

BETWEEN:

CHARLES APPIAH

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

**REASONS FOR ORDER**

**TEITELBAUM, J:**

**FACTS:**

This is an application for judicial review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board [hereinafter the "Board"]. On July 31, 1996, the Board found that the applicant was not a Convention refugee.

Mr. Appiah alleged before the Board that he had suffered persecution in Ghana because of his family's history of opposition to that country's military regime. At the end of 1981, an uncle in the military had led an unsuccessful counter-attack against Flight Lieutenant Jerry Rawlings. In the aftermath, Mr. Appiah and his parents were detained, interrogated and beaten by security forces for three days. Upon their release, for three years, Mr. Appiah and his parents had to report to the military police on a monthly basis.

In November 1992, there was an uprising and protests in the streets against Rawlings because of allegations of electoral fraud. Mr. Appiah was swept up in the police round-up after the protests were quelled. When the police learned his family name, he was questioned, beaten and subjected to torture. He was only released after his family paid a large sum of money. Mr. Appiah was again told to report to the police on a monthly basis. During his last mandatory visit to the police station in December, 1994, the applicant claimed that he was sexually assaulted for over an hour by two men in plain clothes.

When he was released, he was told to continue reporting to the same two men. Mr. Appiah then attempted to bring the assault to the attention of the authorities. He was ridiculed and abused when he tried to lodge a criminal complaint at a different police station. He was simply told to obey his instructions. Soon after, Mr. Appiah fled to Canada and sought refugee status.

#### *The Board's Decision*

The Board did believe that Mr. Appiah had been sexually assaulted and was still suffering under the weight of that traumatic event. However, the Board did not see a link between the sexual assault and Mr. Appiah's family history. It stated, "although the panel believes the claimant's assertion that he was sexually abused on that date, we do not believe that the claimant's detention is politically motivated....." (page 7, Board Decision, page 13, applicant's Record). The Board doubted the applicant's credibility on a number of elements because of what it called "internal inconsistencies" (page 4, Board Reasons, page 10, applicant's Record) and implausibilities. Primarily, the Board contested the existence of Mr. Appiah's uncle, an officer in the Ghanaian military who had led an unsuccessful opposition effort to Flight Lieutenant Rawlings' coup in 1981.

#### *The applicant's Grounds of Review*

The applicant offers three grounds of review. Firstly, the applicant submits that the Board made a patently unreasonable evaluation of his credibility. According to the applicant, the Board failed to fully acknowledge what impact the sexual assault and the ensuing Post Traumatic Stress Disorder ("PTSD") would have on his testimony before the Board.

Secondly, the applicant argues that the Board failed to properly assess the documentary record. The Board did not make any reference to the documentary record describing human rights violations in Ghana. Thus, according to the applicant, the Board failed to acknowledge an important element that could shed light on the applicant's credibility.

Thirdly, the applicant states that the Board failed to respect the *Canadian Charter* and International treaties against torture. The applicant argues that as a consequence of the Board's decision, a recognized victim of sexual assault will be sent back to a country where torture is committed and fundamental human rights violated.

#### **ISSUES:**

- 1. Did the Board err in assessing the applicant's credibility?**

**2. Did the Board err in failing to pay any heed to the documentary record on Ghana?**

**3. Did the Board fail to respect the *Canadian Charter of Rights and Freedoms* and Canada's obligations under international law?**

## **DISCUSSION:**

### **1. The Credibility Assessment<sup>1</sup>**

The respondent highlights the high standard for judicial intervention in reviewing a Board's credibility finding: (see *Bagaragaza v. S.G.C.*, IMM-65-94, December 15, 1994 (F.C.T.D.)). I am satisfied that the Board did commit a reviewable error in assessing the applicant's credibility. The Board accepted only one prong of a two-pronged argument. The first prong concerns the applicant's evidence of sexual assault. The second prong relates to the impact of the sexual assault on the applicant's ability to testify. The Board accepted as fact the applicant's story of sexual assault or what the Board itself called "an important element in the claimant's story" (page 7, Board Decision, page 13, applicant's Record). The Board did not elaborate on why it believed this key element of the applicant's claim except to note that in both Mr. Appiah's oral testimony and written Personal Information Form, he described the sexual abuse "at the police station" (page 7, Board Decision, page 13, applicant's Record). The Board also highlighted the medical and psychological evidence detailing Mr. Appiah's PTSD and the consistency of his symptoms with the occurrence of a traumatic event. The Board concluded that it had "no reason to doubt Mr. Appiah's story of being sexually abused and that his behaviour presents a severe and chronic Post-Traumatic Stress Disorder" (page 9, Board Decision, page 15, applicant's Record). The Board also cited the medical report recommending "that the hearing be conducted in a delicate manner to avoid any deterioration in the claimant's situation" (page 9, Board Decision, page 15, applicant's Record).

In my view, judicial review is warranted because the Board did not evaluate or consider the second prong of the argument, namely how the PTSD could influence the applicant's recall of events or demeanour before the Board. The psychologist was specifically asked to determine "whether a PTSD has consequences on the capacity of an individual to testify about traumatic events he or she has experienced" (page 21, applicant's Record). In fact, Dr. Louise Gaston indicated in her psychological evaluation that for sufferers of PTSD, "it is natural that the facts are reported with difficulty and even sometimes with contradictions...Moreover, he may respond hesitantly, since the interrogator might be

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<sup>1</sup> The transcript of Mr. Appiah's hearing before the Board is incomplete. It does not contain Mr. Appiah's examination-in-chief but only begins with his cross-examination by the Refugee Hearing Officer.

associated to the situation in which he found himself to be the victim of torture.." (page 23, applicant's record).

Once the Board had made the first step of accepting the sexual assault because of the weight of the medical and psychological evidence, it had to follow through on all the ripples and repercussions of this finding. Thus, the Board should have expressly acknowledged the second prong of the PTSD evidence. In other words, not only did the hearing have to be conducted in a "delicate manner", but the Board also had to weigh the possible consequences of the PTSD on its assessment of Mr. Appiah's credibility. It is clear that it did not do so. In fact, the Board emphasized the "claimant's **hesitancy**" (my emphasis) in providing information (page 5, Board Reasons, page 11, applicant's Record).

The Board's assessment of credibility in this instance is linked to its consideration of the psychological and medical evidence. Certainly, this is not the case of a Board "ignor[ing]" the evidence as occurred in *Galindo v. Minister of Employment and Immigration*, [1981] 2 F.C. 781 (F.C.A.). The Board did in fact refer to the medical evidence of PTSD. However, it failed to give this evidence the proper weight or recognition on the crucial issue of credibility. Admittedly, there is a presumption that a decision-maker takes into account all of the evidence provided and that there is no need to explicitly refer to each piece of evidence: (*Hassan v. Canada (Minister of Employment & Immigration* (1992), 147 N. R. 317 (hereinafter "*Hassan*")). However, in this instance, the Board in fact mischaracterized the medical evidence because it did not highlight the effects of PTSD on the applicant's credibility when credibility was the linchpin of its decision.

Furthermore, I am puzzled by the Board giving much significance to the fact that the police were seemingly belated in making inquiries about Mr. Appiah's whereabouts three weeks after the sexual assault. With respect, I find this aspect of the Board's analysis to be patently unreasonable, capricious and hardly a determining factor in the applicant's credibility. Once the Board accepted the fact of sexual assault, it had no cause to attack the applicant's credibility because the perpetrators' were slow on the mark in pursuing their victim.

Moreover, I find the Board's reasoning to be contradictory and inconsistent. On the issue of the identity of the perpetrators, the Board expressly accepted that the assailants were police officers or individuals working "**at the police station**" (my emphasis). The Board also stated that it doubted the motivation behind the "**claimant's detention**" (my emphasis). The use of the word detention is very revealing. One is "detained" by the police or the state authorities; an individual does not complain of

"detention" at the hands of non-governmental authorities. And yet, the Board did not take the next step of believing that Mr. Appiah was at the police station for a political cause even as it had no doubt that he had been raped there. One can only infer from the Board's reasoning that Mr. Appiah was a victim of bad luck and timing.<sup>2</sup> According to the Board, Mr. Appiah just happened to be in the wrong place, a police station rife with sexually predatory police officers, for the wrong reasons. If Mr. Appiah had been at the police station for the "right", that is political reasons, then presumably the Board would have found in his favour. I am therefore at a loss to find how the Board, on the basis of hesitancy and minor inconsistencies on peripheral details, could reasonably decide as it did on the "reasons" for Mr. Appiah's appearance at the police station.

I also believe that the Board acted unreasonably when it found that Mr. Appiah had no uncle or family history of opposition to the ruling forces in Ghana. In my view, the Board acted unreasonably and capriciously when it pinpointed alleged inconsistencies in Mr. Appiah's reporting date to the police authorities as evidence of deception: (see *Aguebor v. Canada (Minister of Employment & Immigration)* (1993), 160 N.R. 315 (F.C.A.)). The Board found Mr. Appiah not to be a credible witness because at one point he stated that he had to report the first day of every month while he later acknowledged that it was in fact the first Monday of every month. I fail to see how such a refinement or nuance of the evidence on a slight detail undermines Mr. Appiah's credibility. One thing is clear and remains constant. Despite the possible effects of PTSD, Mr. Appiah never wavered from his testimony that he did in fact have to report to the police.

However, on at least one other facet of the applicant's credibility, the Board's finding appears reasonable. In letters supposedly written by Mr. Appiah's uncle himself, there was some inconsistency about the rank occupied by the uncle in the Ghanaian army. In one letter, the uncle signed himself "Lieutenant-Colonel". In a second letter, he gave himself the rank, "Captain Appiah...". The applicant explains in his affidavit written in support of the application for judicial review that the different ranks are the result of a simple oversight on his uncle's behalf (paragraph 5, page 19, applicant's Record). The uncle only received the higher rank shortly before his exile. According to the applicant, the uncle is therefore more used to calling himself by the rank of "Captain". The Court, however, cannot give any weight to this evidence because it was not before the Board. On a judicial review application, the Court can only review the official record, not *ex post facto* explanations, whatever their apparent merit.

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<sup>2</sup> Of course, the Board's conclusion begs the question of just why exactly the applicant was at the police station on that particular date.

Aside from the letters, the other issues cited by the Board in its assessment of credibility are unfounded and unreasonable. For instance, the Board doubts the applicant's credibility because he alone of his siblings had been targeted by the police. However, the Record reveals that Mr. Appiah offered an explanation for this discrepancy. Mr. Appiah lived with his parents in the family home while his siblings lived elsewhere in the country.

## **2. The Documentary Record**

The Board, in this instance, failed to pay any consideration to the documentary record describing Ghana's political climate and human rights situation. I accept the principle that a Board need not to refer to each piece of documentary evidence. For instance, in *Hassan, supra*, Justice Heald writes at page 319: "The fact that **some of the documentary evidence** was not mentioned in the Board's reasons is not fatal to its decision. The passages from the documentary evidence that are relied on by the applicant are part of the total evidence which the Board is entitled to weigh as to reliability and cogency" (my emphasis). Nonetheless, the Court must intervene when the Board has seen fit to refer to **none** of the documentary evidence provided by the claimant or the refugee hearing officer. The Board's official record contains many pages of material describing Ghana's decidedly mixed human rights picture.

The respondent rejects the need for the Board to evaluate the documentary record after it had already squarely discounted the applicant's tale of persecution. However, in a case of a claimant alleging a family history of opposition to the ruling regime, particularly on the basis of specific uprisings in 1981 and 1992, it is incumbent on the Board to consider circumstances in the country of origin, if only to acknowledge how they do or do not affect the applicant's story. Is the applicant's claim that the police dismissed his attempt to lay charges against his assailants borne out by the documentary evidence? In Ghana, are rogue police officers allowed to go unchecked, even after they sexually assault detainees? The Board does not even contemplate these vital questions in its reasons. Thus, the documentary evidence, if any, describing the treatment of opponents of Rawling's state machinery escapes the Board's decision. This error also warrants judicial review: (see *Lai v. Canada (Minister of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 245 (F.C.A.))

## **3. International Law and the Charter**

Finally, the applicant submits that the Board violated Canada's international obligations under the *International Convention on the Elimination of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, [the "Convention"], by failing to acknowledge or take proper

account of the evidence of torture. The applicant argues that this international obligation is incorporated into Canadian law by Section 7 and Section 12 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). Section 7 enshrines the right of the applicant to have the medical evidence of PTSD evaluated in "accordance with the principles of fundamental justice" while Section 12 prohibits cruel and inhuman punishment. According to the applicant, the *Charter* was therefore equally cast aside in the Board's decision-making.

In contrast, the respondent argues that the *Charter* and international covenants against torture offer interesting but irrelevant questions since they have little bearing on the evaluation of the Board's decision concerning credibility.

The Court need not address the applicant's submissions on international law and the *Charter*. Given the errors outlined above, there is little need to devote attention to the applicant's rather tentative arguments on these issues. In my opinion, they are superfluous and premature.

## CONCLUSION

The application for judicial review is allowed. The matter is returned for a new hearing before a differently appointed Board in accordance with the herein reasons.

Neither party, when asked, had a question for certification.

"MAX M. TEITELBAUM"

J U D G E

OTTAWA

August 19, 1997