

Federal Court



Cour fédérale

Date: 20181114

Docket: IMM-4259-17

Citation: 2018 FC 1147

Ottawa, Ontario, November 14, 2018

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

SOPHORN SAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Sophorn Sar, the Applicant, is a citizen of Cambodia, now living in Thailand with his family. He seeks judicial review of a decision (Decision) in which his application for a permanent resident visa was denied on the basis that he was neither a member of the Convention refugee abroad class nor a member of the Humanitarian-protected persons abroad designated class, notably the country of asylum class, pursuant to section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) and sections 145 to 147 of the *Immigration and Refugee*

Protection Regulations, SOR/2002-227 (Regulations). The application for judicial review is brought pursuant to subsection 72(1) of the IRPA. The Decision was made by an immigration officer (Officer) of the High Commission of Canada, Immigration Section, in Singapore. The Officer was not satisfied the Applicant had a well-founded fear of persecution in Cambodia.

[2] For the reasons that follow, this application for judicial review will be dismissed.

I. Background

[3] The Applicant lived in rural Cambodia and was a people's representative on the local commune association. He was also a member of the Sam Rainsy Party (SRP), an opposition political party. The Applicant states that his political views made him a target of local government officials.

[4] The events that led to the Applicant fleeing from his village, first to Phnom Penh, Cambodia and then to Thailand, occurred in 2012. In September 2012, the Applicant states that he was sent by the local commune chief to inspect a bridge that had fallen into disrepair. The Applicant confirmed the state of the bridge and erected a barricade to prevent access to it. On his return to the village, he was accused by the commune chief of having erected the barricade in order to collect bribes. The Applicant denied the accusation. He states that the commune chief made the accusation because he feared losing a local election to the Applicant. At his interview with the Officer, the Applicant claimed that the authorities could have killed him when he went to inspect the remote bridge but that he had taken other people with him as witnesses, including a member of an environmental organization and a number of reporters.

[5] A summons for the Applicant to appear in court to answer a charge of extortion was issued on October 11, 2012. The summons set an appearance date of October 24, 2012. The Applicant continued to work normally in his village throughout this period. On October 23, 2012, the Applicant's aunt advised him not to appear in court the following day in accordance with the summons because he would be arrested. The Applicant did not appear in court on October 24. He went to work on October 25, 2012 in his customary manner. While at work that day, the Applicant learned that one of the reporters and the environmentalist who had accompanied him to the bridge the previous month had been arrested.

[6] On November 12, 2012, the Applicant was informed by his cousin, a local policeman, that he was to be arrested. The Applicant fled to Phnom Penh, Cambodia where his family later joined him.

[7] The Applicant remained in Phnom Penh for two months. He and his family travelled to Thailand in January 2013. The Applicant made an asylum claim at the local United Nations High Commission for Refugees (UNHCR) office. He was interviewed for a full day and was approved and recognized as a protected person awaiting resettlement.

[8] The Applicant made an application for permanent residence in Canada and was interviewed by the Officer on December 3, 2015.

II. Decision under Review

[9] The Officer's decision is dated July 25, 2017 and consists of a letter containing the Officer's conclusion that the Applicant was a member of neither the Convention refugee abroad class, nor the Humanitarian-protected persons abroad designated class, and the Officer's Global Case Management System (GCMS) notes. The GCMS notes recount the December 3, 2015 interview of the Applicant and his wife, the Officer's conclusions regarding the Applicant's narrative and, ultimately, her decision refusing his application. The Officer was not satisfied that the Applicant had established a well-founded fear of persecution or that he was seriously and personally affected by civil war, armed conflict, or a massive violation of human rights.

[10] In the GCMS notes, the Officer listed her questions to the Applicant and his responses regarding: his fear of arrest due to his position as a people's representative on the commune association; the events surrounding the September 2012 work trip to the damaged bridge; the extortion accusation by the commune chief; the issuance of the summons to appear; and, the Applicant's failure to appear in court in accordance with the summons. The Officer focused on the fact that the Applicant remained in his village and worked in the normal course past the date set for his appearance in court despite his fear of arrest and injury by local government officials. She also considered the Applicant's stated fear of arrest due to his belief that the Cambodian courts lacked independence and were under the influence of the government.

[11] The Officer summarized her interview with the Applicant's wife, stating that Mrs. Sar had little idea as to why they left Cambodia. In her summary, the Officer referred to the actions

of Mrs. Sar in disciplining their son, who was also present. The Officer intervened twice to ask Mrs. Sar to refrain from hitting the child.

[12] The Officer reviewed documents that were provided to her at the interview. Although the documents had not been translated, the Officer asked the interpreter to explain what was written in the documents. The documents were identified as a letter of membership in the SRP, an SRP membership card, two summonses to appear, a letter of position with the local commune and the birth certificate of the Applicant's son.

[13] The Officer's decision to deny the Applicant's request for a permanent resident visa was based on her concerns with the credibility of the Applicant's claim. Although the Applicant stated that the commune authorities intended to arrest and possibly harm him, the Officer emphasized that the authorities had many opportunities to arrest the Applicant while he continued to work normally in the village after the issuance of the summons. She did not find it credible that the authorities would refrain from arresting him in the weeks between the September 2012 journey to the bridge and his departure for Phnom Penh in November 2012. The Officer also noted discrepancies between the Resettlement Registration Form (RRF) completed by the Applicant in the UNHCR process and his evidence during the interview with respect to the basis for the extortion charge against him.

[14] The Officer referred to the fact that the Applicant was able to stay without issue for two months in Phnom Penh. She was concerned that the Applicant had a durable solution in Phnom Penh.

[15] Finally, the Officer stated that she put her credibility concerns to the Applicant at the interview. However, he did not respond nor did he bring forward new information to address her concerns. In conclusion, the Officer was not satisfied that there was a serious possibility or a reasonable chance that the Applicant had a well-founded fear of persecution.

III. Issues

[16] The Applicant has raised numerous issues in this application for judicial review. Broadly, they can be organized as issues questioning the procedural fairness accorded to the Applicant and issues questioning the reasonableness of the Decision itself.

[17] I have summarized and organized the issues raised by the Applicant as follows:

1. Did the Officer breach the Applicant's right to procedural fairness by failing to provide him adequate notice of the reason for his interview?
2. Did the Officer breach the Applicant's right to procedural fairness by failing to conduct a fair interview, particularly in failing to raise with the Applicant her concerns regarding his credibility and in failing to comprehensively question the Applicant during the interview?
3. Was the Decision reasonable?

IV. Standard of review

[18] The issues of procedural fairness raised by the Applicant will be reviewed for correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-56 (*Canadian Pacific*)). The review focuses on the procedures followed in arriving at the Decision and not on the substance or merits of the case. I must assess whether the process followed by the Officer was just and fair having

regard to all of the Applicant's circumstances, his substantive rights at stake and the other contextual factors identified by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific* at para 54):

[54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at para. 21) that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.

[19] Turning to the issues raised by the Applicant with respect to the Decision itself, it is well-established that an officer's decision as to whether an applicant is a member of the Convention refugee abroad class or the country of asylum class is a question of mixed fact and law reviewable on the reasonableness standard (*Gebrewldi v Canada (Citizenship and Immigration)*, 2017 FC 621 at para 14; *Pushparasa v Canada (Citizenship and Immigration)*, 2015 FC 828 at para 19 (*Pushparasa*); *Bakhtiari v Canada (Citizenship and Immigration)*, 2013 FC 1229 at paras 22-23; *Saifee v Canada (Citizenship and Immigration)*, 2010 FC 589 at para 25). Consequently, this Court will only interfere with an officer's decision if the decision lacks justification, transparency, or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of the case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

1. *Did the Officer breach the Applicant's right to procedural fairness by failing to provide him adequate notice of the reason for his interview?*

[20] The letter notifying the Applicant of his interview is dated November 11, 2015 (Interview Letter). The first line of the Interview Letter stated:

This refers to your application for resettlement to Canada as a refugee.

[21] The Interview Letter referred to the date and time for the Applicant's personal interview and advised the Applicant that all family members included in his application must accompany him to the interview. The Interview Letter also required the Applicant to bring with him all documents in support of his refugee application and indicated how they should be organized.

[22] The Applicant submits that he was treated unfairly as he was not given adequate notice of the reason for the interview. He argues that the Interview Letter was completely silent in this regard. The Applicant also submits that the Interview Letter gave no indication that the Officer had or may have concerns regarding the genuineness of the Applicant's fear of persecution. Further, as certain of the Officer's concerns would have been evident from his application documents, those concerns should have been raised to the Applicant in advance of the interview. The Applicant states that he had already been interviewed by the UNHCR for one full day and did not appreciate that the Canadian process was a wholly separate process that would involve an independent review of his claim.

[23] The Respondent submits that the Applicant was adequately advised of the purpose of the interview with the Officer. The Interview Letter clearly stated that the interview was in relation to the Applicant's application for resettlement in Canada as a refugee. The Respondent argues that the Officer had no duty to advise the Applicant of a statutory requirement. It was the Applicant's obligation to establish that he was a Convention refugee.

[24] I agree with the Respondent and find that there was no breach of the Applicant's right to know the subject matter and purpose of the interview. In making this finding, I have taken into account the serious, substantive rights of the Applicant at risk in this process. However, the Interview Letter informed the Applicant of the purpose of the interview: a personal interview regarding his application for resettlement in Canada as a refugee. The sentence was clearly and simply worded and featured prominently as its own paragraph. The Interview Letter explained who must attend the interview and the documents the Applicant was required to bring.

[25] The Applicant relies on the recent case of *Johnson v Canada (Citizenship and Immigration)*, 2017 FC 550 (*Johnson*), in support of his argument. The central issue in *Johnson* was the adequacy of the notice provided to Mr. Johnson of an interview regarding his application for permanent residence under the spouse and common-law partner class. Justice Gleeson summarized his findings as follows (*Johnson* at para 15):

[15] In this case Mr. Johnson was told that the interview would address issues related to identity. He was told that his spouse need not come, although she did. He was given just over 2.5 hours' notice that the interview, to address concerns related to identity, would take place. He was not advised of the change in the purpose for the interview, that in changing the purpose of the interview it would be addressing an issue fundamental to his application for permanent residence as a spouse or that the interview would lead

to a sudden determinative decision. Considering these facts it is difficult to envisage how the Officer's decision to engage in questions related to s. 4 of the *IRPR* on the spot might be viewed as "adequate notice" as suggested by the Respondent or be procedurally fair in the context of section 4 of the *IRPR* in light of this Court's jurisprudence.

[26] The facts before the Court in *Johnson* were very different from those before me. In the present case, the subject matter of the interview was consistent with the purpose of the interview set forth in the Interview Letter. In *Johnson*, the interview extended well beyond the issue of Mr. Johnson's identity, which was the sole issue raised by the officer in arranging the interview, to address the genuineness of his marriage. In addition, with no notice, Mr. Johnson's wife was interviewed and questioned separately despite being informed she need not even attend the interview.

[27] The Applicant also submits that the Officer had a duty to specify in the Interview Letter her preliminary concerns with the Applicant's claim in order for him to know the case he had to meet. He argues that some of the concerns which became evident in the interview would have been known to the Officer in advance and should have been raised by her in the Interview Letter.

[28] The factual issues raised by the Officer in the interview and her concerns set out in the GCMS notes derive from the Applicant's responses to her various questions at the interview. This is not a case in which the Officer raised issues based on extrinsic documents or information, or issues that could not have been anticipated by the Applicant. The Officer's findings regarding the credibility of the Applicant's claim evolved from his narrative in the interview and could not have been put to the Applicant in advance. It was incumbent on the Applicant to be able to

address issues arising from his application and to establish his status as a Convention refugee to the satisfaction of the Officer. This was the case he had to meet.

2. *Did the Officer breach the Applicant's right to procedural fairness by failing to conduct a fair interview, particularly in failing to raise with the Applicant her concerns regarding his credibility and in failing to comprehensively question the Applicant during the interview?*

[29] The Applicant submits that the Officer breached his right to procedural fairness in failing to conduct a fair interview. He argues that the Officer prevented him from fully explaining his claim during the interview and created an adversarial atmosphere in the manner in which she posed her questions. The Applicant also argues that the Officer failed to put her credibility concerns to him in a meaningful way and did not provide him an opportunity during the interview to respond to those concerns. He states that the Officer failed to investigate his claim “with any fervor”. The Applicant relies on his affidavit dated November 25, 2017 in which he describes his experience in the interview.

[30] I have reviewed the Applicant's November 2017 affidavit, the Decision and the Officer's May 11, 2018 affidavit and responses to the written examination conducted by the Applicant. I fully accept that the Applicant's affidavit truthfully sets forth his recollections of the interview (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA)). However, the GCMS notes, which form part of the Decision (*Pushparasa* at para 15), contradict the Applicant's arguments of procedural unfairness. I find no breach of the Applicant's right to procedural fairness in the conduct of the interview by the Officer.

[31] The GCMS notes indicate that the Officer explained the purpose of the interview to the Applicant at the outset and asked whether he had any questions. The Officer posed a series of questions to the Applicant during the hearing regarding the details of his claim. The Officer's questions were both open-ended, often simply asking "why?" or "how?", and specific, for example "why is this dangerous?", "why [is he] falsely accusing you?", "why arrest them and not you?" The Applicant's responses were brief and provided few details. The Officer prompted him with follow-up questions a number of times. At the end of the interview, the Officer set out her credibility concerns and provided the Applicant an opportunity to respond. There is no evidence that the Officer cautioned the Applicant to only answer the questions asked or that she repeatedly prevented him from providing information, as argued by the Applicant. Rather, she made genuine attempts to elicit his story.

[32] The Applicant also argues that the Officer's obligation to be procedurally fair required the Officer to provide him the opportunity to address her concerns following the interview. The Applicant cites the cases of *Johnson (supra)* and *Ge v Canada (Citizenship and Immigration)*, 2017 FC 594, in support of his submission. In *Johnson*, the issue addressed by Justice Gleeson was the lack of adequate notice provided prior to an interview. In *Ge*, the issue before Justice Southcott was whether an officer had a duty to raise with the applicants in question concerns that they had not been truthful in their responses to a procedural fairness letter. In the present case, the Officer made her decision on the basis of the application before her and the Applicant's evidence provided at the interview. The Officer summarized the determinative factors in the Decision and put them to the Applicant at the end of the interview. She was not required to provide the Applicant with a preview of the Decision for comment and rebuttal.

[33] Finally, the Applicant submits that the reasons given by the Officer were inadequate. He argues that a number of the Officer's findings are not well-explained or substantiated with any detail. In my view, the Applicant's arguments in this regard go to the reasonableness of the Decision and not to the adequacy of reasons as a matter of procedural fairness.

[34] The reasons given for a decision are considered reasonable "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). In the present case, the Officer found that the Applicant lacked credibility and, as a result, had not established his fear of persecution in Cambodia. The GCMS notes set out the factual basis underpinning the Officer's findings of fact and credibility. Her negative credibility inferences were drawn directly from the facts as found. The Decision was brief but the reasons given by the Officer intelligibly communicated to the Applicant the basis of the Decision having regard to its effect on the Applicant and the context in which it was made (*Wang v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1298 at paras 19-20). The Applicant could and has effectively challenged the basis of the Officer's findings. On review, I am able to understand why the Officer made her decision and to determine whether it was reasonable.

3. *Was the Officer's Decision reasonable?*

[35] A review of the Officer's Decision for reasonableness requires me to consider whether the Decision was intelligible, transparent and justifiable in light of the evidence before the Officer, and whether her conclusion was one of the possible and reasonable outcomes for the

Applicant's case. I have reviewed the Decision and considered the parties' submissions against these parameters and find that the Decision was reasonable.

[36] The Applicant submits that the Officer's Decision resulted from a complete failure or disinterest in investigating the pertinent aspects of the Applicant's claim. I have addressed this submission in my review of the Applicant's procedural fairness arguments. The Applicant also suggests that the Officer was influenced by her disdain for the Applicant's wife during the interview. In this regard, I will state only that there is no evidence on the record of any misconduct or bias on the part of the Officer. The GCMS notes properly focus on the Applicant's narrative and reflect the Officer's findings and conclusions on the central issue of the Applicant's credibility.

[37] The Applicant briefly argued that the Officer unreasonably failed to take into account translation and cultural issues in her assessment of his evidence but I note that he raised no issues with the translator provided to him. There is no evidence in the record that the Applicant struggled with the questions being put to him or with the content of the Officer's observations during the interview. Similarly, there is no evidence or suggestion of cultural issues at play in the interview of which the Officer ought to have been aware.

[38] The Applicant argues that the Officer's findings were speculative and unreasonable and makes two main submissions in support of his position. First, the Applicant questions the Officer's finding that his conduct in remaining in his village following the extortion accusation,

the issuance of the October 12, 2012 summons, and his court date, weakened his alleged fear of persecution.

[39] The Officer reviewed in detail with the Applicant the time period between the September 2012 trip to the damaged bridge and his departure from his village. The Officer asked the Applicant what he did after being accused of extortion, whether he was arrested and why the other individuals who accompanied him to the bridge were arrested and he was not. She referred to the Applicant's fear that the commune chief would arrest and harm him and yet the only action taken against him was the issuance of a summons two weeks after the trip to the bridge. The Officer stated that it was not credible that the authorities would wait to arrest him if, in fact, that was their goal. They had many opportunities to arrest the Applicant as he openly remained in the village until mid-November.

[40] The Applicant's fear of injury and persecution at the hands of the local officials was contradicted by the fact he remained in his village and continued to work normally notwithstanding the issuance of a summons for his arrest. In other words, his own conduct negatively affected the credibility of his narrative. The Officer's reliance on this contradiction was not unreasonable given the chronology of events in the Applicant's village.

[41] Second, the Applicant argues that the Officer erred in focusing on the discrepancy between his evidence at the interview and the detail provided in his RRF regarding the factual basis of the extortion charge against him. The Applicant states that it is the charge itself and not the facts underlying the charge that is relevant to his fear of persecution.

[42] The Officer noted the unexplained discrepancy in the summary of her negative assessment of the Applicant's credibility. She provided the Applicant an opportunity to explain the discrepancy but he did not do so. The Officer took into account the contradiction between the RRF and the facts recounted by the Applicant at the interview in making her credibility assessment and I find that she did not err in doing so. The factual basis of the charge against the Applicant was not merely a collateral matter in the Applicant's story. It was one of the few instances in which he offered sufficient detail of the events in question to allow the Officer to probe his story. In addition, she did not place undue weight on this element of her analysis. It was an ancillary factor in the analysis. When read as a whole, the Officer's conclusions with respect to the Applicant's narrative as it related to his fear of persecution in Cambodia rest reasonably on all of the facts put before the Officer by the Applicant himself.

[43] Finally, the Applicant submits that the Officer erred in her reference to Phnom Penh as an IFA or durable solution for the Applicant. He states that the Officer made a speculative determination in her reasons of "a durable solution, legally termed an Internal Flight Alternative (IFA)".

[44] The existence of a durable solution is referred to in paragraph 139(1)(d) of the Regulations and is relevant to the issuance of a permanent resident visa to a foreign national in need of protection. However, the determinative issue in the Applicant's case was whether he had established his fear of persecution. As stated above, the Officer found that he failed to do so. Therefore, he was not a foreign national in need of protection for purposes of subsection 139(1).

The issue of a durable solution for the Applicant, a second stage of inquiry, was not relevant to the Decision and the Officer made no finding in this regard.

VI. Conclusion

[45] The application is dismissed.

[46] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-4259-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4259-17

STYLE OF CAUSE: SOPHORN SAR v THE MINISTER OF CITIZENSHIP
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PLACE OF HEARING: TORONTO, ONTARIO

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