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Motifs et décision – Reasons and Decision

Parrainage

Appelant(s)/Appellant(s)

SAMOL SINN

Respondent

**The Minister of Citizenship and Immigration
Le Ministre de la Citoyenneté et de l'Immigration**

Intimé

**Date(s) and Place
of Hearing**

15 February 2005
17 May 2005
Vancouver, BC

**Date(s) et Lieu de
l'audience**

Date of Decision

29 August 2005

Date de la Décision

Panel

Kashi Mattu

Tribunal

Appellant's Counsel

Massood Joomratty
Barrister & Solicitor

Conseil de l'appelant(s)

Minister's Counsel

Jeff Williamson

Conseil de l'intimé

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Reasons for Decision

[1] These are the reasons and decision of the Immigration Appeal Division in the appeal by Samol SINN (the “appellant”) from the refusal of the sponsorship applications for permanent resident visas for his orphaned nieces Molida YIM and Srey Mey SROUY (the “applicants”) from Cambodia.

[2] The applications were refused pursuant to section 117(1)(f) of the *Immigration and Refugee Protection Act Regulations* (the “*Regulations*”)¹ on the basis the applicants were unable to provide evidence that their parents’ were deceased. The details are set out in the refusal letters and CAIPS notes.²

Background

[3] The appellant is 49 years old and was landed in Canada on January 18, 1980, after fleeing from Cambodia with his wife. They have one child who was born in the refugee camp.

[4] The appellant testified his parents are about 60 and 57 years old, continue to live in Cambodia and do not wish to be sponsored to Canada. The appellant testified he had eight siblings, four of whom were landed in Canada in 1981 and another one was landed in Canada in 1991.

[5] The applicants were born in Cambodia on November 24, 1989 and December 1, 1991, respectively. The appellant testified that the applicants are the daughters of his younger deceased sisters.

Analysis

[6] Section 117(1)(f) of the *Regulations* defines who is an orphaned relative. An orphaned relative is a member of the family class if, with respect to the sponsor, the foreign national is:

¹ *Immigration and Refugee Protection Regulations*, SOR/2002 – 227.

² Record YIM pp.36-41; Record SROUY pp.25-31.

- (f) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is
- (i) the child of the sponsor's mother or father,
 - (ii) a child of a child of the sponsor's mother or father, or
 - (iii) a child of the sponsor's child;

[7] The appellant claims the applicants are his deceased sisters' children and they are both orphans. The only issue to be determined in this appeal is whether or not the applicants' parents are all deceased.

[8] The appellant and both applicants testified. They claim the applicants' parents traveled to the border of Cambodia and Thailand for business in 1993 and never returned. There were also statutory declarations submitted from the applicants' guardians corroborating the testimony. Birth certificates for the applicants have been submitted. Moreover, there were School Report Books for the applicants submitted that include the applicants' guardians as "adoptive mother".³

[9] There were no death certificates submitted or any court orders declaring the applicants' parents are presumed dead. The appellant testified that the applicants' parents have been missing since 1993 and are presumed dead. He explained that the applicants' parents would have attempted to make some contact at least with the two children over the years if they had been alive. He also testified as to information he had received from his parents after the disappearances and efforts made to determine the whereabouts of the applicants' parents subsequently. The appellant also testified regarding the difficulties and infrequency in communicating with his parents over the years given the state of affairs in Cambodia, his parents live in a remote village with no telephone service nearby until recently and ineffectual postal service over the years. The appellant explained he initially would receive communication through word of mouth and exchange of correspondence by hand by people traveling to and from Cambodia. He also explained his parents' limited ability to communicate in writing.

[10] No expert evidence was submitted about the practice of issuing death certificates or court orders of presumptions of death for Cambodia. However, counsel for the appellant submitted the

³ Record YIM pp.30-35; Record, SROUY pp.19-24.

British Columbia *Survivorship and Presumption of Death Act*. (the “SPDA”)⁴ Section 3 of *SPDA* states that a court may make an order declaring a person is presumed to be dead if the court is satisfied that

- (a) a person has been absent and not heard of or from by the applicant, or to the knowledge of the applicant by any other person, since a day named,
- (b) the applicant has no reason to believe that the person is living, and
- (c) reasonable grounds exist for supposing that the person is dead,

[11] Ministers’ counsel did not dispute the country conditions in Cambodia or that many people have disappeared in circumstances described by the appellant⁵, however, he did not find the witnesses to be generally credible and raised concerns related to limited attempts by the appellant and his family to search for and investigate the alleged disappearances of the applicants’ parents, the guardianship arrangements of the applicants and apparent discrepancies in the applicants’ testimony regarding discussions among themselves about their respective parents.

[12] Despite Minister’s counsel’s concerns, based on the evidence before me and on a balance of probabilities, and I find the appellant to be a credible witness who gave reliable and trustworthy evidence. I place limited weight on the applicants’ testimony regarding the circumstances of their parents’ disappearances given their ages at the time and the fact that they would only be reiterating information that they had been told. However, I find the evidence of the applicants’ custody and guardianship arrangements to be generally credible given the personal circumstances of the applicants’ grandparents and the guardians.

[13] I find that given the uncontested historical circumstances in Cambodia, the limited ability to communicate with his family over the years and the fact that the appellant did not return to Cambodia until 10 years after the applicants’ parents’ disappearance, the appellant’s evidence regarding his knowledge of and attempts to investigate the whereabouts of the applicants’ parents was reasonable and plausible. Moreover, I find his testimony regarding the commencement of financial assistance by himself and his siblings in Canada for the applicants’ and reasons for the timing of the sponsorship applications to be credible. I believe the appellant is telling the truth that neither he nor anyone else in his family, nor any of their relatives and neighbours, have heard from

⁴ Exhibit A-2, p.3 – [RSBC 1996] Chapter 444, Presumption of death.

⁵ Exhibit A-1, Tab 5 pp.35-49.

either of the applicants' mothers or fathers since they disappeared some 12 years ago and he has reasonable grounds to believe the applicants' parents are dead. I find it is not plausible or credible that none of the parents would not have communicated with someone known to the family if they were still alive. Based on the evidence before me, I find that the fact that no one has heard from the applicants' parents in about 12 years supports a conclusion that it is more probable than not that they are deceased.

[14] Moreover, I find the appellant submitted all the documents that were requested and advised the immigration officer he could not provide death certificates because he does not know the whereabouts of the applicants' parents. I find the documents submitted appear to be credible and trustworthy. If the immigration officer or Minister's counsel had concerns about the authenticity of any of those documents, it would have been possible to have them verified through Cambodian officials.

[15] Accordingly, I find, on a balance of probabilities, the applicants are orphaned and therefore, the refusals are not valid in law. While the immigration officer did not make any conclusion regarding the relationship between the appellant and applicants and immigration officials may require DNA testing to prove the relationship, which the appellant has testified he is willing to undergo, for purposes of this appeal, the applicants are members of the family class and the appeals are allowed.

NOTICE OF DECISION

The appeals are allowed. The officer's decision to refuse a permanent resident visas are set aside, and the officer must continue to process the applications in accordance with the reasons of the Immigration Appeal Division.

"Kashi Mattu"

Kashi Mattu

29 August 2005

Date (day/month/year)

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| <p>Judicial review – Under section 72 of the <i>Immigration and Refugee Protection Act</i>, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.</p> |
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