

Kamana v. Canada (Minister of Citizenship and Immigration)

Between
Jimmy Kamana, applicant, and
The Minister [of Citizenship and Immigration], respondent

[1999] F.C.J. No. 1695
Court File No. IMM-5998-98

Federal Court of Canada - Trial Division
Montréal, Québec
Tremblay-Lamer J.

Heard: September 22, 1999.
Judgment: September 24, 1999.
(16 paras.)

Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Credible basis for claim — Persecution, protection of country of nationality.

Application by Kamana for judicial review of a decision of the Refugee Division of the Immigration and Refugee Board denying his Convention refugee claim. Kamana was a citizen of Rwanda and belonged to the Tutsi tribe. He was allegedly threatened by members of the Hutu family in his village, who killed his father, injured his uncle and threatened to kill his whole family. Kamana had stayed in the United States for over a month without taking any steps to claim refugee status. The panel found that Kamana did not demonstrate a genuine fear of persecution on account of his lack of credibility.

HELD: Application dismissed. It was reasonable for the panel to find that Kamana had not credibly established the subjective element of his claim. Kamana's behaviour was inconsistent with someone who was being seriously threatened. Kamana could have joined his family in Burundi.

Counsel:

Eveline Fiset, for the applicant.
Marie Nicole, for the respondent.

1 **TREMBLAY-LAMER J.** (Reasons for Order):— This is an application for judicial review of a decision of the Refugee Division of the Immigration and Refugee

Board dated November 9, 1998, which determined that the applicant is not a Convention refugee.

2 Jimmy Kamana is a citizen of Rwanda. He belongs to the Tutsi tribe. He alleges that he was threatened by the members of a Hutu family in his village, who killed his father in May 1997 for accusing the head of their family of murdering his parents.

3 In July 1997, they allegedly injured an uncle and threatened to kill the applicant's whole family if their kinsman remained in prison.

4 The panel found that the applicant had not demonstrated a genuine fear of persecution on account of his lack of credibility and the lack of evidence going to the objective element of his claim. In addition, the panel held that in the alternative, he could have availed himself of the protection of Burundi.

5 With respect to the subjective element, the panel found the applicant not credible. Although the decision contains a few errors, after a careful reading of the evidence, I am not satisfied that it was unreasonable.

6 The panel noted that the applicant had stayed in the United States for one and a half months without taking any steps to claim refugee status. Such behaviour is inconsistent with someone being seriously threatened.

7 It noted that when he went back to Rwanda in 1997, he moved to the capital, Kigali, and stayed there--under threat--for a number of months, when he could have joined some of his family in Burundi. Furthermore, although he claims he was unable to return because the roads were unsafe, his brothers did so without incident.

8 In addition, when he left Rwanda, he did not bother to bring his Community of the Great Lakes Countries (CPGL) card, with which he could avoid being returned to Rwanda if expelled from another country. Once again, that is not the way someone with a well-founded fear of persecution behaves.

9 Against this backdrop, it was reasonable for the panel to find that the applicant had not credibly established the subjective element of the refugee definition.

10 The lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, since both elements of the refugee definition--subjective and objective--must be met.

11 However, even if the panel's finding on the well-foundedness of the subjective fear were unreasonable, the panel rightly held that the applicant could have availed himself of the protection of Burundi.

12 The applicant admitted having refugee status in Burundi. His family has had this status for 40 years. The evidence shows that refugee status in Burundi includes the right

not to be expelled from Burundi. Apart from the right to vote, he has the same rights as citizens of Burundi: the right to education and work. He had a still-valid CPGL card, which allowed him to come and go from Burundi freely.

13 He testified that this card was in Rwanda but provided no evidence that it could not have been sent to him or that it was impossible to obtain another one.

14 When the respondent makes a prima facie case that Article 1(E) of the Geneva Convention applies, the burden of proof is reversed, and in the case at bar, the applicant had to establish that he could not recover or obtain another CPGL card. As Mr. Justice Rothstein said in *Shahpari*:

Nor can the fact that the applicant destroyed the carte de resident avail to the benefit of the applicants. At the very least, once the respondent put forward prima facie evidence that Article 1(E) applies, the onus shifted to the applicant to demonstrate why, having destroyed her carte, she could not apply and obtain a new one. She did not do so.¹

15 Under the circumstances, the Court cannot intervene. The application for judicial review is dismissed.

16 Neither counsel suggested that a question be certified.

Certified true translation: Peter Douglas

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ORDER

The application for judicial review is dismissed.

Certified true translation: Peter Douglas

¹ *Shahpari v. Canada (M.C.I.)* (April 3, 1998), IMM-2327-97 (F.C.T.D.).