

Federal Court



Cour fédérale

Date: 20140912

Docket: IMM-3173-13

Citation: 2014 FC 871

Ottawa, Ontario, September 12, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

RICARDO BELTRAN GARCIA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the April 9, 2013 decision of a member of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [Member] finding that the Applicant is not a Convention refugee or person in need of protection pursuant to sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] The Applicant is a former police officer and a citizen of El Salvador. He claims that he is at risk from a high ranking police officer, and corrupt police officers and gangs associated with that officer, because he refused to participate in corruption.

[3] The Member dismissed the Applicant's motion to have the Member recuse himself on the basis of reasonable apprehension of bias. He also rejected the Applicant's claim on the basis of credibility and consequently found that there was insufficient evidence to establish that the Applicant would be subject to a serious possibility of persecution on a Convention ground, or that he would personally be subjected on a balance of probabilities to a danger of torture, risk to life, or risk of cruel and unusual treatment or punishment if the Applicant were to return to El Salvador. The Member found that the Applicant made major changes to his Personal Information Form [PIF] narrative when he filed an amended narrative and did not provide a reasonable explanation for omissions from the original.

[4] The Applicant does not challenge the dismissal of the motion for recusal but submits that the Member erred in fact and in law by finding that the Applicant did not provide any explanation for the omissions from his original PIF narrative and by failing to consider the evidence of a witness, whom the Member himself summoned, which supported the Applicant's explanation for the omissions.

[5] The Respondent interprets the Applicant's claims as allegations of bias. It further submits that the factual basis upon which the Applicant claims bias and challenges the

reasonableness of the Member's decision is contradicted by the Certified Tribunal Record [CTR].

[6] In this matter, when considering the issues raised by the parties, it was necessary to carefully review the decision, the procedural history of the matter and the CTR, in particular the hearing transcripts.

[7] Having done so, it is my view that the Applicant's submission that the Member erred by finding that the Applicant did not provide any explanation for the omissions from his original PIF narrative, when in fact he did provide an explanation, cannot succeed. It is clear from the decision that the Member acknowledged that explanations had been given, but did not accept those explanations. The Member repeatedly stated "I reject this explanation" and "The claimant provided no reasonable explanation for this omission" (paragraphs 31, 36, 38 and 45).

[8] The Respondent's submission that the Applicant's claim is one of bias can also be quickly dispensed with. The Applicant did not, in either his written or oral submissions, allege bias. His submissions were, undoubtedly, strongly worded and perhaps intemperate in so far as it was submitted that the Member misstated the evidence and ignored testimony and submissions "in order to find" that the Applicant provided no explanation for the difference between the original and amended PIF narratives. However, the issues raised and argued did not pertain to bias.

[9] In that regard, the issue as to whether the Member erred by failing to consider the evidence of the witness that the Member summoned is a valid one and is addressed below.

Background

[10] It is not in dispute that the Applicant's amended PIF narrative made major additions to his original PIF narrative. The Applicant entered Canada on March 30, 2009 and filed his Claim for Refugee Protection on the same day. His original PIF is dated April 24, 2009. The narrative is less than two pages in length and is comprised of fourteen unnumbered paragraphs. It was prepared with the assistance of the FCJ Refugee Centre. His amended narrative is dated June 15, 2011; it is eight pages in length and has fifty nine numbered paragraphs. The Member focused his decision almost exclusively on omissions from the original PIF narrative, including that the Applicant was kidnapped by the Los Zetas in Mexico and used as a forced labourer while making his way to Canada; that his persecution was as a result of his refusal to become involved in police corruption; and, that the police had looked for the Applicant at the homes of his mother and sister after he had fled. As noted above, the Member did not accept his explanations for those omissions.

[11] In his decision, the Member also states the following:

[39] Furthermore, the claimant stated that his original PIF had not been translated to him by Mr. Rico, the individual who had signed the interpreter's declaration. The panel summoned Mr. Rico as a witness. The witness appeared at the November 9, 2012 sitting of the claim. The panel asked the witness if the signature in the interpreter's declaration of the claimant's original PIF was his and he replied that it was. The panel then asked the witness if he had translated the original PIF to the claimant and he replied that he had.

[40] The claimant's counsel asked the witness numerous questions. At no time was the credibility of the witness challenged with respect to the question of whether he had actually translated the original PIF to the claimant.

[12] The hearing of this matter was conducted in five sessions. On August 30, 2012 the second hearing session took place and, as the matter was not concluded, a third session was scheduled. During that session, which was held on September 14, 2012, the Member addressed the amended narrative. When asked why paragraphs thirteen, fourteen and fifteen were not in his original narrative, the Applicant responded:

CLAIMANT: Well the person that helped me to fill out the personal information form focused on general things and when I gave my open narrative they only put the points that they considered to be most important.

MEMBER: Sir at the beginning of the hearing you were affirmed that the original narrative had been read back to you. So if noticed some important facts were missing why did you not mention to them when it was read back to you?

CLAIMANT: I did mention it nevertheless they focused around my sister's death and the corruption among the police, mentioning it as something general and not something with details.

(CTR p. 985)

[13] The Member then engages in a paragraph by paragraph comparison of the original PIF narrative and the amended narrative, asking each time why the addition was not in the original:

MEMBER: [...] Paragraph seventeen [...].

[...]

MEMBER: Why is that not in your original narrative sir?

CLAIMANT: I do not, I do not, I do not know why it does appear really.

MEMBER: Well let us go to paragraph number nineteen. [...] Why is that not in your original narrative sir?

CLAIMANT: To tell you the truth I do not understand when I exposed all my case. The story was done for me in that manner and I thought that they [ph] were mentioning my sister's death and the corruption amidst the police, I thought they had written it like that because that was what was essential, thinking that in the second one I could explain with details every point.

MEMBER: Paragraph number twenty-four sir. [...] Why was that not in your original narrative?

CLAIMANT: I do not know in reality why that does not appear.

(CTR pp 985-986)

[...]

MEMBER: All right let us go on to paragraph twenty-seven and twenty eight sir. [...]

[...]

MEMBER: Why is that not in your original narrative sir?

CLAIMANT: I do not know in reality. I insist that in the personal information form they focused around my sister's death and the corruption in the police.

(CTR p. 988)

[...]

MEMBER: Now paragraph number thirty-two sir. [...] Why did you not mention that in your original narrative?

CLAIMANT: I do not know why it does not appear.

(CTR p. 990)

[14] After a recess, Applicant's counsel brought a motion for bias and sought to have the Member recuse himself. She submitted that the Member had shown a closed mind and that the hearing had been an exercise in establishing that the Applicant was not credible rather than an

effort to understand his story and determine the truth. She gave an example where the Member had asserted that there was contradictory oral evidence when this was not the case and submitted that the Member's approach served to break down the Applicant who came to the RPD with a head injury. The Member rejected the motion. He resumed asking, paragraph by paragraph, why various points were not in the original PIF narrative and elicited several more "I do not know" responses from the Applicant.

[15] In response to a question from the Member as to why the information about the police parking a car outside his mother's house was not in the original PIF narrative, the Applicant stated:

CLAIMANT: I do not know.

When they were filling up the personal information form for me I did all the story and nevertheless the word, the sentence that the person that filled up the personal information form for me told me was that what I had to prove was the death of my sister and the corruption in the police.

I had prepared my personal information form prior to that in Spanish. I have many pages nevertheless the person who did the favor to me to complete it he told me he had absorbed what I was interested in proving before the government of Canada. So that I do not understand why it is that many points that Mr. Judge is asking me about is my only explanation as to the reason for which it does not appear in the original narrative.

MEMBER: And again sir, you did affirm that the personal information form was translated back to you. You found out these things were missing from the narrative sir, why did you not notice it at that time?

CLAIMANT: I did notice it because I had my personal information form in writing and nevertheless the person that has experience in this told me took like what he thought to be important which was my sister's death and the corruption in the police and he omitted this. And I not knowing the system recently arrived to Canada trusted the way the person who was with me

appreciated things, deducing that he with his experience and the amount of years he had been here, knew how, how, what he really had to take for my case.

(CTR p. 1000)

[16] The Member asked who the person was that had helped him prepare the original PIF narrative. The Applicant replied that it was in a community centre. The Member then asked if it was Mr. Giovanni Rico and:

MEMBER: So if I were to call him as a witness he would confirm that fact that you gave him a lot more information than what he put down in your original personal information form?

CLAIMANT: I would not be able to know what answer he would give to Mr. Judge.

(CTR p. 1001)

[17] The Member then moved on to paragraphs fifty-two, fifty-three and fifty-four of the amended narrative, asking why the Applicant did not include in his original PIF narrative that he was kidnapped by the Los Zetas as he was travelling through Mexico and held as a forced labourer. The Member again elicited an "I do not know" response.

[18] At this point the Applicant asked if he could make a comment and again tried to explain that he filled out the original PIF narrative in the way he had been advised to:

CLAIMANT: When I, I am going to insist on something. I developed all my narrative based on my experience since being in the police until arriving here with no omission of anything. But the people who make the favour of helping me clarified to me that I had to prove the danger I was in in [sic] the country I was coming from and when Mr. Judge asks me why it is that it does not appear in the original narrative for all the questions he asks me about the

original narrative my answer would be that I think that the person at that moment did not consider these points to be important. [...]

[...]

I do not have any more to say to Mr. Judge except the fact that the original narrative that is my explanation of why they would not have taken all those points if those were important points.

(CTR p. 1001-1002)

[19] The Member then asked the name of the community centre and the individual that assisted the Applicant. After some confusion, it was established that while it was Mr. Giovanni Rico who had signed the interpreter's declaration in the original PIF narrative, there were in fact two Mr. Ricos at the centre, a father and son. The Applicant testified that he did not believe that it was Mr. Rico's son who had helped him complete the PIF narrative:

MEMBER: Sir you explained that why all of these omissions from the original narrative were because you trusted the person that helped you with the personal information form because he was more experienced than you in these matters: is that correct?

CLAIMANT: Correct

MEMBER: Was that Mr. Rico sir that you trusted?

CLAIMANT: That is where I went to get help but the person who helped me complete the personal information form I do not believe it was him. But it was in that place where they made me the favor to help me.

(CTR p. 1003)

[20] The Applicant went on to try to explain that it was not Mr. Rico who directly translated the PIF narrative for him but another person who worked there. The Member responded:

MEMBER: But sir, again we are dealing with the translation of the document. According to the declaration in your original personal information form it was Mr. Giovanni Rico who translated the

personal information form to you from English to Spanish. Is that correct or not sir?

CLAIMANT: He did it for me from Spanish to English.

MEMBER: Well no, it was from English to Spanish because you speak Spanish sir.

CLAIMANT: The thing is that one takes there the development of the narrative ...

MEMBER: Okay sir, excuse me, I have to stop you here.

All right, there is a declaration in your original narrative and if you do not know the answer to this question please say so. The declaration says that Giovanni Rico translated the personal information form from English to Spanish to you. I want to know if that is true or not; whether the document was translated to you by Mr. Rico, Giovanni Rico from English to Spanish.

CLAIMANT: The answer is no.

BOARD MEMBER: Okay sir I am going to call Mr. Rico as a witness to determine whether your allegations are correct or not.

CLAIMANT: Okay

(CTR p. 1004)

[21] The Member adjourned until November 9, 2012. He issued a summons on November 2, 2012 stating that Mr. Rico was “to give evidence relevant to the claim, specifically to the translation of the Personal Information Form” (CTR p. 217).

[22] On November 9, 2012 the next hearing session was commenced. At that time the Member confirmed that he had received the medical documents dated November 6, 2012. These documents confirmed the Applicant’s workplace injury and persistent headache. Counsel for the Applicant again moved that the Member recuse himself for bias arguing that the Member had descended into the arena. The Member dismissed the motion.

[23] In the course of that discussion the Member addressed the reason why he had summoned Mr. Rico, a process that counsel for the Applicant submits was extraordinary:

MEMBER: The reason why I summoned the witness was because at the last hearing the claimant testified in his oral testimony that the person who had signed the interpreter's declaration in the personal information form, a Mr. Giovanni Rico, was not the person who had actually translated the personal information form to him. Therefore I wanted to settle that issue as to whether Mr. Rico had actually translated the personal information form to the claimant or not.

[24] The Member asked the witness where he was employed, being the FCJ Refugee Centre, FCJ standing for the Faithful Companions of Jesus, and what his role was there, which was currently as the Advocacy and Volunteer Coordinator. He then swore in the witness and asked him three questions:

MEMBER: So again I have C-1 which is the personal information form the claimant in this matter and it has an interpreter's declaration on it.

Counsel do you ... okay.

Now is this your signature here sir?

WITNESS: Yes it is.

MEMBER: And is this your name on top here sir.

WITNESS: Yes it is.

MEMBER: According to this declaration here it says that you have accurately interpreted the entire contents of this form to ... from the English language to the Spanish. Did you do that with this claimant sir?

WITNESS: Yes I did.

MEMBER: Thank you I have no more questions. Counsel?

(CTR p. 1015)

[25] Counsel for the Applicant then questioned the witness. Mr. Rico explained that the FCJ Refugee Centre is a non-governmental organization that helps settle and protect refugee and non-status people in Canada. He started volunteering at the centre when he was very young, around ten years old, and that he was now thirty years old. In 2009 he was a volunteer community legal worker and helped clients fill out forms, informed them of the process, and guided them through the system. When the advocacy and volunteer coordinator position was funded, he applied for it and was appointed. He had on the job training on how to fill out legal forms and, although he held a B.A. from York University, he had no formal qualifications in law or translation.

[26] As to the completion of personal information forms:

COUNSEL: And in 2009 when this personal information form was being prepared were you the only person who helped people with personal information forms?

WITNESS: No a lot of our work is done through volunteer so I am the one that signs off on the forms because I am the one that after everything is done interprets it back to the client. But a lot, because we used to see a lot of cases we had volunteers who would translate the documents for the client; I would just oversee the final product to make sure that the client understood everything that was in the form.

MEMBER: So I am sorry; I am a little bit confused. So were there other people who also helped?

WITNESS: We have, we work through volunteers, so there is a high demand, so I just make sure that the final product if I do not work directly with the client, is... is what the client understands and make sure that everything that is in it is what the client has said.

COUNSEL: When you said that volunteers helped translate documents, what documents would they translate?

WITNESS: They would translate the narrative. At that time we were getting about twenty narratives a week so it would... it is very difficult for me to do all twenty... translate all twenty

narratives. So they would have volunteers come in who I have assessed that speak both English and Spanish and then they would translate the narrative. Then I would sit down with the client and read back what was translated to them.

COUNSEL: So clients would be asked to bring in their own narratives in their own ... in Spanish?

WITNESS: Yes the client is given a form that... in the case of a client that speaks Spanish, is given the personal information form translated into Spanish. They fill that out and we translate it back to English and then the narrative since they write it in their own language, we translate it back to them.

(CTR pp. 1017-1018)

[...]

WITNESS: Well our goal is to make sure that the client first of all fills in the forms on time. So you know if the client comes in with a very extensive narrative that is too long then we ask them to ... to shorten it up due the fact that we will not be able to translate it. And if a narrative is too short we just ask them to be you know, I ask them if that is everything that they want to include and explain to them that you know this is what is going to be the basis of their claim.

COUNSEL: And is there any guideline as to the like appropriate length of a narrative or how much you guys are really able to translate?

WITNESS: Only in the case of ... like we cannot tell them how much they need to write because every case is different. So there is no way of us to know how you know that every case fits into two pages. We just try to you know guide that it you know obviously you cannot tell why you are afraid of going back home in just a paragraph. And if you bring me twenty pages I just do not have the capacity to translate it.

Most of the cases that we see is last minutes because it is after they have been turned down from Legal Aid and that type of scenario, so there is also time constraints in the way we fill out the forms.

COUNSEL: And what is the effect of those time constraints?

WITNESS: It, well the effect depends on when the client comes in. If it is two days before the personal information form is due then you know it affects in how much time we have to sit down

and do the translation and work with the client. So the client has two days before the personal information form is due and shows up with a ten-page narrative sometimes we have to tell them if they could summarize and add amendments to it later.

COUNSEL: Sorry; summarize and?

WITNESS: Add amendments to it after because we know how strict the Immigration and Refugee Board can be with submitting personal information forms on time.

(CTR pp. 1019-1020)

[...]

COUNSEL: You mentioned something before about telling clients that ... that amendments could be made. What is your ... what do you tell clients about their ability to make amendments to their personal information form?

WITNESS: Well that if they get legal counsel the counsel could review the ... the narrative with them and see if there are any things to change. We also know that clients at the beginning can have problems with recollection or you know they are stressed out by the whole process of getting everything in on time that maybe some details might have been left out due to either their forgetfulness or due to the rush of having to get it in on time. So we have explained to them that if you know they believe ... first of all we ask them if that is everything that they have written down is what they want to be written, but also we assure them that they can maybe submit changes to it if something happens, they (inaudible) something differently when they look at it over time.

(CTR p. 1021)

[27] When asked by counsel if he was familiar with any of the Federal Court jurisprudence concerning personal information form amendments he stated that he was not. He also confirmed that he did not remember the Applicant, that there was no record of whether anyone else at the centre had assisted him or not and that the centre did not keep records of any drafts or other documents brought in by clients.

[28] Counsel then questioned the Applicant about his health problems and how his PIF narrative was prepared. He confirmed that he had made an appointment with the centre and that his original PIF narrative was prepared four days short of the filing deadline.

[29] When asked what he had meant when he had testified that Mr. Rico had translated his original PIF narrative from Spanish to English, but not English to Spanish, the Applicant stated:

CLAIMANT: When they are helping you to prepare the narrative at that moment when you sit just beside the person who is helping you they are guiding you on, with aspects that in their opinion believe that it will help you with the case. So there they would take from you the areas that they believed are of importance and then they prepare in the English language on the computer. So I never received a document in Spanish, they only took whatever . . . from my narrative whatever they thought that it was important.

COUNSEL: So that, so my question is like you said that they translated it from Spanish to English which you are explaining they did on the computer. Now why did you say that they did not translate it from English back to Spanish?

CLAIMANT: Well because with respect to that my understanding is that if they had provided to me the translation from English to Spanish then the Spanish should have reflected what I had or what they have observed from the story that I have told them in Spanish and they have written into English.

(CTR p. 1026)

[30] The Applicant stated that a section by section approach was taken to preparing and translating the PIF narrative and confirmed that he believed he had understood its contents when he signed it.

[31] Counsel then questioned the Applicant about his story. Time ran out and a final session was scheduled for November 29, 2012. On November 29, 2012 the fifth and final hearing session was held during which counsel finished questioning the Applicant about his story.

Analysis

[32] Having reviewed the transcripts, it is apparent that the Member was not only testing the Applicant's evidence, which he was clearly entitled to do, but was in some instances misinterpreting the evidence and then challenging the Applicant based on that misinterpretation and alleged contradiction.

[33] As to the issue of the Applicant's explanation for the omissions, the Member was not required to accept the Applicant's explanation for the amendments to his PIF narrative (*Houshan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 650 at para 19; *Kaleja v Canada (Minister of Citizenship and Immigration)*, 2011 FC 668 at para 18). Further, as stated in *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at paras 65-66, the Member was entitled to draw negative credibility inferences based on omissions that are not reasonably explained:

[66] It is well established that a board may draw negative inferences on an applicant's credibility where relevant and important incidents that are not included in the PIF are revealed at a later stage in the refugee proceeding and a reasonable explanation is not provided for their earlier omission (see *Adewoyin v Canada (Minister of Citizenship and Immigration)*, 2004 FC 905, [2004] FCJ No 1112 at paragraph 18; *Santillan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1297, [2011] FCJ No 1586 at paragraph 29; and *Guzun v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1324, [2011] FCJ No 1615 at paragraph 18).

[34] In this case it is apparent from the hearing transcripts that the Applicant repeatedly gave the same explanation for why the two narratives were different. The Respondent submits that the Applicant conceded that he replied “I don’t know” on multiple occasions. And, it is correct that he did so. However, when viewed in the context of the transcripts and the evidence as a whole, this does not truly reflect what transpired or the Applicant’s explanation.

[35] The Applicant testified that he had prepared a detailed PIF narrative in Spanish. However, that he had been guided by the advice of the centre which helped him. The individual who helped him had focused on certain aspects of his claim and had not translated the whole of his Spanish PIF narrative. A general, and not detailed, version of events was generated. He also testified that he was told that he could amend the PIF narrative later if necessary. Having explained this, and being faced with the Member’s repeated questioning as to why the details included in the amended PIF narrative were omitted from his original PIF narrative, the Applicant could only answer, as he did, that he did not know.

[36] The Applicant’s explanation that the centre’s advice was the reason for the omissions from the original PIF need not have been accepted by the Member. However, the Member of his own accord summoned a witness from the centre, Mr. Rico, whose testimony supported the Applicant’s explanation for the omissions. Specifically, his evidence supported the Applicant’s contentions that it was not necessarily Mr. Rico who assisted with the translation of his PIF from Spanish to English (although he oversaw the final result); that claimants brought PIFs that they had prepared in their own language to the centre; that the centre did not have the capacity to translate lengthy PIFs and advised their clients to shorten or summarize them as necessary and

that they would be able to amend later. Mr. Rico also noted that he had no knowledge of the jurisprudence regarding PIF amendments.

[37] The Respondent submits that a review of the decision indicates that the witness' testimony does not corroborate the substance of the Applicant's claim for protection. This is not surprising, as the witness was never asked by either the Member or Applicant's counsel to corroborate the story of persecution, nor was he in a position to do so.

[38] The Respondent also submits that, as stated in the decision "...the only reason for the panel in summoning him was to ascertain whether he had translated the PIF from English to Spanish to the claimant". Therefore, the fact that the witness happened to corroborate the Applicant's explanation for the amendments to the PIF does not require the Member to accept this corroboration.

[39] I would first note that it is apparent from the transcripts that the Applicant was trying to convey to the Member that his PIF was translated from Spanish to English and that persons at the centre, other than Mr. Rico, had assisted him in this regard. When the Member interrupted him and required him to answer whether it was true or not that Mr. Rico had *translated* the document from English to Spanish, he responded that it was not. In contrast, what the Member asked Mr. Rico was whether he had accurately *interpreted the entire contents* of the form from English to Spanish for the Applicant and he confirmed that he had. When the Applicant was subsequently questioned by his own counsel, he also confirmed this. In my view, the Member's brief questioning of the witness did not clarify whether the witness was contradicting the Applicant.

The point in issue seeming to have been whether it was Mr. Rico who had translated the Spanish PIF to English and whether that translation included the whole of the content of the Spanish PIF, not, as the Applicant subsequently confirmed, that Mr. Rico had not interpreted into Spanish the completed English PIF.

[40] I would also note that the Member stated that the reason why he summoned the witness was because the Applicant testified that the person who had signed the interpreter's declaration in the PIF, Mr. Rico, was not the person who had actually translated the PIF to him, and so he wanted to settle that issue. While the Member did not pursue this point with the witness, when questioned by counsel for the Applicant, the witness confirmed that it is often volunteers who assist in the front line translation. This was exactly the information that the Applicant had tried to explain in his testimony and it corroborated his evidence in that regard.

[41] Indeed, the Member asked the Applicant, "[I]f I were to call him [Mr. Rico] as a witness he would confirm that fact that you gave him a lot more information than what he put down in your original personal information form?" The Member did not ask the witness this when summoned. However, Mr. Rico's evidence when questioned by counsel for the Applicant was that claimants provide their own detailed PIFs which are translated and can be summarised when they are too long, especially when the translation must occur within a very short time frame before the filing deadline.

[42] In my view, the Member should have addressed the witness's testimony that corroborated the Applicant's explanation for the omissions in the original PIF narrative. This was important

evidence because the Member reached a negative credibility finding on the basis that no reasonable explanation for the omissions had been given. The Member accepted Mr. Rico's testimony respecting the interpretation of the PIF yet, when faced with evidence that corroborated the Applicant's explanation, the Member did not refer to it or give any indication either that he did not accept the witness' testimony on these points or, if he did not, the basis for that finding. In my view, this was a reviewable error. The more important the evidence that is not specifically mentioned and analysed in the reasons, the more willing a court may be to infer from that the decision-maker made an erroneous finding of fact without regard to the evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17; *Ultima v Canada (Minister of Citizenship and Immigration)*, 2013 FC 81 at paras 17, 35).

[43] In this case the Member failed to assess the explanation offered for the omissions in the original PIF narrative in light of the corroborating evidence given by the witness that he himself summoned. The Member's role was to assess the Applicant's explanations for the amendments. As the Member failed to do so, I find his treatment of that evidence and resultant conclusion that no reasonable explanation for the omissions had been given and resultant assessment of the Applicant's credibility to be unreasonable (*Okoli v Canada (Minister of Citizenship and Immigration)*, 2009 FC 332 at paras 23, 27-28, 33).

Costs

[44] As to costs, the Applicant submits that pursuant to Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, this Court should, for special reasons,

order costs in his favour. Specifically, the Applicant submits that he should be awarded costs on the basis that an immigration official engaged in misleading or abusive conduct or that the Minister unreasonably opposed an obviously meritorious application for judicial review, both as addressed in *Ndungu v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 208 at para 7. Further, rather than addressing the issues, the Respondent addressed other matters and made a personal attack on the Applicant and his counsel.

[45] The Respondent, needless to say, does not agree. It submits that the language of the Applicant's submissions, which are on the public record, brings into question the integrity of the Member and the immigration system. It further submits that both the Member and counsel were simply doing their jobs and that, in any event, there were sufficient inconsistencies in the evidence to warrant both the Member's approach and opposition to the judicial review.

[46] I do not view the actions of either party as personal attacks on the other nor as conduct amounting to "special reasons" justifying an award of costs in favour of the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter will be remitted back to the Immigration Refugee Board for re-determination by a different Member;
2. The Applicant's request for costs is denied and there shall be no order as to costs; and
3. No question for certification was submitted and none arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-3173-13

STYLE OF CAUSE: RICARDO BELTRAN GARCIA v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 3, 2014

JUDGMENT AND REASONS : STRICKLAND J.

DATED: SEPTEMBER 12, 2014

APPEARANCES:

Leigh Salsberg FOR THE APPLICANT

Brad Bechard FOR THE RESPONDENT

SOLICITORS OF RECORD:

Leigh Salsberg FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario