

Date: 20081010

Docket: IMM-647-08

Citation: 2008 FC 1145

OTTAWA, Ontario, October 10, 2008

PRESENT: The Honourable Louis S. Tannenbaum

BETWEEN:

PHAKCHIRA PHROMSENA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant in this matter seeks judicial review of the decision of the Refugee Protection Division (RPD) that she is neither a Convention refugee nor a person in need of protection. She claimed protection on the basis that she feared persecution by her ex-husband and by gangsters to whom she owes money in Thailand.

[2] The RPD noted that Ms. Phromsena had not gone to the police or sought any other form of protection after she was abused by her ex-husband or threatened by the gangsters. On the basis of inconsistencies and contradictions in her testimony, she was found not to be a credible witness. The RPD found it to be an unusual coincidence that the applicant's ex-husband had arrived in Canada

shortly after she did and pointed out that she had not approached Canadian authorities for assistance after her ex-husband allegedly strangled her in this country.

[3] The RPD also noted that an internal flight alternative (IFA) likely existed for the applicant and that she would reasonably be expected to avail herself of such before fleeing to another country. It was also noted that Ms. Phromsena could sell land that she owns in Thailand to pay off the gangsters who she claims would harm her due to her unpaid debts, which arose either due to her ex-husband's drug use or from opening a business.

[4] The applicant contests the decision of the RPD on three points:

- a. The Panel failed to provide her with a fair hearing when it refused to adjourn her hearing to allow her new counsel to assist her;
- b. Her right to a fair hearing was denied when the Refugee Protection Officer was permitted to disclose documents in the middle of the hearing on which the decision was based in part; and
- c. The Panel ignored evidence directly relevant which contradicts its decision.

[5] The right to counsel and the timing of disclosure of documents are both issues of procedural fairness. Should the procedure which led to the decision of the RPD be found to have been unfair, the decision must be vacated unless it is inevitable that the claim would have been rejected: *Cortes Silva v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 738, 265 F.T.R. 297. The

assessment of the evidence is a matter squarely within the expertise of the RPD and deference should be given it. A decision on the evidence will be upheld unless it is unreasonable.

[6] The applicant had clearly made her intentions known that she wished to be represented by counsel when she hired her previous counsel. Her subsequent counsel, retained following a breakdown in her relationship with her first counsel, attempted to obtain an adjournment of her hearing and went so far as to indicate that he would be available for a hearing the day after that scheduled. The applicant submits that it was an unfair exercise of the RPD's discretion to refuse his request. She further argues that it was also unfair for the RPD to fail to record any discussion which took place with the unrepresented applicant in order to allow her to fully understand its full reason for denying the requested adjournment.

[7] The respondent counters that the right to counsel is not absolute and that a fair hearing was not denied in this case as the issues were not complex and the applicant was properly able to represent her own interests and to explain the basis of her claim to the RPD: *Mervilus v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206, 262 F.T.R. 186.

[8] While it is correct that some circumstances require an applicant to be represented in order to ensure that his or her case is decided according to natural justice, the requirement of representation is not absolute. The decision to adjourn a scheduled hearing is discretionary and due deference must be shown to the RPD in its scheduling of hearings. The current case does not fall within the category described by Justice Sean J. Harrington at paragraph 25 of *Mervilus*. It must also be noted

that the transcript of the hearing shows that the applicant indicated to the RPD at the outset that it was her preference to continue with the hearing in the absence of her counsel. I do not find that the refusal to adjourn the hearing in order to allow the applicant to be represented resulted in a breach of procedural fairness.

[9] Next, the applicant submits that her right to procedural fairness was denied by the reliance of the RPD on documents which were disclosed in the middle of the hearing. The failure to disclose documentary evidence in sufficient time to allow the applicant to make ‘full answer and defence’ is a breach of natural justice: *Nrecaj v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 630, 65 F.T.R. 171.

[10] The respondent answers that the documents disclosed mid-hearing were not relied upon by the RPD as they were not directly relevant to the applicant’s case. One concerned the criminalization of marital rape in Thailand and the other explained limitations on the access by media to information in the hands of the authorities regarding domestic violence. Both documents are only relevant to the circumstances of the applicant in giving some context of the seriousness with which Thai authorities view domestic violence.

[11] The law is clear that an applicant must be permitted to know what evidence will be used in the examination of his or her claim in order to allow for the provision of explanations. That being said, evidence which is only peripherally relevant to an applicant’s claim and which would not require an explanation cannot, by its very nature, be relevant to a ‘full answer and defence’. In the

case at bar, I cannot see how the applicant would have needed to address the two documents the timing of disclosure of which she contests. The RPD clearly understood her claim and the evidence surrounding it. It is clear from the transcript, as well, that the Refugee Protection Officer ensured that the applicant had seen, in a pre-hearing conference, all the documentary evidence which she would be presenting. Ms. Phromsena was aware of the 'case she had to meet' and the duty to provide a fair hearing was not breached.

[12] Finally, the applicant submits that the RPD erred in ignoring documentary evidence which describes the ineffectiveness of measures adopted by the Thai authorities to counter domestic violence and which supported her contention that the authorities would fail to become involved in domestic abuse matters.

[13] The respondent submits that the RPD need not refer in its reasons to every piece of evidence proffered by an applicant. The RPD's serious concerns about the credibility of the applicant were combined with its assessment of the documentary evidence and resulted in the negative decision on her refugee claim. Such assessment was open to the Panel and was not in error.

[14] It is trite law that the RPD is presumed to have considered all the evidence before it absent significant indications to the contrary: see, for example, *Florea v. Canada (Minister of Employment and Immigration)* (F.C.A.), [1993] F.C.J. No. 598. Having found the applicant's story not to be credible, the Panel is not then to be faulted for failing to address documentary evidence which was

not relevant to that same story. The Panel did not ignore relevant evidence and its decision was not unreasonable. Accordingly, the application for judicial review will be dismissed.

[15] No question of general importance has been proposed for certification and none arises on these facts.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. No questions will be certified.

"Louis S. Tannenbaum"

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-647-08

STYLE OF CAUSE: PHAKCHIRA PHROMSENA v. M.C.I.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 2, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** TANNENBAUM D.J.

DATED: October 10, 2008

APPEARANCES:

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