

Federal Court



Cour fédérale

Date: 20090618

Docket: IMM-5014-08

Citation: 2009 FC 643

Ottawa, Ontario, June 18, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

PARVEEN KUMAR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] In the present case, the contradictions are at the core of the Applicant's claim. They were sufficient for the Immigration and Refugee Board, Refugee Protection Division (Board) to conclude that he was not credible.

[2] A high degree of deference must be awarded to such decisions:

[17] ... The Court must demonstrate a high degree of deference since it is up to the Board to weigh the applicants' testimony and assess the credibility of their statements. If the Board's findings are reasonable, no intervention is warranted. However, the Board's decision must be based on the evidence: it should not be made

arbitrarily or on the basis of erroneous findings of fact without regard for the evidence put forward ...

(*Bunema v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 774, 160 A.C.W.S. (3d) 865; reference is also made to *Navarro v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 358, 169 A.C.W.S. (3d) 626 at paras. 12-14).

[3] It is trite law that the Board is entitled to choose, in context, the evidence that is more fitting to the particularities of each given case. It is not up to the Applicant, nor the Court (*Starcevic v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1370 at par. 18) to reweigh the evidence or otherwise dictate the elements to which the Board should have attributed more weight:

[21] The RPD must, as a specialized tribunal, weigh the evidence submitted and make the necessary determinations.

[22] To do so, the RPD may choose the evidence that best represents reality and this choice is part of its role and its expertise...

(*Del Real v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 140, 168 A.C.W.S. (3d) 368; reference is also made to: *Alba v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1116 at par. 5; *Mohimani v. Canada (Minister of Employment and Immigration)* (1993), 41 A.C.W.S. (3d) 556, [1993] F.C.J. No. 564 (QL) (F.C.A.) at par. 2).

II. Judicial Procedure

[4] This is an application for judicial review of a decision of the Board, rendered on October 17, 2008 and signed on October 22, 2008, determining that the Applicant was not a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[5] The decision of the Board is based on the Applicant's absence of credibility.

III. Facts

[6] The Applicant, Mr. Parveen Kumar, is a citizen of India.

[7] Mr. Parveen Kumar alleges that his problems stem from his brother, Ravinder Kumar, being falsely accused of helping militants and a gangster named Umesh Yadav.

[8] According to Mr. Parveen Kumar, his brother Ravinder was arrested, detained and tortured on two occasions. He finally left India for Italy, where he supposedly lived illegally for a few years before claiming asylum.

[9] On January 24, 2005, after Ravinder's departure, the police broke in Mr. Parveen Kumar's house looking for his brother. As he was not on the premises, the police arrested Mr. Parveen Kumar instead.

[10] Mr. Parveen Kumar claims that the police told him they had found his name in a journal which linked him to the militants. He alleges he was released on January 25, 2005, after having been tortured.

[11] Mr. Parveen Kumar asserts that he consulted an attorney shortly after his liberation but that the police force was made aware of his intention to institute proceedings against it.

[12] Consequently, the police raided Mr. Parveen Kumar's home a second time in May 2006. Since he was not present, his father agreed to bring him to the police station upon his return.

[13] When Mr. Parveen Kumar presented himself to the authorities, he was arrested, detained and tortured to reveal the whereabouts of Umesh Yadav. He was eventually released under the condition to report to the police monthly.

[14] Mr. Parveen Kumar decided to leave India for New Delhi. On October 8, 2006, after a few months in New Delhi, he left for Canada where he arrived on October 9, 2006.

[15] He claimed asylum on October 27, 2006.

[16] The hearing before the Board was held on August 20, 2008. Mr. Parveen Kumar was represented by counsel.

IV. Issue

[17] Did the Board err in determining that the Applicant was not credible?

V. Analysis

Lack of credibility

[18] In the present case, the Board found that Mr. Parveen Kumar's narrative was not credible for the following reasons:

- a) The Applicant testified that he was tortured in May 2006 to reveal Umesh Yadav's whereabouts although the documentary evidence established that he had been killed eight months earlier in July 2005. Confronted, the Applicant denied that fact and added that it was

possible that there were two persons by the same name. He, however, never substantiated with evidence the existence of the “second Yadav” (Tribunal Record (TR) at pp. 336-337);

- b) Questioned about his brother’s occupation since his return to India, the Applicant testified that he was working in a shop with his father and that he had not had any problems with the authorities. Given that the Applicant testified that his brother was sought and perceived by the authorities as being a gangster and a terrorist, the Board found implausible that he could have returned to India, after allegedly fleeing to Italy to claim refugee protection, then to work with their father in a shop without having had any problems (TR at pp. 344-345);
- c) The Applicant specified that the police, not only suspected him personally of having a link to the militants but that his name was found on a terrorists’ list. In those circumstances, the Board found it odd that the police would have agreed to release the Applicant, even with the payment of a bribe. The Applicant explained that people from the village council had gone to the police station to explain that “he had nothing to do with the terrorists”. The Applicant was, however, unable to explain what had convinced the police to drastically change their opinion of him to allow for his release (TR at pp. 317-318);
- d) The Applicant failed to provide any corroborating evidence to establish that his brother had claimed refugee protection in Italy (TR at p. 6);
- e) The Applicant contradicted his Personal Information Form (PIF) on a central element of his claim:
 - i. The Applicant testified that his family had showed the police proof that his brother was in Italy and that since then, they no longer came for his brother but only for him, although his PIF mentioned that the police did not

believe that his brother was in Italy and that they came for him on January 24, 2005 and that he was arrested because his brother was not there.

- ii. Confronted with the apparent contradictions, the Applicant contradicted himself again, stating that the proof of departure of his brother was shown to the police on the day he was released, namely on January 25, 2005, while his PIF indicated that this proof had been shown to the police prior to the Applicant incarceration, thus, prior to January 24, 2005 (TR at p. 7).

[19] It is trite law that the weighing of the evidence and the evaluation of an applicant's credibility is at the core of the Board's jurisdiction (*Bunema*, above, at para. 1; reference is also made to: *Singh v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 62, 159 A.C.W.S. (3d) 568; *Encinas v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 61, 152 A.C.W.S. (3d) 497; *Kengkarasa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 714, 158 A.C.W.S. (3d) 973).

Applicant's first issue: Rules of evidence applicable before the Board

[20] Mr. Parveen Kumar claims that the Board committed a reviewable error by concluding that the presence of his name on a terrorist list made it highly improbable that he would be released. To him, this conclusion is based on speculation.

[21] Contrarily to Mr. Parveen Kumar's allegations, the Board did not speculate on this issue. It is founded on Mr. Parveen Kumar's own testimony (TR at pp. 317-318).

[22] Mr. Parveen Kumar states that the Board erred by not having given him an opportunity to fully provide explanations for the reasons as to why the police accused him of being involved with militants and with Umesh Yataav.

[23] As appears from the transcript, the Board questioned Mr. Parveen Kumar on the reasons he was given by the police for his wrongful detention and the plausibility of this part of his narrative.

[24] Indeed, Mr. Parveen Kumar stated that he was told he was suspected of being linked with militants and that his name was included in a journal recovered from militants. Mr. Parveen Kumar also declared that he was suspected of being a terrorist.

[25] The Board confronted Mr. Parveen Kumar with the documentary evidence and the incoherence of his part of the narrative; it was held highly unlikely that he would have been released after the payment of a bribe if he was suspected of being a terrorist or a militant (TR at p. 318).

[26] Mr. Parveen Kumar's attorney objected to this way of proceeding because he considered that the Board was asking the Applicant to give his opinion. The Board rejected the objection; it gave Mr. Parveen Kumar the opportunity to explain his narrative in its entirety as this was the only manner by which to evaluate the genuineness of his claim.

[27] The Board was entitled to proceed in the manner chosen.

[28] Indeed, Parliament had chosen an inquisitorial procedural model for the determination of refugee claims by the Board and hearings conducted in an informal manner (*Thamotharem v.*

Canada (Minister of Citizenship and Immigration), 2007 FCA 198, [2008] 1 F.C.R. 385 at para. 35).

[29] The Board is, therefore, not bound by the usual rules of evidence. It may receive and base its decision on elements of proof, considered to be credible and trustworthy (*Kalangestani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1528, 154 A.C.W.S. (3d) 452; L. WALDMAN, *Immigration Law and Practice*, 2nd ed., vol. 1, Butterworths, sections 9.15-9.16, 9.196-9.197).

[30] Paragraphs 162(2) and 170(g) and (h) of the IRPA:

<p>162. ...</p> <p>(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.</p> <p>...</p> <p>170. The Refugee Protection Division, in any proceeding before it,</p> <p>(a) may inquire into any matter that it considers relevant to establishing whether a claim is well-founded;</p> <p>(b) must hold a hearing;</p> <p>(c) must notify the person who is the subject of the proceeding and the</p>	<p>162. [...]</p> <p>(2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.</p> <p>[...]</p> <p>170. Dans toute affaire dont elle est saisie, la Section de la protection des réfugiés :</p> <p>a) procède à tous les actes qu'elle juge utiles à la manifestation du bien-fondé de la demande;</p> <p>b) dispose de celle-ci par la tenue d'une audience;</p> <p>c) convoque la personne en cause et le ministre;</p>
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Minister of the hearing;

(d) must provide the Minister, on request, with the documents and information referred to in subsection 100(4);

(e) must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations;

(f) may, despite paragraph (b), allow a claim for refugee protection without a hearing, if the Minister has not notified the Division, within the period set out in the rules of the Board, of the Minister's intention to intervene;

(g) is not bound by any legal or technical rules of evidence;

(h) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances; and

d) transmet au ministre, sur demande, les renseignements et documents fournis au titre du paragraphe 100(4);

e) donne à la personne en cause et au ministre la possibilité de produire des éléments de preuve, d'interroger des témoins et de présenter des observations;

f) peut accueillir la demande d'asile sans qu'une audience soit tenue si le ministre ne lui a pas, dans le délai prévu par les règles, donné avis de son intention d'intervenir;

g) n'est pas liée par les règles légales ou techniques de présentation de la preuve;

h) peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision;

[31] The Guideline 6 – Scheduling and Changing the Date or Time of a Proceeding in the Refugee Protection Division and the Guideline 7 – Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division both confirm that principle:

GUIDELINE 6

DIRECTIVES N^o 6

**SCHEDULING AND
CHANGING THE DATE OR
TIME OF A PROCEEDING
IN THE REFUGEE
PROTECTION DIVISION**

**MISE AU RÔLE ET
CHANGEMENT DE LA
DATE OU DE L'HEURE
D'UNE PROCÉDURE À LA
SECTION DE LA
PROTECTION DES
RÉFUGIÉS**

INTRODUCTION

INTRODUCTION

...

[...]

The RPD has the authority to set its own procedures, as long as the principles of natural justice and fairness are followed.

La SPR est maître de sa procédure, mais doit respecter les principes de justice naturelle et d'équité. [...]

...

[...]

GUIDELINE 7

DIRECTIVES N^o 7

**CONCERNING
PREPARATION AND
CONDUCT OF A HEARING
IN THE REFUGEE
PROTECTION DIVISION**

**DIRECTIVES
CONCERNANT LA
PRÉPARATION ET LA
TENUE DES AUDIENCES À
LA SECTION DE LA
PROTECTION DES
RÉFUGIÉS**

INTRODUCTION

INTRODUCTION

...

[...]

... Administrative tribunals operate less formally and more expeditiously than courts of law. Accordingly, the Immigration and Refugee Protection Act (IRPA) requires the IRB to deal with proceedings before it informally, quickly and fairly...

[...] Les tribunaux administratifs s'acquittent de leurs fonctions de façon moins formelle et selon une procédure plus expéditive que les cours de justice. Ainsi, la CISR est tenue, par la *Loi sur l'immigration et la protection des réfugiés* (LIPR), de fonctionner sans formalisme et avec célérité et équité. [...]

THE ROLES OF MEMBERS, RPOS AND COUNSEL

...

... Case law 4 has clearly established that the RPD has control of its own procedures. It decides and gives directions as to how a hearing is to proceed...

...

3. HEARING

It is an essential part of the members' inquisitorial role to be actively involved in the conduct of hearings. The member is in charge of the inquiry and issues directions to make the proceedings more efficient...

...

24. ... Questioning must bring out relevant information that will help the member make an informed decision. Questions that are answered by the claimant just repeating what is written in the PIF do not help the member.

RÔLES DES COMMISSAIRES, DES APR ET DES CONSEILS

[...]

[...] La jurisprudence montre clairement que la SPR est maître de sa propre procédure. Elle décide du déroulement de l'audience et donne les instructions à cet égard [...]

[...]

3. AUDIENCE

La participation active des commissaires à la tenue des audiences fait partie intégrante de leur rôle inquisitoire. Le commissaire dirige l'enquête et donne des directives pour favoriser l'efficacité de la procédure. [...]

[...]

24. [...] L'interrogatoire doit servir à obtenir l'information pertinente qui aidera le commissaire à rendre une décision éclairée. Les questions invitant le demandeur d'asile à simplement réciter l'exposé circonstancié du FRP n'aident pas le commissaire. [...]

Applicant's second issue: Lack of corroborating evidence

[32] Mr. Parveen Kumar asserts that the Board could not request corroborating evidence with respect to his brother's refugee claim in Italy since his testimony was not contradicted.

[33] Mr. Parveen Kumar's allegations were contrary to an email confirming that the Italian authorities had no record of the presence of Ravinder in the country (TR at p. 110).

[34] The evidence was, therefore, contradictory and the Board had to confront Mr. Parveen Kumar on this issue and on his lack of corroborating evidence.

[35] Indeed, the Board could ask Mr. Parveen Kumar to produce documentary evidence since his testimony was not credible and could draw a negative inference in the absence thereof:

[28] It is trite law that the Board may draw an unfavourable conclusion about Mr. Singh's credibility when his story is implausible and when he does not submit any evidence to corroborate his allegations. In *Encinas v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 61, [2006] F.C.J. No. 85 (QL), Mr. Justice Simon Noël wrote the following:

[21] I would add that it is clear from reading the transcript of the hearing that the applicants did not discharge their onus of proof to convince the RPD that their claim was well-founded. Indeed, the RPD informed them more than once that certain facts should have been put in evidence (the employment relationship in 2003, for example). Consequently, the RPD, not having at its disposal the evidence that it would have liked to receive, found that the version of the facts in the claim was not credible. That finding was certainly open to the RPD. (Emphasis added).

(*Singh*, above; *Encinas*, above).

[36] In the present case, Mr. Parveen Kumar omitted to provide documents that were at the core of his claim and failed to offer satisfactory explanations for his lack of corroborating evidence.

[37] In fact, Mr. Parveen Kumar stated that he did not think of asking for documents and said that the interpreter who helped him file his claim never asked for anything else (TR at p. 6, paras. 14-15).

[38] The Board was not satisfied with this answer since Mr. Parveen Kumar was represented by counsel for the filing of his claim and PIF and, therefore, had time before the hearing to request additional documents and complete his file.

[39] Section 7 of the *Refugee Protection Division Rules*, SOR/2002-228 states:

7. The claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.

7. Le demandeur d'asile transmet à la Section des documents acceptables pour établir son identité et les autres éléments de sa demande. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour s'en procurer.

[40] In *Dundar v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1026, 161 A.C.W.S. (3d) 137, the Court held:

[18] A refugee claimant bears the onus of establishing elements in his or her claim for protection (*Gill v. Minister of Citizenship and Immigration*), [2004] FC 1498, [2004] F.C.J. No. 1828 at para. 25). In *Samseen v. Canada (Minister of Citizenship and Immigration)*, [2006] FC 542, [2006] F.C.J. No. 727 (QL), at para. 14, this principle was held to include “giving truthful, coherent and non-evasive answers to basic questions about events which are alleged to have happened to him and which form the basis of his claim. [...]”

[19] Moreover, in evaluating the merit of a refugee claim, “[...] the Board [is] entitled to take into account the applicant's lack of effort to obtain corroborative evidence to establish [elements of his claim] and to draw a negative inference of his credibility based on this.” (*Samseen, supra*, at para. 30). Therefore, while corroborative evidence is not determinative of a refugee claim, the Board is free to inquire into its absence.

[20] Indeed, this inquiry flows directly from Rule 7 of the Refugee Protection Division Rules [...]

...

[22] ... Where valid reasons to doubt a claimant's credibility exist, the Board may draw negative credibility inferences from a failure to provide supporting evidence. However, in my opinion, these inferences may only be drawn where the applicant has also been unable to provide a reasonable explanation for his or her lack of corroborating material. (Emphasis added).

(Reference is also made to *Chikukwa v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1191, 75 Imm. L.R. (3d) 144 at paras. 56-57).

Applicant's third, fourth and fifth issues: Re-weighting of the evidence

[41] Mr. Parveen Kumar goes into great lengths to argue each and every one of the Board's conclusion with respect to his credibility.

[42] It is clear that Mr. Parveen Kumar is attempting to have the Court re-weigh the evidence, hoping for a different conclusion.

[43] The Board was able to award low probative value to certain exhibits such as P-7 and P-8, since Mr. Parveen Kumar's narrative was found to lack credibility (*Hamid v. Canada (Minister of Employment and Immigration)* (1995), 58 A.C.W.S. (3d) 469, [1995] F.C.J. No. 1293 (QL); *Singh v. Canada (Minister of Employment and Immigration)*, 2006 FC 756, 150 A.C.W.S. (3d) 199 at par. 17).

VI. Conclusion

[44] For all of the above-reasons, the Applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;
2. No serious question of general importance be certified.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5014-08

STYLE OF CAUSE: PARVEEN KUMAR
v. THE MINISTER OF CITIZENSHIP
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PLACE OF HEARING: Montreal (Quebec)

DATE OF HEARING: June 9, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: June 18, 2009

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