

Federal Court



Cour fédérale

Date: 20160210

Docket: IMM-3451-15

Citation: 2016 FC 178

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 10, 2016

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

SOVANNA RETH SARY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Sovanna Reth Sary, is a Cambodian citizen. In 2010, when he was working in a restaurant in Phnom Penh, he received an offer to work in a restaurant in

Trois-Rivières, Quebec. Mr. Sary accepted, obtained his visa and arrived in Canada in March 2011. He was 19 years old at the time.

[1] The owner of the restaurant in Trois-Rivières apparently confiscated Mr. Sary's passport upon his arrival and, for the following two and a half years, Mr. Sary apparently worked 12 hours a day, six days a week. Mr. Sary says he was not remunerated for his work, because the restaurant owner claimed that he had to reimburse the visa fees incurred by his network in Cambodia. When Mr. Sary confronted the restaurant owner regarding this matter, he apparently received death threats.

[2] In June 2014, after finally having obtained his passport, Mr. Sary fled the restaurant with the help of a customer, and in July, applied for refugee status in Canada, citing his situation as a victim of human trafficking. The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada denied Mr. Sary's application in November 2014 on the grounds that he lacked credibility. Mr. Sary submitted an appeal to the Refugee Appeal Division [RAD], which also denied his application in June 2015 and confirmed that Mr. Sary is not considered a refugee or a person in need of protection under Sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA].

[3] Mr. Sary is now calling for a judicial review of this RAD decision denying his application. He argues that in rendering its decision, the RAD did not have sufficient grounds to doubt his credibility and that it failed to comply with the rules of procedural fairness by adding a new reason in the assessment of his lack of credibility. Mr. Sary asked the Court to set aside the

RAD's decision, and refer the matter back for redetermination before a differently constituted panel, in light of all the evidence submitted.

[4] The following issues are in dispute:

- Did the RAD err in finding that Mr. Sary is not credible?
- Did the RAD breach the rules of procedural fairness in dealing with Mr. Sary's application?

[5] For the reasons presented below, Mr. Sary's application for judicial review must fail. The Court finds that the RAD did not bend the rules of procedural fairness and that its findings on Mr. Sary's lack of credibility were reasonable and clearly fall within a range of possible, acceptable outcomes in the circumstances.

II. Background

A. *Decision*

[6] In its June 2015 decision, the Refugee Appeal Division confirmed the Refugee Protection Division's decision that Mr. Sary is not a Convention refugee under Section 96 of the IRPA or a person in need of protection under Section 97 of the same Act. Its decision was based on Mr. Sary's lack of credibility, and the RAD related several reasons to support this finding.

[7] As background information, the RAD noted the uncertain status of the law regarding the RAD's role and indicated that it would follow the principles set out by the Federal Court in

Huruglica v. Canada (Citizenship and Immigration), 2014 FC 799. According^F to these principles, the RAD must act as an appellate tribunal and perform its own assessment of the evidence, while deferring to the RPD on issues of credibility.

[8] In its review, the RAD first confirmed the RPD's decision to grant little probative value to a letter from a certain Mr. Ophinaz because he did not demonstrate objective and independent knowledge of the death threats allegedly received by Mr. Sary. Next, the RAD confirmed the RPD's finding that Mr. Sary's refugee claim form did not identify Cambodian head cook Ek Vuthy as his persecuting agent. According to the RAD, the document did not support the conclusion that Mr. Vuthy was "the person in Cambodia" referred to in Mr. Sary's statement. Rather, the RAD determined that Mr. Vuthy, who had initially introduced Mr. Sary to the owner of the Canadian restaurant, cannot be considered to be involved in human trafficking.

[9] The RAD also identified a contradiction in the circumstances surrounding Mr. Sary's hiring at the restaurant in Trois-Rivières: Mr. Sary said that Mr. Vuthy had introduced him to the restaurant owner, whereas he had previously declared, when applying for his Canadian visa, that he had found the job through the cooking school where he had studied.

[10] The RAD also noted that although the letter written by Mr. Sary's father identified Mr. Vuthy, it did not corroborate Mr. Sary's testimony that his father had gone to see the police. Mr. Sary's refugee claim form made no mention of this either. Also, since Mr. Sary's father was still living in the same location in Cambodia, the RAD believed there was no reason to fear

Mr. Vuthy. The RAD therefore confirmed the RPD's finding that Mr. Sary did not demonstrate that Mr. Vuthy would act on the threats he allegedly made.

[11] Finally, the RAD did not believe that Mr. Sary was a victim of human trafficking, because it found it implausible that the Trois-Rivières restaurant owner would give Mr. Sary his passport back and let him go if he were involved in human trafficking in collusion with Mr. Vuthy. In addition, the RAD noted that there was no evidence that Canadian police were notified about a clandestine immigration network in Trois-Rivières.

[12] The RAD found that Mr. Sary did not meet his burden of proof because he did not submit any credible evidence to support his statement that he was a victim of human trafficking and that he was likely to be subjected to torture, harm or cruel and unusual treatment upon his return to Cambodia. The RAD therefore confirmed the determination made by the RPD regarding Mr. Sary.

B. *Standard of review*

[13] Reasonableness is the standard of review for assessing issues of credibility and the assessment of evidence performed by the RAD, because these are questions of mixed fact and law (*Bikoko v. Canada (Citizenship and Immigration)*, 2015 FC 1313 at paragraph 8). Mr. Sary does not challenge this standard.

[14] In judicial review, reasonableness 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. The grounds for a decision are deemed 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 [*Newfoundland Nurses*] at paragraph 16; *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paragraph 47). In this context, the Court must show restraint and deference to the tribunal’s decision and cannot substitute its own reasons, but it may, if it finds it necessary, look to the record for the purpose of assessing the reasonableness of the outcome (*Newfoundland Nurses* at paragraph 15).

[15] Procedural fairness issues, for their part, are to be determined on the basis of a correctness standard of review (*Mission Institution v. Khela*, 2014 SCC 24 at paragraph 79; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 [*Khosa*] at paragraph 43). The question that now arises is not really whether the decision was “correct”, but rather whether, in the end, the process followed by the decision-maker was fair (*Majdalani v. Canada (Citizenship and Immigration)*, 2015 FC 294 at paragraph 15; *Krishnamoorthy v. Canada (Citizenship and Immigration)*, 2011 FC 1342 at paragraph 13).

III. Analysis

A. *Did the RAD err in finding that Mr. Sary is not credible?*

[16] Mr. Sary maintains that the RAD did not have sufficient grounds to doubt his credibility and that it failed to take into account several explanations provided during his testimony at the hearing and several arguments raised in his factum. He asserts that the RAD put too much emphasis on secondary considerations, such as the fact that he did not include Mr. Vuthy's name in his refugee claim form or that his father had not had any problems. Mr. Sary argues that even if these findings were sufficient in law, they are not supported by the facts. According to him, the evidence reveals that he has always maintained that Mr. Vuthy was his persecuting agent. In addition, the death threats made against Mr. Sary's father legitimize his fear of reprisal.

[17] Mr. Sary argues that the testimony of a refugee claimant is presumed to be true (*Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA) [*Maldonado*]), and that the RAD's decision must be based on the balance of probabilities (*Orelien v. Canada (Minister of Employment and Immigration)*, [1992] 1 FC 592 (FCA) at page 605). Finally, Mr. Sary criticizes the RAD for having failed to study some of the RPD's findings on alleged contradictions regarding the amount owing by Mr. Sary to his persecuting agents and on the length of time Mr. Sary took to claim refugee status once his visa expired in 2012.

[18] The Court does not agree and does not subscribe to Mr. Sary's arguments. Rather, the Court shares the Minister's opinion that all the evidence in the docket was considered by the RAD and amply supports the RAD's findings regarding Mr. Sary's lack of credibility.

[19] From the outset, the Court must clarify that the presumption of truthfulness mentioned in *Maldonado* is not unchallengeable, and the applicant's lack of credibility suffices to rebut it. Also, even if some elements do not appear to be sufficient when taken individually, the accumulation of contradictions or omissions may serve as a basis for a negative credibility finding (*Quintero Cienfuegos v. Canada (The Minister of Citizenship and Immigration)*, 2009 FC 1262 at paragraph 1).

[20] The RAD's findings on Mr. Sary's credibility were based on several valid grounds, including the following: the lack of probative value of Mr. Ophinaz's letter; Mr. Sary's failure to identify Mr. Vuthy as his persecuting agent in his refugee claim; the absence of evidence that Mr. Vuthy will act on his alleged threats against Mr. Sary's father; the implausibility of collusion between Mr. Vuthy and the Trois-Rivières restaurant owner; and Mr. Sary's inability to meet his burden of proof.

[21] The RAD was right to focus on Mr. Sary's failure to clearly identify Mr. Vuthy as the persecuting agent in his refugee claim form and on the fact that Mr. Sary's father had not had any problems. Mr. Sary emphasizes his statement and the fact that Mr. Vuthy is clearly identified in it as the "person in Cambodia." However, following its review, the RAD decided otherwise, and the Court is not at all convinced, after reviewing this document and the words used by Mr. Sary, that the RAD's reading is unreasonable. In addition, the Court notes that the RAD also considered several other elements such as the lack of documentary evidence that police were contacted and the implausibility of Mr. Sary's explanation of how he recovered his passport after allegedly having been submitted to two and a half years of forced labour.

[22] The Court is not convinced that the RAD committed any errors in assessing Mr. Sary's credibility. It is well established that the Court must show significant deference to the RPD and the RAD with respect to the assessment of refugee claimants' credibility (*Dunsmuir* at paragraph 53; *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at paragraph 4; *Rahal v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at paragraph 22). Credibility issues are one of the RAD's core competencies (*Pepaj v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 938 at paragraph 13). All of the RAD's determinations that provide the basis for its finding that Mr. Sary is not credible are reasonable and, according to the Court, there is no doubt that they fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[23] Moreover, the fact that a piece of evidence is not expressly dealt with in a decision does not render it unreasonable when there are sufficient grounds to assess the tribunal's reasoning (*Corzas Monjaras v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 771 at paragraph 20; *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] FCA No. 1425 [*Cepeda-Gutierrez*] at paragraph 16). In this case, the Court is satisfied that the RAD considered all the evidence, even if it does not refer directly to all its components. A tribunal is presumed to have considered all the evidence and is not required to refer to each constituent element (*Newfoundland Nurses* at paragraph 16). It is only when a tribunal is silent on evidence clearly pointing to the opposite conclusion that the Court can intervene and infer that the tribunal overlooked the contradictory evidence when making its finding of fact (*Cepeda-Gutierrez* at paragraph 17). This is not the case here.

[24] The Court's mission is not to reassess pieces of evidence in the docket; rather, it must limit itself to finding whether a conclusion is irrational or arbitrary. According to the reasonableness standard, it is sufficient that the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, and the Court not substitute its own opinion to that of the tribunal even if it could, in its own view, constitute a preferable outcome (*Khosa* at paragraph 59).

[25] The arguments put forward by Mr. Sary simply express his disagreement with the RAD's assessment of the evidence and in fact ask the Court to prefer its own opinion and reading to that of the RAD. However, this is not the Court's role in matters of judicial review (*Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at paragraph 99; *Cina v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 635 at paragraph 67). The reasons for the RAD's decision regarding Mr. Sary's credibility are intelligible and transparent, and demonstrate that the conclusion falls within a range of acceptable outcomes. There is therefore no reason for the Court to intervene.

B. *Did the RAD breach the rules of procedural fairness in dealing with Mr. Sary's application?*

[26] Mr. Sary also argues that the RAD breached procedural fairness by raising, on its own initiative, a new reason undermining Mr. Sary's credibility, i.e. the contradiction between Mr. Sary's visa file and his testimony on how he had found his job in Trois-Rivières. Mr. Sary argues that the RAD did not give him an opportunity to provide explanations in this regard at the hearing, which constitutes a breach of the principles of procedural fairness.

[27] The Court does not share this opinion.

[28] First, Mr. Sary's visa application was part of the file before both the RPD and the RAD. Mr. Sary even referred to it in the evidence and in the factum submitted to the RAD. There is no breach of procedural fairness when the RAD performs an independent assessment of the evidence in the docket, as it did in this case (*Haji v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 868 at paragraphs 23 and 27 [*Haji*]). Similar to the situation in *Haji*, no new evidence was presented before the RAD by Mr. Sary, and the RAD reviewed the RPD's assessment of Mr. Sary's credibility and found it to be reasonable based on its review of the evidence.

[29] When pleading her case before the Court, Mr. Sary's counsel emphasized some recent decisions rendered by the Court, including *Ching v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 725 [*Ching*]. However, these decisions deal with situations where the RAD raised a new issue or argument in its decision, and did not give the applicant the opportunity to respond. For example, in *Ching*, the Court found that the RAD had reviewed the RPD's credibility findings whereas the applicant had not raised these reasons in its appeal. It was a "new issue" and the RAD was then obliged to notify the parties and provide them with an opportunity to respond. An issue is new when it raises a new basis (beyond the grounds of appeal as framed by the parties) for potentially finding error in the decision under appeal. Similarly, in *Ojarikre v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 896 at paragraph 20 and *Jianzhu v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 551 at paragraph 12,

cited by Mr. Sary, the RAD's decision had raised issues that had not be studied by the RPD or put forward by the applicant.

[30] The situation is quite different in this case. The RAD did not raise a "new issue" by pointing out the contradiction between Mr. Sary's visa application and his testimony on how he found his job in Trois-Rivières. It simply made reference to another piece of evidence in the tribunal's file which supported the RPD's findings on Mr. Sary's lack of credibility. The RPD's decision and Mr. Sary's submissions dealt extensively with this credibility issue and the arguments in its regard. This is not a situation where the decision maker considered extrinsic evidence without giving Mr. Sary the opportunity to review it. On the contrary, Mr. Sary's credibility constituted the very basis of the RPD's decision and the appeal filed by Mr. Sary.

[31] The Court is thus satisfied that the process followed by the RAD was fair to Mr. Sary and in keeping with the spirit and the letter of the rules of procedural fairness.

IV. Conclusion

[32] For the foregoing reasons, Mr. Sary's application for judicial review is dismissed. The RAD's decision denying his application is transparent and intelligible, and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. In addition, at no time did the procedure followed by the RAD violate its obligations of procedural fairness.

[33] The parties did not raise any serious questions of general importance for certification in their submissions, and the Court agrees that there are none in this case.

JUDGMENT

THE COURT ORDERS THAT:

1. The application for judicial review is dismissed, without costs;
2. No serious questions of general importance will be certified.

“Denis Gascon”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3451-15

STYLE OF CAUSE: SOVANNA RETH SARY v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: JANUARY 20, 2016

JUDGMENT AND REASONS: GASCON J.

DATED: FEBRUARY 10, 2016

APPEARANCES:

Stéphanie Valois

FOR THE APPLICANT

Anne-Renée Touchette

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stéphanie Valois
Counsel
Montréal, Quebec

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of Canada
Montréal, Quebec

FOR THE RESPONDENT