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HOOSAIN v. SECRETARY FOR THE INTERIOR.

(APPELLATE DIVISION.)

1969. November 6, 17. STEYN, C.J., OGILVIE THOMPSON, J.A.,  
WESSELS, J.A., JANSEN, J.A., and VAN WINSEN, A.J.A.

*Population registration.—Appellant by acceptance a Malay.—By descent an Indian.—Classification as an Indian.—Propriety of.—Proc. 123 of 1967, para. (5).*

The appellant had objected to a Race Classification Board to his classification as a member of the Indian Group. Although the Board found that he was a Malay by acceptance it also found that he was, by descent, a full-blooded Indian and for that reason, in accordance with the provisions of Proclamation 123 of 1967, he was a member of the Indian Group because descent, in terms of the intention of the Legislature, enjoyed preference over his acceptance as a Malay. An appeal against this decision was dismissed. In a further appeal,

*Held*, as the appellant by virtue of his full-blooded descent belonged to the ethnic Indian Group under paragraph (5) of the Proclamation, that he could not, without deviating from the established ethnic pattern which appears in the Coloured Group, at the same time, for the purposes of the Proclamation, be in fact a Cape Malay or, for that matter, be in fact a member of any other Group.

The decision in the Cape Provincial Division in *Hoosain v. Secretary for the Interior*, confirmed.

Appeal from a decision in the Cape Provincial Division (VAN ZIJL and BANKS, JJ.). The facts appear from the judgment of STEYN, C.J.

*L. R. Dison*, for the appellant: “.....”

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*L. L. Boshoff*, for the respondent: “.....”

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STEYN, C.J.: Appellant lodged an objection with a race classification board to his classification as a member of the Indian Group. His objection was refused on 29th January, 1969 and an appeal to the Cape Provincial Division was also unsuccessful. He appeals with the allegation that he should be classified as a member of the Malay Group. It appears that appellant was born on 21st December, 1942 in India from Indian parents who both had their homes there. On his behalf it was argued, without much energy—that his father is not of pure Indian descent, but there appears to be scant doubt that both his parents are in fact members of a race or tribe whose national home is India. His father moved to the Republic and here he was classified as an Indian. His identity card was issued to him in 1962 and he never objected to his classification. On the contrary, in his evidence before the board he stated that he was satisfied with it. Appellant's mother

remained in India and was not classified here. In 1950, at the age of eight years he followed his father here together with the other children of the family. Here he fell to the care of Gassa Safar, a Malay woman. According to her evidence, if I understand it correctly, he was not always continuously in her home; but presumably largely under her influence—he regarded her as a mother—according to other evidence also he gradually identified himself more and more with the Malay Group. He is also Moslem by religion, attended a Malay school and speaks Afrikaans in the manner of a Malay. After his father had concluded a marriage with another woman here, he became estranged from him. A certain Allie, who acted as a sort of guardian to appellant, tried to raise him as an Indian, but it is alleged that he resisted this. In January, 1963 Allie let him go to India to stay there for a while but he did not feel at home there and in November, 1963 he returned. In the

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application for identification documents required for the journey to India, which was signed by appellant on 19th November, 1962, i.e. when he was nearly 20 years old, his race is given as "Asiatic"; and in a return (N.V.R. 3) for the purposes of the Population Registration Act 30 of 1950 which was signed by appellant a few days previously, "Indian" was filled in opposite "Race (Indian, Chinese, Malay or other)". In 1968 he married the daughter of Indian parents. He states that initially they opposed the marriage because they look down on Malays. It was a Malay wedding but certain Indian customs were taken into account. According to the majority of a large number of witnesses, they regard appellant as a Malay and accept him as such. There are others however who allege that they regard him as Indian. According to the judgment of the Board, the appellant wanted to prove that he was generally accepted as a Cape Malay, and respondent also called witnesses regarding the question whether appellant was in fact accepted as one of them by Malays. This apparently is what the investigation was confined to on both sides. The Board accepted that after appellant had arrived here from India, he was practically adopted by Gassa Safar and raised as a Malay, and that on a balance of probabilities he is usually accepted as a Malay. The Board however also found that he is a full-blood Indian and that because of this, in terms of the provisions of Proc. 123 of 1967, he is a member of the Indian group, because, in terms of the intention of the Legislator, descent has precedence over passing as a Malay.

According to sec. 21 A (2) of the Act, as amended, the present case must be judged in terms of the provisions as they existed on the date when the Board gave its ruling i.e. on 29th January, 1969, and in terms of the provisions of the said Proclamation without consideration of the retrospectivity of Act 106 of 1969 whereby the said section was inserted in the Act. In terms of sec. 5 of the Act, the Proclamation divides coloureds into seven groups. The two relevant groups are defined as follows:

- “(2) The Malay Group, which shall consist of persons who in fact are, or who, except in the case of persons who in fact are members of a race or class or tribe referred to in paragraph (1), (3), (4), (5) or (6), are generally accepted as members of the race or class known as the Cape Malays.
- (5) The Indian Group, which shall consist of persons who in fact are, or who, except in the case of persons who in fact are members of a race or class or tribe referred to in paragraph (1), (2), (3), (4) or (6), are generally accepted as members of a race or tribe whose national home is in India or Pakistan.”

The proviso in respect of persons who are generally accepted as members of a specific group, viz. the exclusion from that category of those who are in fact members of a race, class or tribe for which one of the other six groups is prescribed is found in the definitions of all the groups, except the seventh, the Group of Other Coloureds. As regards these six groups, it is clear that a person who is in fact a member of one of them cannot be or become a member of another group on the ground that he is generally accepted as a member of one of the other groups. In such a case the fact that he is generally accepted as such cannot have the effect of removing him from the group of which he is in fact a member in terms of the relevant group, no fault can be found with the Board's finding that he cannot be classified in the Malay Group because he is generally accepted as a Malay.

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It cannot be doubted that appellant is in fact a member of a race or tribe whose national home is India. As has already been mentioned, he was born of Indian parents in India and had his home there until he was eight years old. On his behalf it was however argued before this Court that according to the evidence he is in fact a member of a race or tribe known as the Cape Malay and this is so because he became so by virtue of a factual process of identification with Cape Malays a process which is distinguishable, so it was argued, from the fact that he is generally accepted as a Cape Malay. The difference is not obvious. It presupposes that a person, such as the appellant, could become one of the Malays by virtue of his own identification with them as regards language, religion and way of life, even though he is not usually accepted as such. It is at least debatable whether actual membership can be obtained in such a way, without adoption into the Malay community by virtue of general acceptance. Should it in fact be possible as a factual happening, it would in a case such as the present have the result that the person concerned is in fact a member of two different groups. I do not think that the Legislator intended that any person could be classified into more than one group at the same time. In respect of coloureds it appears, *inter alia* from the provision in sec. 5 (1) of the Act that each coloured whose name is recorded in the register must be classified “according to the ethnical or other group to which he belongs”. Should he then, in the case of actual membership of two groups, be classified in one of the two, he would not be able to allege that it was wrong. There is nothing in the relevant legislation which indicates that the choice in such a case—if it can occur

at all—would rest with the person concerned. On the contrary it would appear that even if the alleged factual process had taken place here the appellant could in any case not be classified into any other group than the Indian group. Sec. 5 (5) of the Act and para. (c) of the Proclamation and the definition of ethnic groups in the Proclamation emphasise descent. In terms of para. (c) of sec. 5 (5) a coloured whose natural parents are both classified as members of the same ethnic or other group, must be classified as a member of that group. According to para. (c) of the Proclamation, as regards the said six groups a person is presumed to be a member of a race, class or tribe if his natural father is classified as a member of that race, class or tribe. (Cf. *Secretary for the Interior v. Jawoodien*, 1969 (3) S.A. 413 (A.D.)). It is true that appellant's mother was not classified as a member of the Indian Group, as would presumably have happened had she followed her husband here, but even if sec. 5 (5) is not applicable because of that, then appellant still undoubtedly belongs to the Indian ethnic group as defined in para. (5) of the Proclamation by virtue of full-blood descent, and without diverging from the established ethnic pattern which occurs among coloureds he cannot at the same time be a member in fact of the Malay, or for that matter any other group, for the purposes of the Proclamation.

I would also wish to add that I am not convinced that the evidence shows that appellant, apart from general acceptance, actually became a Cape Malay by virtue of the alleged factual happenings, but in the

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light of the foregoing it is not necessary to go into the evidence. The appeal is dismissed with costs.

OGILVIE THOMPSON, J.A., WESSELS, J.A., JANSEN, J.A., and VAN WINSEN, A.J.A., concurred.

Appellant's Attorneys: *Fuller, de Klerk & Osler*, Cape Town; *McIntyre & van der Post*, Bloemfontein. Respondent's Attorneys: *Deputy State Attorney*, Cape Town, Bloemfontein.