

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

Between  
Ali Abdi Hassan, applicant, and  
The Minister of Citizenship and Immigration, respondent

[1999] F.C.J. No. 1359  
Court File No. IMM-5440-98

**Federal Court of Canada - Trial Division**  
**Toronto, Ontario**  
**Evans J.**

Heard: August 24, 1999.  
Judgment: September 7, 1999.  
(30 paras.)

*Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Credible basis for claim — Refugee Division, reasons — Refugee Division, duties of — Evidence — Appeals or judicial review, grounds.*

Application by Hassan for judicial review of a decision of the Refugee Division, reversing a finding by the Immigration and Refugee Board that Hassan was a Convention refugee. The Minister had the original decision reversed on the ground that it had been obtained through misrepresentation and concealment of material facts. Hassan had represented to the Board that he was a Somali citizen and feared persecution if returned to Kenya. He was originally granted refugee status on that basis. However, Hassan had come to Canada on a Kenyan passport. He indicated that this document was false, but the Board had before it two letters from the Kenyan Department of Immigration, stating that the passport was genuine and that Hassan was a citizen of Kenya, not Somalia. A medical report was submitted to the Refugee Division, indicating that Hassan was HIV-positive and schizophrenic, with a history of alcohol abuse. The Refugee Division, without specifically referring to the medical report, vacated the original decision on the ground that Hassan's testimony was not credible and that, while there was credible evidence to indicate that he was Kenyan, there was no credible evidence that he was Somali.

**HELD:** Application allowed. The credibility of Hassan's testimony was fundamental to the Refugee Division's decision. However, in making its finding, the Refugee Division did not deal with the medical report, which was relevant to the finding of credibility. The deficiencies in Hassan's testimony which led the Refugee Division to find it was not credible were consistent with the psychiatric and other problems from which Hassan suffered. The Refugee Division should have indicated clearly in its

reasons that it had explicitly addressed the content of the report in assessing Hassan's credibility. For its reasons to be adequate, the Refugee Division was required to give full and fair consideration to the evidence.

**Statutes, Regulations and Rules Cited:**

Immigration Act, R.S.C. 1985, c. I-2, ss. 69.2(2), 83(1).

**Counsel:**

Michael Crane, for the applicant.  
Godwin Friday, for the respondent.

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**EVANS J. (Reasons for Order):—**

**A. INTRODUCTION**

1 In November 1992 Ali Abdi Hassan was found to be a Convention refugee by the Immigration and Refugee Board. In February 1998, more than 5 years later, the Minister applied to the Refugee Division to vacate that decision on the ground that it had been obtained by the misrepresentation and concealment of material facts.

2 The Minister alleged that, contrary to the applicant's representations to the Board, Mr. Hassan was a citizen of Kenya and held a valid Kenyan passport.

3 A hearing to vacate the refugee determination was held in August 1998 and in the following month the Refugee Division rendered its decision, which was in favour of the Minister.

4 This is an application for judicial review of the Refugee Division's decision to vacate its earlier determination that Mr. Hassan was a refugee. Counsel for Mr. Hassan submitted that the Refugee Division's reasons contained several reviewable errors and that decision should be set aside as erroneous in law. Although counsel's arguments ranged widely, in my opinion the critical question is whether the Refugee Division's reasons for decision were adequate.

5 The relevant provision of the Immigration Act, R.S.C. 1985, c. I-2 is as follows:

69.2(2) The Minister may, with leave of the Chairperson, make an application to the Refugee Division to reconsider and vacate any determination made under this Act or the regulations that a person is a Convention refugee on the ground that the determination was obtained by fraudulent means or misrepresentation, suppression or concealment of any material fact, whether exercised or made by that person or any other person.

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69.2(2) Avec l'autorisation du président, le ministre peut, par avis, demander à la section du statut de réexaminer la question de la reconnaissance du statut de réfugié au sens de la Convention accordée en application de la présente loi ou de ses règlements et d'annuler cette reconnaissance, au motif qu'elle a été obtenue par des moyens frauduleux, par une fausse indication sur un fait important ou par la suppression ou la dissimulation d'un fait important, même si ces agissements sont le fait d'un tiers.

## B. FACTUAL BACKGROUND

6 In the Personal Information Form completed by Mr. Hassan with the assistance of counsel, and filed with the Refugee Division prior to the hearing of his claim for refugee status, he stated that he was a citizen of Somalia and feared persecution there. He stated also that he had no other citizenship, but had resided in Kenya before coming to Canada.

7 Mr. Hassan also stated in the PIF that he had travelled to Canada on a Kenyan passport, and put an asterisk beside his answer. The form instructed applicants to indicate with an asterisk if their travel document was false.

8 It is conceded that the PIF would have been before the Board when it determined that Mr. Hassan was a refugee. However, no transcript of that hearing was available; indeed, there was some doubt as to the precise nature of the hearing that was held.

9 Nonetheless, some important evidence was before the Refugee Division when it held the vacation hearing in 1998. The evidence included two letters from the Kenyan Department of Immigration stating that the applicant's Kenyan passport was genuine and had been issued to him. The writer also said that the file of the applicant and his siblings had been examined and that they all seemed bona fide Kenyans. The applicant was said to belong to a certain Kenya-Somali clan from central Kenya, and that he would be expected to be fluent in English and Swahili, "and most likely speak very little Somali."

10 These letters confirmed the impression formed by the immigration officer when the applicant arrived at Pearson International Airport. In his notes the officer had recorded that the applicant had said that he had a "legal Kenya passport", "no fraud", and that in the officer's own opinion the applicant was a citizen of Kenya and an economic refugee.

11 A medical report on the applicant was also submitted to the Refugee Division two days after the completion of the vacation hearing. It had been prepared by a neuro-psychologist at St. Michael's Hospital in Toronto who had interviewed and tested the applicant. The report stated that the applicant had been diagnosed as HIV-positive and as a schizophrenic, and had a history of alcohol abuse. The report noted that the applicant was receiving treatment at the hospital for both his physical and his psychiatric problems.

12 The writer of the report stated that the applicant was

... performing below expectations on tests of verbal fluency, psycho-motor speed, cognitive flexibility, and verbal learning and memory.

The applicant's cognitive test performances were described as "poor".

13 The applicant has maintained that he neither misrepresented nor concealed material facts when his refugee claim was determined. His position has been that he is a Somali citizen, and not a citizen of Kenya. He obtained a Kenyan passport on the basis of a forged birth certificate. While he is currently recognized by Kenyan authorities as a citizen, he fears that he will be deported to Somalia once they discover that his passport was obtained by fraud and that he is not a Kenyan citizen.

### C. THE DECISION

14 The Refugee Division found that the applicant's testimony was not credible: it was inconsistent about when he had gone to Kenya, and he gave "hesitant and confused answers" to questions about the circumstances in which he obtained his passport. The Refugee Division found equally unsatisfactory and implausible the evidence of witnesses called by Mr. Hassan who testified that they had known the applicant and his family in their home town in Somalia, and had seen them there at various times in the 1980s.

15 The Refugee Division concluded that there was no credible evidence that the applicant was a Somali citizen. On the other hand, his Kenyan passport and the letter from the Kenyan Department of Immigration were evidence that he was a citizen of Kenya. The panel therefore found on the balance of probabilities that the applicant was a citizen of Kenya and that he had concealed this fact from the Board when he made his claim for refugee status against Somalia.

### D. ANALYSIS

16 The Refugee Division's finding that the testimony of the applicant was not credible was fundamental to its decision. If the panel had believed Mr. Hassan's evidence that he had been born in Somalia and obtained his Kenyan passport on the basis of a false birth certificate, it could not have found that he was guilty of misrepresentation or concealment. This is because he probably would not be a citizen of Kenya, even though he is currently recognized as such, and his passport, although not a forgery, had been obtained on the basis of false information and could thus be described as "false".

17 Findings of credibility are, of course, at the heart of the specialized fact-finding jurisdiction of the Refugee Division, and only in the most unusual circumstances will they be impugned by a reviewing court. However, an administrative tribunal must earn the reviewing court's deference by explaining clearly the basis of its findings and how it dealt with evidence relevant to those findings.

18 In order to discharge its duty to give adequate reasons for its decisions a tribunal is not required to refer explicitly to or to analyse every evidential item before it that tends to negate a finding of fact that it has made. Much depends on the relevance and cogency of the evidence, and on the importance to the ultimate decision of the fact to which the evidence relates.

19 In this case, as I have indicated, the credibility of the applicant's testimony was fundamental to the panel's decision. The panel explained its finding by reference to the contradictions in the applicant's evidence, and to the slow and confused answers that he gave to questions. Indeed, on reading the transcript I can confirm that the applicant's evidence was on occasions quite incoherent.

20 However, in making its finding the panel did not come to grips in its reasons with the content of the medical report that had been submitted to it. In my opinion this report was both cogent and relevant to the finding of credibility. The deficiencies in the applicant's testimony that led the panel to find that it was not credible are also consistent with the psychiatric and other problems from which the report states that Mr. Hassan suffers, the treatment that he is receiving for them and the results of the tests administered to Mr. Hassan by the psychologist.

21 I do not wish to be understood to be saying that the panel's finding of non-credibility was unreasonable in light of the medical report. Not at all. What I do say is that the reasons for decision ought to have indicated clearly that, in assessing the applicant's credibility, the panel explicitly addressed the content of that report.

22 To be sure, the panel did state in the introductory portion of its reasons that it had considered the various items of evidence before it, including the medical report submitted on behalf of the applicant. However, given the cogency of that report, its relevance to the panel's finding of non-credibility and the central importance of credibility to the outcome, the Refugee Division ought to have gone further than this. It was obliged to explain how it dealt with it in the context of making its non-credibility finding: *Ngombo v. Canada* (Minister of Citizenship and Immigration) (1997), 40 Imm. L.R. (2d) 321 (F.C.T.D.).

23 In determining the adequacy of the panel's reasons I have also taken into account the unusual nature of the proceeding before it: a vacation hearing held on the application of the Minister to determine whether the applicant misrepresented or concealed material facts on the basis of which he was found by the Board to be a refugee nearly six years previously. In these circumstances an individual is entitled to the clearest assurance that the Refugee Division has given full and fair consideration to the evidence.

## E. CONCLUSION

24 For these reasons the application for judicial review is granted.

## F. CERTIFIED QUESTIONS

25 After I sent to both counsel a draft of these reasons counsel for the Minister submitted two questions for certification under subsection 83(1) of the Immigration Act. The first was whether a document that was obtained by the misrepresentation of a material fact was "a false document" within the meaning of the question on the PIF which requires claimants to indicate if their travel documents were "false". In my opinion, the meaning of a question on an administrative form is not a question of law and does not constitute "a serious question of general importance" that requires consideration by the Court of Appeal.

26 Counsel also asked me to certify the question of whether a person who has been issued with a passport obtained on the basis of a forged birth certificate is a national of that country, when the country in question recognizes the individual as a national.

27 In my opinion, this question is largely factual in nature because it depends on the law of the country that issued the passport. In *Zheng v. M.C.I.*, [1996] F.C.J. No. 1349 (F.C.T.D.; IMM-332-96; October 13, 1996), to which counsel drew my attention in his submissions on the certification of a question, there was unequivocal evidence that under the law of Tonga the issue of a passport by Tongan authorities conferred nationality on the person to whom it was issued. In other countries, however, a person is issued with a passport because she is a national: the issue of a passport does not make the person to whom it is issued a national.

28 The evidence before me did not indicate that the law of Kenya was the same as that of Tonga. The letter from the Kenyan Immigration Department only stated that, on the basis of the official's perusal of the file, the applicant appeared to be a citizen of Kenya. Accordingly, if the Kenyan authorities subsequently determine that Mr. Hassan had not been entitled to a Kenyan passport because he was not a national, he could be deported to Somalia.

29 In the absence of evidence on the law of Kenya, it is presumed to be the same as the law of Canada. Accordingly, the Refugee Division's decision could well have been different if it had believed the applicant's evidence.

30 I do not find that a serious question of general importance is involved in this case.

EVANS J.