

Date: 20081202

Docket: IMM-47-08

Citation: 2008 FC 1342

Ottawa, Ontario, December 2, 2008

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

SAM OR PHAN

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the panel), dated November 19, 2007, determining that the applicant is not a “refugee” pursuant to section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA), or a “person in need of protection” within the meaning of section 97 of the IRPA. The application was made under subsection 72(1) of the IRPA.

II. Factual background

[2] The applicant is a 63-year-old citizen of Cambodia. She has been widowed since 1977 and claims to have lost her husband at the hands of Pol Pot henchmen. She has four children, two of whom are Canadian citizens and live in Canada. The other two live in Cambodia.

[3] The applicant was a French teacher and administrative official with the Department of Education in Phnom Penh, until she retired in 2005, after which she continued to work at the French cultural centre in Phnom Penh.

[4] The applicant became a member of the Sam Rainsy Party, an opposition party, in 1997. She opposed corruption and the lack of democracy in the country led by the Cambodian People's Party – the CPP. She became more active in the Sam Rainsy Party several months before her retirement in 2005. She states that her activities consisted of distributing books to local communities, school supplies to students and food to labourers' families and to the needy. She also claims to have been involved in the preliminary meetings of the community elections scheduled for April 2007. She attended all the propaganda work meetings. In her personal information form (PIF), she wrote that since 1997, [TRANSLATION] "I worked to promote the awareness of and to instill democratic ideas regarding the rights and duties of citizens of democratic countries, in the spirit of people of my neighbourhood, particularly the young people."

[5] The applicant alleges that her activities did not go unnoticed by CPP officials. She testified that officials from different ministries attended the course that she was giving at the French cultural centre. In this course she talked about [TRANSLATION] "the country's current affairs." She said that

she also talked about political statements [TRANSLATION] “sometimes two or three minutes before the class”

[6] In her PIF, the applicant wrote that on September 14, 2005, she was threatened by CPP officials, who told her to stop working for the opposition party. However, in her testimony, she says that she was threatened on the telephone and [TRANSLATION] “by the sound of the voice, by the tone of the voice” she figured out that the threats were made by CPP officials.

[7] The applicant stated that there was gunfire in the direction of her home in November 2005. She also said that she was attacked in July 2006. During that attack, her attackers insulted her, telling her: [TRANSLATION] “Old woman, shut up if you want to live.”

[8] The applicant, fearing a violent death like that of her late husband, decided to leave the country. As she already had a Canadian visa to visit her daughters, she came to Canada on August 6, 2006, and filed her refugee claim on September 14, 2006, claiming refugee status on the basis of her political activities with the Sam Rainsy Party.

III. Impugned decision

[9] The panel determined that the applicant was not a Convention refugee or a person in need of protection. This is a summary of the panel’s decision dated November 19, 2007:

- The panel does not believe that the applicant, on a balance of probabilities, provided credible or trustworthy evidence supporting the existence of a connection between the problems she experienced in her country and her political activities;
- the applicant is merely a member of the Sam Rainsy Party, and she only became active in 2003;
- the activities that she led seemed to be largely community-based, and she was never hindered from carrying out any of her political activities;
- apart from her book distribution, the applicant's only other activities amounted to sharing her thoughts and reflections with her students at the French cultural centre;
- the incidents the applicant refers to appear to be tied to anonymous persons and since the applicant herself has no evidence establishing that these incidents were connected to alleged involvement in political activities, the panel determined that the applicant had been the victim of crime or criminal activities;
- the documentary evidence, while it refers to attacks against representatives of the Sam Rainsy Party, seems to emphasize the fact that the attacks are connected to actual political activities in the course of electoral campaigns. The applicant never participated in such a campaign; and

- finally, the fact that the applicant was able to travel outside the country on many occasions while she was a member of the Sam Rainsy Party establishes that she was not considered a threat to the party in power.

IV. Issue

[10] Did the panel err in determining that there was no connection between the persecution suffered by the applicant and her political activities?

V. Standard of review

[11] The determination that there was no connection between the attacks and the applicant's political activities bears on a question of fact. The case law is consistent that the appropriate standard for such determinations is that of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, 1 S.C.R. 190 at paragraph 51).

[12] The reasonableness of a decision is concerned "mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law," *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47.

VI. Analysis

[13] The panel determined that there was no connection between the persecution suffered by the applicant and her political activities. This was a determinative finding of the panel.

[14] The panel acknowledges that the documentary evidence refers to attacks against representatives of the Sam Rainsy Party and specifically those connected with true political activities. The applicant's political activities, summarized above, were not challenged by the panel. Her membership in the Sam Rainsy Party was not, either. However, the panel determined that the alleged threats and physical attack against the applicant were the product of criminal activity and not related to the applicant's political activities.

[15] The panel did not refer at all to the applicant's credibility. We must therefore presume that the applicant's credibility was not questioned by the panel. In this case, according to the applicant's testimony, the alleged threats explicitly referred to her political activities. I refer to certain relevant passages from her testimony at the hearing before the panel:

(a) At page 155 of the tribunal record:

[TRANSLATION]

Q. Was this the first. . . the only time that you had trouble in your country?

A. It was the second time, but the first time was in . . . was in September, yes, but that, that was just the verbal threat, then on the telephone.

Q. By whom?

A. The sound of the voice, the tone of the voice, I deduced that they were . . . they were CPP officials, i.e. people who . . .

Q. Was . . .

A. . . . from the party of the Cambodian people.

Q. Okay, but what was the message?

A. The message was: “Old woman, mind your own business, drink at the pagoda instead of . . .,” because in my country, people, especially people my age . . . people my age, 60, 55 years old like that . . .

- Um-hum.

A. . . . you drink at the pagoda to say your prayers, something like that.

(b) at page 160 of the tribunal record:

[TRANSLATION]

Q. Okay, so, can you tell me what is happening, what happened in July?

A. Yes. In July, on July 19, yes it was July 19. When I went home, it was . . . that day then I thought that it was a bad day for me, my son had trouble, he could not come to pick me up and I took a moto-taxi, right, a moto-taxi there and we arrived nearby my home.

So, about 400, 500 metres from my home, there were two motorbikes approaching me and. . . the one that was in a group, he gave me . . . he punched me here from behind.

- Um-hum.

A. Insulting me, saying: “Old woman, shut your mouth if you want to live.” So, I fell to the ground, but before falling, I had the . . . by reflex I put my arm like this.

- Um-hum.

A. Yes and then I fell into the road and there. Along my body here, this part and this part . . .

- Okay.

A. . . . it was very painful and then, I was brought home.

[16] Also, in the personal information form, the applicant had already explained the source of the threats she had experienced. She wrote the following in the PIF:

[TRANSLATION]

I was threatened several times by the people from the party that is now in power in Cambodia, i.e. the “Cambodian People’s Party” and that was because of my activities as a member of the “Sam Rainsy Party” with my students and the inhabitants.

[17] The panel’s finding to the effect that the threats and physical attacks allegedly made against the applicant were the result of criminal activity is speculative. There is no tangible evidence to this effect. Indeed, the applicant’s testimonial evidence is to the effect that these threats and the attack are connected to her political activities. Although she was unable to identify her attackers, she testified that they expressly told her to be quiet if she valued her life. This evidence is inconsistent with the panel’s finding. Although the panel was entitled to reject this testimony of the applicant, considering the relevance and the importance of this evidence in the context of the refugee claim, and that the panel did not impugn the applicant’s credibility, it had to specifically address this evidence and explain why it was not accepted. This was not done. I have no choice but to find that the panel failed to consider this evidence of the applicant on an essential point of her claim, *Cepeda-Gutierrez v. Canada (M.C.I.)*, [1998] F.C.J. No. 1425 (Lexis) at paragraph 17. The panel therefore made its decision without taking into account the evidence before it. This omission amounts to a reviewable error.

VII. Conclusion

[18] For these reasons, the application for judicial review will be allowed. The matter will be referred for reconsideration by a differently constituted panel in accordance with these reasons.

[19] The parties did not propose a serious question of general importance for certification as contemplated by paragraph 74(*d*) of the IRPA. I am satisfied that such a question is not raised in this matter. Therefore, no question will be certified.

JUDGMENT

THE COURT ORDERS AND DECIDES that:

1. The application for judicial review be allowed. The matter shall be referred for reconsideration by a differently constituted panel in accordance with these reasons.

2. No serious question of general importance is certified.

“Edmond P. Blanchard”

Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-47-08

STYLE OF CAUSE: SAM OR PHAN v. MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: September 17, 2008

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

DATE OF REASONS: December 2, 2008

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