

Federal Court



Cour fédérale

Date: 20200131

Docket: IMM-2599-19

Citation: 2020 FC 186

Ottawa, Ontario, January 31, 2020

PRESENT: Mr. Justice Boswell

BETWEEN:

HASSAN HUSEIN MOHAMED

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Shortly after his arrival in Canada in 2016, the applicant, Hassan Husein Mohamed, claimed refugee protection on the basis that he was personally targeted by al-Shabaab, a terrorist, jihadist fundamentalist group based in East Africa.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] heard Mr. Mohammed's claim for refugee status on March 14, 2019. At the

conclusion of the hearing that day, the RPD rendered an oral decision rejecting the claim because Mr. Mohamed had not proven his identity and finding that his claim had no credible basis.

[3] Mr. Mohamed has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act, SC 2001, c-27 [IRPA]* for judicial review of the RPD's decision. He asks the Court to quash the RPD's decision and remit the matter back for redetermination by a different member of the RPD.

I. Background

[4] Mr. Mohamed alleges he was born in Moqokori, Somalia, in October 1979. He claims that in July 2003, while driving a truck, he ran over and killed a pedestrian trying to cross the road. While victims' families usually opt for financial compensation in such a situation, Mr. Mohamed says this victim's family opted for revenge and sought his death. These events caused him to flee Somalia for the first time in August 2003.

[5] Mr. Mohamed travelled to Italy where he claimed asylum. He misrepresented himself as being from a minority clan because he had been told he would be returned to Somalia if he indicated he was from a majority clan. This eventually led to denial of his claim since he was unable to answer questions about the minority clan.

[6] After his asylum claim in Italy failed, Mr. Mohamed travelled to Sweden in 2004, and to Norway in 2006, to seek asylum in those countries. Once each country matched his fingerprints to his Italian asylum claim, they did not allow him to apply and returned him to Italy. While in

Italy, Mr. Mohamed learned the family of the individual he had killed in 2003 had accepted financial compensation and ceased to demand his death.

[7] Mr. Mohamed returned to Somalia in February 2010. After Somalian and African Union Mission to Somalia troops liberated Moqokori from al-Shabaab in July 2015, Mr. Mohamed became involved in the local soccer program and captained the district team. He also organized teams and tournaments. He claims he received a phone call in March 2016 from a member of al-Shabaab accusing him of being against the holy war by being involved in the infidels' sport and recruiting young people to soccer instead of the jihad.

[8] Mr. Mohamed further claims that in June 2016, while driving his taxi, members of al-Shabaab ambushed and abducted him, and placed him in a cell. The next night, while being transported to what he assumed would be his death, Mr. Mohamed escaped from the back of the pick-up truck and ran through the jungle, evading gunfire. He claims he returned to Moqokori for a brief time but, fearing al-Shabaab would find him, he fled Somalia a second time in early July 2016. Mr. Mohamed says he flew to Toronto, Ontario, using fraudulent travel documents that he threw away on the flight to Toronto.

[9] At the RPD hearing, Mr. Mohamed revealed further details of his claim. First, he gave different birth dates for two of his brothers than those stated in his basis of claim form. Second, he admitted to having a false Italian document under a different name along with a false Norwegian passport. Third, he told the RPD his asylum claims in Italy, Sweden, and Norway

were recorded under the name “Hassan Husein” without his last name. When asked why he had not shared this information earlier, Mr. Mohamed said he “just remembered”.

[10] Fourth, Mr. Mohamed elaborated on his return to Somalia from Italy. He claimed he returned to Somalia on Ethiopian Air after getting a “go home paper” and travelling under the name “Hassan Husein”. He also claimed he left Italy because there was “no life” in Italy.

[11] Fifth, in answering the RPD’s questions, Mr. Mohamed advised he had never contacted Ethiopian Air to get the details of his return to Somalia in 2010; nor had he contacted any embassies or consulates in Canada to get his asylum files from Italy, Sweden, or Norway.

[12] Sixth, Mr. Mohamed added details to his escape from al-Shabaab in 2016. He claimed when he was running from al-Shabaab through the jungle, bushes and plants kept hitting and going into his legs, some parts were still in his legs and he needed surgery. In answer to the RPD’s questions, he confirmed he had yet to visit a doctor about this, adding the pain had recently started getting more severe.

[13] A witness testified at the hearing to prove Mr. Mohamed’s identity. Both Mr. Mohamed and the witness referred to each other as “relatives” as they share a clan rather than a direct familial relationship. Mr. Mohamed and the witness first met in 2011 when Mr. Mohamed visited the witness’s mobile phone shop. They saw each other again in 2013 when they chatted and had lunch together. They reunited in Toronto the day after Mr. Mohamed arrived in Canada

when they ran into each other at a coffee shop and recognized each other. They have been living together ever since.

[14] The witness testified he knew Mr. Mohamed by name, and they were from the same clan and had met in Ethiopia. The witness also testified Mr. Mohamed told him he had fled Somalia because he was running away from al-Shabaab, who had threatened and abducted him because he was involved in a solar system light project in Moqokori. The witness confirmed Mr. Mohamed's involvement in soccer.

[15] Mr. Mohamed later addressed the witness's solar project testimony. He claimed al-Shabaab also targeted him because of the solar light project. He claimed he had supplied a photograph of the project, which showed concrete circles and a metal post. In response to why these details were not in his basis of claim narrative, Mr. Mohammed answered he believed including the photograph made it part of his application for refugee status but his original lawyer had not included further details.

[16] The RPD questioned Mr. Mohamed about the documents included with his application. He said he had received his brother's statement and identity card from Somalia, together with his own soccer identity card, as email attachments from his brother to his former lawyer. He did not know why the application did not include the email transmitting these documents or that originals would be needed. Mr. Mohamed confirmed the soccer identity card was not a government document, but simply something the organization prepared for him.

[17] Answering questions from his own counsel, Mr. Mohamed stated that he did not have a Somali identity card like his brother's because his brother obtained the card in order to get a passport, which Mr. Mohamed apparently never did. He also told the RPD that the letter of support he received from the Loyan Foundation was based on his general knowledge of Somalia and his stated clan and affiliation.

II. The RPD's Decision

[18] On March 14, 2019, after a day-long hearing, the RPD rejected Mr. Mohamed's claim.

[19] The RPD found Mr. Mohamed had not proven he was a Convention refugee or a person in need of protection. Specifically, the RPD found he had proven neither his identity nor the basis of his claim. The RPD found Mr. Mohamed's entire story was without credibility or trustworthiness.

[20] The RPD noted Mr. Mohamed did not have a passport and he was requested to prove his identity by alternative means. The RPD found the presumption of truthfulness had been rebutted due to serious credibility concerns for both Mr. Mohamed and the witness. The RPD also noted Mr. Mohamed admitted to lying about his clan membership on three separate occasions in asylum proceedings. It found his explanation – that he feared being returned as a member of a majority clan if he told the truth – to be unreasonable because it showed a pattern of immigration fraud.

[21] The RPD found this prior misrepresentation undermined Mr. Mohamed's alleged clan membership, including the information he gave the Loyan Foundation, which was the basis of their referral letter. The RPD therefore assigned no evidentiary weight to the Foundation's letter because it only confirmed his clan affiliation based on Mr. Mohamed's self-report.

[22] The RPD considered Mr. Mohamed's return to Somalia in 2010, classifying it as voluntary reavilment due to difficult living conditions in Italy. The RPD did not find this was a reasonable explanation to return to Somalia because: there was no evidence Mr. Mohamed was at risk in Italy; his basis of claim form was silent on the matter; Italy was a safe country at the time; and al-Shabaab was targeting returnees to Somalia. The RPD expected Mr. Mohamed would have tried to make his way to Canada or the United States in 2010 rather than voluntarily return to Somalia.

[23] In the RPD's view, Mr. Mohamed had obstructed its work in trying to confirm his status in Europe by signing a consent form for the RPD to obtain information on "Hassan Husein Mohamed" when he knew he was known to European officials as "Hassan Husein", something he never admitted until the hearing. The RPD did not find reasonable Mr. Mohamed's statement that he just remembered at the hearing that this was how his name was recorded in Europe.

[24] The RPD added that Mr. Mohamed's explanations about his lack of efforts to obtain documentation from European authorities or Ethiopian Air were unreasonable. The RPD inferred any information from Mr. Mohamed's European claims would have led to adverse information on his identity and his basis of claim and concluded he was not a credible witness.

[25] In the RPD's view, the witness presented to support Mr. Mohamed's identity was not consistent, credible, or trustworthy. The RPD did not find it reasonable that the witness recounted Mr. Mohamed's persecution based on a solar energy project before the persecution based on soccer. The RPD noted that the solar project was not in Mr. Mohamed's basis of claim form and that he had referred to it as more of a secondary issue. Based on this inconsistency, the RPD found the witness was not credible. The RPD had difficulty with the witness's inability to give specifics about how he knew Mr. Mohamed was who he said he was, relying instead on lineage and their parents' friendship.

[26] The RPD made further credibility determinations against Mr. Mohamed based on inconsistencies between his and the witness's testimony. The RPD did not find reasonable that Mr. Mohamed believed including a photograph of the alleged solar project was enough to make it part of his claim. The RPD remarked that, despite other amendments, Mr. Mohamed never updated his basis of claim form with this information, and his brother did not mention this in his statement. The RPD discounted the brother's statement as it simply repeated Mr. Mohamed's story.

[27] The RPD dismissed all other documents as unreliable:

- It dismissed Mr. Mohamed's brother's ID card on the basis that he had gotten some of his other relatives' birth dates wrong;
- It dismissed Mr. Mohamed's soccer identity card and the brother's statement on the basis that they were not originals and the email sending them was not included. In the RPD's view, the soccer identity card looked like anyone with a computer could have made it, the brother's statement was simply based on Mr. Mohamed's already

discredited story, and it was difficult to determine whether the stamp on the police report was real;

- It disregarded the series of photographs Mr. Mohamed tendered since they did not prove where they were taken; and
- It dismissed a YouTube screenshot because it was not credible that Mr. Mohamed would be smiling and posing for pictures a month after allegedly receiving a threat from al-Shabaab, and there was no evidence where the video was taken or whether he was from that area.

[28] The RPD concluded that it had no credible and trustworthy evidence of Mr. Mohamed's identity or his basis of claim. The RPD found he was not credible, the documents he submitted were entitled to no weight, and that, therefore, under subsection 107(2) of the *IRPA* there was no credible basis upon which Mr. Mohamed could be a Convention refugee or person in need of protection.

III. What is the Standard of Review?

[29] The Supreme Court of Canada has recently recalibrated the framework for determining the applicable standard of review for administrative decisions on the merits.

[30] The starting point is the presumption that a standard of reasonableness applies in all cases and a reviewing court should derogate from this presumption only where required by a clear indication of legislative intent, or when the rule of law requires the standard of correctness to be applied (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16 and 17 [*Vavilov*]; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at

para 27). Neither circumstance is present in this case to justify a departure from the presumption of reasonableness review.

[31] Reasonableness review is concerned with both the decision-making process and its outcome. It tasks the Court with reviewing an administrative decision not only for the existence of internally coherent reasoning and the presence of justification, transparency and intelligibility, but also determining whether the decision is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at paras 12, 86 and 99; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[32] If the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome; nor is it the function of the reviewing court to reweigh the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

[33] This application was heard prior to the Supreme Court's recent decision in *Vavilov*. Although the parties' submissions were made under the framework in *Dunsmuir*, they were afforded an opportunity after the hearing to make further written submissions on the standard of review. Neither party suggested in their post-hearing submissions that the standard was anything other than reasonableness.

[34] Reasonableness is the standard for reviewing findings by the RPD concerning the credibility of an applicant and the lack of any credible basis for a claim (*Toussaint v Canada*

(*Citizenship and Immigration*), 2019 FC 267 at para 5; *Mohamed v Canada (Citizenship and Immigration)*, 2017 FC 598 at para 22; *Tsikaradzei v Canada (Citizenship and Immigration)*, 2017 FC 230 at para 12). This pre-*Vavilov* jurisprudence continues to offer insight into the applicable standard of review (*Vavilov* at para 143).

IV. The Parties' Submissions

A. *Mr. Mohamed's Submissions*

a) *Identity*

[35] In Mr. Mohamed's view, the RPD's emphasis on the misstatement of his clan membership coloured its analysis about his credibility and identity. According to Mr. Mohamed, the RPD unreasonably faulted him for not presenting himself at the Italian consulate and asking for a copy of his asylum documents.

[36] Mr. Mohamed says the RPD erred in finding against him based on his belief, communicated at the hearing, that his last name may not have been documented in Europe. According to Mr. Mohamed, the RPD did not consider that he was being truthful and that he had simply signed what was given to him when the RPD needed his authorization to verify his records in Europe.

[37] Mr. Mohamed says the RPD also erred in dismissing the Loyan Foundation letter because he had not disclosed his prior deceit about his clan affiliation in Europe and because he was the one who had provided the information to the Foundation. According to Mr. Mohamed, the RPD

ignored this Court's guidance that knowledge of the country of origin and the native language are valid factors to assess in verifying identity. He adds that this Court has accepted nationality conclusions in letters similar to that of the Loyan Foundation.

[38] In Mr. Mohamed's view, the RPD unreasonably rejected the witness's testimony about Mr. Mohamed's identity. According to Mr. Mohamed, the RPD rejected this testimony based on the witness giving only generalities, even though the witness explained that their parents were friends and they were connected by lineage.

[39] Mr. Mohamed says the RPD erred in rejecting various documentary evidence. He takes issue with the speculative finding that the soccer identity card could have been created by anyone with a computer. According to Mr. Mohamed, the RPD never reviewed the totality of the evidence.

b) *Credibility*

[40] Mr. Mohamed notes that the RPD put substantial weight on his clan misrepresentation in Europe. He claims the RPD was wrong to refer to him misrepresenting his clan membership three times, since he had not actually been permitted to make claims in Sweden and Norway once his fingerprints were matched to his claim in Italy. Mr. Mohammed also notes that the RPD rejected his explanation as to why he had said he was from a minority clan but did not explain why it rejected his explanation.

[41] In Mr. Mohamed's view, the clan misrepresentation, which he admitted to in his basis of claim narrative, preyed on the RPD's decision, in that it was cited numerous times as a justification for disbelieving him, disbelieving his witness, and rejecting his evidence. According to Mr. Mohamed, each piece of evidence must be assessed individually, rather than be coloured by a lie, and the RPD did not do this.

[42] Mr. Mohamed contends the RPD erred in dismissing the identity witness's evidence based on the clan misrepresentation. In his view, the RPD unreasonably rejected the witness's testimony because the witness focused on the solar energy project. According to Mr. Mohamed, this was a minor omission from his basis of claim form and should not have formed the basis for further credibility findings.

[43] Mr. Mohamed says the RPD unreasonably attacked his credibility based on his return to Somalia in 2010. He claims the RPD did not consider either the realities of life as a failed asylum seeker or that his original reason for fleeing Somalia no longer existed.

c) *No Credible Basis*

[44] According to Mr. Mohamed, a no credible basis finding does not result automatically when the RPD finds a claimant's testimony not credible. Mr. Mohamed notes the threshold for such a finding is a high one and can be made only if there is no independent or credible documentary evidence to support a positive decision. Mr. Mohamed says this means all evidence must be assessed.

[45] Mr. Mohamed further says there was abundant information before the RPD about al-Shabaab, the groups they target and persecute, and the difficulties of returnees in Somalia. Based on this documentation, Mr. Mohamed asserts the RPD erred in making a no credible basis finding.

B. *The Respondent's Submissions*

a) *Identity*

[46] In the respondent's view, Mr. Mohamed did not supply acceptable documentation to prove his identity, since none of the evidence was reliable or credible. It was therefore reasonable, the respondent says, for the RPD not to find Mr. Mohamed's identity credible. The respondent adds that Mr. Mohamed's identity witness was not credible based on the inconsistencies between his and Mr. Mohamed's testimony.

[47] The respondent notes the Loyan Foundation letter was given no weight because it was based on a clan identity provided by Mr. Mohamed and on an omission. The respondent adds that it was reasonable for the RPD to discard the rest of the documentary evidence based on inconsistencies. In the respondent's view, Mr. Mohamed is simply asking the Court to reweigh the evidence.

b) *Credibility*

[48] The respondent argues that the RPD is entitled to deference in its credibility assessment. According to the respondent, the RPD gave clear reasons based on the evidence to support its findings. In the respondent's view, Mr. Mohamed supplied absolutely no corroborating evidence.

[49] According to the respondent, the RPD's reavilment findings support that Mr. Mohamed is not credible. Since the claim is based on his risk of being targeted as a returnee, it is inconsistent that he would return to Somalia in 2010. The respondent adds that Mr. Mohamed supplied no evidence of any danger he or any other asylum seekers faced in Italy.

c) *No Credible Basis*

[50] The respondent says some credible or trustworthy evidence is required to prevent a finding that a claim has no credible basis. According to the respondent, Mr. Mohamed offered absolutely no trustworthy or credible evidence to support his claim and the no credible basis finding was not unreasonable.

V. Analysis

[51] The RPD's findings were unreasonable. Its decision cannot stand.

[52] As Mr. Mohamed notes, the RPD placed substantial emphasis on the misrepresentation of his clan affiliation in his claims in Europe. While Mr. Mohamed argues there was only one claim

and the RPD erred in referring to three claims, he clearly stated during his testimony that he applied for asylum in each of Italy, Sweden, and Norway. Whether there were actual or formal applications in Sweden and Norway does not matter to the overall analysis. The RPD's over-reliance on this fact led it to make unreasonable findings.

[53] The RPD's analysis of Mr. Mohamed's explanation for the misrepresentation was unreasonable. The RPD found his explanation unreasonable because it showed a consistent and repeated pattern of immigration fraud. This analysis is not reasonable because the RPD did not say whether it believed the explanation; it simply said the explanation was proof of immigration fraud and, therefore, not a reasonable explanation. This is not intelligible.

[54] Although the RPD was certainly entitled to question Mr. Mohamed's credibility given his previous deceit, it never explained why he would lie about his clan membership since his claim in no way revolved around his clan membership. The absence of an explanation in this regard by the RPD is unreasonable.

[55] The RPD's treatment of the Loyan Foundation letter was also unreasonable. First, this letter was tendered not to prove personal identity but, rather, as proof of Mr. Mohamed's Somali nationality. It was unreasonable for the RPD to assign this letter no evidentiary weight and not consider whether it supported Mr. Mohamed's identity as a Somalian national; this is particularly so with refugee claimants from countries such as Somalia where identity documents are often problematic and may not be readily available, or available at all (*Warsame v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 118 at para 18).

[56] The RPD also dismissed the Loyan Foundation letter for what it did not say – whether Mr. Mohamed disclosed he had previously lied about his clan affiliation – rather than what it did say about the process for assessing clan affiliation and making a finding in that regard. It was unreasonable for the RPD to disregard the letter for what it did not say (*Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 729 at para 11).

[57] The RPD's reasons for disbelieving the identity witness's testimony were unreasonable. The RPD reproached the witness because he could only give generalities about how he met Mr. Mohamed in Somalia, remarking that it was clearly not a close relationship. Yet, what the witness testified to was that he and Mr. Mohamed were relatives going back 6 or 7 generations. The witness considered they had a close familial relationship. The RPD unreasonably dismissed this testimony because it expected Mr. Mohamed would have come up more specifically in conversations between the witness and his father. The RPD never explained why it expected details beyond what the witness provided.

[58] Lastly, the RPD conflated its credibility findings about Mr. Mohamed and the evidence with a no credible basis finding. The RPD did not carefully consider whether there was any credible evidence to support the claim.

[59] In advance of reaching a conclusion of no credible basis, the RPD must look to any objective documentary evidence for any credible or trustworthy support for an applicant's claim (*Eze v Canada (Citizenship and Immigration)*, 2016 FC 601 at para 26). The RPD can only make a finding that a claim has no credible basis under subsection 107(2) of the *IRPA* where “the only

evidence before the RPD is the testimony of the claimant”. Hence, if there is any credible or independent evidence capable of supporting the claim, it will have “a ‘credible basis’ even if the claimant’s testimony is found not to be credible” (*Chen v Canada (Citizenship and Immigration)*, 2015 FC 1133 at para 16 [emphasis in original]).

[60] The RPD’s finding that Mr. Mohammed was not credible does not automatically result in a no credible basis finding (*Foyet v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1591 at paras 23-26). The threshold for a no credible basis finding is a high one because it precludes the possibility of an appeal to the Refugee Appeal Division [RAD] of the IRB by virtue of paragraph 110(2)(c) of the *IRPA*. Claimants who seek judicial review of a negative RAD decision benefit from an automatic stay of removal under subsection 231(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, unless they are from countries designated under subsection 109.1 (1) of the *IRPA*.

[61] The RPD must look to the objective documentary evidence before making a no credible basis finding in respect of a refugee claim. As noted in *Behary v Canada (Citizenship and Immigration)*, 2015 FC 794 at para 53: “Only if there is no independent or credible documentary evidence, or if any such evidence cannot support a positive decision, can the RPD make such a finding”.

[62] The RPD issued oral reasons for its decision after obtaining new information for the first time at the hearing. It rushed to make a “no credible basis” decision based in part on this new

information without going back through the evidence to assess whether there was any corroborating information.

[63] There was documentary evidence before the RPD, notably reports from the United Nations High Commissioner for Refugees, referenced in the National Documentation Package (April 30, 2018), which could support Mr. Mohammed's claim. However, the RPD determined that his claim had no credible basis without assessing the independent and credible documentary evidence capable of supporting the claim. The RPD's determination in this regard was neither reasonable nor justified.

VI. Conclusion

[64] Mr. Mohammed's application for judicial review is allowed. The matter is returned for redetermination by a different member of the RPD.

[65] Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed and the matter returned for redetermination by a different panel member of the Refugee Protection Division of the Immigration and Refugee Board in accordance with the reasons for this judgment; and no serious question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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PLACE OF HEARING: TORONTO, ONTARIO

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