

**Date: 20080221**

**Docket: IMM-1504-07**

**Citation: 2008 FC 226**

**Ottawa, Ontario, February 21, 2008**

**PRESENT: The Honourable Mr. Justice Kelen**

**BETWEEN:**

**CRAIG DANIEL MAIMBA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated March 23, 2007 concluding the applicant, Craig Daniel Maimba, was not a Convention refugee or a person in need of protection.

**FACTS**

[2] The applicant, a 36-year-old Zimbabwean citizen, seeks refugee protection in Canada on account of his political opinion and membership in the Zimbabwe opposition party, Movement for

Democratic Change (MDC). The applicant states his problems in Zimbabwe began after he became the chairperson of a youth league chapter of the MDC.

[3] In his Personal Information Form (PIF), the applicant alleges two specific incidents of persecution that caused him to leave Zimbabwe. First, the applicant recounts an occasion in July 1999 when youth members of the ruling Zimbabwe African National Union – Patriotic Front (ZANU-PF) confronted the applicant and other MDC members at a bus terminal and began threatening and harassing them. The altercation was violent. The ZANU-PF members drew weapons and beat the applicant and his companions. The applicant states he was seriously injured in the attack, receiving a cracked jaw and requiring dental surgery. The applicant states that while he reported this event to the police, it was never seriously investigated and the perpetrators were never caught.

[4] The second incident raised by the applicant occurred in April 1999, when he was confronted and arrested by state security agents. According to the applicant, the security agents threatened to torture or kill him if he did not provide them with information about the MDC and its activities. The applicant states that he was interrogated for three days and released when the security agents realized that the applicant would not provide any information. The applicant states after being released, security forces monitored his whereabouts.

[5] In August 2000, the applicant left Zimbabwe and traveled to the United States on a student visa. From August 2000 until February 2006, the applicant remained in the United States, attending

college in Wichita, Kansas. On February 15, 2006, the applicant arrived in Canada and filed a claim for refugee protection. His claim was heard by the Board on January 18, 2007.

### **Decision under review**

[6] On March 23, 2007, the Board rejected the applicant's refugee claim. In its decision, the Board found the applicant lacked credibility and did not believe his allegations of persecution. As the Board held at page 1 of its decision:

I have found that the claimant is neither a Convention refugee, nor a person in need of protection. I do not find credible the allegations made by the claimant in support of his claim, in light of inconsistencies and implausibilities in his testimony. I further find a lack of subjective fear due to failure to claim elsewhere. ...

Accordingly, the Board dismissed the claim.

### **ISSUES**

[7] The applicant raised a number of issues in his written memorandum. However, the Court will rephrase the issues as follows:

1. Did the Board err in concluding the applicant's testimony lacked credibility;
2. Did the Board err in concluding the applicant lacked a subjective fear of persecution by delaying his departure from Zimbabwe; and
3. Did the Board err by ignoring and misinterpreting the objective evidence that the applicant, as a member of the MDC, was a person in need of protection?

## **STANDARD OF REVIEW**

[8] The issues raised in this application concern the Board's assessment of the applicant's credibility. It is well settled that issues of credibility and the plausibility of testimony are entitled to the highest level of deference and will only be set aside if found to be patently unreasonable: see *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 128.

## **ANALYSIS**

### **Issue No. 1: Did the Board err in concluding the applicant's testimony lacked credibility?**

[9] The applicant argues the Board made a number of serious errors in reaching its decision that he lacked credibility. Specifically, the applicant argues the Board erred by:

1. drawing a negative inference from alleged inconsistencies between the applicant's port of entry declaration and his PIF narrative;
2. drawing a negative inference from the applicant's testimony regarding the specific events of persecution and in not properly considering his corroborating evidence;
3. basing its negative determination on the fact that the applicant did not leave Zimbabwe until August 2000; and
4. finding that it was implausible that the applicant could be involved in the MDC youth movement prior to the party's creation in September 1999.

### **Inconsistencies in the various statements**

[10] In its decision, the Board found that the applicant's testimony at the port of entry differed significantly from the allegations of mistreatment contained within his PIF narrative. Specifically, the applicant stated at the port of entry that he was detained by security agents in approximately 1995, while his PIF narrative stated that the detention occurred in April 1999. Further, while the

port of entry declaration stated the applicant was assaulted at work, his PIF narrative states that he was assaulted at a bus terminal. The applicant argues that both of these findings are “more illusory than real,” and that the Board’s findings in this regard were made in error.

[11] The Court does not accept the applicant’s statement that he was working at the bus terminal when he was assaulted by the group of ZANU-PF youth members. While the Court accepts that the applicant was employed by a company engaged in commuter and tourism transportation, the applicant’s testimony before the Board clearly establishes that the attack occurred while he was waiting at the bus terminal with friends and relatives. There is a clear inconsistency between the applicant’s statement at the port of entry and that which was given before the Board. Accordingly, the Board was justified in reaching a negative credibility inference on this basis.

[12] Further, the Court also does not accept the applicant’s submission that the Board failed to provide reasons for rejecting his explanation that he was unsure of the exact date he was arrested. In its decision, the Board clearly states at page 2 that it was simply not plausible for the applicant to have miscalculated the date of arrest by four years. This is a significant difference in accounts between the port of entry declaration and the PIF narrative. Accordingly, the Board’s finding was justified on the evidence.

**Applicant’s account of events and corroborating evidence**

[13] In its decision, the Board drew a negative inference from the applicant’s vague testimony surrounding the two incidents of harassment in Zimbabwe. The Board stated at pages 2-3 of its decision:

... He did not remember the date of the assault in July 1999 and did not disclose the date of his detention in April 1999. If the events did occur in that order, he did not follow the instructions to list the events in chronological order in his PIF. His PIF gives the impression the assault occurred before the detention. He sent in a revised PIF narrative and instead of clarifying the dates added “approximately” before April 1999, thereby further obfuscating the dates in his allegations. ... At least three letters of support, including one from his mother, make reference to the assault with a “knuckle-duster” and yet none of them mention a date of occurrence. The medical note attesting to his injuries in July 1999 is also undated. For these reasons I find his documentary evidence and oral testimony unreliable and I am not persuaded his allegations are credible.

[14] The applicant challenges this finding on a number of fronts. First, he states the PIF amendment was not an attempt to obfuscate the dates, but was merely a clarification to reflect the fact that the applicant is not particularly good with dates. Second, the applicant states that the Board applied a “specious test for credibility” and rejected his submissions merely because they were not listed in chronological order. Finally, he argues that the Board was dismissive of his corroborating evidence simply because the medical report was not dated.

[15] However, the Court concludes that when taken as a whole, the applicant’s testimony and evidence creates serious concerns over when the alleged events occurred. The applicant has an onus to proffer evidence corroborating his claims of persecution: see *Kovacs v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1473, [2006] 2 F.C.R. 455. While the applicant in the case at bar provided a number of personal letters attempting to support his claim, none of them include any reference to when the alleged events occurred. As well, while the medical report attests to a date of treatment, the letter itself is not dated. Accordingly, when taken as a whole, the applicant’s

testimony and corroborating evidence made it reasonable for the Board to reach a negative credibility finding.

[16] Further, given that the Board found the applicant lacked credibility in respect of his testimony surrounding the alleged attack, it was open to the Board to conclude that the letters should be accorded little weight as evidence of the applicant's story: *Kalangestani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1528, [2006] F.C.J. No. 1916 (QL); *Hamid v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 1293 (T.D.) (QL).

[17] Finally, the applicant also argues the Board erred in its negative inference that it was implausible for a high-profile MDC member to not be stopped from leaving Zimbabwe, stating that such a conclusion conflicted with the applicant's uncontradicted testimony that there are no exit controls in Zimbabwe. However, the respondent notes that the Board's decision was not premised on the existence of exit controls, but on the applicant's own testimony that security agents continued to monitor his whereabouts from April 1999 until he left the country. Accordingly, it was open to the Board to conclude that if the security agents were truly interested in the applicant, they would have known he was leaving Zimbabwe and would have prevented him from doing so.

#### **Applicant's membership in the MDC**

[18] The applicant argues the Board erred in finding that it was implausible for him to have been engaged in the MDC in January 1999 despite the fact that the MDC was not officially created until September 1999. The Court concludes that the applicant's lack of evidence in this regard justified

the Board's finding. Further, it is clear that even if the Board had accepted the applicant's testimony that he was involved in the MDC prior to its official formation, there are sufficient other findings upon which the Board's negative decision can properly rest. Accordingly, the Court concludes that the Board was justified in finding the applicant lacked credibility, and will not intervene on this basis.

**Issue No. 2: Did the Board err in concluding the applicant lacked a subjective fear of persecution by delaying his departure from Zimbabwe?**

[19] The applicant argues the Board erred in basing its decision, in part, on his delay in leaving Zimbabwe. The Court agrees. The Board's reasons refer to the delay as evidence of a lack of subjective fear.

[20] The applicant submits, and the Court agrees, that since the Board's screening form did not identify delay as a potential issue, the Board breached procedural fairness in relying on any such delay without first notifying the applicant.

**Issue No. 3: Did the Board err by ignoring and misinterpreting the objective evidence that the applicant, as a member of the MDC, was a person in need of protection?**

[21] The applicant argues the Board erred in failing to consider the objective documentary evidence that MDC members in Zimbabwe continue to face a serious risk of persecution.

Accordingly, the Board should have accounted for this objective credible evidence despite finding that the applicant failed to provide credible testimony. In support is the Federal Court decision in



*Mylvaganam v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1195 (QL),

where Mr. Justice Gibson stated at paragraph 10:

¶ 10 The CRDD had before it substantial documentary evidence attesting to the difficulties that all young Tamil males, particularly those from the north, face in Sri Lanka. Even if it rejected outright, as it did, the applicant's own alleged experience of persecution, in its analysis in support of its decision in this matter, it does not appear to have rejected the applicant's identity as a young Tamil male from the north of Sri Lanka. Having accepted this identity, the CRDD then ignored the substantial evidence before it that a person such as this applicant might well be subjected to persecution if he were required to return to Sri Lanka and that therefore he might very well have had not only a subjective fear of persecution but also potentially a well-founded objective basis to that fear. In failing to so much as even consider this possibility, I am satisfied that the CRDD reached its decision in this matter without taking into account all of the evidence that was before it...

[Emphasis added.]

[22] Having reviewed the evidence and the applicant's submissions in this regard, the Court concludes that the Board erred in its assessment of the documentary evidence. The case law is clear that when assessing an applicant's objective risk of harm in returning to their country of origin, there may be instances where, having accepted the applicant's identity, the objective documentary evidence is such that the claimant's particular circumstances make him a person in need of protection despite the fact that the Board has found the claimant lacks credibility: see *Kandiah v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 181, [2005] F.C.J. No. 275 (QL) per Martineau J. However, Mr. Justice Martineau also states that such assessments are to be made on a case-by-case basis depending on the nature of the evidence presented in the particular case.

[23] While the Board held at page 3 of its decision that it was not persuaded that the applicant had a high profile in the MDC, the Board did not find that the applicant was not a member of the MDC. The Board did not address relevant and important evidence of the applicant's membership in the MDC, namely his MDC membership card from Zimbabwe, the letter from the MDC in Zimbabwe that the applicant is an active member, and a letter from the Office of the Secretary General of the MDC dated April 25, 2002, confirming that the applicant was a "very active member of the MDC" and that his father is the MDC Councillor for Ward 22-Hatfield in Zimbabwe.

[24] As Mr. Justice Evans held in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, the Board has a burden of explaining why it did not consider this evidence about the applicant's membership in the MDC when the documents appear squarely to contradict the Board's conclusion. As I held in my January 16, 2008 Judgment in *Chavi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 53, [2008] F.C.J. No. 63 (QL) at paragraph 14:

¶ 14 The U.S. Department of State report [for Zimbabwe] is objective evidence that membership in the MDC is sufficient to place a person at risk of harm. ...

[25] In that case, I held that the Board's failure to consider this important objective evidence is an error of law in considering whether a member of the MDC in Zimbabwe is a person in need of protection. In Canada, the applicant was a member of a Canadian branch of the MDC. The applicant testified that if he returned to Zimbabwe, he would intend to continue being a member of the MDC. In this regard, the Board must assess whether the applicant is at risk of serious injury from the Zimbabwe government in accordance with my Judgment in *Chavi*, above.

## **CONCLUSION**

[26] For these reasons, the Court concludes that the Board did provide valid reasons for finding that the applicant lacked credibility, and such credibility findings are entitled to the highest degree of curial deference. However, the Board erred in law in basing its decision, in part, on the applicant's delay in leaving Zimbabwe. The Board further erred in failing to consider the objective documentary evidence that the applicant may be a person in need of protection due to his membership in the MDC. The Court does not consider that the Board made a finding that the applicant was not a member of the MDC, only that the applicant was not a "high-profile" member as claimed.

[27] Accordingly, the Court must allow this application for judicial review and remit the matter back to the Board for redetermination in accordance with these reasons.

[28] Both parties and the Court agree that this case does not raise a question that should be certified.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is allowed; and
2. The Board's decision is set aside and the matter is referred back to a differently constituted panel of the Board for redetermination in accordance with these reasons.

“Michael A. Kelen”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-1504-07

**STYLE OF CAUSE:** CRAIG DANIEL MAIMBA v.  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

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**DATED:** February 21, 2008

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