Federal Court  Cour fédérale

Date: 20210430

Docket: IMM-7043-19

Citation: 2021 FC 383

Ottawa, Ontario, April 30, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

ABDI MOLLIM HASSAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Abdi Hassan's application for refugee status was refused because the Refugee Protection Division (RPD) and the Refugee Appeal Division (RAD) concluded he had not sufficiently proved his identity including his nationality as a citizen of Somalia. For the reasons that follow, I agree with Mr. Hassan that the RAD's reasons for discounting the evidence of a witness called to establish his identity were unreasonable, and that the RAD's decision therefore cannot stand.

[2] The application for judicial review is therefore granted and Mr. Hassan's appeal is remitted to the RAD for redetermination.

II. Issue and Standard of Review

[3] The sole issue on this application is whether the RAD erred in concluding Mr. Hassan had not discharged his burden of proof to establish his identity.

[4] The parties agree the RAD's decision is reviewable on the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Warsame v Canada (Citizenship and Immigration)*, 2019 FC 920 at para 26 [*Warsamie Warsame*].

[5] Mr. Hassan's arguments address primarily the RAD's assessment of the evidence. Reasonableness review does not permit the Court to simply reassess or reweigh evidence and reach its own conclusions: *Vavilov* at para 125. Rather, the Court must defer to the RAD's assessment, and determine only whether the RAD's decision is reasonable in light of the evidentiary record and the factual matrix. A decision may be unreasonable where it fundamentally misapprehends evidence, fails to take evidence into account, or shows incoherent reasoning in assessing the evidence: *Vavilov* at paras 102–107, 125–126. Ultimately, the question is whether the decision, when read as a whole and taking into account the administrative setting, is transparent, intelligible, and justified: *Vavilov* at paras 85, 91–95, 99–100, 102.

III. Analysis

[6] Identity is at the "very core of every refugee claim": *Hassan v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 459 at para 27. Failure to establish identity is fatal to a claim for refugee protection: *Edobor v Canada (Citizenship and Immigration)*, 2019 FC 1064 at para 8. The *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] requires the RPD's assessment of a claimant's credibility take into account whether they have acceptable documentation establishing their identity, and if not, "whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation": *IRPA*, s 106; see also *Refugee Protection Division Rules*, SOR/2012-256, s 11.

[7] Mr. Hassan says he is a Somali citizen, born in the town of Galcad. His refugee claim asserts he fears the terrorist organization Al Shabaab, which tried to recruit him in 2015 and kidnapped and beat him when he refused to join them. He fears that if returned to Somalia, Al Shabaab would find him and either recruit or kill him, given their presence throughout the country. A material element of Mr. Hassan's claim was thus his identity as a Somali citizen.

[8] Mr. Hassan has no documents from Somalia proving his Somali citizenship. As the objective country condition documents indicate, Somalia's inhabitants have been unable to obtain official government documents for years. This Court has described it as "notorious" that government documents from Somalia are "virtually unobtainable": *Warsamie Warsame* at para 50, citing *Abdullahi v Canada (Citizenship and Immigration)*, 2015 FC 1164 at para 9.

[9] Mr. Hassan therefore sought to establish his identity through his own testimony and through three pieces of corroborative evidence: (a) an affidavit from a cousin in the United States; (b) the oral testimony of a witness who knew him in Somalia; and (c) a letter from a non-governmental organization, Dejinta Beesha, which concluded Mr. Hassan is a citizen of Somalia and ethnic Somali based on his knowledge of Somali language, geography, history, and culture solicited through a questionnaire and interview. The RAD discounted each of these pieces of corroborative evidence and concluded Mr. Hassan had made insufficient efforts to get evidence from Somalia, notably from an uncle in Mogadishu. It therefore concluded he had not discharged his burden of proof to establish his identity and dismissed his appeal. Mr. Hassan challenges the RAD's treatment of each of these pieces of evidence.

[10] In my view, the RAD's treatment of the oral testimony of the witness is determinative of this application.

[11] Mr. Hassan arrived in Canada in 2016. At the time, he knew one person in Canada, a person I will refer to as Witness 1. Mr. Hassan and Witness 1 knew each other in Somalia. When the RPD hearing was originally scheduled for November 2016, Mr. Hassan's counsel advised the RPD that Witness 1 would testify as to Mr. Hassan's identity as a citizen of Somalia.

[12] The hearing was subsequently postponed to September 2017. Owing to a personal emergency, Witness 1 could not testify at the hearing. However, another person Mr. Hassan knew in Somalia, and who Mr. Hassan met again by chance in Toronto in January 2017, was available. The day prior to the hearing, counsel wrote to the RPD indicating that Mr. Hassan

intended to have this person, who I will call Witness 2, testify as to his identity as a citizen of Somalia. As is clear from the audio recording of the RPD hearing, Witness 2 confirmed that he knew Mr. Hassan in Somalia, saw him once or twice a week in Somalia between 2009 and 2012, and that Mr. Hassan had told him he was born in Galcad, although he did not know his birth date.

[13] In a section of its reasons entitled "Witness not credible," the RAD gave two reasons for agreeing with the RPD that Witness 2's testimony should be given no weight. First, it had concerns about Witness 2 having testified instead of Witness 1. Second, it held that Witness 2's information that Mr. Hassan was a Somali born in Galcad came from Mr. Hassan and was therefore not independent knowledge. I agree with Mr. Hassan that the RAD's discussion of these issues was unreasonable.

(1) Witness 2 as a "replacement" witness

[14] At Mr. Hassan's refugee hearing, the RPD asked him why he did not get a written statement from Witness 1 since he could not testify. Mr. Hassan answered that he told Witness 1 he did not need his evidence since he had someone else, namely Witness 2. The RPD found it was "not reasonable" to conclude a written statement from a witness who was willing to testify as to his identity was unnecessary. It therefore drew a negative inference. The RPD also found it "suspect and fortuitous" that Mr. Hassan was able, in a relatively short span of time, to find by chance in Toronto two people who knew him in Somalia.

[15] Mr. Hassan challenged these findings before the RAD. In doing so, his written submissions noted that "[a] first witness could not attend, so a replacement was found," and

argued the RPD erred in drawing a negative inference from this fact alone when he had no control over an unavailable witness. Mr. Hassan also argued to the RAD that the RPD was wrong to say it was “fortuitous” to meet two individuals in Canada by coincidence, since he knew Witness 1 was in Canada before he arrived, so theirs had not been a chance meeting.

[16] The RAD agreed with Mr. Hassan that the RPD erred in drawing a negative inference from the purported coincidence. However, the RAD said it was “disturbed” by the submission that a “replacement” witness was found. To the RAD, that language conjured up an image that Mr. Hassan was “shopping for witnesses like one shops for a product in a store.” I agree entirely with Mr. Hassan that it was unreasonable for the RAD to seize on the particular language used by counsel in written submissions to describe the situation as a basis to undermine that witness’s evidence. Regardless of what counsel’s language “conjured up” in the RAD’s view, both the situation and Witness 2’s evidence should have been assessed on their merits without undue focus on counsel’s choice of words.

[17] The RAD then concluded it was “concerning” that Mr. Hassan did not try to apply for an adjournment to give Witness 1 a chance to testify on a different day. The RAD found this demonstrated a lack of reasonable efforts to establish identity, and drew a negative inference.

[18] Again, I find this an unreasonable basis on which to draw a negative inference. There was no indication Witness 1 had any better or different evidence to provide regarding Mr. Hassan’s identity than Witness 2. To the contrary, Mr. Hassan in his testimony described both Witness 1 and Witness 2 as people he knew in Somalia because they each came to the store where

Mr. Hassan worked: Witness 1 brought goods there; Witness 2 shopped there. While calling two witnesses to speak to the same thing may be appropriate and beneficial in some circumstances, I see no reasonable basis to draw a negative inference from Mr. Hassan not seeking an adjournment so that Witness 1 could provide evidence when Witness 2 was available. Indeed, since Witness 2 was a third party to the proceedings, there is no basis to impugn his credibility based on the litigation choices of Mr. Hassan and his counsel.

[19] The Minister suggested the RAD's finding on this issue was tied to the fact that Witness 2 did not have first-hand knowledge of Mr. Hassan's citizenship. It is not clear to me that there is a link in the RAD's reasoning between its conclusions about requesting an adjournment and the strength of Witness 2's evidence. In any event, as the Minister agreed, there was no evidence that Witness 1's basis of knowledge was any different than that of Witness 2 on this issue. I find the RAD provided no adequate justification for its conclusion that an adverse inference should be drawn regarding Witness 2's evidence based on Mr. Hassan not requesting an adjournment to allow Witness 1 to testify.

(2) Consistency and independent knowledge

[20] The RPD held that while Witness 2's evidence and that of Mr. Hassan were generally consistent, the information they knew about each other "could have simply been rehearsed and memorized prior to the hearing." Mr. Hassan challenged this assertion on appeal to the RAD, noting that consistency is a "badge" and "important hallmark" of credibility. The RAD took issue with this assertion:

> In relation to the witness who did testify, I firstly take issue with the Appellant's contention that "consistency is a badge of credibility". Just because inconsistent testimony is a badge of lack of credibility does not then lead to a corollary that consistent testimony is therefore credible.
>
> In this case, the witness stated that he "knew" the Appellant was a Somali born in Galcad because the Appellant told him. This is not independent knowledge that has been acquired by the witness. The "consistency" only comes from the fact the witness remembered what the Appellant told him, and generates no evidence of any weight establishing the Appellant's personal identity including his nationality.
>
> [Emphasis added.]

[21] Having read Mr. Hassan's brief submissions to the RAD on this issue, I agree he did not argue that all consistent testimony is by definition credible. Rather, he was noting that consistency is an indicia of credibility, and taking issue with the RPD's disregard of the consistency of the evidence on grounds that it could simply have been memorized. Contrary to the RAD's statements, this Court has generally recognized that consistency of corroborative evidence is one factor among many in assessing credibility, and even one of the "hallmarks" of credibility: *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 19; *Singh v Canada (Citizenship and Immigration)*, 2020 FC 179 at para 17.

[22] The RAD is certainly right that evidence may be consistent and yet not credible for other reasons. Mr. Hassan does not contend otherwise. Indeed, if there are uncanny similarities in evidence, this may suggest "scripting" and undermine credibility, although such a conclusion must give consideration to explanations given for the similarity: *Ravichandran v Canada (Citizenship and Immigration)*, 2015 FC 665 at paras 16–22. However, the RAD did not point to

any basis to suggest Witness 2's evidence was "memorized" or otherwise not credible, and the contention was not put to Witness 2.

[23] Rather, the RAD's focus was on the fact that the identified consistency between Witness 2's evidence and that of Mr. Hassan arose from the fact that Witness 2's information came from Mr. Hassan. This was an unreasonable conclusion for two reasons.

[24] First, Witness 2's evidence was not limited to the fact that Mr. Hassan had told him he was a Somali born in Galcad. Notably, as Mr. Hassan points out, it included direct evidence of his personal knowledge of having seen Mr. Hassan in Somalia at the time when Mr. Hassan says he was there. While this may not alone definitively establish that Mr. Hassan is a Somali citizen, it is a relevant piece of evidence when assessing—as the RAD was required to do in the absence of reliable government documentation from Somalia—whether Mr. Hassan was more likely than not a Somali citizen: *Warsamie Warsame* at paras 47–50. Witness 2 also said he knew Mr. Hassan personally in Somalia for several years when Mr. Hassan was between the ages of 19 and 22. This too is potentially relevant to his personal identity, one of the issues before the RAD.

[25] Second, although Witness 2 said his knowledge of Mr. Hassan's citizenship and place of birth came from Mr. Hassan, the context in which those statements were made is important. Witness 2's evidence was that Mr. Hassan told him he was born in Galcad when the two were in Somalia, years before Mr. Hassan came to Canada or made a refugee claim. This is a very different context than, for example, Mr. Hassan telling Witness 2 shortly before the hearing.

[26] In either of the above situations, the evidence regarding Mr. Hassan's place of birth is technically hearsay. However, neither the RPD nor the RAD is bound by technical rules of evidence, but may accept any evidence it considers credible or trustworthy: *IRPA*, ss 170(*g*)–(*h*), 171(*a.2*)–(*a.3*). Yet the RAD rejected Witness 2's evidence solely on the ground that the information about Mr. Hassan's birth came from him and not "independent knowledge," without consideration of whether the context in which that information was given made it more or less credible or trustworthy.

[27] I note that if corroborative evidence of someone's identity or place of birth were invariably limited to those with "independent knowledge" not derived from the individual, the only people who could credibly vouch for a claimant's identity and place of birth would be those with "direct" knowledge of their name and birth (*e.g.*, someone who was present at their birth or had seen official identity documents). This would unduly limit the potential sources of evidence available to a refugee claimant to prove their identity. This is particularly so for someone who claims to come from a place where reliable official identity documents are scarce at best. In my view, it was unreasonable for the RAD to conclude that information originally provided by the claimant regarding their nationality "generates no evidence of any weight," without any other assessment of its reliability or trustworthiness based on the context in which the information was given.

[28] I add that even if the RAD were bound by technical rules of evidence, which it is not, evidence of prior consistent statements of a witness may be admitted and given weight where the context of the statement provides indicia of its credibility: see, *e.g.*, *R v Gill*, 2018 BCCA 275 at

paras 76–80. This “narrative as circumstantial evidence” exception recognizes that the fact of making a prior consistent statement and “the circumstances in which it was made, including its timing” may be useful to a trier of fact in assessing the credibility of, and thereby corroborating, a witness’s evidence: *Gill* at para 76. I note this simply to underscore that it was unreasonable for the RAD to dismiss the corroborative evidence of Witness 2 without consideration of the context and timing of when Mr. Hassan told him where he was born.

[29] The RAD gave no other reason to give Witness 2’s evidence no weight other than that his evidence about where Mr. Hassan was born came from Mr. Hassan and that Witness 1 was not called. For the above reasons, I conclude it was unreasonable to give Mr. Hassan’s evidence no weight on these grounds.

[30] The question then becomes whether the unreasonable assessment of this evidence is sufficient to render the decision as a whole unreasonable: *Vavilov* at para 100. I conclude that it is. Witness 2’s evidence was significant, as it both placed Mr. Hassan in Somalia and indicated that he said he was born in Galcad long before there might have been immigration-related reasons to do so. The RAD gave some, albeit little, weight to the other evidence presented, namely the cousin’s affidavit and the letter from Dejinta Beesha. Had Witness 2’s evidence been accepted, the RAD might well have concluded the RPD erred in finding Mr. Hassan had not proved his identity as a Somali citizen on a balance of probabilities. I therefore conclude that the RAD’s unreasonable treatment of that evidence was not merely superficial or a minor misstep. Rather, it represents a sufficiently serious shortcoming that the decision cannot be said to exhibit the requisite degree of justification, intelligibility, and transparency: *Vavilov* at para 100.

(3) Dejinta Beesha letter

[31] While the foregoing is sufficient to dispose of this application, the reasons the RAD gave for ascribing little weight to the Dejinta Beesha letter warrant some comment.

[32] The RAD concurred with the RPD's findings that knowledge of Somalia and the Somali language does not automatically equate to Somali citizenship. The reasons of the RPD, with which the RAD concurred, were that Mr. Hassan's "ability to speak and write Somali as well as his ability to describe Somalia's heritage and culture is neither reliable nor trustworthy evidence upon which [to] find that the claimant has established his personal identity and his national identity as a citizen of Somalia" [emphasis added].

[33] This Court has recognized on a number of occasions that knowledge of language, culture, history, and geography can indeed be relevant evidence of a refugee claimant's origins: *Warsamie Warsame* at paras 47–48; *Warsame v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 118 at paras 14–18 [*Sadaq Warsame*]; *Tran v Canada (Citizenship and Immigration)*, 2013 FC 1080 at para 8; *Kebedom v Canada (Citizenship and Immigration)*, 2016 FC 781 at para 31. The fact that it may not alone be conclusive of identity does not mean, without more, that it is unreliable or untrustworthy. As Justice Manson observed in *Sadaq Warsame*, "[n]o piece of evidence should be dismissed simply because it is a single piece of the totality of evidence provided": *Sadaq Warsame* at para 18, echoing *Teganya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 42 at para 25. Such evidence must be considered in

the context of the evidence as a whole, and not by considering whether it is sufficient to establish identity if considered in isolation.

[34] The RAD also adopted the RPD's finding that Dejinta Beesha did not establish that they had tried to contact Mr. Hassan's relatives to confirm his identity. However, Dejinta Beesha did not purport to undertake an investigation of Mr. Hassan's family connections. As its letter stated, it conducted its assessment through a written questionnaire and oral interview, and its conclusion was based on Mr. Hassan's knowledge of the Somali "language, background, geography, history, heritage, socio political [*sic*], clan lineage and culture of Somalia." In my view, it was unreasonable for the RAD to effectively discount the relevant evidence the Dejinta Beesha letter does provide about Mr. Hassan's knowledge of Somalia on the basis that it did not provide evidence regarding a different type of investigation altogether: *Teganya* at para 25; *Sadaq Warsame* at paras 16–18; *Warsamie Warsame* at paras 48–51.

[35] Finally, I note for clarity that my lack of comment on other aspects of the RAD's reasons, including the RAD's assessment of the cousin's affidavit and its consideration of Mr. Hassan's efforts to get evidence from Somalia, should not be taken as an endorsement of them.

IV. Conclusion

[36] The application for judicial review is granted and Mr. Hassan's appeal will be remitted to a different panel of the RAD for redetermination. No party requested that I certify a serious question of general importance and I agree that none arises in the matter.

JUDGMENT IN IMM-7043-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. Mr. Hassan's appeal is remitted to a different panel of the Refugee Appeal Division for redetermination.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	APRIL 30, 2021

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