So today is January 13. So 13 and 21 is 33 (*sic*). That makes it -- there's only 31 -- that means February 2nd.
>
> **CC:** That's fine.
>
> […]
>
> **M:** […] All right. So ma'am, when I receive your lawyer's submissions and various motions and such, I will consider it and then I will make a decision. […]

[73] It is clear that Applicant's counsel requested three weeks in order to have the audit done and to make post-hearing submissions. The RPD granted an extended period of three weeks and even noted in its Decision that such time period is longer than the typical period of one or two weeks to provide post-hearing submissions.

[74] The RPD gave the Applicant an opportunity to raise any further concerns regarding the adequacy of the interpretation but she failed to do so. Although counsel requested an extension of time to perform and provide the audit, the RPD reasonably denied that request.

[75] I note that the CTR indicates that Applicant's counsel requested a recording of the hearing the day after the hearing. There is no indication that any delays occurred in sending that recording to the Applicant.

[76] The Decision also indicates that the RPD took into consideration the specific translation issues raised by counsel at the hearing. There is no reason to believe that, had the Applicant put forward any further concerns regarding the adequacy of the interpretation, the RPD would not have considered those submissions before rendering its Decision. It is also telling, I think, that the Applicant has placed no evidence before me concerning the inadequacy of the translation that was not specifically dealt with in the Decision. She had every opportunity to do this, but has declined to provide an audit or any other evidence to show specific inaccuracies material to the Decision. Consequently, the Court has no evidence before it to demonstrate that the translation was not adequate.

[77] I conclude that the RPD was alert to the issues and concerns raised by the Applicant regarding the translation. It was unreasonable for the Applicant (represented by counsel) to fail to take advantage of an opportunity afforded to her and then claim that the RPD did not provide adequate procedural fairness. The RPD provided an adequate level of procedural fairness in the circumstances and I concluded that no breach occurred.

[78] It is my view that the Applicant understands this perspective very well because, at the oral hearing before me she raised a new point that was not in her written submissions. She now says that it was procedurally unfair for the RPD not to grant the extension of time that counsel requested to complete the audit on the grounds that

> Unfortunately, the timeframe that I had indicated at the conclusion of the proceedings on January 13, 2011 is not enough time to complete the audit process as I have not been able to obtain the complete report from the interpreter as of this date due to other obligations that the interpreter had when I contacted the interpreter.

[79] Counsel for the Applicant only raised this issue at the hearing, so that Respondent's counsel was taken entirely by surprise and indicated that she was not in a position to deal with it.

[80] The RPD gave reasons in the Decision for refusing the request for an extension of time:

> The Panel indicated, and counsel agreed, that interpretation needs to be adequate, and is not necessarily expected to be perfect. In that regard, counsel was given an extensive period, three weeks after the hearing, to provide such audit. Such audit was not provided with the submissions, and counsel therein requested additional time to provide said audit. Such request was denied. Counsel was given an extended period of three weeks to provide the submission and audit, if he chose to provide same, and indicated at the hearing that such time frame would be satisfactory. The Panel notes that such time period is longer than the typical period of a week or two to provide post-hearing transmittals. Further, counsel only requested an extension of time for performing and providing said audit within his submissions, which were only provided on the afternoon of the due date of his post-hearing submissions.

[81] Applicant's counsel before me could easily have alerted Respondent's counsel to this new issue prior to the hearing, and could have given some indication that she intended to raise it. The fact that she did not, placed the Respondent at a severe procedural disadvantage. As Justice Dawson said in *Al Mansuri v Canada (Minister of Public Safety and Emergency Preparedness)* 2007 FC 22 at paragraph 16,

> …the new issues have nothing in common with the issues upon which the Court granted leave. It is an entirely new case. Given that Parliament has provided that an application for judicial review may only be brought with leave under the *Immigration and Refugee Protection Act*, in my view caution must be exercised when allowing

> new issues to be raised that were not the subject of the leave application.

See also *Trujillo v Canada (Minister of Citizenship and Immigration)* 2006 FC 414 at paragraphs 7 and 8.

[82] In addition, there is simply not enough evidence before me to decide whether the RPD's refusal of an extension of time was reasonable in terms of the criteria enumerated in section 37 of the *Refugee Protection Division Rules* SOR/2002-228:

37. (1) A party who wants to provide a document as evidence after a hearing must make an application to the Division.	**37.** (1) Pour transmettre, après l'audience, un document à la Section pour qu'elle l'admette en preuve, la partie en fait la demande à la Section.
Written application	Forme de la demande
(2) The party must attach a copy of the document to the application. The application must be made under rule 44, but the party is not required to give evidence in an affidavit or statutory declaration.	(2) La partie fait sa demande selon la règle 44 et y joint une copie du document, mais elle n'a pas à y joindre d'affidavit ou de déclaration solennelle.
Factors	Éléments à considérer
(3) In deciding the application, the Division must consider any relevant factors, including:	(3) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :
(*a*) the document's relevance and probative value;	*a*) la pertinence et la valeur probante du document;
(*b*) any new evidence it brings to the proceedings; and	*b*) toute preuve nouvelle qu'il apporte;
(*c*) whether the party, with reasonable effort, could have provided the document as required by rule 29.	*c*) si la partie aurait pu, en faisant des efforts raisonnables, le transmettre selon la règle 29.

See also *Nagulesan v Canada (Minister of Citizenship and Immigration)* 2004 FC 1382 at paragraphs 15 to 17.

[83] The Applicant provided the RPD with very little by way of explanation for the interpreter's delay and what efforts counsel had made to meet the initial deadline. In view of the explanation that was placed before the RPD, I cannot say that the refusal to grant an extension was unreasonable or, consequently, that a breach of procedural fairness occurred as a result.

Treatment of the Pilowsky Report and the Applicant's Psychological Condition

[84] The Applicant submits that the RPD failed to take her psychological state, as shown by Dr. Pilowsky's report, into account when it assessed her credibility. I disagree.

[85] Early in its analysis regarding the Applicant's credibility, the RPD discusses her psychological state and the Pilowsky Report specifically:

> The Panel at this point will note that the claimant frequently during the hearing provided unreliable testimony, and blamed it on her poor memory. The Panel does note the psychological report in Exhibit C-2, which does mention that the claimant suffers from an extremely wide array of psychological and mental problems, one of which was problems with memory. The Panel will first note that the claimant on the whole, in the Panel's observation, was able to testify adequately, although she appeared to tire later on in the afternoon. It appeared to the Panel, who is not a doctor or psychologist, that the claimant may have had some minor memory issues. Thus the Panel on certain occasions herein can ascribe some issues to memory problems. However, the claimant did prepare her PIF with the assistance of counsel, affirmed that her PIF was complete, true and correct, and does have to take responsibility for her evidence, on the whole. [Emphasis added].

[86] The RPD clearly acknowledged the Pilowsky Report and the Applicant's specific psychological state. The RPD also noted that the PIF was prepared by the Applicant with the aid of counsel and that the Applicant affirmed that her PIF was complete, true and correct. Just because the Applicant may suffer from cognitive and psychological problems does not mean that credibility is not an issue or that all inconsistencies can be attributed to those problems. The RPD must still assess credibility, and provided it takes into account the evidence of cognitive or emotional impairment, the Court must be loath to interfere because the Court does not have the advantage of seeing and hearing the witness testify.

[87] Several of the RPD's many negative credibility findings were a result of inconsistencies between the Applicant's testimony and her PIF. In one case, the RPD found that the inconsistencies were a result of an embellishment at the hearing and not due to any memory loss. However, in another case, the RPD accepted that the Applicant may have been confused and did not remember, and the RPD did not draw a negative inference as to credibility.

[88] Reading the Decision as a whole, it is clear that the RPD examined each inconsistency and made a determination as to the Applicant's credibility. The RPD clearly took into account all the circumstances, including the Applicant's medical and emotional issues, the preparation of her PIF with counsel's assistance, and the pressures and stress of the hearing.

[89] In my view, all the cases the Applicant relies on are distinguishable from the facts before me.

[90] The Applicant relies on *Min*, above, for the proposition that where there is medical evidence before the RPD that might explain shortcomings in an applicant's testimony, the RPD must consider and give appropriate weight to that evidence. In this case, as mentioned above, the RPD clearly acknowledged and considered the medical evidence provided. Indeed, the RPD even refused to draw a negative inference as to credibility at one point because of the Applicant's memory problems as set out on the Pilowsky Report. This was not a case like *Min*, where the RPD did not even refer to the report at all.

[91] The Applicant also relies on *Singh* 1, above, for the proposition that it is an error for the RPD to base a decision on a discrepancy between information given at the port of entry and information given later in the process without taking into account the evidence of the Applicant's psychological state. Again, the case at bar is distinguishable. In *Singh*, the RPD neglected to refer to a psychiatric evaluation which stated that at the time the notes were made by the immigration officer, the claimant was suffering form post-traumatic syndrome. In this case, the RPD not only mentioned the Pilowsky Report, but clearly kept the report in mind when making its credibility determinations.

[92] Finally, with regards to the quoted passage from *Fidan* above, it must be noted once again that the facts of this case are distinguishable. In *Fidan*, Justice von Finckenstein stated that the RPD was obligated to provide some meaningful discussion as to how it had taken account of the applicant's serious medical condition before it made its negative credibility finding. The RPD failed to do so in *Fidan* and judicial review was granted.

[93] In the present case, the RPD meaningfully discussed how it took into account the Applicant's medical problems. The RPD addressed the issue early in its credibility analysis and kept it in mind at each individual negative credibility finding.

[94] In this case, the Applicant tries to rely on the Pilowsky Report and the RPD's alleged ignorance of it to explain away all of the negative credibility findings. However, as stated by the Respondent, no psychological report could act as a cure-all for deficiencies in the Applicant's evidence.

State Protection and Credibility

[95] The Applicant submits that the RPD's finding that she did not rebut the presumption of state protection cannot stand because the RPD based this finding on an unreasonable credibility finding. This argument must fail because I have concluded above that the RPD did not err in finding that the Applicant was not credible.

[96] The Applicant also submits that the RPD only provided a summary of country conditions regarding the availability of state protection in Bangladesh but provided no analysis in support of its ultimate conclusion. She relies on *Dervishi v Canada (Minister of Citizenship & Immigration)*, 2006 FC 354 to argue that the RPD erred in this regard. This argument is not tenable for two reasons.

[97] First, the onus was on the Applicant to rebut the presumption of adequate state protection by adducing "relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate." See *Carillo*, above, at paragraph 30. The

Applicant did not discharge this burden and the RPD was free to conclude that state protection was available in this case.

[98] Second, the paragraph in *Dervishi* the Applicant relies on is clearly distinguishable from the facts in this case. In *Dervishi*, Justice Layden-Stevenson held at paragraph 22:

> The applicants are entitled to the benefit of the officer's reasons as to why they failed to rebut the presumption of state protection on the evidence they adduced (which was apparently accepted by the officer). …[T]he application for judicial review will be allowed.

[99] Unlike *Dervishi*, here the RPD did not accept any of the evidence the Applicant adduced. The RPD was clear that the reason the Applicant failed to rebut the presumption of state protection was her failure to provide corroborating evidence, such as police reports, to substantiate her attempts to seek state protection. She also did not provide or specifically identify any documentary evidence that would indicate the police in Bangladesh would not be willing or able to adequately protect a widow such as her from alleged extortionists.

CONCLUSION

[100] In my view, the Applicant was provided with adequate procedural fairness and failed to take advantage of the opportunity provided to support allegations of inadequate interpretation.

[101] It also seems clear that the RPD took into account the Applicant's particular mental and psychological state when assessing inconsistencies between her testimony and her PIF. The RPD's determinations on credibility, which are findings of fact and deserving of deference, are all reasonable based on the evidence before it.

[102] Finally, the RPD's determination that the Applicant failed to adduce clear and persuasive evidence to rebut the presumption of adequate state protection was also reasonable based on the RPD's reasonable negative inferences as to her credibility.

[103] For all these reasons, this application for judicial review must be denied.

[104] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is 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

DOCKET:	IMM-2124-11
STYLE OF CAUSE:	SAYEDA HASINA KHATUN Applicant - and - MINISTER OF CITIZENSHIP AND IMMIGRATION Respondent
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 19, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	February 6, 2012

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