

Federal Court



Cour fédérale

**Date: 20120928**

**Docket: IMM-8005-11**

**Citation: 2012 FC 1144**

**Ottawa, Ontario, September 28, 2012**

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

**BETWEEN:**

**ARIF ZAHERALI HASSANA ALI DHALLA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant is a citizen of Tanzania. He is educated and English-speaking, and yet, if he is believed, he was taken in by an unscrupulous consultant and negligently represented by a lawyer whom he did not retain. He takes no responsibility for his current predicament but blames the consultant and the lawyer.

[2] This much is without doubt – the applicant’s refugee claim was declared by the Refugee Protection Division of the Immigration and Refugee Board to have been abandoned and the

applicant is seeking to have that decision set aside. Most everything else in this file raises doubt because the evidence is contradictory, confusing, and suspect. That evidence and my assessment of it is set out in the following section.

## **Background**

### *The Applicant and the Consultant*

[3] The applicant filed an affidavit in this application which, in addition to the exhibits attached and the certified tribunal record (CTR), reveals the following history.

[4] The applicant says that “when I first made my refugee claim, I retained a counsel, Ademola Oladapo (“Oladapo”), to represent me” and was told that he was authorized to do so and paid him “about \$3,000 or \$4,000” for his services, but has no receipts.

[5] The form entitled “CLAIM FOR REFUGEE PROTECTION IN CANADA” in the CTR contains a Third Party Declaration which reads as follows:

Did someone assist you in filing out this form? If yes, this person needs to sign the following declaration.

I (print full name clearly) Ademola Oladapo, do solemnly declare that I have assisted in the accurate completion of this form to the person concerned. I have been informed by the person, and I do believe, that he/she completely understands the nature and effect of these forms, and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

Mr. Oladapo checks that he is a “Consultant” and signed the declaration on September 13, 2009.

[6] The applicant, on October 14, 2009, signs and declares the information in the form to be true. On October 15, 2009, the Board sent the applicant a form letter acknowledging receipt of the refugee claim and informs him that the Board must receive his completed Personal Information Form (PIF) within 28 days or he will have to appear on November 25, 2009, for an abandonment hearing. The letter also sets out his entitlement to legal representation as follows:

- at your expense or you may be eligible to receive assistance from Legal Aid. For information about Legal Aid, read the booklet called *The Refugee Protection Claim Process – An Overview*;
- if you choose to hire counsel, you should do so immediately, so that your counsel can send your PIF to the IRB on time and prepare for your hearing;
- you should hire a counsel who is able to send your PIF on time to the IRB or to proceed on a scheduled hearing date, if not you will have to hire another counsel who is able to do so;
- if your counsel charges a fee, your counsel must be a member in good standing of either a bar of a province, the Chambre des notaires du Québec or the Canadian Society of Immigration Consultants in order to be able to represent you before the IRB;
- if your counsel charges a fee, your counsel must provide the RPD with their membership identification number and the name of the organization of which they are a member;
- when you hire counsel after a date has already been set for your hearing, you are responsible for making sure that your counsel is available and ready to proceed on the scheduled date;
- you should make sure that your counsel is available on the scheduled date. The RPD may not change the date or time of your hearing because your counsel cannot attend, therefore it may be necessary for you to hire new counsel who is available on the scheduled date;
- if you hire counsel or change counsel, you must immediately advise the RPD and CIC, in writing, of the name, address, telephone number, fax number and email address, if any, of your counsel, and if your counsel charges a fee, their membership identification number and the name of the organization they belong to. [emphasis added]

[7] The PIF was filed in time and the applicant signed Declaration A (as he did not require the assistance of a translator) declaring the following:

I declare that the information in this form and all attached documents is complete, true and correct. I declare that I am able to

read English and that I fully understand the entire content of this form and all attached documents. My declaration has the same force and effect as if made under oath.

[8] The PIF contains a section entitled “Your Counsel” and begins by asking the question “Do you have counsel?” The “No” box was marked with an X and the remainder of the section which provides address and other detailed information to be provided when an applicant has counsel was marked “N/A.” Notwithstanding having sworn to the completeness and accuracy of the PIF, in his affidavit, the applicant states: “I have just now noticed that under the “counsel” section, this was blank.”

[9] The CTR shows that a form entitled “NOTICE TO APPEAR FOR A SCHEDULING CONFERENCE” dated March 2, 2011, was mailed to the applicant (and to no one else) informing him of a scheduling conference on March 21, 2011. That form contains the following at its end: “Note: If you have retained counsel, please appear with a letter from counsel confirming that he/she is retained and ready to proceed and also providing at least 6 available dates for the hearing of your refugee claim(s) [emphasis added].”

[10] The applicant attended alone at the scheduling conference, presented no letter from his alleged counsel, and the refugee hearing was scheduled, with his knowledge, to be held on June 23, 2011. The “ASSIGNMENT COURT HEARING INFO SHEET” filed at the scheduling conference by the Presiding Member reflects that no counsel was present and that the Presiding Member explained to the applicant the Convention refugee definition and his right to counsel. There is nothing written on the form under the heading: “Comments related to any of the above:

(what efforts have been made to retain counsel, what is the likelihood of counsel being retained etc.)” nor does the applicant in his affidavit attest that he informed the Board that he had counsel.

[11] At the scheduling conference, the applicant was handed a form entitled “PEREMPTORY NOTICE TO APPEAR” stating that he has to appear on June 23, 2011, for the refugee hearing.

That form also contains the following statement:

You must be present and ready to proceed by the scheduled start time. If you or your counsel fail to appear as required, the RPD may, after giving you a reasonable opportunity to be heard, determine your claim to be abandoned [emphasis added].

[12] No one appeared on June 23, 2011. The applicant’s explanation for his failure to appear is that he had a scheduled medical appointment that day.

Following [the scheduling conference], I accidentally scheduled a medical appointment for June 23, 2011. When I received a notice to appear for a hearing of my claim of June 23, 2011, I spoke to Oladapo about what to do. He advised me that it was not a problem to reschedule the hearing. I gave him a medical note for the appointment, and he assured me and I believed that he would attend the hearing to postpone it on my behalf. I did not keep a copy of the note. I wish to emphasize that I would certainly have attended if I had known that a medical appointment was not a valid reason for rescheduling the hearing [emphasis added].

[13] The emphasized portion of the applicant’s sworn statement is contradicted by the objective evidence before the Court. He swears that he made the medical appointment after the scheduling conference and only realized the conflict when he received the Notice to Appear; however, that form shows that he was personally served with it at the Scheduling Conference.

Therefore, contrary to his affidavit, he knew the date of the hearing before he made the alleged medical appointment.

[14] As a result of the applicant's failure to appear, the Board scheduled a show cause hearing and on August 23, 2011, mailed a notice that it would be held on October 5, 2011. The applicant admits that he received that notice but he again failed to attend. His reason was that he again had a medical appointment:

Unfortunately, I also had a medical appointment scheduled for October 5, 2011. When I received the notice to appear for that day, I spoke to Oladapo and gave him a medical note for that appointment. He again assured me and I believed that he would attend on my behalf, and that it would not be a problem to postpone the hearing.

I should note that, at that point, I was unaware that Olapado had not attended the June 23 hearing. Had I known that, I would have immediately retained new counsel, and would have certainly have attended the October 5 hearing to explain all this.

[15] This explanation is not credible. It is not believable that the applicant would think that his medical appointment would result in the postponement of the October hearing given that the hearing in June had not been postponed for exactly that reason. At a minimum, it ought to have raised a serious question in the applicant's mind as to what steps his consultant had taken to get the hearing postponed or explain his medical appointments. If the applicant is to be believed, he simply took what Mr. Oladapo said at face value and had none of the doubts that a reasonable or careful person would, given the history to date.

[16] No one appeared at the show cause hearing on October 5, 2011, and the Board declared that the claim was abandoned. A Notice of Abandonment Decision form dated October 13, 2011, was sent to the applicant and written reasons were subsequently provided on January 4, 2012, when this application commenced.

[17] The applicant attests that when he received notice that his claim had been abandoned, he was “shocked.” Again, he turned to Mr. Oladapo, who he says told him he would file an “appeal to the Federal Court, which apparently he did,” referring to the present application. The Application for Leave and for Judicial Review states on its face that the address for service on the applicant is “Arif Zaherali Hassan Dhalla, 2413 Islington Avenue, Suite 604, Etobicoke, Ontario, M3W 3X6. Telephone Number (416) 802-1463 and Fax Number (416) 746-4080.” The Court notes that this is the address Mr. Oladapo provided as his address in his declaration in the PIF. It is not the address or phone number of the applicant.

[18] It was at this point that the applicant retained the law firm that now represents him. He says that in his presence, his counsel called Mr. Oladapo and asked what had happened at the hearings. The applicant attests to the following:

Oladapo stated that he had sent my medical notes by fax to the RPD. He agreed to meet me on December 6, 2011 at his apartment (where I always met him previously) to give me a copy of my file, including the correspondence with the RPD. He asked me to call to confirm.

On December 6 and 7, 2011, I called him at the same number that [my counsel] had used, but he did not answer, and his voicemail was full.

[19] As a result, his counsel filed a request to the Board under the provisions of the *Privacy Act*, and on December 1, 2011, was provided with copies of all the records of the applicant in the Board's files (the ATIP disclosure). Rather than resolving questions, the ATIP disclosure created more.

[20] The first issue raised by the ATIP disclosure that is noted by the applicant surrounds two medical letters.

[21] The first medical letter that is contained in the Board's file is a letter from a dentist marked by the Board as having been received on June 23, 2011, at around 1:40 pm, after the scheduled refugee hearing had concluded because no one attended. The applicant says that it is a forgery.

This letter is not the letter I gave to Oladapo, I have never seen it until now, and I do not recognize the name of the purported author or dental centre. This is clearly a fake produced by someone else.

[22] The applicant in oral submissions submits that the language of the letter is so poor that it is obvious it was not written by a dentist. It is dated June 22, 2011, is from Dr. Neelum Jamal of the Midtown Dental Centre, addressed to whom it may concern, and is set out verbatim, below:

22nd day of June,2011.

Dear Sir/Madam

TO WHOM IT MAY CONCERN

The above named patient by name ; Arif Zaherali H Dhalla is currently having dental pains and will be undergoing treatment at our Dental Centre and would be requiring some days off work.



This request arises from the fact that he needs to perform a root Canal operation regarding his teeth. His tooth requires Endodontic therapy due to Cavities infection deep inside his tooth.

Thanking you in Advance regarding your help and cooperation towards the above mentioned Patient.

Your's Faithfully,

Dr. Neelum Jamal.

[23] The second medical report that is contained in the Board's file is a letter from a doctor received by the Board on October 6, 2011, at around 9 a.m., which the applicant says is also a forgery. He says:

I have never seen this fax cover or medical note before. This is fax cover is not from me, and is not in my handwriting. The medical note – which I can see is similar to the fake medical note of June 23 – is not about me, and the purported author is not my doctor. This is also clearly a fake. I am seeing the note for the first time, and I am shocked.

[24] This letter is dated October 5, 2011, is from Dr. Hank C. Lee of the Regent Medical Clinic, is addressed to whom it may concern, and is set out verbatim, below:

5th day of October,2011.

Dear Sir/Madam

TO WHOM IT MAY CONCERN

The above named patient by name ; Arif Zaherali H Dhalla is currently having a Migraine which is caused by abnormal brain activity, which is triggered by stress , certain foods, environmental Factors and would be requiring some days off work.

His Migraine attack may have been triggered by Physical or emotional stress, smoking or exposure to smoke, Allergic

reactions, loud noises or certain odors or perfumes or missed meals.

I am therefore recommending he has a CT scan or take an EEG testing to rule out seizures.

Thanking you in Advance regarding your help and cooperation towards the above named Patient.

Your's Faithfully,

Dr. Hank C. Lee.

[25] The Court shares the applicant's view that there are remarkable similarities in these letters. The formatting is identical, the first line is identical including its odd formatting and underlining of the applicant's name, the final paragraph is identical, and the grammatically incorrect valediction is identical. Both are extremely suspect and, in my view, fraudulent.

*The Applicant and the Lawyer*

[26] The second issue raised by the ATIP disclosure that the applicant notes is that the Board's files indicate that at some point the applicant was represented by a lawyer, Adetayo G. Akinyemi. The applicant attests in his affidavit: "I have no idea who this person is, and have never met him or her." He further states that he has filed a compliant with the Law Society of Upper Canada regarding Mr. Akinyemi and attaches a copy as an exhibit to his affidavit. The Minister notes, quite correctly, that there is nothing in the affidavit or elsewhere to indicate that this complaint was filed and is being considered by the Law Society.

[27] This is where matters stood until a few minutes before the scheduled hearing of this application when a letter from Mr. Akinyemi dated September 20, 2012, addressed to myself as

the hearing judge and to the applicant's counsel was received. The Court was informed at the hearing that counsel for the respondent had been communicating with Mr. Akinyemi and this apparently lead to him writing the following:

I am an Immigration Lawyer in Toronto and I have represented and will continue to represent clients at the Federal court.

My written representation to this Hon. Court is brought forward to ensure that my name is not tarnished, as I do not intend to speak on the merits of the case of this Applicant.

I do NOT know and I have never met Mr. Ali Dhalla and this fact is quite evident from the contents of Mr. Dhalla's affidavit dated the 7th day of December 2011, particularly at paragraph 16 (a). (Copy of affidavit enclosed)

Furthermore, I do not know and have never had a staff or representative called Ademola Oladapo

In fact, in his complaint to the Law Society, Mr. Dhalla believes I am female which is incorrect. (Copy of complaint enclosed)

Furthermore, in his PIF, the claimant did not indicate he had any counsel. (Copy of PIF) enclosed.

The first indication I ever got of the existence of Mr. Dhalla was when the Refugee Board sent me a disclosure package for this client, indicating I was his counsel, which turned out to be an obvious error.

Upon receipt of this message, I was worried I may have misplaced or lost sight of one of my client's matters and I immediately instructed my assistant, Ms. Anyudy Urena, to write to the Refugee Board asking for copies of this client's PIF, so that I could follow up, as I did not have Mr. Dhalla's name on my list of clients. (Copy of my assistant's letter to the Board is herewith enclosed)

Despite my letter to the Board, I never received a copy of the client's PIF and when my assistant called the Board to enquire whether my name was on the client's PIF, she was advised by the board that I was not listed on the client's PIF as counsel.

I do not know how or what document the refugee board relied on to contact me and upon my instruction, my assistant notified the

board that I was not counsel for this individual, hoping that office would rectify any error with dispatch.

It is rather disturbing that Mr. Ali Dhalla “scheduled” medical appointments on both days he was expected to attend his hearing, particularly after his previous experience of the 23<sup>rd</sup> day of June 2011 and the resultant letter of 23<sup>rd</sup> day of August 2011 that he received from the IRB. This is however an issue that will be dealt with by the Federal Court in making a decision on his Application for leave.

But for the error from the scheduling unit of the IRB, there is not a single document relating to Mr. Dhalla’s case that was prepared or sent by me on his behalf and I urge this Hon. Court to vindicate me accordingly.

All of which is respectfully submitted.

Dated this 20<sup>th</sup> day of September 2012

Yours truly,  
Adetayo G. Akinyemi  
Barrister & Solicitor

[28] It was suggested by the applicant at the hearing that Mr. Akinyemi’s letter contained false statements because he claimed that his first knowledge of the applicant was when he received the Board’s disclosure package but that this package was received some months after he wrote to the Board seeking disclosure of the applicant’s PIF. On closer review of the file, the Court is satisfied that the submission is not accurate; it is premised on an incorrect view of the evidence. There were two disclosure packages sent to Mr. Akinyemi and the first was sent to him only a few days before his letter to the Board. Nonetheless, whether he became involved in the applicant’s claim, how he became involved, and what his involvement, if any, remain mysterious and raise further questions.

[29] The CTR and ATIP disclosure contain the following communications involving the Board and Mr. Akinyemi.

[30] The first reference to Mr. Akinyemi is in a internal Board document, Statement of Service, in the ATIP disclosure which states that on May 2, 2011, the Board served the standard disclosure package for Tanzania dated April 27, 2011, on “counsel” being Mr. Akinyemi. There is nothing in either file to indicate that the Board had been informed by anyone that Mr. Akinyemi was counsel for the applicant. I strongly suspect that this was a clerical error made by a Board official.

[31] This disclosure sent to Mr. Akinyemi caused him, as he writes in his letter, to be worried that he may have lost sight of or misplaced a client file. Accordingly, at his instruction, his secretary wrote to the Board. That one page letter/fax is dated May 6, 2011, references the applicant’s Board file number, and reads: “Kindly, forward a copy of my client’s personal information form to my address noted above.”

[32] Mr. Akinyemi says that he received no PIF in response and upon following up, his assistant was told, correctly, that he did not appear as the applicant’s counsel on the PIF. However, the copy of his letter/fax in the ATIP disclosure from the Board has a handwritten notation on it stamped May 17, 2011, that appears to read: “Copy of PIF [?BC NCR?] sent to cnsl. Jessie.” The bracketed letters with question mark bookends are my best guess at the handwriting. The notation may or may not indicate that Jessie sent the PIF to Mr. Akinyemi – only Jessie knows.

[33] Mr. Akinyemi goes on to say that he did not know what document the Board relied upon to send him the document package but instructed his assistant to contact the Board and notify it that he was not counsel for the applicant. I have no reason to question Mr. Akinyemi, but note that there is nothing in the material before the Court to objectively confirm any such communication from his office. Nevertheless, there is evidence that thereafter, and from time to time, but not consistently, the Board took the view that the applicant had no counsel.

[34] The Court notes, for example, that on the Board's Hearing Information sheet prepared for the Member for the June 23, 2011, hearing it is indicated that the applicant has "No Counsel." Similarly the RPD Hearing Disposition Record for that hearing also indicates that the applicant has no counsel. Furthermore, in what appear to be notes of the Member made in preparation for the June 23, 2011, hearing there is a notation "No Counsel – nothing on file."

[35] However, there are other later documents in the CTR and ATIP disclosure that indicate that from the Board's perspective Mr. Akinyemi was counsel for the applicant; specifically the following:

- A Re-Scheduling Request Form for Postponed / Adjourned Cases bearing the date of June 24, 2011, lists Mr. Akinyemi as counsel and states his phone number and contains a notation under the heading Special Instruction that indicates that on June 27, 2011, a Board representative "spoke with counsel" and he agreed to the matter being scheduled for October 5, 2011, at 1 pm.

- The Registrar of the Board on August 23, 2011, sent a Notice to Appear for the show cause hearing to be held on October 5, 2011, to both the applicant and Mr. Akinyemi as “claimant’s counsel.”
- The Board’s form prepared for the Member for the show cause hearing on October 5, 2011, as well as the RPD Hearing Disposition Record indicate Mr. Akinyemi as counsel of record.
- A Statement of Service form of the Board reflects that on September 1, 2011, Mr. Akinyemi was served with the Standard Disclosure Package for Tanzania dated August 31, 2011.
- The Distribution/Statement of Service form dated October 13, 2011, indicates that the Board served both the applicant and Mr. Akinyemi with the Board’s decision declaring the claim to have been abandoned.

### **Issue**

[36] The applicant raises one issue: whether his counsel, Mr. Oladapo and/or Mr. Akinyemi acted in an incompetent or fraudulent manner, causing his refugee claim to be declared abandoned in breach of procedural fairness and natural justice.

### **Analysis**

[37] Both the applicant and Mr. Akinyemi agree that he was never retained by the applicant and never acted for him. I am satisfied that the Board’s documents reflecting that he was counsel reflect a clerical error on the part of the Board. More problematic is the Board’s document that reflects that one of its employees had a discussion with Mr. Akinyemi concerning the scheduling

of the show cause hearing. If any such conversation took place, I am prepared to accept, absent evidence to the contrary, that Mr. Akinyemi did not understand that the matter involved the applicant and not one of his clients. This is a matter the Board may wish to inquire into; however, whether or not the conversation took place as recorded, it had nothing to do with the applicant failing to appear at the show case hearing. The applicant was aware of the date of the hearing but he failed to attend.

[38] The applicant submits that a failure of natural justice may result from the negligence or fraudulent conduct of a claimant's counsel. In appropriate and exceptional cases, an individual can be separated from the consequences of the conduct of his own counsel. However, as is rightly pointed out by the applicant in his memorandum of argument, this Court has recently stated that "the negligence of counsel should not cause an Applicant, who has acted with care, to suffer [emphasis added]." *Jane Doe v Canada (Minister of Citizenship and Immigration)*, 2010 FC 284 at para 28.

[39] One thing of which I am certain is that the applicant has failed to demonstrate that he acted with care at any time prior to the declaration of abandonment.

[40] The applicant's story of Mr. Oladapo is quite simply not credible. There is no evidence that Mr. Oladapo was retained by the applicant to do anything other than assist him in making the initial refugee claim. I do not believe that he agreed to act as counsel at the hearing and that the applicant only noticed that his name was absent from the PIF when he received a copy of it as part of the ATIP disclosure. He attended the pre-scheduling conference alone and, despite



being informed of his right to counsel, did nothing to advise the Board then or later that he already had counsel. If, as he says, he had counsel, then there is no explanation from him as to why he failed to mention this fact to the Board.

[41] I further do not believe that he coincidentally and inadvertently had two medical appointments on the two dates of the refugee hearing and show cause hearing. I have already noted that contradiction in his affidavit evidence as to the timing of the first appointment and the scheduling of the hearing. I find it also significant that he has provided no explanation of the purpose or nature of the two alleged medical appointments, much less supporting documentation. He has not gone back to the doctors who allegedly saw him to get replacement notes, or provided any documentation to support his claim that he had these appointments. Critically, there is no explanation offered as to why, if the applicant had provided Mr. Oladapo with genuine medical notes, he would fabricate notes and send them to the Board. I find it unbelievable that the applicant would believe that he could obtain an adjournment because of a conflicting medical appointment in light of the express warnings on the notices from the Board that if he failed to appear the claim might be declared abandoned. Even if I were to give him the benefit of the doubt the first time, it is beyond belief that he would think an adjournment would be forthcoming on the second occasion when it was not granted on the first.

[42] I do not believe the applicant when he swears that he did not know that Mr. Oladapo had not appeared at the June 2011 hearing because he admits to having received a notice that says as much. I cannot believe that any reasonable person would continue to return to Mr. Oladapo time

and time again, trusting him counter to all common sense and in the face of the instructions being provided to him by the Board.

[43] Even if I believed the applicant's story – which I do not – the only conclusion that can be drawn is that he has been anything but “careful” in the pursuit of his claim. He did not attempt to reschedule his alleged medical appointments. He did not read the clear instructions from the Board on multiple occasions. He did not question Mr. Oladapo after receiving the abandonment notice, or take extra care at that point. Frankly, nothing suggests he did *anything* carefully in pursuing his refugee claim.

[44] In short, I find that it is the applicant, and no one else, who is responsible for the abandonment declaration. He is the author of his own misfortune. The Board's decision is reasonable and just.

[45] Neither party is proposing that a question be certified.

[46] I am directing the Court's Registry to send copies of these Reasons for Judgment and Judgment to both Mr. Akinyemi and the Chair of the Board for their information and in the hope that each takes whatever corrective action is considered necessary to prevent any further incidence of the sort that occurred here.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application is dismissed and no question is certified.

"Russel W. Zinn"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-8005-11

**STYLE OF CAUSE:** ARIF ZAHERALI HASSANA ALI DHALLA v. THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** September 24, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** ZINN J.

**DATED:** September 28, 2012

**APPEARANCES:**

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