Federal Court  Cour fédérale

Date: 20190128

Docket: IMM-3320-18

Citation: 2019 FC 118

Ottawa, Ontario, January 28, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

SADAQ WARSAME

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision by the Refugee Protection Division of the Immigration and Refugee Board [the RPD] dated June 14, 2018, which determined that the Applicant is not a Convention refugee or a person in need of protection within the meaning of sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

II. Background

[2] The Applicant, Sadaq Jama Warsame, claims that:

a. He is a citizen of Somalia, born in 1987;

b. He fled Somalia at four years of age with his step-father and relocated to Kenya, after his mother was killed by members of the Hawiye clan;

c. He was deported back to Somalia by Kenyan authorities in 1994, after the refugee camp he had been living in was closed;

d. He returned to Kenya in 2007;

e. He fled Kenya in 2011 after being targeted on the basis of his Sufi faith during his work as a driver. His uncle, whom he worked with as a driver, was killed in 2010 by Al Shabab Muslim extremists due to his Sufi faith;

f. With the help of a smuggler the Applicant flew to Brazil, and then travelled by bus, car, and foot through Central America to Mexico;

g. He was detained by Mexican immigration authorities for roughly a month, in June and July of 2011; during this detention he was not handcuffed, and was able to play soccer and visit a gym;

h. He then travelled to the United States, where he was detained for six months, between July of 2011 and January of 2012; during this more lengthy detention, he was handcuffed, jailed and did not have the same freedoms he had enjoyed during his detention in Mexico;

i. In June of 2012, in order to escape detention, he withdrew his refugee claim in the US on advice from his lawyer that the claim would be denied and he would be deported back to Somalia.

[3] The Applicant crossed the Canada-US border south of Winnipeg in June of 2012, and filed an application claiming refugee protection in Canada dated June 6, 2012 [the Application].

[4] The basis of the Applicant's refugee claim is that he is a Sufi believer, and as such would be the target of Al Shabab Muslim extremists if he was returned to Somalia. He also claims to be a member of the Marehan clan, who are particularly targeted by Al Shabab. Additionally, the Applicant asserts that he would be targeted by Al Shabab due to having lived in the West for more than six years.

[5] The Applicant claims that, as a result of the traumatic events in his life and the political turmoil in Somalia, he has no documents to verify his identity.

I. Decision Under Review

[6] The Applicant testified by way of an interpreter before a Member of the RPD at a hearing on May 3, 2018 [the Hearing].

[7] In a decision dated June 14, 2018, the RPD determined that the Applicant was neither a Convention refugee under section 96 of the IRPA nor a person in need of protection under subsection 97(1) of the IRPA [the Decision].

[8] In reaching the Decision, the RPD found that the Applicant had failed to establish his personal identity, and also made several adverse credibility findings.

II. Issues

[9] The issues are:

A. Did the Member err in considering the Applicant's identity?

B. Did the Member err by mischaracterizing the Applicant's evidence regarding a prior refugee claim?

C. Did the Member err in assessing the psychological reports?

III. Standard of Review

[10] The standard of review is reasonableness.

IV. Analysis

A. *Did the Member err in considering the Applicant's identity?*

[11] Given his personal history and the history of political upheaval in Somalia, the Applicant

has no formal identity documents. The Applicant submitted before the RPD several pieces of evidence in an attempt to establish his identity:

a. A letter from Midaynta Community Services, a Somalian association in Toronto, dated May 1, 2018, offered in support of the fact that the Applicant is a citizen of Somalia [the Midaynta Letter];
b. A letter from Dixon Community Services, an organization that serves refugees and newcomers from Somalia, dated May 15, 2014, offered in support of the fact that the Applicant is a member of the Marehan clan and a citizen of Somalia [the Dixon Letter];
c. An affidavit from Muse Jama Farah, the alleged first cousin of the Applicant's father, undated, who deposes to the Applicant's personal identity [the Farah Affidavit].

[12] The Member assigned no weight to either of the letters, on the basis that neither confirmed the Applicant's personal identity. The Member also assigned no weight to the Farah Affidavit, because "the affiant's declarations are insufficient to establish identity and are based on his opinion of the claimant's resemblance to his father."

[13] The Member concluded that the Applicant had failed to establish his personal identity.

[14] The Applicant argues, in relation to the Midaynta Letter and the Dixon Letter, that the Member erred in his refusal to give the documents weight by evaluating the letters based on what they did not evidence (the Applicant's personal identity) rather than what they could evidence (the Applicant's identity as a Somalian citizen).

[15] The Respondent argues that the Member reasonably found this evidence to be of "minimal probative value".

[16] I find that the Member erred when considering the two letters. As Justice Hughes wrote in *Teganya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 42 at paragraph 25 [*Teganya*], discussing an affidavit that had been dismissed by an immigration officer on the basis that it did not address certain issues:

> This dismissal is unreasonable. The affidavit must be considered for what it does say. Not every piece of evidence must be directed to every specific point in issue. A party must be allowed to build its case, certain parts are background, other parts fill in gaps. The evidence as a whole is to be considered. No piece should be dismissed simply because it is a piece.
>
> [Emphasis added]

[17] The Member dismissed the two letters on the basis that they did not prove the Applicant's personal identity. The Member erred by failing to consider that the letters do support the Applicant's identity as a Somalian national. The Applicant had put forward the Farah Affidavit to establish his personal identity.

[18] While it is not the role of this Court to re-weigh evidence that was before a tribunal, I find in this case that the Member's treatment of the letters was unreasonable. No piece of evidence should be dismissed simply because it is a single piece of the totality of evidence provided. It is not appropriate to consider such evidence in isolation; rather one must consider the whole of the evidence purposively and contextually. This is particularly so in cases dealing

with refugee claimants from countries where identity documents are often problematic and may not be readily available, or available at all.

[19] Accordingly, on this reason alone, this matter should be sent back for redetermination. With respect to the Member's curt analysis of the Farah Affidavit, I echo the words of Justice Hughes in *Teganya,* above at paragraph 26, that "all the documentary evidence should be considered by a different person with a fresh mind".

B. *Did the Member err by mischaracterizing the Applicant's evidence regarding a prior refugee claim?*

[20] In considering the Applicant's credibility, the Member wrote:

> [11] Mr. Warsame entered illegally in the USA, having travelled through various Latin American countries. He was arrested by immigration officers. He claimed asylum in the United States and was found eligible. Pending his hearing before a judge, he was detained for 6 months. In his Personal Information Form, he declares that his claim was denied in the United States. This implies he had no choice but to leave the United States. However, he was confronted with the US Immigration file in which it is clearly stated that he withdrew his claim before knowing whether it would be accepted or rejected. He gave various explanations for this discrepancy.
>
> [Emphasis added]

[21] The Member then went on to make a negative credibility inference from this discrepancy, as well as the "various explanations" that the Applicant provided for the discrepancy.

[22] The Applicant argues that the Member erred in drawing this negative inference, because the Applicant had amended the narrative in his Personal Information Form [PIF] several years ago, shortly after his PIF was initially submitted.

[23] The Applicant's original PIF reads:

> I was detained by U.S. immigration authorities that led to depression. When my asylum claim in the U.S. was denied I feared being returned to Somalia and came to Canada to file a refugee claim.

[24] The Applicant's amended PIF, which has a handwritten date of September 5, 2014, reads:

> I was detained by U.S. immigration authorities that led to depression. My lawyer in the U.S. told me that if I do not withdraw my claim it will be denied and I will be immediately deported to Somalia. I therefore withdrew my claim. and [*sic*] came to Canada to file a refugee claim.
>
> [Emphasis added to show amendments]

[25] The Applicant argues that not only did he amend his original PIF long before the Hearing, he also provided a reasonable explanation for the initial error – that he did not fully understand the US immigration proceeding, he was sick with malaria and desperate to get out of detention after being held for six months, and he simply signed the papers that his lawyer put before him.

[26] I agree that the Member erred by mischaracterizing key evidence, and therefore drawing a negative credibility inference from a documentary error that the Applicant had corrected years ago. The Applicant provided a reasonable explanation for the initial error, and corrected it in a

timely fashion. Had the Member reasonably considered these facts, it is unlikely that any negative credibility inference would have been drawn from the Applicant's initial error.

C. *Did the Member err in assessing the psychological reports?*

[27] The Member considered two psychological reports submitted by the Applicant:

> Counsel has adduced one report from a psychologist, Dr. J. Pilowsky, and one report from a psychotherapist, Jena Ledson. Both reports were made at the request of counsel, Ms. Lani Gozlan. As usual, these reports are based on the claimant's narrative. It has been established in case law that a psychologist may well find a patient depressed, but he or she cannot conclude that the symptoms come from the patient's story to establish the credibility of the allegations.
>
> [Footnote omitted]

[28] The Applicant submits that the Member erred in deciding not to provide any weight to the reports because (i) they are based on the Applicant's narrative, and (ii) there is no evidence that the Applicant's symptoms stem from his alleged persecution. The Applicant argues that the Member failed to assess the impact of the Applicant's mental health condition and symptoms on his ability to testify. The Applicant suggests that this analysis is particularly important due to the Member's comments that the Applicant's testimony was laborious, vague and evasive.

[29] The Respondent submits that the Member was right to reject the reports, as they were each prepared at the request of counsel and based on one appointment with the Applicant. This Court has held in a number of decisions that such reports should be treated cautiously.

[30] The report by Ms. Ledson, dated September 8, 2014, concluded that the Applicant exhibited symptoms consistent with posttraumatic stress disorder and major depressive disorder. It also mentioned the possibility that the Applicant was depressed. Similarly, the report by Dr. Pilowsky, dated December 5, 2014, diagnosed chronic depression and posttraumatic stress disorder.

[31] In *AM v Canada (Minister of Citizenship and Immigration)*, 2011 FC 964 at paragraph 49, Justice Russell wrote:

> The main problem with the Decision, however, is the RPD's failure to grasp the significance of the psychological evidence or to explain why it was not taken into account when assessing the discrepancies in the Applicant's evidence and the explanations that the Applicant gave for those discrepancies. The RPD appears to leave out of account entirely the psychological report "with respect to the claimant's allegations, as noted in the psychiatric report, giving rise to his refugee claim…." This is because "the panel notes that these are based solely on the claimant's evidence, which the panel has found, as noted below, not to be credible." Nowhere does the RPD address the issue of whether the symptoms of post-traumatic stress disorder described in the report could have impacted the Applicant's powers of recall and his ability to give evidence, which are highly material considerations for the RPD's negative credibility findings based upon inconsistencies and its rejection of the Applicant's explanation for those inconsistencies. In other words, the psychological report was not put forward as proof of persecution in Albania; its purpose was to alert the RPD to the Applicant's current mental condition and the impact this might have upon his testimony.

[32] Analogously here, the Member rejected the reports on the basis that they did not prove the Applicant's story; this was not their purpose. The reports should have alerted the Member to the Applicant's mental health conditions and the impact these conditions might have upon the

Applicant's testimony. The Member's failure to appreciate the Applicant's mental health contextually was, in these circumstances, unreasonable.

JUDGMENT in IMM-3320-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is referred to a different member for reconsideration;

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3320-18
STYLE OF CAUSE:	SADAQ WARSAME v MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 24, 2019
JUDGMENT AND REASONS:	MANSON J.
DATED:	JANUARY 28, 2019

APPEARANCES:

Ms. Lani Gozlan	FOR THE APPLICANT
Ms. Sally Thomas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lani Gozlan Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT