Federal Court  Cour fédérale

Date: 20170227

Docket: IMM-3807-16

Citation: 2017 FC 242

Ottawa, Ontario, February 27, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

KIZITO CHIBUZO NWEKE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of a member ("Member") of the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada dated August 9, 2016 finding that the Applicant is not a Convention refugee or person in need of protection pursuant to ss 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") and that his claim is manifestly unfounded pursuant to s 107.1 of the *IRPA.*

Background

[2] The Applicant is a citizen of Nigeria and alleges that he is bisexual. He claims that in 1987 he was posted to the St. Joseph's Catholic Parish for apostolic training and there he had his first same-sex relationship with another student, Chinedu Anosike ("Chinedu"). When they confessed this relationship to their mentor priest they were not recommended for continuation to priesthood after their apostolic work. The Applicant claims that on March 23, 2016, while he was in Canada, he received a telephone call from his aunt advising him that Chibike Eze and Leonard Nwogu had been caught in a homosexual act and had confessed that the Applicant introduced them to that practice. The Applicant denies this but confirms that the three were sexual partners. The Applicant claims that his aunt told him that there were young men from his community who had vowed to kill him as have members of his wife's family. The Applicant also fears for his safety in Nigeria at the hands of the Nigerian police, who can imprison him for 14 years due to his sexual orientation, as well as his caste.

[3] The RPD heard the claim on June 6, 2016. Following a break, the presiding Member advised the Applicant and his counsel that the Member had just noticed that he had inadvertently left the recording running during the break but that he would instruct the registry that that period of time would not form part of the record. Following the issuance of the RPD's decision, it was discovered that, in fact, the first two hours of the hearing had not been recorded.

Decision Under Review

[4] As a preliminary matter, the Member stated that the day after the Applicant's hearing, a US biometrics match report, marked as received by the RPD on the day of the hearing, was

brought to his attention. The Member allowed the Applicant time to make written submissions on this post hearing disclosure. Instead, the Applicant's counsel made two applications asking the Member to recuse himself and that the Applicant be granted a new hearing *de novo* before a different panel. The Member dismissed both applications.

[5] In the first application, the Applicant argued that the Member had breached the duty of procedural fairness by accidentally leaving the recording on during the break. Specifically, that the Applicant had a reasonable apprehension of bias because he had no independent means to verify that the Member or any staff were not exposed to the recorded confidential solicitor-client information. The Member noted that the Applicant was advised of this mistake at the hearing and assured that the RPD staff would be instructed to strike that portion of the recording from the record. The Member found that the Applicant had effectively waived any objection at the hearing as the Member had asked the Applicant and his counsel what they wanted to do when alerted to this error and both unambiguously stated that they wished to continue with the hearing. The Member noted that he took the promised steps and had been advised by the recording unit of the RPD that this would not present a problem. The Member stated that he had not listened to the recording as he had taken detailed notes and that it is not relevant whether any other staff person listened to the recording since he is the decision-maker. And, at any rate, he had no knowledge that anyone accessed the recording at the conclusion of the hearing. Therefore, no breach of procedural fairness arose.

[6] The Member also noted the Applicant's argument that he was placed in an unfair position in the absence of the U.S. biometrics match report during the hearing as he struggled to recall his

travel history but the Member was privy to the undisclosed information and used it to impugn his credibility. The Member found that there was no basis for that argument as he did not see the report until after the hearing and as such could not have used it in an unfair manner. Therefore, this ground for the application was also rejected. Nevertheless, he had given the Applicant additional time to file written submissions on the substantive contents of the report.

[7] However, the Applicant instead submitted a second application seeking a *de novo* hearing in which he added "a new twist to his old argument". Specifically, that whether the Member received the disclosure the day after the hearing was not relevant because the disclosure is primarily to the claimant who must be able to prepare, the Applicant relied on Rule 34 of the *Refugee Protection Division Rules*, SOR/2012-256 in support of that position. The Member stated that Rule 34 requires that a party abide by timelines if it wants to use documents and the RPD is not a party for the purposes of the hearing. Further, that the Applicant had been given the opportunity to address the document but failed to do so and, in any event, the document was not relied on by the Member in reaching his decision. The Member concluded that there had been no breach of procedural fairness.

[8] The Member held that the determinative issue was whether the Applicant was a credible witness. While the Applicant testified without major inconsistencies when questioned about his prior same-sex partners and alleged orientation as a bisexual, deficiencies in his supporting documents pointed to their fraudulent provenance, which when combined with the Applicant's lack of reasonable explanations, led the RPD to conclude that the Applicant intentionally sought to deceive the RPD.

[9] In this regard the Member noted that the Applicant had provided three documents from a seminary to corroborate his claim that he had his first same-sex experience with his roommate, Chinedu, there in 1987 and that he was subsequently ejected from apostolic training by December 1988. The three original documents were a general certificate of education dated June 1987 ("Education Certificate"), a notice of apostolic training dated June 2, 1987 and a notice of recall from apostolic training dated September 12, 1988 (collectively, the "1980's Letters"). The RPD compared the Education Certificate to the 1980's Letters and noted several differences between them including their colour, font and general degree of degradation. The Member rejected the Applicant's explanation that he used the Education Certificate more often, which was why it looked more degraded, whereas the 1980's Letters were stored with his possessions. The Member noted that the 1980's Letters are purportedly almost 30 years old and it was unreasonable that they would appear brand new. Further, that it was unreasonable that the St. Peter Claver Seminary ("Seminary") would print its logo in a way that it was virtually impossible to determine what it said in its messages. As well, the name of the Seminary is spelt differently in the Education Certificate, as "St. Peter Claver's Seminary", and in the 1980's Letters which say "St. Peter Claver Seminary". The Member stated that if the 1980's Letters were authentic then he would expect that the Seminary could spell its own institution's name accurately.

[10] Based on the above, the Member concluded that the Education Certificate was authentic but that the 1980's Letters were forged. Therefore, the Applicant had failed to show on a balance of probabilities that he was posted for apostolic training after June 1987 and later

recalled in 1988 as alleged due to his sexual orientation. This led the Member to doubt that the Applicant ever met Chinedu.

[11] The Member next addressed three affidavits provided by the Applicant in support of his claim which were sworn by the High Court of Justice in the Federal Capital Territory, Abuja ("High Court"). He noted that they were all sequentially numbered, sworn on the same date and that the Applicant had confirmed that all three affiants went to Abuja on the same day to swear their affidavits.

[12] The Member found these affidavits to be fraudulent for several reasons. First, while they were allegedly affirmed at the same time in the same court, they contained inconsistent drafting as to the citation for the applicable legislation governing the swearing of oaths and that it was unreasonable that the mistake would not have been noticed. Second, the Member had concerns with the affidavit of Chinedu, in particular, why he would declare his sexual orientation to a government institution like the High Court and thereby put himself at risk of criminal prosecution. The Member rejected the Applicant's explanation that Chinedu swore the affidavit in a different city as a compromise, noting that the Applicant's own evidence was that Chinedu would have provided his banking information to swear the affidavit which would have made him traceable throughout Nigeria. The Member also quoted sections of a Response to Information Request ("RIR") found in the National Documentation Package indicating that it is not standard practice for Commissioner of Oaths to swear an affidavit regarding a person's sexual orientation and it would be strange for a person to swear such an affidavit given the implications. The Member noted the Applicant's explanation that the RIR is not applicable to this case and

provided reasons for rejecting that explanation. The Member also noted the Applicant's explanation that the affidavit was worded carefully to not go as far as declaring Chinedu's homosexuality. The Member rejected this explanation and noted the relevant portions of the affidavit contradicting the Applicant's explanation.

[13] The Member did not believe that Chinedu would swear to the facts contained in the affidavit before a government official, found that the affidavit was fraudulent, drew an adverse inference as to the Applicant's general credibility, and found that there was insufficient credible evidence to find that Chinedu exists and that the Applicant experienced his first same-sex sexual experience as he alleged, which cast doubt over whether he is bisexual.

[14] The Member stated that the remaining documentary evidence did not overcome the submission of fraudulent documents and the resulting credibility findings. The Member addressed this evidence and explained why he assigned it no weight. In that regard, he assigned low probative value to the letters of support from the 519 Community Centre, the Metropolitan Community Church in Toronto and Black CAP because they are granted to persons on the basis of their attendance and participation and the fact that the Applicant attended these programs did not mean he was necessarily bisexual. The Member gave no weight to several email exchanges with Chibike on the basis that Yahoo is a public web based email provider and anyone can create and sign up for an email account. Further, that the emails are not independent corroborative documents confirming that Chibike exists and because the Applicant was generally not credible the Member did not believe the facts contained in the emails. The Member cited similar

concerns with respect to the email exchange with a chaplain from Nigeria and screenshots of text messages from his wife.

[15] The Member stated that he did not believe that the Applicant is bisexual, that he had his first same-sex relationship at the Seminary, that Chinedu, Chibike or Leonard exist and that the Applicant was implicated for crimes related to his sexual orientation in Nigeria. Further, that his overall lack of credibility led the Member not to believe the Applicant's alleged fear of persecution from his wife's family whether due to his sexual orientation or caste. And, that the Applicant's lack of credibility and failure to deal with the RPD with clean hands rendered his claim to be manifestly unfounded.

Issues and Standard of Review

[16] In my view, this application raises the following issues:

1. Was the duty of fairness breached as a result of the gap in the RPD hearing recording and transcript?
2. Is the RPD's decision reasonable?

[17] The question of whether the Applicant's procedural rights were violated due to the loss of the audio recording is reviewable on the correctness standard (*Huszar v Canada (Citizenship and Immigration)*, 2016 FC 284 at paras 12-13 ("*Huszar*").

[18] The standard of review that applies to the RPD's findings of credibility are reviewable on the reasonableness standard and are to be afforded considerable deference by this Court (*Aguebor v Canada (Employment and Immigration)*, [1993] FCJ No 732 (CA) at para 4; *Khosa*

at para 46 ("*Khosa*"); *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 22; *Rezmuves v Canada (Citizenship and Immigration)*, 2013 FC 973 at para 33). Reasonableness is also the standard that applies to the RPD's finding that the claim is manifestly unfounded pursuant to s 107.1 of the *IRPA* (*Brindar v Canada (Citizenship and Immigration)*, 2016 FC 1216 at paras 8-9; *Warsame v Canada (Citizenship and Immigration)*, 2016 FC 596 at para 25).

[19] Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision making process (*Khosa* at para 59). 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 the law (*Dunsmuir v New Brunswick,* 2008 SCC 9 at para 34).

Issue 1: Was the duty of fairness breached as a result of the gap in the RPD hearing recording and transcript?

Applicant's Position

[20] The Applicant acknowledges that there is established jurisprudence standing for the proposition that the mere absence of a transcript does not amount to a breach of natural justice. However, if the Court is prevented from dealing with an important issue arising from the judicial review application due to the absence of the transcript, then the Applicant is entitled to a new hearing (*Kandiah v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 321 (FCA) ("*Kandiah*"); *Canadian Union of Public Employees, Local 301 v Montreal (City)*, [1997] 1 SCR 793 ("*CUPE*"); *Goodman v Canada (Minister of Citizenship & Immigration)*, [2000] FCJ No 342 (FCTD)). Further, where the Applicant raises an issue that can only be determined on the basis of a record of what was said at the hearing, the absence of a transcript prevents the

Court from addressing the issue properly (*Vergunov v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 584 (FCTD) ("*Vergunov*")).

[21] The Applicant submits that the Member stated upon his return to the hearing after the break that he had just noticed that the recording had not stopped but that this statement was misleading and not true as the Member should have noticed that the recording device was off for the two hours of the hearing before the break. Further, that the decision states that the Applicant and counsel unambiguously stated that they wished to continue the hearing when advised of the error. The Applicant says that "[b]ut for the availability of the transcript of the hearing after the break it would have been impossible to figure out who is telling the truth". Thus, the absence of the two hour recording is indispensable to the judicial review. In reply, the Applicant goes further and submits that the Member deceived the Applicant into thinking that the recording was on for the first two hours and the Member's actions cast a cloud on the sanctity and integrity of the process. Because the Applicant cannot trust and rely on the Member's statement of fact in this regard, this amounts to a breach of procedural process that is repugnant to natural justice.

[22] Further, that during the first two hours of the hearing the Applicant was subjected to very detailed questioning by the Member about his sexual orientation, why he fears returning, who he fears and why and how his sexual orientation affected his marriage. The Applicant submits that the reviewing Court should have the benefit of this information to determine whether the decision of the Member regarding the Applicant's credibility and sexual orientation was reasonable.

[23] The Applicant filed an affidavit in support of his application for judicial review which, in part, addresses his allegation of procedural unfairness. In that affidavit he asserts that the Member's statement that counsel and the Applicant "unambiguously" wanted to continue with the hearing is clearly contradicted by the transcript. Further, that he has a reasonable apprehension of bias arising from the Member's actions by "strangely stopping the recording devise [*sic*] one minute into the hearing; not again activating it until two and [*sic*] half hours later".

Respondent's Position

[24] The Respondent submits that the Applicant's bald allegation that the Member deceived him by mistakenly telling him and his counsel that he just noticed that the recording device had been left on during the break is without merit. Given the Member's comments at the hearing and the lack of any evidence to the contrary it can be presumed that the issues with the recording were due to a technological misstep and not because of any maliciousness on the part of the Member.

[25] Nor has the Applicant established that any breach of procedural fairness resulted from the lack of a full transcript. There is no statutory right to a recording or a transcript of proceedings before the RPD. Thus, the absence of a full transcript will not in and of itself violate the rules of natural justice. The question is whether the absence of a transcript impedes the Applicant's ability to challenge the decision. The Applicant must raise an issue that affects the outcome of the case that can only be determined on the basis of a transcript such that its absence affects the Court's ability to properly address the issue (*CUPE* at paras 76 and 81; *Huszar* at paras 17-22;

Forde v Canada (Public Safety and Emergency Preparedness), 2017 FC 80 at para 20 ("*Forde*"); *Agbon v Canada (Citizenship and Immigration)*, 2004 FC 356 at para 3 ("*Agbon*")).

[26] The Respondent submits that here the Applicant has not established that his ability to challenge the decision has been compromised by the lack of a transcript. The RPD's decision is centered on the fraudulent nature of the Applicant's supporting documents, based on concerns apparent from the face of those documents. Further, the Applicant's submissions reference relevant portions of the existing transcript, where the Member states its concerns for counsel. The Applicant has not suggested that anything happened in the first half of the hearing that contradicted this discussion or what is reflected in the reasons. Therefore, it is clear that the Applicant's ability to challenge these findings have not been impacted by the fact that the transcript is incomplete (*Zheng v Canada (Citizenship and Immigration)*, [2000] FCJ No 2002 (FCTD) at paras 4-5) and no breach of procedural fairness arises.

Analysis

[27] In my view, there is no merit to the Applicant's allegation that the Member intentionally deceived him by stating that the recording was on during the break when in fact it had been off for the preceding two hours. The transcript indicates that the Member stated, as soon as the hearing resumed, that he had just noticed that the recording had not stopped during the break. He stated that he believed that this covered a period of about 26 minutes and that he would instruct the registry that the period in issue would not be a part of the record and asked if this was okay. Counsel for the Applicant replied "All right". The Member went on to state that he did not want to know about any discussions between the Applicant and his counsel during that time,

restated that it did not form a part of the record and "[I]t basically was an inadvertent mistake leaving the recording on".

[28] In his reasons, the Member describes the event in the context of the Applicant's application for a *de novo* hearing, as follows:

> [6] This application was rejected because the claimant effectively waived any objection at the hearing. When I advised the claimant and his counsel of this error, I asked him what they wanted to do. They unambiguously stated that they wished to continue with the hearing. I advised them that I would take steps to strike this portion of the recording from the official record….

[29] While the transcript does not indicate that the Applicant and his counsel were asked if they wished to continue, it is clear that they were given notice of the concern and agreed to proceed in the manner proposed by the Member. It is also clear that, at that time, the Member believed that there had been an inadvertent technological mishap by recording during the break.

[30] The transcript does not support the Applicant's assertion that the Member, by this exchange, knew that two hours of recording had been missed and that he intended to deceive the Applicant in this regard. Nor is there any other evidence to support this serious allegation. I also do not accept the Applicant's submission that the manner in which the Member characterized the incident brands the truth of all of his findings as suspect, giving rise to a reasonable apprehension of bias and warranting an adverse inference as to the integrity of the process.

[31] The live issue in this matter is the impact of the inadvertent failure to record two hours of the proceeding and the resultant gap in the hearing transcript.

[32] As stated by the Supreme Court of Canada in *CUPE*:

> 81 In the absence of a statutory right to a recording, courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice. Where the statute does mandate a recording, however, natural justice may require a transcript. As such a recording need not be perfect to ensure the fairness of the proceedings, defects or gaps in the transcript must be shown to raise a "serious possibility" of the denial of a ground of appeal or review before a new hearing will be ordered. These principles ensure the fairness of the administrative decision-making process while recognizing the need for flexibility in applying these concepts in the administrative context.

[33] Further, an applicant must show that the record before the reviewing judge would provide an inadequate basis for its decision, which requires more than unsubstantiated allegations (*CUPE* at paras 82 and 84).

[34] The test for determining whether an applicant has discharged his or her onus to establish procedural unfairness is that the applicant must raise an issue that affects the outcome of the case that can only be determined on the basis of a record of what was said at the hearing such that the absence of a transcript prevents the Court from addressing the issue properly (*Agbon* at para 3; *Huszar* at para 19; also see *Vergunov*).

[35] In the context of RPD hearings where there have been gaps in the transcript of the oral evidence, this Court has held that *CUPE* and the Federal Court of Appeal's decision in *Kandiah* stand for the proposition that the failure of an administrative tribunal to record its proceedings does not, in itself, constitute a denial of procedural fairness. Absent a statutory right to a transcript, the Court must determine whether the record before it allows it to properly dispose of

the application (*Wang v Canada (Citizenship and Immigration)*, 2011 FC 812 at para 8 ("*Wang*")). In *Wang*, the applicant had provided affidavit evidence of her testimony at the hearing and the reasons under review contained references to that testimony. The Court was satisfied that there was a sufficient record for the judicial review of the Immigration Appeal Division's ("IAD") decision to proceed.

[36] Similarly, in *Forde*, the IAD failed to record approximately one hour of the applicant's testimony. The applicant argued that the absence of a full transcript impaired his ability to challenge the RPD's adverse credibility findings. Justice O'Reilly found that the existence of a gap in the record did not amount to a breach of procedural fairness, the question was whether the applicant's ability to challenge the decision-maker's findings had been compromised (citing *Agbon* at para 3). Justice O'Reilly noted that the applicant had not provided an affidavit to fill the gap and had been given an opportunity to make written submissions after the hearing. Neither those submissions nor the IAD's reasons referenced any testimony that may have been given while the recording was turned off. Justice O'Reilly found that in those circumstances a new hearing was not required.

[37] As noted at paragraph 18 of *Huszar*, in determining whether the absence of the transcript amounts to a serious possibility of procedural unfairness, the case law establishes a number of factors to consider including:

(1) the grounds for review advanced;

(2) the importance of the impugned findings to the refugee claim;

(3) the basis upon which the RPD arrived at its findings;

(4) the subject matter of the transcript gaps, and the significance of the transcript gaps to the impugned findings;

(5) other means the tribunal used to fill the gaps; and

(6) other means available to the Court to determine what went on at the hearing.

[38] In this matter, the Member found that, given the serious credibility concerns arising from the Applicant's submission of fraudulent documents which went to the material and substantive parts of his claim, being the circumstances surrounding his first alleged same-sex experience, the Applicant was wholly and generally without credibility. In that regard, the Member had found that the 1980's Letters and the three affidavits were fraudulent. The remainder of the documentary evidence was found not to overcome those credibility concerns.

[39] Thus, the Applicant's assertion that during the first two hours of the hearing the Member asked him detailed questions about his sexual orientation and related matters and, therefore, that the Court should have the benefit of this information to determine whether the Members' credibility and sexual orientation findings was reasonable, simply does not meet the test. The Applicant raises an issue of credibility but it is not one that can only be determined on the basis of a record of what was said at the hearing and where the absence of a transcript prevents the Court from addressing the issue properly. The Applicant in no way ties the information that he alleges is missing to the Member's findings on credibility. Indeed, the Member explicitly stated that the Applicant had testified without major inconsistencies when questioned about his prior same-sex partners and his alleged sexual orientation as a bisexual, rather that it was the unexplained deficiencies in his supporting documents that led the Member to conclude that they

were fraudulent and that the Applicant intentionally sought to deceive the RPD. It was for this reason that the Member did not believe what the Applicant stated in support of his claim regarding his sexual identity or his caste identity.

[40] However, in his affidavit filed in support of his allegation that the gap in the transcript amounts to a breach of procedural fairness, the Applicant states that he had great difficulty at the hearing in getting the Member to understand the difference between a General Certificate of Education (GCE) certificate, issued by the West African Examination Council, an external examination body whose standardized examination every high school graduate in West Africa sits for, much like the Scholastic Aptitude Test in North America, with letters issued by a local school or seminary. He stated that he believed that the Member's impatient and hurried dismissal of his explanations during the first part of the hearing led him to make very wrong and unreasonable conclusions regarding the Applicant's case. Further, that the Member unnecessarily made much issue with the difference between his General Certificate of Education, a document printed in 1980's West African Examination Council computer and printer with the traditional perforations on both sides with continuous feed papers and letters issued by his local seminary.

[41] In my view, this raises only one point that speaks to the question of whether the gap in the transcript affects the Court's ability to address this judicial review. That is, whether the Member had before him evidence that the Education Certificate was not obtained from the Seminary, as the Applicant now deposes, if this can only be ascertained from the transcript and is necessary to assess the reasonableness of the Member's credibility findings.

[42] In his reasons the Member explicitly states that the Applicant "provided three (3) documents from the seminary". Further, that at the hearing he compared the 1980's Letters to the Education Certificate and asked the Applicant to explain why these contemporaneous documents looked so different. He noted that the Education Certificate was yellowed, had rounded edges and occasional rips. It was typed using an older or typewriter style printer font on a standard form with older printer hole perforated tracks on either side of the document. In contrast, the 1980's Letters were printed on paper that is brilliant white, the edges were fairly sharp and there were no rips or other degradation and the font of the 1980's Letters was more contemporary. Further, the 1980's Letters included a crest or logo in a black box which was sized too small to read the messages contained within it and was fuzzy. The Member set out and rejected the Applicant's explanation that the Education Certificate had been used more often which explained the difference in degradation of the two sets of documents. He concluded that the appearance of the 1980's Letters was not consistent with 30 year old documents.

[43] The Member also noted that on the Education Certificate the name of the seminary is "St. Peter Claver's Seminary" while on the 1980's Letters the name is "St. Peter Claver Seminary". The Member stated that if the 1980's Letters were authentic he would have expected them to name their own institution's name accurately. The Applicant in his statutory declaration given in support of his BOC refers to the Seminary as "St. Peter Claver Seminary", the spelling used in the 1980's Letters wherein the Member found to be fraudulent. The Member found the Education Certificate to be genuine. It is clear from his reasons that the Member thought that the Education Certificate and the 1980's Letters were from the same source.

[44] I am inclined to think, had there been oral evidence explaining that the two sets of documents had been issued by different parties, the Member would have mentioned this in his reasons, given his detailed reasons for discounting the 1980's Letters. Further, a review of the existing transcript does not suggest that the Applicant attempted to and had difficulty in explaining the distinction concerning the source of the Education Certificate and the 1980's Letters. The documents were entered as exhibits when his counsel began his questions of the Applicant and the Member clarified at that time that his concern was that the Education Certificate looked different in colour, was more degraded, and had punch hole tracks on both sides of the pages not present on the 1980's Letters. The Applicant's counsel then asked the Applicant several questions about the Education Certificate, including why it has punch marks and certain lines and the Applicant responded that he did not know why, that is how he received it. The Applicant did not suggest that the differences may have been explained by the differing sources of the documents, nor did the Applicant's counsel make an attempt to clarify that issue which one might expect if the Applicant had struggled to express that point when questioned by the Member.

[45] However, if the Applicant, as he now deposes, did try to explain that the Education Certificate and 1980's Letters were from difference sources, then the reasons could also suggest that the Member overlooked or misapprehended that evidence. The difficulty that the Court is faced with is that the Applicant's affidavit evidence alleging a breach of procedural fairness is unchallenged. While the Member stated that he kept detailed notes of the hearing, which he relied upon in reaching his decision, those notes or extracts from them, have not been provided. Thus, although it may be reasonable for the Court to infer, based on the reasons and the existing

transcript, that it is probable that the Applicant did not testify that the Education Certificate and 1980's Letters came from different sources, without the missing portion of the transcript, and absent a challenge to the Applicant's affidavit evidence in this regard, I cannot make this factual determination. In effect, in these circumstances I would be compelled to make a finding as to the Applicant's credibility based on an inference from the record that is before the Court, but it is not the role of this Court on judicial review to assess the credibility of the Applicant.

[46] And, significantly, it was based on the Member's comparison of the Education Certificate and the 1980's Letters that the Member found the letters to be fraudulent. While the Member also found the three affidavits to be fraudulent and the Applicant takes issue with that finding, none of his submissions are related to the gap in the transcript. He does submit, however, that the Member's error in finding that the 1980's Letters were fraudulent prejudiced the Member's view as to the Applicant's credibility.

[47] While I am of the view that the Member's assessment of the three affidavits as fraudulent was reasonable for the reasons he set out, the fact remains that the Member's decision was also based on his finding that the 1980's Letters were fraudulent. Additionally, he found that the remaining documents submitted by the Applicant did not overcome the submission of the fraudulent documents and based his manifestly unfounded finding on the submission of fraudulent documents, including the 1980's Letters. Given this, the Court is left with no appropriate alternative but to quash the decision and return the matter to the RPD for re-determination, although the ultimate outcome may well be the same.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is remitted back for re-determination by a different RPD member;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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