

# **Ashari v. Canada (Minister of Citizenship and Immigration)**

Between

Morteza Asna Ashari and Turkan Yildiz, appellants, and  
The Minister of Citizenship and Immigration, respondent

[1999] F.C.J. No. 1703  
Court File No. A-525-98

**Federal Court of Appeal  
Vancouver, British Columbia  
Décary, Robertson and Noël JJ.**

Heard: October 26, 1999.  
Oral judgment: October 26, 1999.  
(8 paras.)

*Aliens and immigration — Admission, refugees — Exclusion and expulsion — Natural justice — Constitution of board or tribunal (considerations, incl. bias) — Bias, apprehension of.*

Appeal by Ashari from a decision by the Minister of Citizenship and Immigration denying his claim for refugee status. Ashari claimed that the Refugee Division's actions raised a reasonable apprehension of bias because it failed to notify the Minister that the issue of exclusion was raised during a refugee hearing. Bias occurred because the Division compromised the non-adversarial nature of the proceedings when it assumed the onus to prove exclusion. This onus applied only to the Minister. Ashari further claimed that the Division could not determine the issue of exclusion in the absence of the Minister. The government would not be able to satisfy the burden of proof if the Minister did not participate in the hearing. The Minister was not given notice because the Division was unclear that exclusion would be an issue.

**HELD:** Appeal dismissed. Neither the Immigration Act nor the Rules required the Minister's participation. No bias existed because of the Minister's absence. It was false to assume that the government could not satisfy the burden of proof if the Minister did not participate. The onus of proof was not to be confused with the standard of proof. The Division could decide, based on the evidence filed by the parties, that Ashari fell within the exclusion clause.

## **Statutes, Regulations and Rules Cited:**

Immigration Act, s. 69.1(5)(a), 69.1(5)(b).

Immigration Act Rules, s. 9(2), 9(3).

**Counsel:**

Douglas Cannon, for the appellant.

Helen Park, for the respondent.

---

The judgment of the Court was delivered orally by

1 **DÉCARY J.**— This appeal deals with the following questions certified by Madam Justice Reed for the purposes of section 83 of the Immigration Act ("the Act"):

1. Is a reasonable apprehension of bias demonstrated when the Refugee Division does not notify the Minister pursuant to s. 69(5) [sic - should be 69.1(5)] of the Immigration Act or Rule 9(2) of the Convention Refugee Determination Rules that a Section E or F of Article 1 (exclusion) issue is raised in the context of a refugee hearing.
2. Do the Ministerial exclusion issue notification provisions set out in the Immigration Act at s. 69(5) [sic - should be 69.1(5)] and the Convention Refugee Determination Rules at s. 9(2) & (3) exist for the sole benefit of the Minister? If yes, might the failure to notify the Minister result in any prejudice to the refugee claimant? If no, does a failure to notify the Minister in accordance with these sections constitute an error of law regardless of the result of the CRDD decision or the degree of prejudice to the refugee claimant.

2 The reasons for judgment of the Trial Judge are reported at (1998), 158 F.T.R. 268; (1998), 44 Imm. L.R. (2d) 288.

3 It will be helpful to reproduce the text of the relevant provisions:

Immigration Act

69.1 [...]

(5) At the hearing into a person's claim to be a Convention refugee, the Refugee Division

(a) shall give

- (i) the person a reasonable opportunity to present evidence, question witnesses and make representations, and
- (ii) the Minister a reasonable opportunity to present evidence and, if the Minister notifies the Refugee Division that the

Minister is of the opinion that matters involving section E or F of Article 1 of the Convention or subsection 2(2) of this Act are raised by the claim, to question the person making the claim and other witnesses and make representations; and

- (b) may, if it considers it appropriate to do so, give the Minister a reasonable opportunity to question the person making the claim and any other witnesses and to make representation concerning the claim.

\* \* \*

69.1 [...]

(5) À l'audience, la section du statut:

- a) est tenue de donner:
  - (i) à l'intéressé, la possibilité de produire des éléments de preuve, d'interroger des témoins et de présenter des observations, (ii) au ministre, la possibilité de produire des éléments de preuve, d'interroger l'intéressé ou tout autre témoin et de présenter des observations, ces deux derniers droits n'étant toutefois accordés au ministre que s'il l'informe qu'à son avis, la revendication met en cause la section E ou F de l'article premier de la Convention ou le paragraphe 2(2) de la présente loi;
- b) peut, dans tous les cas, si elle l'estime indiqué, autoriser le ministre à interroger l'intéressé ou tout autre témoin et à présenter des observations.

\* \* \*

#### The Convention Refugee Determination Division Rules

9. [...]

(2) Where, before the commencement of a hearing, the refugee hearing officer or the Refugee Division is of the opinion that a claim before the Refugee Division might involve Section E or F of Article 1 of the Convention or subsection 2(2) of the Act, the refugee hearing officer shall forthwith notify the Minister and provide the Minister with such information as is necessary.

(3) Where, during a hearing, the refugee hearing officer or a member is

of the opinion that a claim before the Refugee Division might involve section E or F of Article 1 of the Convention or subsection 2(2) of the Act, the refugee hearing officer or the member shall so inform the presiding member and, if the presiding member so directs, the refugee hearing officer shall forthwith notify the Minister and provide the Minister with such information as is necessary.

\* \* \*

9. [...]

(2) Lorsque, avant le début d'une audience, l'agent d'audience ou la section du statut est d'avis qu'une revendication dont elle est saisie pourrait mettre en cause les sections E ou F de l'article premier de la Convention ou le paragraphe 2(2) de la Loi, l'agent d'audience en informe sans délai le ministre et lui fournit les renseignements nécessaires.

(3) Lorsque, au cours d'une audience, l'agent d'audience ou un membre est d'avis qu'une revendication dont est saisie la section du statut pourrait mettre en cause les sections E ou F de l'article premier de la Convention ou le paragraphe 2(2) de la Loi, il en informe le président de l'audience et, si ce dernier l'ordonne, l'agent d'audience en informe sans délai le ministre et lui fournit les renseignements nécessaires.

\* \* \*

Sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees

(Subsection 2(1))

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

\* \* \*

(Paragraphe 2(1))

E. Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser:

- a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;
- b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
- c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

4 As we understand the certified questions when read in the context of the appellants' arguments, this Court is asked to decide whether the Convention Refugee Determination Division ("the Refugee Division") of the Immigration and Refugee Board ("the Board") demonstrates a reasonable apprehension of bias in considering the issue of exclusion when the Minister of Citizenship and Immigration ("the Minister") is not notified that the issue of exclusion is to be considered and does not take part in the proceeding. As the argument goes, the Board would be compromising the non-adversarial nature of the proceedings before it in assuming itself the onus of proving exclusion, which onus, according to the appellants, falls on the Minister.

5 The argument is based on two premises which, in our respectful view, are unsound.

6 The first one is that the Board may not determine the issue of exclusion in the absence of the Minister. The argument has been rejected by this Court in *Arica v. Minister of Employment and Immigration* (1995), 182 N.R. 392 (F.C.A.). Where, as here, neither the Act nor the Rules require the participation of the Minister in proceedings before the Board, the Board can simply not be said to be biased or to demonstrate a reasonable apprehension of bias by the mere fact of holding the inquiry in the absence of the Minister. We need not decide in this case what would be the sanction, if any, of the failure by the hearing officer to notify the Minister under Rule 9(2), because there is no evidence in the record that, before the commencement of the hearing, the refugee hearing officer or the Refugee Division was of the opinion that a Section E or F exclusion might be an issue.

7 The second false premise is that the government cannot satisfy the burden of proof if the Minister does not participate in the proceeding. The onus of proof is not to be confused with the standard of proof. There is no reason, in principle, why a Board could

not be satisfied, on the basis of the evidence filed by the hearing officer and by a claimant, that the claimant falls within the exclusion clause.

8 The appeal will be dismissed.

DÉCARY J.