

THE FEDERAL COURT

LA COUR FÉDÉRALE

Court No. : IMM 1372-09

No. de la cause :

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Reasons for Judgment and Judgment

November 19, 2009

Yvon Pinard

DATE

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Form T-4C

Formule T-4C

Federal Court



Cour fédérale

Date: 20091119

Docket: IMM-1372-09

Citation: 2009 FC 1063

Ottawa, Ontario, November 19, 2009

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

KUMAR, Shiv

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board dated February 19, 2009. The panel denied the applicant's claim for protection due to the applicant's lack of credibility.

[2] Mr. Shiv Kumar (the applicant) is a citizen of India and comes from the state of Haryana. He left India for Canada on November 1, 2006, and claimed refugee protection on November 6, 2006. He made his claim on the basis of section 96 and paragraph 97(1)(b) of the Act.

[3] The following facts were not accepted by the panel. The applicant claimed that he operated a pesticide company, Shri Bala Ji Trading Co., in India. On August 12, 2005, one of his employees, a person named Makbool, purportedly went to the neighbouring village on the applicant's scooter to make a delivery. That evening, the police apparently came to the applicant's shop to question him about his scooter. His employee had allegedly fled during a police check, abandoning the scooter on site along with some bullets. The police purportedly accused the applicant of helping militants transport their merchandise. His shop was apparently searched and the applicant was arrested. His family allegedly got him released after paying a bribe. The applicant indicated that he was continually harassed by the police following this event. He was purportedly arrested again on February 19, 2006, and questioned on his connection to militants. Once again, his family apparently got him released after paying a bribe. He testified that he was tortured during the two arrests. Fearing for his safety, he purportedly went to New Delhi. He apparently then requested the services of a smuggler, who allegedly helped him leave India on November 1, 2006.

[4] The RPD found that the applicant had failed to discharge his burden of demonstrating a "well-founded fear of persecution" in the event of returning to India. The panel also determined that the applicant had not demonstrated, on a balance of probabilities, that he was a "person in need of protection". The RPD found the applicant's allegations with respect to the crucial elements of his refugee claim to be not credible. Instead, the panel found that the applicant had invented his account

entirely and fabricated all of the documents in order to support his refugee claim. Consequently, the panel did not attach any probative value to these documents.

[5] Where the question is one of fact established pursuant to the exercise of discretion, the standard of review is reasonableness (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 53). Credibility findings are generally not open to judicial review. According to the Federal Court of Appeal in *Aguebor v. Canada (M.E.I.)*, 160 N.R. 315, at paragraph 4:

There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. . . .

[6] The RPD determined that the applicant was not credible because of the contradictions between the documents he produced and his testimony.

[7] The panel gave the applicant until December 30, 2008, to produce documents or evidence establishing that he was the owner of the shop, that Makbool was his employee and that he had truly been hospitalized twice.

[8] In fact, the transcript of the hearing discloses numerous contradictions between the documentary evidence submitted and the applicant's testimony.

(1) The employment contract

[9] The applicant provided a document to demonstrate the existence of an employment contract between his employee, Makbool, and his company. Despite this, the panel did not believe that the applicant had had an employee named Makbool. At first sight, the finding seems unreasonable, but this impression is misleading. The panel specifically asked the applicant whether he had made Makbool sign an employment contract and he had responded that he had not:

Q: Did he sign any contract with you, working contract?

A: No.

Q: Do you have anything to prove that this person was working for you?

A: I don't have record of banking salary but I used to pay him salary in cash. But maybe there could be something to prove it, that could prove it.

Q: Like what?

A: I can ask my accountant that I used to pay him this much salary, I didn't issue him a cheque or anything but my accountant used to pay him cash.

Q: But what would the accountant be able to give you?

A: I would not be able to prove it in front of you, give you a full proof because in India so many times we hire people like that.

[10] Therefore, the panel gave the applicant time to produce, in particular, an employment document for Makbool. Despite his testimony, [TRANSLATION] "to the panel's great surprise" the applicant produced the original employment contract between Makbool and his company. The applicant thus contradicted his own testimony. The panel was therefore justified in finding that his

credibility was affected by this. In this context, the panel's inference that the applicant had not had an employee named Makbool is reasonable.

(2) The company

[11] The applicant alleged that he owned a pesticide company. The document initially filed did not prove his connection to the company Shri Bala Ji Trading Co. Confronted with this fact, the applicant indicated that he could obtain his company's registry, on which his name would appear. In fact, the RPD specifically asked the applicant whether he could obtain a document demonstrating that he was the owner of the company and he responded that he could:

Q: Because reading this document, sir, what I understand from this document is that the company Sri Bala G. Trading Company exists, that it has a valid licence for the period between the 21st of February 2005 until the 31st of December 2006. But it does not at all, it is not at all related to you. What can you add, sir, to show to the Tribunal that you possess this company?

A: At the moment I don't have anything.

Q: Can you obtain something?

A: Yes, absolutely.

Q: What can you obtain?

A: I can ask to, for the registry of the shop to be sent to me.

Q: Do you think your name will be written on this registry?

A: Yes.

[12] The applicant then filed a letter from someone acknowledging that the applicant is truly the owner of Shri Bala Ji Trading Co. He never mentioned this document when he was asked whether he could obtain a document proving that he was the owner of his company. Furthermore, the panel

doubted whether the letter is genuine. This document's letterhead does not contain an address or any other contact information by which its authenticity could be verified. Under the circumstances, the panel was entitled to not attach probative value to this document. It was also entitled to draw a negative inference from the unexplained absence of a specific document that the applicant said he would be able to obtain. Moreover, the panel considered documentary evidence indicating that false documents circulate freely in India.

(3) The visa file

[13] The panel questioned the applicant on the visa file produced. It appears that a letter from the company S.K. Plastic Industries was filed in support of the visa application. At the hearing, the applicant insisted that he did not know this company and that he had never signed this letter. The panel noted that the applicant's signature at page 13 of his Personal Information Form seems identical in every respect to the signature found in the letter. Under these circumstances, the panel was entitled to find the applicant's explanation suspicious.

[14] Given all of these contradictions, I am of the opinion that the panel was reasonably entitled to make the finding it did. Consequently, the application for judicial review is dismissed.

JUDGMENT

The application for judicial review of the decision dated February 19, 2009, by the Refugee Protection Division of the Immigration and Refugee Board is dismissed.

“Yvon Pinard”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1372-09

STYLE OF CAUSE: KUMAR, Shiv v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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REASONS FOR JUDGMENT AND JUDGMENT: PINARD J.

DATED: November 19, 2009

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