

In re Doe, 99 Hawai'i 522 (2002)

57 P.3d 447

99 Hawai'i 522  
Supreme Court of Hawai'i.

In the Interest of Jane DOE, Born on December 15, 1982; John Doe, Born on August 24, 1984.

In the Interest of John DOE, Born on October 20, 1991; John Doe, Born on November 24, 1992.

Nos. 23663, 23664. | Nov. 8, 2002.

In child protection proceedings, the Family Court, Third Circuit, Ben Gaddis, J., granted foster custody of four siblings to agency. Parents appealed. The Supreme Court, Acoba, J., held that: (1) as matter of first impression, due process clause of state constitution affords parents independent substantive liberty interest in care, custody, and control of their children; (2) absence of interpreter from some, but not all, hearings did not substantially prejudice mother; (3) substantial credible evidence supported family court's findings with respect to father's alcohol use and violent conduct; (4) substantial credible evidence supported family court's findings with respect to past, present, and likely future physical and psychological harm to children; (5) mother's failure to protect children from father's violent conduct amounted to perpetration of harm upon children by action and omission; and (6) state courts had subject matter and personal jurisdiction.

Affirmed.

West Headnotes (29)

[1] **Infants**

⚡ Dismissal and mootness

Parents' appeals from custody determinations with respect to two of their children were rendered moot upon children's reaching age 18. HRS §§ 587-2, 587-11.

Cases that cite this headnote

[2] **Infants**

⚡ Dependency, Permanency, and Termination Factors; Children in Need of Aid

**Parent and Child**

⚡ The relation in general

Parental rights are of constitutional dimension.

Cases that cite this headnote

[3] **Constitutional Law**

⚡ Parent and Child Relationship

Independent of the federal constitution, parents have a substantive liberty interest in the care, custody, and control of their children protected by the due process clause of the state constitution. Const. Art. 1, § 5.

19 Cases that cite this headnote

[4] **Constitutional Law**

⚡ Notice and Hearing

Procedural due process requires that an individual whose rights are at stake understand the nature of the proceedings he or she faces. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 5.

2 Cases that cite this headnote

[5] **Constitutional Law**

⚡ Parent and Child Relationship

As an aspect of procedural due process, individuals must, as needed, be provided an interpreter at family court proceedings where their parental rights are substantially affected. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 5.

4 Cases that cite this headnote

[6] **Constitutional Law**

⚡ Parent and Child Relationship

Whether or not a person's parental rights are "substantially affected" in a family court proceeding, so as to entitle him or her, as an aspect of procedural due process, to an interpreter if required, is a question that must be resolved on a case-by-case basis and cannot

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be determined by a bright-line test. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 5.

3 Cases that cite this headnote

[7] **Constitutional Law**

☞ Protection of Children; Child Abuse, Neglect, and Dependency

**Infants**

☞ Disposition proceedings

Parents' parental rights were "substantially affected," for purposes of procedural due process analysis, in combined adjudication and disposition hearings in child protection proceedings, where one purpose of hearings was to determine whether or not their parental rights should eventually be terminated. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 5.

4 Cases that cite this headnote

[8] **Infants**

☞ Course and conduct

To assess whether an interpreter is necessary in family court proceedings, the trial court should examine the party or witness, appointing an interpreter if: (1) the party or witness is unable to speak English so as to be understood directly by counsel, court, and jury; or (2) if the party is unable to hear, understand, speak or use English sufficiently to comprehend the proceedings and to assist counsel in the conduct of the case.

2 Cases that cite this headnote

[9] **Constitutional Law**

☞ Protection of Children; Child Abuse, Neglect, and Dependency

**Infants**

☞ Course and conduct

Absence of interpreter from some, but not all, hearings in child protection proceedings did not substantially prejudice mother so as to implicate her right to procedural due process, where mother was capable of comprehending

and speaking English; several witnesses testified that mother comprehended and spoke English in daily conversation, and specifically at home, and during court proceedings mother was able to answer most questions without aid of an interpreter. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 5.

Cases that cite this headnote

[10] **Infants**

☞ Course and conduct

Mother acquiesced to absence of interpreter from most hearings in child protection proceedings by her agreement to proceed without interpreter in some instances, and by her failure to request postponement of proceedings in interpreter's absence after explicitly being given that opportunity.

Cases that cite this headnote

[11] **Infants**

☞ Parental unfitness or incompetence

Substantial credible evidence supported family court's findings in child protection proceedings with respect to father's alcohol use; one child's foster mother stated that father drank "every day," that she saw father intoxicated "[f]our or five times a week," and that once, father "could barely stand" due to his intoxication, foster mother of two other children testified that children told her that their father drank "every day[.]" and one child reported that, once, while drunk, father "grabbed [him] and held [him] up against a wall," and on another occasion had "broke[n] into [his] room" because "he was drunk."

Cases that cite this headnote

[12] **Infants**

☞ Domestic Violence and Altercations

**Infants**

☞ Physical or emotional abuse; cruelty

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MOON, C.J., LEVINSON, NAKAYAMA, RAMIL, and ACOBA, JJ.

### Opinion

Opinion of the Court by ACOBA, J.

We hold that parents who are in need of an interpreter because of their inability to understand English are entitled to the assistance of one at any family court hearing in which their parental rights are substantially affected. However, under the circumstances of this case, Appellant–Mother<sup>1</sup> (Mother) has failed to demonstrate her “need of an interpreter” and the manner, if any, whereby she was substantially prejudiced by the absence of an interpreter at certain proceedings. Moreover, Appellee–Department of Human Services (DHS) established by a preponderance of the evidence that Mother's children were harmed by her or that she presented a threat of harm to them. As to Father, despite his contention that the Family Court of the Third Circuit<sup>2</sup> (the court) inappropriately considered his behavior outside of Hawai'i, the court's findings that he harmed his children and posed a threat to them can be sustained on the basis of Father's actions in Hawai'i. Therefore, we hold that the court properly exercised jurisdiction in the instant case. We affirm the court's May 22, 2000 decision and order which granted foster custody of Jane Doe (born 12/15/82), John Doe 1 (born 8/24/84), John Doe 2 (born 10/20/91), and John Doe 3 (born 11/24/92) (collectively, Children) to DHS and the July 31, 2000 order denying parents' motion for reconsideration.

### I.

[1] All four children, who are the subject of the proceedings, are the natural children of Father. Mother is the natural mother of only John Doe 2 and John Doe 3. Jane Doe and John Doe 1 are now eighteen years old. Family court jurisdiction over them has expired because they are not less than eighteen years of age. See Hawai'i Revised Statutes (HRS) §§ 587–2 (1993) and –11 (1993).<sup>3</sup> Therefore, all appeals regarding Jane Doe's and John Doe 1's foster custody status are now moot.

DHS received a referral on August 6, 1999, alleging that Father had sexually abused Jane Doe and had physically abused the Children. On August 19, 1999, a detective and

DHS social worker interviewed Mother and Father. John Doe 2 and John Doe 3 were taken into protective custody after the interview, but John Doe 1 remained in the family home. On August 23, 1999, DHS filed a Petition for Temporary Foster Custody. The first hearing for this case was held on August 25, 1999, at which time the court awarded temporary foster custody to DHS and set the case for a return date of September 2, 1999.

Mother is a native of the Marshall Islands, and her primary language is Marshallese. At the return date hearing on September 2, 1999, the first hearing at which he appeared, Mother's attorney asked for an interpreter “because [he didn't] feel confident that [Mother could] fully understand” the proceedings.. \*\*452 \*527 At a continued status conference held on October 13, 1999, Mother's attorney again explained that “it's becoming increasingly obvious that she really needs an interpreter.” On November 1, 1999, the first day of the combined adjudicatory/disposition hearing,<sup>4</sup> an interpreter was present during Mother's testimony. The court related that an interpreter would assist Mother

not because she cannot communicate about everyday matters but because the particular nature of these proceedings involves the use of unusual language, legal concepts that are difficult to sometimes understand and rather specialized English that the Court feels [Mother] probably does not understand.

The court made its decision after questioning Mother on the record without an interpreter. That afternoon, the court chose to handle “housekeeping” matters rather than take further testimony from Mother because of the interpreter's absence. At the close of the hearing, the court told Mother's attorney, “I should leave you in charge. You certainly did better than everybody else [at obtaining an interpreter],” but then asked the bailiff to obtain an interpreter for the next hearing.

At the continuation of the disposition hearing on November 2, 1999, an interpreter was not present. Mother's attorney again requested an interpreter. After a recess, however, he informed the court that Mother was willing to proceed without an interpreter for that day on the condition she not testify.<sup>5</sup> The court did not question Mother regarding this procedure, but rather recounted its efforts to secure a Marshallese interpreter, explaining that, “[b]ased on the Court's observation of

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[M]other during her testimony, *I don't think that it will be prejudicial for her to continue the trial with other witnesses. I think she comprehends the English language marginally and can understand the proceeding.*" (Emphasis added.) The November 2, 1999 hearing continued with the testimony of Jane Doe's foster parent, the foster parent of John Doe 2 and John Doe 3, and the DHS social worker assigned to the case. Jane Doe's foster mother testified about several conversations she had with Mother,<sup>6</sup> each of which took place in English. Jane Doe's foster mother, who does not speak Marshallese, explained, "[Mother] can speak English.... I can understand her and we have conversations for hours. She can speak. She may have a heavy accent, but that's not a problem." At the close of the hearing, the court conducted the following colloquy with Mother's attorney:

THE COURT: ... We have yet to secure a Court[-] certified interpreter. We have a call in to one on Oahu.

[Mother's attorney], what I want to do is tender the question to you, will it be satisfactory to have the interpreter only for your client's testimony or do you wish to \*\*453 \*528 have the interpreter for the remainder of the trial?

Or put it another way, how have you managed to get along using the process that we used today?

[MOTHER'S ATTORNEY]: Your Honor, may I just confer with [Mother]?

THE COURT: Yes. Sure.

(Off-the-record discussion.)

[MOTHER'S ATTORNEY]: Your Honor, my client indicated that her preference is to have an interpreter here all the time, if that can be managed. That's her first choice, Your Honor.

THE COURT: Uh-huh. Well, I can attempt to arrange that, but I cannot guarantee that.

I can certainly—it's pretty obvious to me that she needs an interpreter for her testimony. And I can certainly—we can arrange a schedule to accommodate that...

*If we cannot secure an interpreter, [Mother's attorney], does your client wish to go ahead and proceed with other witnesses or does she want to postpone the date and have us wait until we can find one?*

(Off-the-record discussion.)

[MOTHER'S ATTORNEY]: *We can proceed, Your Honor.*

THE COURT: Okay.... I want the record to be clear. We have a central master list of court interpreters state wide. And we're calling all the interpreters we can find that speak Marshallese.

[MOTHER'S ATTORNEY]: Okay. Your Honor, at what point in time—should I make my own efforts or am I—

THE COURT: Well, given the way your efforts have worked out, I'm a little leery...

[MOTHER'S ATTORNEY]: I would prefer the Court get its own interpreter.

THE COURT: I think that might be better.

(Emphases added.)

On December 17, 1999, Father called Mother to the stand without an interpreter present. Before her testimony, however, the deputy attorney general representing DHS inquired of the court as to whether the court was "going to have problems with an interpreter." A recess was taken and, upon resuming the hearing, the court stated, "We're going to call [Mother]," to which Mother's attorney responded, "Yes, Your Honor." The direct examination proceeded with difficulty initially:

[FATHER'S ATTORNEY]: [Mother], since the children were removed from your home the second time, how many visits have you had with the children?

A: *I don't understand. I don't understand.*

[DEPUTY ATTORNEY GENERAL]: Judge, that's my problem. I mentioned to counsel off the record that we might have some problems with interpretation—I'm sorry—not having an interpreter here.

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Father similarly moved on June 13, 2000. On July 31, 2000, the court denied the motions for reconsideration. Mother and Father filed a joint notice of appeal on August 10, 2000.

On June 19, 2000, June 30, 2000, July 14, 2000, and September 16, 2000, the court entered orders stating that "[e]ach party understands that unless the family is willing and able to provide the children with a safe family home within a reasonable period of time, their respective parental and custodial duties and rights shall be subject to termination[.]"

DHS subsequently filed permanent plans<sup>9</sup> for the Children which proposed goals of permanent custody jurisdiction to DHS by November 2000 for John Doe 1 and guardianship to the current caretakers or other family members of John Does 2 and 3 by February 2001. On August 11, 2000, an order to show cause hearing was held and the "parties stipulated that it [was] not in the best interest of the children to proceed to a permanent plan hearing at [that] time." At the show cause hearing, a review date of December 14, 2000 was set. On November 17, 2000, DHS filed a Safe Family Home Report that recommended DHS's foster custody of the children be continued "until permanency can be addressed" and advised that Mother and Father were unlikely to resolve safety issues "within a reasonable time frame." The record on appeal does not reflect what, if anything, took place at the December 14, 2000 review hearing.

## II.

Mother raises the following points on appeal: (1) the court failed to provide Mother \*\*457 \*532 with an interpreter for all proceedings; and (2) DHS did not establish that John Doe 2 and John Doe 3 were harmed by Mother or that Mother presented a harm to them. Father raises the following points on appeal: (1) the court failed to exclude statements Mother made to a social worker without the assistance of an interpreter; (2) the court made unsupported findings regarding Father's consumption of alcohol; (3) the court made numerous factually incorrect findings; (4) the court accepted testimony of Jane Doe's foster mother without making findings as to her challenged credibility; (5) the court gave weight to testimony regarding purported acts of harm which occurred outside of Hawai'i and the United States; (6) HRS § 587-11 violates due process because it is overbroad; (7) the court's

delay in concluding the adjudication hearings resulted in a violation of Father's due process rights; and (8) the court erred in finding that Father subjected the children to harm. We initially address Mother's first contention and will resolve her second point while discussing Father's arguments.

## III.

As mentioned, we believe that parents who need an interpreter because of their inability to understand English are entitled to the assistance of one at any family court hearing in which their parental rights are substantially affected. However, because Mother has not shown that the court erred in finding that she could comprehend and speak English, it cannot be said that Mother was substantially prejudiced by the absence of an interpreter.

[2] It is well-established that parental rights are of constitutional dimension. In *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the United States Supreme Court stated:

The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment,<sup>10</sup> *Meyer v. Nebraska*, [ ] 262 U.S. [390,] 399, 43 S.Ct. [625,] 626 [67 L.Ed. 1042] [ (1923) ], the Equal Protection Clause of the Fourteenth Amendment,<sup>11</sup> *Skinner v. Oklahoma*, [ ] 316 U.S. [535,] 541, 62 S.Ct. [1110,] 1113 [86 L.Ed. 1655] [ (1942) ], and the Ninth Amendment,<sup>12</sup> *Griswold v. Connecticut*, 381 U.S. 479, 496, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring).

*Id.* at 651, 92 S.Ct. 1208. Accordingly, the "rights to conceive and to raise one's children" are "essential, ... basic civil rights of man" protected by the United States Constitution. *Id.* The Court has affirmed that a parent's desire for "the ... custody of his or her children ... undeniably warrants deference, and absent a powerful countervailing interest, protection." *Lassiter v. Department of Social Servs. of Durham County*,

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N.C., 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (citation and internal quotation marks omitted). (Emphasis added.) Indeed, "the interest of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme Court]." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion).<sup>13</sup> Similarly, the appellate courts of this state, referring to the federal constitution, have affirmed that, "[a]lthough the interests of the child are of paramount concern, the parents have a cognizable and substantial interest in the child which is constitutionally protected...." ' *In re Doe Children*, 85 Hawai'i 119, 123, 938 P.2d 178, 182 (App.1997) (quoting *In re Welfare \*\*458 \*533 of McGee*, 36 Wash.App. 660, 663, 679 P.2d 933, 935 (Wash.Ct.App.1984) (internal citations omitted) (emphasis added)). "The 'manifest importance of the right of a parent to raise his or her child' ' has been "analogized to a 'fundamental liberty interest[.]'" ' *In re Doe*, 96 Hawai'i 272, 283-84, 30 P.3d 878, 889-90 (2001) (quoting *In re Doe*, 77 Hawai'i 109, 114-15, 883 P.2d 30, 35-36 (1994)).

While Hawai'i's appellate courts have not expressly held that individuals' parental rights are protected under the Hawai'i constitution, the courts have addressed whether such rights are protected under the due process clause of the Hawai'i Constitution, article I, section 5. See *In re Doe*, 95 Hawai'i 183, 185, 191-92, 20 P.3d 616, 618, 624-25 (2001) (discussing contention that Child Protection Act deprives parents of due process under both federal and Hawai'i constitutions); *In re Doe Children*, 85 Hawai'i at 123, 126, 938 P.2d at 182, 185 (holding that mother, in a Child Protective Act case, had procedural due process right under both state and federal constitutions to submit questions to be asked of minors in chambers); *In re Male Child, Born May 27, 1983*, 8 Haw.App. 66, 75, 793 P.2d 669, cert. denied, 71 Haw. 668, 833 P.2d 900 (1990) (addressing claim that family court violated parents' due process rights under both federal and Hawai'i constitutions for alleged failure to timely notify parents of basis for petition for termination).

[3] We affirm, independent of the federal constitution, that parents have a substantive liberty interest in the care, custody, and control of their children protected by the due process clause of article I, section 5 of the Hawai'i Constitution.<sup>14</sup> Parental rights guaranteed under the Hawai'i

Constitution would mean little if parents were deprived of the custody of their children without a fair hearing. Indeed, "[p]arents have a fundamental liberty interest in the care, custody, and management of their children [and] [t]he state may not deprive a person of [his or] her liberty interest without providing a fair procedure for the deprivation." *Hollingsworth v. Hill*, 110 F.3d 733, 738-39 (10th Cir.1997) (citations and internal quotation marks omitted). Furthermore, "[t]he Supreme Court has said that parental rights cannot be denied without an opportunity for them to be heard at a meaningful time and in a meaningful manner." *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir.2000) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)) (internal quotation marks omitted); see also *Morrell v. Mock*, 270 F.3d 1090, 1095 (7th Cir.2001) (explaining that a "claim ... based on a [parent's] liberty interest [is] protected by the due process clause of the Fourteenth Amendment [and t]o meet the requirements of due process, the state must afford notice and an opportunity to be heard at a meaningful time and in a meaningful manner") (citations and internal quotation marks omitted).

[4] Procedural due process requires that an individual whose rights are at stake understand the nature of the proceedings he or she faces.<sup>15</sup> See *State v. Casipe*, 5 Haw.App. 210, 214, 686 P.2d 28, 32, cert. denied, 67 Haw. 686, 744 P.2d 781 (1984) ("Where incompetence of the interpreter is claimed by a defendant to have deprived him [or her] of a fair trial, the crucial question is: Was the testimony as presented through the interpreter understandable, comprehensible[,] and intelligible, and if not, whether such deficiency resulted in the denial of defendant's constitutional rights?" (Emphasis added)). "Fundamental due process rights may require ... an interpreter to translate courtroom proceedings. 'This is so because inherent \*\*459 \*534 in [the] nature of justice is the notion that those involved in litigation should understand and be understood.'" ' *Figueroa v. Doherty*, 303 Ill.App.3d 46, 236 Ill.Dec. 527, 707 N.E.2d 654, 658 (1999) (quoting 25 Am.Jur.2d *Trial* § 230 (1991)) (emphasis added).

In that regard, two jurisdictions have considered whether interpreters should be provided at proceedings in which parental rights were affected. In *In re Valle*, 31 S.W.3d 566 (Tenn.Ct.App.2000), the Tennessee Court of Appeals referred to several sources in determining that parents are

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entitled to an interpreter in the course of a parental termination proceeding. Noting (1) that in criminal cases “it is the duty of the court to provide the necessary means for the defendant to understand the nature of the charges against him [or her], the testimony of the witnesses, and to communicate to the court,” *id.* at 573 (quoting *State v. Thien Duc Le*, 743 S.W.2d 199 (Tenn.Crim.App.1987)), (2) that, generally, “the party litigant is entitled to be present in all stages of the actual trial of the case,” *id.* (citing *Warren v. Warren*, 731 S.W.2d 908, 909 (Tenn.Ct.App.1985)), and (3) that the Tennessee Rules of Civil Procedure provide for appointment of an interpreter, *see id.* at 572,<sup>16</sup> the appellate court concluded that, “[c]onsidering the drastic nature of a termination of parental rights case, it is particularly incumbent on the trial court to be careful in exercising discretion for the appointment of an interpreter,” *id.* at 573. Ruling that the trial court did not sufficiently inquire into the parents' need for an interpreter, it ordered the trial court on remand to address such a need.<sup>17</sup> *See id.*

In *In re Kafia M.*, 742 A.2d 919 (Me.1999), mother claimed that the absence of an interpreter at the early stages of a child protection proceeding violated her due process rights. A Somali speaker, mother was not provided an interpreter during earlier, related contacts with social worker personnel but was provided an interpreter throughout the termination proceedings. The Supreme Judicial Court of Maine determined there was no due process violation because the father interpreted their communications with mother. *See id.* at 927.

#### IV.

[5] [6] [7] In light of the constitutional protection afforded parental rights, we hold that, as an aspect of procedural due process, individuals must, as needed, be provided an interpreter at family court proceedings where their parental rights are substantially affected.<sup>18</sup> Whether or not a person's parental rights are so affected is a question that must be resolved on a case-by-case basis and cannot be determined by a bright-line test. *Cf. Lassiter*, 452 U.S. at 32, 101 S.Ct. 2153 (when discussing whether a parent has a right to an attorney in parental termination cases, explaining that “it is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in

determining when the providing of counsel is \*\*460 \*535 necessary to meet the applicable due process requirements, since here, ... the facts and circumstances are susceptible of almost infinite variation” (internal quotation marks, brackets, ellipsis points, and citation omitted)). An example of a family court proceedings where a person's parental rights are substantially affected would be the combined adjudication/disposition hearings in this case, where one purpose of the hearings was to determine whether or not parental rights should eventually be terminated.

[8] To assess whether an interpreter is necessary, trial courts should consider the guidelines adopted by the Chief Justice on June 22, 1995. Those guidelines, proposed by the Joint Judiciary–Bar Task Force on Certification of Court Reporters, indicate that

[a]n interpreter is needed if, upon examination by the court, (1) a party or witness is unable to speak English so as to be understood directly by counsel, court, and jury, or (2) if a party is unable to hear, understand, speak and/or use English sufficiently to comprehend the proceedings and to assist counsel in the conduct of the case.<sup>19</sup>

Supreme Court of Hawai'i, *Policies for Interpreted Proceedings in the Courts of the State of Hawai'i* Rule 1(A) (adopted June 22, 1995) (emphases added.)

[9] With these guidelines in mind, it cannot be said that Mother has demonstrated she was substantially prejudiced by the absence of an interpreter at some of the hearings. Several witnesses testified that Mother comprehends and speaks English in daily conversation, and specifically at home. The court also found that Mother “unders[ood] and responded in an intelligible manner to the questions posed.” Under the facts, this finding was not clearly erroneous. Mother was able to answer most questions without the aid of an interpreter, evidencing under the circumstances of this case that, although an interpreter at all stages would have been preferable, the absence of one did not substantially prejudice her.