Federal Court  Cour fédérale

Date: 20090706

Docket: IMM-5052-08

Citation: 2009 FC 702

Ottawa, Ontario, July 6, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

AIMÉ-GASTON GATORE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to s. 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a Board of the Refugee Protection Division of the Immigration Refugee Board (Board), dated October 14, 2008 (Decision) refusing the Applicant's application to be deemed a Convention refugee or person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant was born in 1977 and claims he is a citizen of Burundi.

[3] The Applicant's father was a Tutsi and was murdered by a former Hutu neighbour, Simon Bigere (Bigere), in October 1995. The Applicant did not witness the murder but was at the scene moments later where he found a note next to his father's body saying that this was "only the beginning." The Applicant complained to the police the next day, but no follow-up occurred and the family did not seek further help. The Applicant alleges a fear of persecution at the hands of Bigere.

[4] The Applicant claims that Bigere resurfaced eleven years later and began threatening him. He claims that a grenade exploded in front of his house on May 20, 2006. This was followed by a telephone call from a man claiming to be Bigere who took responsibility for the attack. The Applicant claims that the police did not take action. He says they warned him not to pursue the matter because Bigere was a military officer with the national army under the new Hutu-based National Council for the Defence of Democracy-Forced for the Defence of Democracy (CNDD-FDD). The Applicant claims that he realized his life was in danger when he received another threatening call from Bigere on July 10, 2006.

[5] The Applicant says that he went into hiding after this phone call and made arrangements to flee Burundi by seeking a United States (U.S.) Visa under false pretences. He applied for a U.S. Visa on October 10, 2006. The visa was issued on October 12, 2006. He then left Burundi on October 22, 2006, travelled to the U.S. on October 23, 2006 (through Italy) and then made his way to Canada two days later, arriving in Fort Erie by taxi on October 25, 2006. He filed a refugee claim at Fort Erie that same day.

DECISION UNDER REVIEW

[6] The Board found that the Applicant is not a Convention refugee or person in need of protection.

[7] The Board noted that the jurisprudence warns decision makers to avoid attributing weight to an applicant's demeanour because it can be influenced by cultural background, the stress of being questioned in a refugee hearing and/or psychological factors arising from previous persecution. In this matter, however, the Board made an exception.

[8] During the first half of the hearing, the Applicant appeared relaxed and looked at the Board while being questioned. The Board noted that his oral account of what happened in 1995 – which included standing next to the body of his dead father who had been stabbed – was "matter of fact" and completely devoid of emotion. The Applicant "spoke of the loss of his father and his ordeal as if he were narrating a movie he had seen."

[9] After the mid-hearing break, the Board felt that the Applicant's demeanour changed and that he "no longer maintained eye contact with anyone and he kept his head low while answering questions. His account was delivered with so much emotion and consternation that at times it sounded orchestrated, almost theatrical." The Board held that the Applicant's "demeanour during his hearing…tainted the credibility of his overall account."

[10] The Board also had other credibility concerns, including the Applicant's failure to demonstrate a subjective fear of persecution when he did not go into hiding after July 10, 2006, and his failure to seek asylum in Italy and in the U.S.

[11] The Applicant also claimed that he knew it was Bigere who had killed his father; however, his evidence contained different accounts. His Personal Information Form (PIF) claimed that a note was left behind. No reference was made to the note having a name on it or of its being signed by anyone. At the hearing, the Board asked the Applicant how he knew Bigere killed his father, whether he saw anyone kill his father, and whether the note left behind had been signed. The Applicant's first account was that he never saw anyone and that the note was not signed. He claimed he heard his father yell and that when he came to him he was already dead. The Applicant was asked how he knew who killed his father if he saw nobody and the note was not signed. The Applicant's account changed and he replied that the small piece of paper stated "this is only the beginning…it is me Bigere." This discrepancy was pointed out to the Applicant and he explained that the note was not signed but it had Bigere's name printed on it. The Board found this inconsistency was not reasonable.

[12] The Board had no reason to doubt that the Applicant's father had died, but it was not persuaded that the Applicant or his family knew who killed him. The Applicant's account of the note was inconsistent and neither he nor anyone else witnessed the murder. The notion that a Hutu

would leave behind a note confessing to having murdered his Tutsi neighbour at a time when the government, the army and the police were dominated by Tutsis was not believed by the Board.

[13] The Board alleged that counsel had admitted during his submissions that during the Tutsi administration (before the Hutu-based CNDD took power) one would have expected Tutsi victims of crime to be met with goodwill and collaboration from the Tutsi authorities. The Board cited counsel's reasoning to support its own finding on this issue.

[14] The Board held that there was no credible or trustworthy evidence to confirm how the Applicant's father had died. The death certificate in evidence was issued in 2008, twelve to thirteen years after the father's death. It also bore the same date of issue as the death certificate of the Applicant's mother, who died almost one year later in June 1996. Neither document states the cause of death. The Applicant claimed that, at the time of his father's death, no death certificate was issued and, in the 12 years following, there had never been a need to obtain the documents. The Board asked how the Applicant and his sibling managed the affairs of the rented properties left behind without evidence of their parents' deaths. The Applicant stated that the documents were never asked for. The Board attributed "little weight" to the death certificate of the Applicant's father.

[15] The Board found that it did not have sufficient credible or trustworthy evidence to support the Applicant's allegation that Bigere killed his father in 1995.

[16] The Board felt that the Applicant's behaviour did not demonstrate a subjective fear of persecution. The Applicant claimed that he was fearful after his father's killing and went to the home of a family member in Kiriri (in another area of the city); however, he returned to the family home soon afterwards and never went back to the police to follow up on his complaint regarding his father's murder.

[17] Despite having been allegedly threatened by Bigere with death, the Applicant remained living in the same city, continued attending University between May and August 2006 (he had to go back to write a number of exams), and he pursued all the arrangements related to his U.S. Visa application in downtown Bujumbura at the U.S Embassy. When asked to explain his behaviour, the Applicant claimed that he feared for his life and that he went into hiding on July 15, 2006. He said that he went to stay with his brother who lived in the same city just a few kilometres away. The Applicant was reminded of the declarations he had made at the Port of Entry (POE) in Fort Erie when he arrived in Canada in which he had confirmed that he resided at his home in Bujumbura until October 2006 (when he left Burundi). The Applicant had also declared that he attended the *Université des Grands Lacs* until September 2006. The Applicant had declared these statements to be true, accurate and complete when he signed the Declaration Section on October 25, 2006.

[18] The Applicant's explanation was that he was in hiding and hardly ever went out of the house. He only went back to the University to write his exams. The Board found that the Applicant was never in hiding.

[19] The Board also noted that nobody in the Applicant's family had ever been bothered by Bigere and the Applicant's wife and siblings continue to live in the city of Bujumbura. There was no single, logical explanation why Bigere would single out the Applicant.

[20] The Applicant claimed he did not consider asking for asylum in Italy or the U.S because he knew that Canada does not return people to Burundi. The Board understood this to mean that the Applicant "was aware of Canada's moratorium and the fact that it was not returning failed refugee claimants to Burundi when the [Applicant] left the country."

[21] The Board found that if the Applicant's life was in jeopardy, and if he had a subjective fear of persecution when he left Burundi, he would have sought international protection at the first possible opportunity. Both Italy and the U.S. are free, democratic nations and signatories to the 1951 Convention. The Board held that the Applicant's failure to seek asylum in those countries undermined his refugee claim. He did not have sufficient credible or trustworthy evidence in support of his claim. The Board also found that the Applicant did not face a serious possibility of persecution in Burundi.

[22] The Board concluded that the Applicant's removal to Burundi would not subject him personally to a danger, believed on substantial grounds to exist, of torture, and would not subject him personally to a risk to his life, or a risk of cruel and unusual treatment or punishment, under section 97(1) of the Act. Therefore, the Applicant's claim failed on all three grounds under the Act.

ISSUES

[23] The Applicant submits the following issues on this application:

1) Whether the Board violated natural justice by failing to record the entire hearing;

2) Whether the Board arrived at unreasonable conclusions, without regard to the actual testimony before it.

STATUTORY PROVISIONS

[24] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[25] In *Dunsmuir*, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[26] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may

adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[27] On issues of credibility, the standard of review has, pre-*Dunsmuir*, been patent unreasonableness: *Hou v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1586 at paragraph 13 and *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.) at paragraph 4 (*Aguebor*).

[28] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the second issue on this application, to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[29] The Applicant has also raised a procedural fairness issue for which the standard of review is correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

ARGUMENT

The Applicant

Natural Justice

[30] The Applicant submits that the primary basis for the Board's rejection of his claim was his demeanour. Once a tribunal has stated that its entire perception of a case is affected or "tainted" by one issue, it is hard to separate this from the impact of other findings. The Applicant cites *Peng v. Canada (Minister of Immigration and Employment)*, [1993] F.C.J. No. 119 (F.C.A.) for the proposition that once a Board has made a central finding against a claimant's credibility, it cannot be dissociated from the overall assessment of credibility. If the finding is set aside, then the Decision must also be set aside.

[31] The Applicant cites and relies upon *Kozman v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 714 at paragraphs 22 and 23:

> **22** Counsel for the applicant argued it was impossible for anyone to determine the extent to which the taint permeated these other issues because they were, in part at least, anchored on findings of fact reached by the tribunal based on its assessment of the applicant's testimony.
>
> **23** I believe counsel for the applicant's call for prudence is a wise one and finds support in the Federal Court of Appeal's

> decision in Caron v. Canada (Attorney General), [1998] F.C.J. No. 97, where the Court said this:
>
> > 4 It is very possible that the breach of the rules of natural justice attested to by the incident did not have a major influence, particularly since the findings of fact being discussed were the findings made by the Board of Referees, where everything had proceeded properly. It is also very possible that the applicant's somewhat disordered and unorganized submissions could not have been viewed favourably in any event, regardless of the context and the language in which they were presented. However, we do not believe that these considerations can have any influence whatever. It is plain to us that this kind of breach of natural justice must vitiate the proceedings before the umpire, and accordingly the decision that resulted therefrom.

[32] The Applicant submits that the Board's accusation that the Applicant is a "theatrical liar" could affect its entire perception of his claim. The Board's reliance on demeanour was made in violation of a principle of natural justice. In *Gracielome v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 463 (F.C.A.), it was held that a refugee must be confronted with a Board's doubts. The Applicant submits that he had no way of knowing that the Board found anything wrong with his demeanour.

[33] The Applicant also submits that the Board violated natural justice by failing to record the second half of the hearing where the Board claimed the Applicant became "almost theatrical." The Applicant cites *Paramo-Martinez v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 261 (F.C.T.D.) where an allegation that questions had been asked in a sarcastic tone was dismissed because the recording of the hearing was not played at the judicial review hearing. The

Applicant submits that he is unfairly prejudiced by the Board's failure to record the entire hearing because he cannot disprove the allegations.

[34] The Applicant also cites and relies upon *Cius v. Canada (Minister of Citizenship and Immigration)* 2008 FC 1 (*Cius*) for the proposition that if a refugee wants to prove the tone of voice the Court expects the refugee to produce the recording of the hearing. An affidavit is not enough.

[35] The Applicant also cites *Benavente v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 635 (F.C.T.D.); *Goodman v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 342 (F.C.T.D.) (*Goodman*); *Navaratnam v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 142 (F.C.T.D.) and *Tung v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 292 (F.C.A.) for the proposition that it is a violation of fundamental justice not to have a transcript available when an application involves something contentious that would have been reflected in a transcript.

[36] The Applicant submits that the Court in *Goodman* and *Sikder v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 915 (F.C.A.) held that a lawyer's notes are not an adequate substitute for a recorded hearing. The Applicant says that the error of the Board in not taping part of his testimony is sufficient to grant judicial review because it means he is prejudiced in his ability to present his case.

[37] The Applicant also relies upon *Hatami v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 402 (F.C.T.D.) for the proposition that where a board has not made an adverse credibility finding, the lack of a transcript or recording of a hearing does not affect a court's ability to judge the case.

[38] The Applicant also submits that the Board's finding that the Applicant's lawyer admitted that an aspect of the Applicant's testimony was implausible is perverse and in violation of natural justice, particularly since his submissions were not recorded.

Conclusions of the Board

[39] On this issue, the Applicant submits that the Board's finding that he showed a lack of subjective fear by not claiming asylum in Italy or in the United States in unreasonable and is without regard to the evidence. The Applicant knew that Canada does not deport Burundians; therefore, it was logical for him to come to Canada. The Applicant cites *Hue v. Canada (Minister of Employment and Immigration)*, [1988] F.C.J. No. 283 (F.C.A.) (*Hue*) at pages 2-3:

> The Board rejected the Applicant's claim, according to its reasons, on the sole ground that he had not made it in 1981 when he went to Greece and boarded his ship. This, for the Board, would show that the Appellant's fear was not real and that his contention to that effect, his having waited so long before making it, was not credible.
>
> …we disagree completely with the Board's reasoning in the present case. It seems to us obvious that the Applicant's fear is in relation to his having to return to the Seychelles and as long as he had his sailor's papers and a ship to sail on, he did not have to seek protection.

> …the matter will be referred back to the Board for reconsideration on the basis that, in the circumstances of this case as revealed by the evidence, it is not possible to dispute the credibility of the Appellant's statement as to his fear on the sole basis that he made his claim for refugee status in 1986 only.

[40] The Applicant also notes that *Hue* was relied on in *Gyawali v. Canada (Minister of Citizenship and Immigration)* 2003 FC 1122 at paragraphs 17-19:

> **17** In *Hue v. Canada (Minister of Employment and Immigration)*, [1988] F.C.J. No. 283(F.C.A.), the applicant had worked on a ship for the duration of the five-year delay between his departure from home and his claim for refugee status. The Court found that it was evident he had no fear of having to return to his homeland while he had his sailor's papers and a ship to sail on, that fear was realized only when he was given leave from the ship and was faced with returning to the Seychelles Islands.
>
> **18** In the case at bar, the applicant had a student visa and had also made an application for permanent residency. It is clear that it was not until he lost his financial support from his family in Nepal that he feared having to return there because he could no longer pay for his studies. Clearly there is a direct parallel with the sailor on the ship who is finally given leave and has nowhere to go but home. Both had left home for fear of persecution and had found a safe place to stay and work, so much so that they did not feel the need to apply for refugee status as they were safe for the time being. Suddenly, both found themselves in peril of returning home through circumstances over which they had no power or influence and immediately filed a claim.
>
> **19** It is thus not reasonable for the Board to draw any negative inference against the applicant.

[41] The Applicant submits that the Board’s finding on this issue is unreasonable. The Board did not dispute that he had visas and was able to travel through Italy and the U.S. at no risk of being returned to Burundi. It was also accepted that he is safest in Canada.

[42] The Board also found that the Applicant showed a "lack of subjective fear as he returned to the family home soon thereafter and he never went back to the police to follow up on his complaint regarding his father's murder." The Applicant says that this is a perverse finding made without regard to the evidence that his father was murdered and the killer ran away. The Applicant went to the police to file a complaint but the police said the killer had fled to the bush and could not be found. It was logical for the Applicant to return home, as the killer was gone and the police were willing to arrest him if he came back.

[43] The Applicant also points to the Board's finding that he lacked subjective fear because he did not go into hiding. This finding is based on a factual error. The Applicant's testimony was that he was enrolled as a student until September, but the last time he attended university was to write an exam sometime between May and August.

[44] In relation to his address, the Applicant submits that he told the officer his family's residential address, as he thought he was expected to state his permanent address. The Applicant did not think that hiding temporarily elsewhere amounted to a change of residential address.

[45] In relation to whether the note was signed, the Applicant submits that he was asked if the note was signed and he said it wasn't. Bigere had printed his name at the end of the note, but it was not signed. The Applicant alleges that this was not a contradiction. The Board found this implausible because the police were Tutsi at the time and the Board "treats the Applicant's lawyer as reliable, claiming that he explained in submissions that the police were Tutsi then." The

Applicant states that this finding was without regard to counsel's actual submissions, which were that Bigere was able to write his name because he had planned his escape.

[46] The Applicant submits that the Board's findings were made without regard to the fact that the Applicant's narrative states that Bigere made no effort to conceal his identity and relied on this to trick the Applicant's father.

[47] The Applicant further submits that the death certificate cannot be given "little weight" as the Applicant's father is either dead or alive and the death certificate is either real or fraudulent. The Applicant cites *Kathirkamu v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 308 which held that it is an error of law to find a validly issued document fraudulent if there is no evidence to establish fraud.

[48] The Applicant also submits that the Board's assumption that Bigere would target the Applicant's entire family, instead of just the Applicant, disregards his testimony. The Applicant stated that he heard and recognized Bigere at the door and found his father dying. It was only the Applicant who went to file a complaint with the police. Bigere joined the movement which is now the government of Burundi and which administers the police and gives Bigere access to police records.

[49] The Applicant submits that his siblings do not have the same connection to the murder as he does and have made no complaints to the police about it. The Applicant had not met his wife at the

time of the murder, so the chances of her being targeted are remote. The Board ignored the current political context in which rebels now control the government, including the police force.

[50] The Applicant concludes that this Decision is based on credibility findings which are unreasonable.

The Respondent

Credibility

[51] The Respondent submits that the Board was entitled to decide adversely with respect to the Applicant's credibility based on contradictions and inconsistencies in the Applicant's story and between the Applicant's story and other evidence before the Board: *Aguebor; Leung v. Canada (Minister of Employment and Immigration),* [1990] F.C.J. No. 908 (F.C.A.) and *Alizadeh v. Canada (Minister of Employment and Immigration),* [1993] F.C.J. No. 11 (F.C.A.).

[52] The Respondent says that this Court should not interfere with the Board's assessment of credibility when an oral hearing has been held and where the Board has had the advantage of seeing and hearing the witnesses, unless the Court is satisfied that the Board based its conclusion on irrelevant considerations or that it ignored evidence. Where any of the Board's inferences and conclusions were reasonably open to it on the record, the Court should not interfere, whether or not it agrees with the inferences drawn by the Board: *Grewal v. Canada (Minister of Employment and Immigration),* [1983] F.C.J. No. 129 (F.C.A.) at paragraph 2; *Martinez v. Canada (Minister of Employment and Immigration),* [1981] F.C.J. No. 1132 (F.C.A.) at paragraph; *Singh v. Canada*

(Minister of Employment and Immigration), [1986] F.C.J. No. 514 (F.C.A.); *Brar v. Canada (Minister of Employment and Immigration)*, [1986] F.C.J. No. 346 (F.C.A.) and *Oduro v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 560 (F.C.T.D.).

[53] The Respondent says that, in assessing the credibility of the evidence, the Board is entitled to consider and evaluate the general demeanour of the Applicant while testifying. This includes an assessment of the manner in which he replied to questions, his facial expressions, tone of voice, general integrity, and powers of recollection: *Leung v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 685 (F.C.A.); *Wen v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 907 (F.C.A.) and *Mostajelin v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 28 (F.C.A.).

[54] The Respondent says that negative findings of credibility based upon the demeanor of witnesses and the Board's observations of the Applicant's demeanour are unassailable on judicial review in the absence of perversity: *Sun v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 636 and *Ankrah v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 385 (F.C.T.D.).

[55] The Respondent acknowledges the error that the second portion of the hearing was not recorded. The Respondent notes, however, that the lack of transcription of some of the hearing is irrelevant to this application because the Court would be in no position to asses the Applicant's demeanour even if a transcript were available. The Court would be required to make a finding on

the Applicant's demeanour based on a written transcript consisting only of a series of questions and answers in written form. The Respondent concludes that the "Applicant's argument must be taken to be frivolous and advanced only in an effort to opportunistically take advantage of the RPD's slip."

[56] The Respondent contends that there is no merit to the Applicant's claim that he was accused of being logical or bland and then overly emotional. The Board was entitled to expect consistency and it was reasonable for it to be "troubled by bland, forensic testimony (while discussing tragic matters such as the murder of one's parent), followed by an overwrought and emotional testimony." The Respondent says that "two styles of testimony ought not be given by the same person, on the same day."

[57] The Respondent also submits that it was not an error for the Board to have not commented during the hearing on the Applicant's shifting demeanour. The Respondent notes that the case law relied upon by the Applicant involved confrontation with a board's doubts over the content of an applicant's account.

[58] The Respondent "acknowledges" the *Cius* case and does not dispute that for an applicant to prove matters such as tone of voice they must produce a recording and cannot expect a court to accept a self-serving affidavit attesting to a board's tone.

[59] The Respondent submits that there is no statutory right to a transcript of the Board's hearings. Whether a missing or incomplete transcript will give rise to a breach of natural justice depends on the circumstances of each case. In order to establish a breach of natural justice, the Applicant must demonstrate that there is a serious possibility of an error on the record. The Applicant has failed to do this. See: *A.J.M. v. Canada (Minister of Citizenship and Immigration)* 2005 FC 98 at paragraph 42 and *Gokpinar v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1065 at paragraph 7.

[60] The Respondent cites *Kandiah v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 321(F.C.A.) (*Kandiah*) at paragraph 9:

> …In the absence of a transcript, the appellant may establish by other means what transpired at the hearing. This is especially true of the hearings before the Refugee Division where the applicant is always present and, in most cases, is the only witness heard.

[61] The Respondent notes that the decision in *Kandiah* was endorsed by the Supreme Court of Canada in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 (*Canadian Union*). The Respondent cites paragraph 81 of *Canadian Union*:

> **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.

[62] The Respondent also relies upon paragraph 76 of *Canadian Union*:

> …In Kandiah, the Federal Court of Appeal acknowledged the concern underlying the decision in Tung, that is, that an applicant may be deprived of his or her grounds of review or appeal given an absence of a transcript of what transpired at the impugned hearing. It held, however, that if the decision facing the court could be made on the basis of evidence established through other means, the principles of natural justice would not be infringed. The reviewing court should refrain from quashing the administrative order in such cases. This decision has been considered authoritative in the academic commentary on this issue: R. W. Macaulay and J. L. H. Sprague, Hearings Before Administrative Tribunals (1995), at p. 12-98.

[63] The Respondent's position is that where a reviewing court has, or could have, another means of determining what occurred at the hearing, it is not enough to simply claim there was no evidence for a particular finding. An applicant has an obligation to provide some basis for rejecting a tribunal's assessment as to what took place before it—such as affidavit evidence or counsel's notes. The Applicant in the present case has failed to provide such a basis and should not be permitted to rely on the absence of a complete recording alone as establishing a breach of natural justice: *Canadian Union* at paragraph 84 and *Goodman v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 342 at paragraphs 72 and 77.

[64] The Applicant has an obligation to put forward some evidence that the Board's assessment of his demeanor was unreasonable. The Respondent cites *Muchiri v. Canada (Minister of Citizenship and Immigration)* 2005 FC 550 at paragraph 12:

> There may well be findings of credibility which can be contested because the applicant swears positively that he did not say what the Board says he did (*A.J.M. v. Canada (Minister of Citizenship*

> *Immigration*), [2005] F.C.J. No. 142, 2005 FC 98, and *Tang v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 979 (QL)). However, in this case, Mr. Muchiri does not specifically contest the evidence. Rather, he submits the lack of a complete transcript makes it impossible for this Court to review the record so as to determine whether or not there was a patently unreasonable finding. Given that natural justice does not require that there be a transcript in the first place, Mr. Muchiri, who has a burden as applicant, must do more (*Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793). Without positive and specific statements identifying erroneous findings, the Court is hardly in position to decide that justice requires a new hearing.

See also: *Sivanathan v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 500 at paragraphs 5-6.

[65] The Respondent also points out that, in addition to finding that the Applicant's demeanor undermined his credibility, the Board found that elements of his story were implausible and that there were inconsistencies in his accounts, and that his behavior indicated a lack of subjective fear. In this situation, the existing record before the court is sufficient to support the Board's conclusion and the application should be dismissed. The Respondent cites and relies upon *Cicek v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1425 at paragraph 12:

> **12** In light of this recent pronouncement by the Supreme Court, I am of the view that I need only determine whether the record before the Court renders it possible to dispose of this application. Upon reviewing the said record, it is my opinion that the available transcripts and documentary evidence render it possible in this particular situation. The inconsistencies and contradictions noted by the tribunal are reflected by the record, and are sufficient to support its finding of a lack of credibility.

[66] The Respondent concludes on this issue by stating that the Applicant's claim that a transcript will prove that the Board was wrong is absurd.

Conclusions of the Board

[67] The Respondent says that there is no support for the claim that the Board "perversely distorted" counsel's statement that part of the Applicant's testimony was implausible. The Board stated that Applicant's counsel admitted that a Tutsi victim of crime would expect support from the Tutsi authorities, which supported the Board's own findings.

[68] The Board's finding that it would be implausible for a murderer to reveal themselves by signing a note is reasonable. The Applicant's suggestion that this was not implausible because Bigere planned to flee cannot "co-exist with the other evidence that the note also indicated that 'this is just the beginning'."

[69] The Board also found it implausible that the Applicant went back home and did not follow up on his complaint. This is reasonable. The Applicant has not addressed the Board's finding that it was implausible for the alleged killer, Bigere, to have come out of hiding a decade after the alleged killing.

[70] The Board's finding that the Applicant was never in hiding was also reasonable and based on the evidence. The Applicant gave inconsistent evidence of where he was living and the Board

was entitled to rely on this inconsistency to conclude that the Applicant's account was not true. The Board was not required to accept the Applicant's explanation for the discrepancy.

[71] In relation to the Applicant's failure to avail himself of protection or asylum in Italy or the U.S., the Respondent notes that it is well-established that the Board can consider the failure to claim asylum at the first available opportunity as indicating a lack of credibility or a lack of subjective fear, provided it is not the only basis for rejecting the claim. The Respondent states that the Applicant's insistence that he was at no risk of being returned from Italy or the U.S. is no answer to the relevant case law on this issue or the Board's finding. The Board did not base its Decision solely on the Applicant's failure to claim in Italy or the U.S.; the Board only commented on it. It is the other findings that dispose of the Applicant's case.

[72] As regards the death certificate, the Respondent states that the Board did not make any inconsistent findings by giving the death certificate "little weight." The Board accepted that the Applicant's father is dead, but did not accept the death certificate as being proof of the details of the death, or the Applicant's account of the death being at the hands of Bigere.

[73] The Respondent also says that there is no error in the Board's finding that the Applicant's other family members have not been targeted by Bigere. This is not a central finding, as the Board had already determined the Applicant's entire story was not credible. The Applicant's evidence merely confirms the Board's finding that Bigere has bothered no one and would not seek to.

[74] The Respondent submits that the Board was entitled to find that the Applicant gave inconsistent evidence by not indicating his address as his hiding place. As well, the Board was entitled to find the account of Bigere contradictory. The Applicant explained that he answered “No” to the question of whether Bigere signed the note and did not mean by his answer that there was no name on the note. This explanation was given to the Board and the Board did not accept it. This finding is within the purview of the Board and there is no arguable issue of law raised by the Applicant’s continued “insistence that he did not give inconsistent testimony, and should be forgiven for the apparent inconsistency.” The Board noted that the Applicant’s oral description of the note was not inconsistent with his written version set out in his PIF.

[75] The Respondent concludes that the Court should not substitute its decision for that of the Board. The Board did not make findings that were perverse or unreasonable in nature and its conclusions were substantiated on the evidence before it.

ANALYSIS

[76] While I agree with the Respondent that the lack of a transcript is not in itself a ground for setting aside a decision, I believe that the lack of a transcript in the circumstances of this case does give rise to a breach of procedural fairness.

[77] The Board went out of its way to emphasize that the Applicant's demeanour affected the Board's overall view of the Applicant's evidence: "The panel finds the claimant's demeanour during his hearing has tainted the credibility of his overall account."

[78] The alleged change in demeanour occurred during that portion of the hearing for which there is no transcript and no recording:

> Remarkably, when Counsel began to question him after the mid hearing break, the claimant's demeanour changed drastically. He no longer maintained eye contact with anyone and he kept his head low while answering questions. His account now was delivered with so much emotion and consternation that at times it sounded orchestrated, almost theatrical.

[79] The Board clearly regarded the way that the Applicant responded to the questions of his own counsel as emotional, anxious and confusing. This was so much the case that at times it sounded orchestrated, almost theatrical. The implication is that the Applicant's account should be doubted as something arranged beforehand (orchestrated) and insincere (theatrical).

[80] The Applicant denies all of this and has sworn an affidavit to that effect. Without a transcript and/or a recording he can do no more. The Respondent has declined to cross-examine the Applicant on his affidavit and merely asserts in argument that it is self-serving.

[81] The Respondent also says that a transcript would not reveal anything about the demeanour issue:

> The transcript, were it available, would not record whether the Applicant "no longer maintained eye contact" or "kept his head

> low," aspects of the testimony specifically commented on by the RPD.

[82] But the Board also comments upon "emotion," "consternation," orchestration and theatricality. In fact, it is the arranged and insincere manner of the Applicant's delivery that the Board says taints "his overall account."

[83] A transcript and a recording would not reveal eye contact, or the way the Applicant held his head, but they would reveal:

a. Whether there really was a remarkable change from matter-of-fact to emotion and consternation;
b. Whether any such change was a result of the questions that were asked and the way that they were asked;
c. Whether there was some element of orchestration and theatricality in the Applicant's responses;
d. Whether the Applicant's failure to make eye contact and his keeping his head low had something to do with the kind of response that counsel's questions demanded of him.

[84] It should also be born in mind that the Board gave the Applicant no indication that it had a problem with his demeanour and delivery at the hearing, so he could place nothing on the record to address this concern. Without a transcript and a recording, he has been left to make his concerns known to the Court through an affidavit which the Respondent says is merely self-serving. If the

Respondent's position were accepted, it would mean that the Applicant would have no way of showing the Court why the Decision is wrong or unreasonable on this point.

[85] It also has to be born in mind that the Board's findings on orchestration and theatricality underpin all of the Board's credibility findings which, in my view, are not particularly strong or compelling unless the Board's general negative credibility assertion is reasonable. The Applicant claims it is not and, without a transcript and a recording of the second part of the hearing, he has been deprived of the means to make his case before the Court.

[86] On the facts of this case, then, the lack of a transcript and a recording result in procedural unfairness and deprive the Applicant of the means of presenting and substantiating his case before the Court.

[87] Having come to this conclusion, there is no point in considering the other issues raised.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This Application is allowed and the matter is referred back for reconsideration by a different Board member;

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-5052-08
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