Federal Court  Cour fédérale

Date: 20151214

Docket: IMM-2032-15

Citation: 2015 FC 1381

Ottawa, Ontario, December 14, 2015

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

HANAN ALSHA'BI
(AKA HANAN AL SHABI)
MUNIR JOUBEIN
RAGHAD AYMAN JOUBEIN
(AKA RAGHAD JOUBEIN)

Respondents

JUDGMENT AND REASONS

[1] This is the judicial review of the decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada (IRB) dated April 9, 2015, in which the RAD set aside a negative decision of the Refugee Protection Division (RPD) and determined that the

Respondents are Convention refugees pursuant to s 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). This application is brought pursuant to s 72 of the IRPA.

Background

[2] Ms. Hanan Alsha'bi (Principal Respondent) and her two minor children, Raghad Ayman Joubein and Munir Joubein, are stateless Palestinians (collectively, the Respondents). They, and the Principal Respondent's husband and father of the minor Respondents, Mr. Ayman Joubein, moved to the United Arab Emirates (UAE) in 2001 when Mr. Joubein took a job as a construction manager. The Respondents lived as temporary residents in the UAE from 2001 until they fled to Canada on July 9, 2014. Mr. Joubein did not travel to Canada with the Respondents. The Respondents possess a Syrian travel document.

[3] Shortly after arriving in Canada, the Respondents filed a claim for refugee protection. They claimed that they feared they could be deported back to Syria at any time because their residency in the UAE was temporary and subject to renewal. By its decision of December 4, 2014, the RPD found the Respondents to be neither Convention refugees nor persons in need of protection.

[4] The RPD determined that the Respondents' countries of former habitual residence were Syria and the UAE. The RPD found that if the Respondents were to be removed to Syria they would face more than a mere possibility of being persecuted due to their Palestinian nationality and their particular circumstances. However, the RPD also reviewed the documentary evidence concerning what rights a UAE temporary residence permit confers, which included that

residence permit holders have the right to re-enter the UAE as often as desired provided that they do not remain out of the country for an uninterrupted period exceeding six months. Residence permits are cancelled when permit holders remain out of the UAE for an uninterrupted period longer than six months. The RPD noted that the Respondents left the UAE on July 9, 2014 and that the residence permits contained in their passports would expire on September 30, 2015. Therefore, they had a right to return to the UAE as of the date of its decision.

[5] The RPD found that the Respondents had lived in the UAE without any problems since 2001, other than their fear of being sent back to Syria. It noted that Mr. Joubein had been threatened to be deported to Syria if he tried to change his employment to work for another company, but also that he continued to work for the same employer on an open-ended contract.

[6] The RPD concluded that to be found a Convention refugee, a stateless person must show on a balance of probabilities, that he or she would suffer persecution in any country of former habitual residence and that he or she cannot return to any of his or her other countries of former habitual residence where they would not face persecution (*Thabet v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FC 21 (FCA) [*Thabet*]). As the Respondents had the ability to return to the UAE and were not at risk there, they did not meet the second branch of the *Thabet* test. Nor did the lack of permanence in their status in the UAE amount to persecution giving rise to a claim for protection or refugee status. Accordingly, the RPD rejected their claim.

Decision Under Review

[7] The Respondents appealed the RPD decision to the RAD. The RAD declined to grant an oral hearing but did accept new evidence.

[8] The new evidence included three documents, dated January 14, 2015, which showed that the residence permits of each of the Respondents had been cancelled by the UAE Ministry of Interior. The RAD referred to s 110(4) of the IRPA and determined that the documents arose after the rejection of the claims by the RPD, that they were not reasonably available at the time and, that the Respondents could not have been reasonably expected to have presented them at first instance. Further, that the documents confirmed the Principal Respondent's testimony before the RPD that their status in the UAE was temporary. The RAD found that the Respondents had remained outside the UAE for more than six uninterrupted months and, therefore, had lost their status. The new documents confirmed that they did not have a right to return to the UAE.

[9] The RAD noted that the RPD had found the Respondents to be credible witnesses and accepted that finding. Further, that the Respondents are stateless and, if they go to the UAE, they will be sent to Syria.

[10] The RAD referred to *Thabet* and found the documentary evidence was clear that, should they return to Syria, they would have a serious possibility of persecution due to their Palestinian ethnicity. Further, the RAD found that the Respondents fall into high risk profiles identified by

the United Nations High Commissioner for Refugees, including: Palestinian refugees who had their former habitual residence in Syria; women, given the high incidence of gender-based violence; and, medical doctors from Syria (the Principal Respondent is a dentist). Accordingly, the RAD concluded that the Respondents have a well-founded fear of persecution. It based this conclusion on the likelihood that the Respondents would be deported to Syria should they be returned to the UAE. The RAD found this conclusion to be supported by the new evidence adduced by the Respondents on the appeal, as well as the objective documentary evidence, which confirmed that the Respondents no longer have status in the UAE and the UAE deports Palestinians, sometimes arbitrarily. It therefore set aside the negative determination of the RPD and found that the Respondents are Convention refugees.

Issues

[11] The Minister raises the following issues in this judicial review:

1. Did the RAD err in accepting the new evidence?
2. Did the RAD err in proceeding with a hearing *de novo*?
3. Did the RAD fail to assess whether it was within the Respondents' control to maintain their status in the UAE?

Standard of Review

[12] The parties are in agreement that the standard of review with respect to these three issues is one of reasonableness. Reasonableness is concerned with the justification, transparency and intelligibility of the decision-making process and also with whether the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law. A reviewing

Court will interfere with the decision only if it falls outside that range (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-49; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 45-46, 59).

Issue 1: Did the RAD err in accepting the new evidence?

Minister's Position

[13] The Minister submits that the evidence adduced before the RAD did not constitute new evidence within the meaning of s 110(4) of the IRPA, because it simply confirmed evidence already presented to the RPD. In that regard, documents post-dating the hearing date do not qualify as new evidence if the information contained within them was already known and accepted by the RPD. The Minister contends that the law in the context of a Pre-Removal Risk Assessment (PRRA) should be analogously applied in the context of a RAD appeal (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*]; *Ponniah v Canada (Citizenship and Immigration)*, 2013 FC 386 at para 31 [*Ponniah*]). As such, new evidence on a RAD appeal must prove facts that are materially different from those found by the RPD. As the RPD accepted that the Respondents would lose their status if they remained outside of the UAE for more than six months, the Minister submits the RAD erred in admitting evidence which simply confirmed this expected consequence.

Respondents' Position

[14] Responding to Minister's reliance on jurisprudence concerning new evidence submitted in the context of a PRRA, specifically the test in *Raza*, the Respondents submit that this question

of law is unsettled. They note that this Court in *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022 (presently under appeal, see: A-512-14) found that the *Raza* test should not be strictly applied in the context of a RAD appeal. Nor did the RAD explicitly consider what test to apply; rather it considered the evidence to be new because it post-dated the RPD hearing. The RAD did not err in that regard.

[15] However, even applying the *Raza* test, the RAD reasonably concluded that the documentary evidence met the requirements under s 110(4), even if the expiration of the Respondents' status in the UAE was not unexpected. The evidence was credible, relevant, material, and new, in the sense that it proved a state of affairs that arose after the RPD hearing, and contradicted the finding of fact by the RPD that the Respondents had a right of return. The Respondents also distinguish *Ponniah* on the basis that the new documentary evidence proved that they lost their status, and this fact was materially different from the finding by the RPD that they had not. In the absence of this new material fact, the RPD found the Respondents did not meet the test in *Thabet*. The Respondents submit the RAD reasonably concluded the new evidence compelled the opposite conclusion: that they could not return to the UAE without the likelihood of deportation to Syria.

[16] The Respondents also rely on the approach to s 110(4) set out in my decision in *Deri v Canada (Citizenship and Immigration)*, 2015 FC 1042 at para 55 [*Deri*] (presently under appeal, see: A-431-15). They submit that, applying that approach, which strictly tracks the statutory conditions under s 110(4), the Respondents submit the evidence was dated January 14, 2015 and thus arose after the rejection of their claim before the RPD on November 14, 2014. They submit

this evidence was not reasonably available at the time of the decision, and they could not have been reasonably expected to provide it to the RPD. Accordingly, the RAD's conclusion – that the new evidence satisfied the requirements of s 110(4) – was reasonable.

Analysis

[17] In my view, the RAD did not err in accepting the evidence confirming the cancellation of the Respondents' residence permits in the UAE.

[18] Subsection 110(4) states as follows:

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection	(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[19] The documents establishing that the Respondents' residence permits had been cancelled were issued by the UAE on January 14, 2015. That evidence arose after the rejection of their claim by the RPD on November 14, 2014. The evidence did not exist and, therefore, was not reasonably available at the time of the hearing before the RPD and the Respondents could not be reasonably expected to have presented it.

[20] In my view, because the new evidence meets the explicit requirements of s 110(4), the present case does not require this Court to resolve the question of whether the test in *Raza* informs admissibility under s 110(4) (*Deri* at paras 53-55). However, if *Raza* does apply, I would still find that the new evidence was admissible for the reasons set out by the Respondents in their written submissions.

[21] I would also note that the Minister's position conflates the RPD's knowledge of a potential state of affairs – that the Respondents would lose their status if they remain outside the UAE for more than six months – with the state of affairs occurring in fact. The Respondents had not lost their status at the time of the hearing before the RPD and the RPD did not consider the Respondents' claim in the event that their status in the UAE were to expire. Rather, the claim was denied because the Respondents had a right of return at the time of the decision and, therefore, did not meet the *Thabet* test. As such, I disagree with the Minister that the new evidence was simply confirmatory of the RPD decision. At the time of the RPD hearing, the Respondents possessed temporary resident status in the UAE and, therefore, a right of return. The RPD decision rested on this finding of fact. The RAD decision, however, rested on the factual finding that the Respondents had lost their status and with it their right to return, and, as a result, now met the *Thabet* test. The new evidence proved that a relevant fact was materially different from a finding of the RPD (*Ponniah* at para 31).

Issue 2: Did the RAD err in proceeding with a hearing *de novo*?

Minister's Position

[22] The Minister submits the RAD erred by conducting a hearing *de novo*. In the Minister's view, the primary role of the RAD is to review the record of proceedings before the RPD for error. The RAD is to correct errors in RPD decisions and ensure consistency in the legal principles applied. As such, a RAD hearing is neither a hybrid appeal nor a *de novo* appeal, but is in the nature of a true appeal.

[23] The Minister acknowledges that, to date, this Court has expressed diverging opinions on the role of the RAD. The Minister submits that while consensus has emerged that the RAD is not to review RPD decisions in the manner of a judicial review, this Court has also generally refrained from explicitly describing the RAD appeal as a *de novo* hearing (*Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 [*Alyafi*]; *Djossou v Canada (Citizenship and Immigration)*, 2014 FC 1080 [*Djossou*]; *Akuffo v Canada (Citizenship and Immigration)*, 2014 FC 1063; *Alvarez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 702 at para 25 [*Alvarez*]; *Eng v Canada (Citizenship and Immigration)*, 2014 FC 711 at para 26 [*Eng*]; *Spasoja v Canada (Citizenship and Immigration)*, 2014 FC 913 at para 42 [*Spasoja*]).

[24] The Minister asks this Court to follow the line of case law which has placed the RAD's appellate role as more akin to a true appeal, where questions of law are to be reviewed on a standard of correctness, and questions of fact or mixed fact and law are to be reviewed on a standard of palpable and overriding error (*Spasoja* at paras 39, 42; *Alvarez* at paras 27-29; *Eng* at

paras 28-30). This approach affords the RAD a "robust and meaningful" appeal power, without diminishing the importance of the full RPD hearing process.

[25] In support of this position, the Minister refers to the RAD's enabling provisions, s 110 through s 111.1 of the IRPA, and the surrounding context of the statutory scheme. It submits that these provisions, properly interpreted, indicate that a RAD appeal is limited in scope, and not intended to be a rehearing of a claim already determined by the RPD. Rather, Parliament intended a RAD appeal to be an expeditious review (s 110(2.1)), primarily in writing and based on the record of proceeding before the RPD (s 110(3)), and focused on specific errors identified by the appellant or the Minister (s 110(1)). Further, s 110(4) limits acceptance of new evidence. Similarly, s 110(3) provides that the RAD "must" proceed without an oral hearing, unless new documentary evidence raises a serious, central, and dispositive issue of credibility. This all illustrates that the RAD is not to conduct a new assessment of a claim.

[26] The Minister also refers to the broad remedial powers afforded to the RAD under s 111 of the IRPA. Under this provision, the RAD must confirm or set aside the determination of the RPD, substitute its own decision, or refer the matter to the RPD for redetermination. The Minister submits, however, that in order for the RAD to substitute its own opinion for that of the RPD, there must be an error arising in the RPD decision. In this regard, the Minister relies on the surrounding schematic context of the IRPA, including s 111(2)(a), which limits the scope of the RAD's ability to send matters back to the RPD for redetermination to circumstances where the RPD was "wrong in law, in fact or in mixed law and fact". The Minister submits that the

same limitation should be read into the RAD's jurisdiction to set aside a decision and substitute its own opinion under s 111(1)(b).

[27] The Minister contrasts the powers of the RAD with the broad mandate granted to the RPD, submitting that the RPD performs a much wider, inquisitorial function in determining all eligible claims for protection, which demonstrates that the RAD is primarily intended to review decisions of the RPD for error in a manner akin to a trial appeal rather than a *de novo* hearing. Further support of this position is found in the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules], specifically Rules 3(3)(g)(i)-(ii) and 9(2)(f)(i)-(ii), which require a party appealing a decision to the RAD to identify the errors arising from the RPD decision.

[28] Here the RAD failed to assess the RPD decision and failed to consider whether the RPD decision was made in error. The RAD did not state anywhere in its reasons that the RPD erred in its assessment or that the RPD should have granted the claim of the Respondents. As such, the Minister submits the RAD unreasonably overturned the decision of the RPD according to a misinterpretation of its proper statutory mandate. Thus, according to the Minister, the RAD acted outside of its role as a reviewing body, and erroneously embarked on a second refugee hearing (*Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 at para 18 [*Dhillon*]).

Respondents' Position

[29] The Respondents submit that an appeal to the RAD is a hybrid between a hearing *de novo* and a true appeal (*Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 at paras 54-55 [*Huruglica*]) and that the RAD "must review all aspects of the RPD's decision and come to

an independent assessment of whether the claimant is a Convention refugee or a person in need of protection. Where its assessment departs from that of the RPD, the RAD must substitute its own decision". The RAD is not restricted, as an appellate court is, to intervening on facts only where there is a "palpable and overriding error".

[30] The Respondents submit that the IRPA expressly allows the RAD to receive new evidence and, if it does so, to either remit the matter back to the RPD, or, to substitute its own decision for that of which the RPD ought to have made. Thus, the position of the Minister, being that the RAD is limited to reviewing the RPD decision for error, is fundamentally at odds with the RAD's power to receive new evidence and to reach its own determination of a claim in reliance on that new evidence. In this regard, the Respondents submit that it makes no sense that the RAD be permitted to receive new evidence but be restricted to a review of RPD decisions for error. The power to receive new evidence acknowledges that there may be circumstances where new evidence arises after the case had been decided by the RPD and, in these circumstances, it is reasonable and just to allow the RAD to consider it.

[31] The Respondents contend that, where new evidence is submitted, the function of the RAD necessarily goes beyond a mere review. In those cases, the RAD must determine if the evidence is "new" and if it might have affected the RPD's decision. If so, then it must go further and determine if there is a sufficient basis to render the decision that the RPD would render or whether the case should be remitted for reconsideration. This position finds support in *Dhillon* as the Court in that case found that an appeal before the RAD is directed at the RPD decision and entertained on the basis of the record, unless new evidence is accepted.

[32] Here, as the RPD rejected the Respondents' claim on the sole basis that six months had not passed since they left the UAE, the Respondents submit that the RAD correctly accepted the new evidence. Six months had passed by that time and the new documentary evidence proved that they had lost their status. As a result, the RAD correctly applied this new evidence to the law and the factual context otherwise accepted by the RPD, and, in so doing, the RAD correctly determined that a different result was warranted. Accordingly, the RAD made no reviewable error.

Analysis

[33] In *Huruglica*, in the context of the RAD standard of review, Justice Phelan addressed the nature of appeals conducted by the RAD and stated:

> [54] Having concluded that the RAD erred in reviewing the RPD's decision on the standard of reasonableness, I have further concluded that for the reasons above, the RAD is required to conduct a hybrid appeal. It must review all aspects of the RPD's decision and come to an independent assessment of whether the claimant is a Convention refugee or a person in need of protection. Where its assessment departs from that of the RPD, the RAD must substitute its own decision.
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> [55] In conducting its assessment, it can recognize and respect the conclusion of the RPD on such issues as credibility and/or where the RPD enjoys a particular advantage in reaching such a conclusion but it is not restricted, as an appellate court is, to intervening on facts only where there is a "palpable and overriding error".
>
> [56] The RAD's conclusion as to the approach it should take in conducting an appeal is, with respect, in error. It should have done more than address the decision from the perspective of "reasonableness". Therefore, the matter will have to be referred back.

[34] Since *Huruglica* was decided, there has been general agreement within this Court that the RAD is not to review decisions of the RPD in the manner of a judicial review. However, to date the question of the nature of such an appeal has not been resolved, and *Huruglica* remains under appeal (see A-470-14). And, while the Minister submits that this Court has generally refrained from explicitly describing an appeal to the RAD as being in the nature of a *de novo* hearing, in my view, this is perhaps not an entirely accurate description of the current state of the jurisprudence. For example, in *Djossou*, Justice Martineau described the nature of true appeals, *de novo* appeals and mixed model or hybrid appeals and concluded that the RAD, in that case, should have asked itself which model was to be applied. Because the RAD had not done so, Justice Martineau sent the matter back for redetermination, but did not make a final determination on the point:

> [52] In this case, there was no meaningful analysis by Member Bissonnette of the nature of the appeal before the RAD. His conclusion as to the process the RAD must follow to hear an appeal is, with all due respect, unreasonable. The Member ought to have done more than review the RPD's decision on the basis of the nature of the issue criterion that is more often than not automatically applied by courts sitting in judicial review. As a specialized administrative appeal tribunal, the RAD should now ask whether the appeal process provided at sections 110 and 111 of the IRPA, is a true appeal, an appeal *de novo*, or a hybrid appeal. If so-called "paper-based" appeals are the rule, and some parallel can reasonably be drawn with a true appeal (not a judicial review), the RAD may also, in the exercise of its discretion, consider new documentary evidence adduced by the refugee protection claimant or by the Minister and hold an oral hearing to hear *viva voce* evidence where the conditions set out at subsections 110(3) to (6) of the IRPA are met, in its view.
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> [53] Although my colleague Justice Roy dismissed any suggestion that an appeal before the RAD is [TRANSLATION] "an opportunity for a new trial or a reconsideration of the matter in its entirety" (*Spasoja*, above at para 39), other colleagues of mine, Justices Shore, Phelan and Gagné are not as categorical and all three insist on the need for a re-examination of the evidence even in paper-based appeals (*Alvarez*, above at paras 25 and 33; *Eng*,

> above at paras 26 and 34; *Huruglica*, above at paras 47, 48 and 52; *Akuffo*, above at para 45). Without deciding in favour of either approach, it is precisely this kind of reflection and analysis of possible options that is sorely lacking in the decision under review, thus rendering it unreasonable.

[35] In *Alyafi*, Justice Martineau stated that it could probably be argued that the RAD appeal "is a kind of de novo appeal" but that this was not a point he was required to rule on in that case. Ultimately, he concluded that as long as the question of the scope of the appellate review has not been settled by the Federal Court of Appeal or the Supreme Court of Canada, the RAD should be permitted to elect either the true appeal or hybrid roles when assessing decisions of the RPD.

[36] Thus, it can perhaps more accurately be stated that the state of the law on this point remains a live issue, as opposed to the Minister's characterization that the Court has actively refrained from describing the RAD appeal process as *de novo*. Further, based on *Alayfi*, until the issue is determined by the Federal Court of Appeal or the Supreme Court of Canada, the RAD will not be found to have necessarily erred by applying either approach (*Alyafi* at paras 51-52; *Djossou* at para 91; *Taqadees v Canada (Citizenship and Immigration)*, 2015 FC 909 at paras 9-13).

[37] And, in any event, in the circumstances of the matter now before me, I am not convinced that the RAD conducted a hearing *de novo*. It is true that the RAD permitted the admission of new evidence under s 110(4), and made its decision based on this evidence. However, the hearing otherwise proceeded on the record before the RPD. It also denied the Respondents' request for an oral hearing and deferred to the RPD's credibility findings.

[38] Further, because the new evidence materially altered the factual substratum of the Respondents' claim, I am also not convinced that, in these circumstances, it was necessary for the RAD to assess the RPD decision for error. It was the new evidence that led the RAD to depart from the decision of the RPD and to substitute its own opinion.

[39] Subsection 110(1) of the IRPA permits an appeal of a decision of the RPD, in accordance with the rules of the IRB, on a *question* of law, of fact or of mixed law and fact. This will normally proceed without a hearing and on the basis of the record that was before the RPD (s 110(3)). But new evidence that meets the criteria set out in s 110(4) is permissible and may be considered by the RAD. As to outcomes, the RAD can confirm the RPD's determination (s 111(1)(a)), set it aside and "substitute a determination that, in its opinion, should have been made" (s 111(1)(b)), or refer the matter back to the RPD for redetermination with any directions the RAD considers appropriate (s 111(1)(c)).

[40] It is of note that s 111(2) states that the matter can be referred back to the RPD for redetermination *only* if the RAD is of the opinion that the decision of the RPD is wrong in law, in fact or in mixed law and fact (s 111(2)(a)), *and*, the RAD cannot make a decision to confirm (s 111(1)(a)) or set aside the RPD's determination and substitute its determination that, in the RAD's opinion, should have been made (s 111(1)(b)) without hearing evidence that was presented to the RPD.

[41] Thus, in this case, the RAD admitted the new evidence and, on the basis of the change of fact that it established, found that the RPD's finding was no longer valid. It was in this sense

that it was "wrong". The RAD denied an oral hearing and did not refer the matter back to the RPD, a course of action which was open to it if it was of the opinion that it could make a decision without hearing evidence that was before the RPD. Given the narrow basis of the RPD's finding, which was premised primarily on the fact that the Respondents had a right of return, and given the change of that fact as established by the new evidence, being that they could no longer return, it was reasonably open to the RAD to substitute its own opinion.

[42] Although the Minister relies on *Dhillon*, in that case the appellants did not file any new evidence before the RAD and Justice LeBlanc stated that the issue was whether the RAD had committed a reviewable error by not considering an argument that was not in fact raised before it or before the RPD. That case is, therefore, factually distinguishable from the matter now before me.

[43] As to the RAD Rules, these require the records of the parties to include a memorandum with detailed submissions regarding the "errors that are the grounds of the appeal" (RAD Rules 3(3)(g)(i) and 9(2)(f)(i)). It should be kept in mind, however, that these are procedural requirements. Subsection 110(1) states that a person or the Minister may appeal, in accordance with the RAD Rules, on a question of law, fact or mixed fact and law.

[44] And, while the RAD could have referred the matter back to the RPD and directed it to make a redetermination taking the new evidence into account, and perhaps it should have done so, particularly as the RPD was aware that if the Respondents remained out of the country for more than six months then their residence permits would expire, I cannot conclude that the RAD

erred when, having accepted the new evidence, it applied this to the law and the factual context otherwise accepted by the RPD. The RAD reasonably determined, on that basis, that a different result was warranted. Further, and contrary to the Minister's submission, in doing so the RAD did not conduct a completely new assessment of the claim.

[45] For the above reasons a reviewable error does not arise on this issue.

Issue 3: Did the RAD fail to assess whether it was within the Respondents' control to maintain their status in the UAE?

Minister's Position

[46] The Minister submits the Respondents did not return to the UAE following their unsuccessful claim before the RPD and deliberately allowed their status to expire. In this circumstance, the RAD erred in failing to assess whether it was within the Respondents' ability to control or to retain their status in the UAE, and the RAD had a duty to make that assessment (*Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 28 [*Zeng*]).

[47] The Minister submits that, had the UAE been the Respondents' country of nationality, this would have raised the issue of exclusion under Article 1E of the United Nations *Convention Relating to the Status of Refugees*, Can TS 1969 No 6 [*Refugee Convention*]. While acknowledging that the Respondents are stateless and were temporary residents in the UAE without permanent resident or citizenship status, the Minister submits they had the ability to "reside, work, study, enter, and exit as they wished" and were free of fear of persecution. Thus,

although the UAE was their country of habitual residence, and not their country of nationality, their situation is analogous, as the RPD found they could benefit from the protection of the UAE.

[48] As such, the Minister relies on the jurisprudence with respect to Article 1E of the *Refugee Convention* and asserts that the analysis for determining if the Article 1E exclusion, as set out in *Zeng*, should also be applied in this circumstance.

[49] According to the Minister, the requirement to conduct such an analysis must apply equally whether the RPD is considering status in countries of habitual residence or countries of nationality as there is no practical difference between these two situations where an individual had status in a safe third country and subsequently lost that status. Therefore, the RAD should have inquired into the reason for the Respondents' loss of status (whether it was voluntary or involuntary), whether they could return to the third country, the risk they would face in their home country, Canada's international obligations, and any other relevant factors. The RAD also erred by failing to make any inquiry into whether the Respondents could renew or reapply for their status in the UAE.

[50] The Minister submits that the Respondents created their own precarious circumstances by remaining in Canada after their refugee claim was refused by the RPD, knowing full well that they would lose their status in the UAE if they remained outside of the country for more than six months. Therefore, the Respondents cannot be permitted to benefit from a situation of their own creation as "the condition of not having a country of nationality must be one that is beyond the

power of the applicant to control" (*Canada (Minister of Citizenship and Immigration) v Williams*, 2005 FCA 126 at para 22 [*Williams*]).

[51] The Minister submits that the RAD's failure to consider these fundamental principles of refugee law caused its decision to fall into fatal error.

Respondents' Position

[52] The Respondents submit that there is no authority in law to support the Minister's attempt to apply the Article 1E jurisprudence to claims of stateless persons. Rather, it is submitted that the applicable test is set out in *Thabet*.

[53] Article 1E states that the Convention shall not apply to a person who is recognized by the authorities in the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country. Thus, to be excluded under Article 1E, the tribunal must make a determination that the person has all of the rights of a national of that county. Cases decided under Article 1E, such as *Zeng* and *Williams*, concern claimants with surrogate protection elsewhere.

[54] Such circumstances warrant distinct consideration from situations where the person is stateless. Under the test in *Thabet*, the tribunal must determine whether or not the stateless person has a well-founded fear of persecution in their countries of former habitual residence. If the person has a well-founded fear in all of those countries then he would be accepted as a Convention refugee. If the tribunal concludes that the person has a well-founded fear in one

country but not in other countries of former habitual residence then it must determine if the person has a right of return to one of the other countries. If there is a former habitual residence where there is no fear of persecution and the claimant has a right of return then the claim must be rejected.

[55] *Thabet* is directed at only one issue, the right of return. It does not compel consideration of the other factors relevant to Article 1E including whether the person has all of the rights of a national.

[56] The Respondents submit that Article 1E serves a wholly different purpose than the protective provisions of the *Refugee Convention*, as Article 1E is aimed at excluding from refugee protection persons who are not *bona fide* refugees (*Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at 1024).

[57] Further, in this situation the Respondents' status is not, as the Minister suggests, analogous to the status of a person who would be excluded under Article 1E. To be excluded under Article 1E, the claimant must have permanent secure status in a safe third country (*Canada (Minister of Citizenship and Immigration) v Choubak*, 2006 FC 521 at para 56; *Shamlou v Canada (Minister of Citizenship and Immigration)*, 103 FTR 241, [1995] FCJ No 1537 at paras 35-36 (TD) (QL)). Here the Respondents' status was precarious. It was dependent on the Principal Respondent's husband continuing to work and could be cancelled at any time if he lost his job. Moreover, the Respondents' documentary evidence, accepted by the RAD, confirmed

that this status had been cancelled. Thus, the RAD reasonably applied the test in *Thabet* to find the Respondents could not return to their country of former habitual residence.

[58] Because in *Thabet*, the Federal Court of Appeal expressly rejected the notion that a stateless refugee claimant had to establish a well-founded fear of persecution against all countries of former habitual residence, the Respondents submit that the principles in *Williams* can have no application. Further, there is no basis for reading a fault element into the requirements for granting them refugee status. Nor is there any jurisprudence in which this Court has applied a fault analysis to the question of whether a stateless person has a right of return to a safe country of former habitual residence.

[59] The Respondents also submit the RAD was not required to consider whether status might be obtained again in the future, given there was no evidence on this point, and given that no such requirement is found in the *Thabet* test or s 96(b) of the IRPA.

[60] As there is no support for the Minister's position that the Article 1E jurisprudence should be applied to this circumstance, the Respondents submit that it was reasonable for the RAD not to have done so and no error arises.

Analysis

[61] Section 98 of the IRPA incorporates Article 1E into Canadian law:

Exclusion — *Refugee Convention*	**Exclusion par application de la Convention sur les réfugiés**
98. A person referred to in section E or F of Article 1 of the *Refugee Convention* is not a Convention refugee or a person in need of protection.	98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

Article 1E is contained in a Schedule to the IRPA. It states as follows:

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.	E. Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

[62] In *Zeng*, the Federal Court of Appeal spoke to the purpose of Article 1E. That provision is an exclusion clause which precludes the conferral of refugee protection if an individual has surrogate protection in a country where the individual enjoys "substantially the same rights and obligations as nationals of that country" (*Zeng* at para 1). Article 1E is intended to prevent asylum shopping, being the circumstance where an individual seeks protection in one country (the country of refuge), from alleged persecution, torture, or cruel and unusual punishment in another country (the home country), while entitled to status in a safe country (the third country).

[63] The Federal Court of Appeal set out the test to be applied to Article 1E determinations as follows:

> [28] Considering all relevant factors to the date of the hearing, **does the claimant have status, substantially similar to that of its nationals, in the third country?** If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.
>
> (emphasis added)

[64] In that case, the applicants were citizens of the People's Republic of China but held permanent residence status in Chile. The Federal Court of Appeal was satisfied that the RPD had concluded, on a balance of probabilities, that they were recognized by the competent authorities in Chile as having most of the rights and obligations that were attached to that nationality. The RPD, in its reasons, also referred to the submissions of the claimants' counsel regarding the possible expiration of their status stating:

> In my assessment, the Minister has established that Article 1E is applicable to these two claimants. <u>The evidence indicates, on a balance of probabilities, that the claimants held permanent residence status in Chile at the time of the hearing</u>. Moreover, if the status could have been lost, as suggested by claimant's counsel, because the claimants were outside of Chile for more than a year without applying to extend their permanent status, the failure to make such an application is that of the claimants themselves which, as stated by the authorities, cannot avail to their benefit.
>
> (emphasis in original)

[65] The Federal Court of Appeal stated that the RPD's factual finding that the claimants possessed status in Chile was owed deference and was reasonable. Further:

> [37] Returning to the test set out in paragraph 27 and its first question — considering all relevant factors to the date of the hearing, does the claimant have status substantially similar to that of its nationals in the third country — the RPD answered the question affirmatively thereby ending the matter. It did so after thoroughly reviewing the evidence and the submissions. Its subsequent comment, "in the event that the status was lost," is gratuitous and irrelevant.

[66] Thus, the primary question in an Article 1E analysis is whether, at the time of the hearing, the claimants had status substantially similar to nationals of the country in question. A claimant who is acknowledged to be stateless does not have a country of nationality or status in any country that is substantially similar to nationality and, for that reason, would not fall within the application of the exclusion.

[67] In this case the UAE is not the Respondents' country of nationality and it is conceded by the Minister that the Respondents are neither permanent residents nor citizens of that country. And, while the Minister submits the Respondents had the ability to "reside, work, study, enter, and exit as they wished", this does not establish that their status was substantially similar to UAE nationals. Nor is it supported by the evidence.

[68] The Respondents' status was temporary, contingent on the continued employment of the Principal Respondent's husband, and, subject to cancellation. Further, the RAD found that objective documentary evidence also showed that the UAE deports Palestinians, sometimes arbitrarily. Thus, even if it could be said that the Respondents created their own precarious

situation by remaining in Canada for more than six months, their prior situation in the UAE was not substantially similar to a national of the country which is the premise of the *Zeng* test. This brings into question the analogous application of the *Zeng* analysis to their situation because they were not afforded the protection of a national in the UAE.

[69] As to *Williams*, in that case the claimant held both Rwandan and Ugandan citizenship by birth. At age 18, by retaining his Rwandan citizenship, he automatically ceased to be a citizen of Uganda. However, upon renunciation of his Rwandan citizenship he would, as of right, again become a citizen of Uganda.

[70] There, it was common ground that refugee protection would be denied if, at the time of the hearing, the claimant was entitled to acquire, by mere formalities, the citizenship or nationality of a particular country where he had no well-founded fear of persecution. The Federal Court of Appeal referenced *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 and its own decision in *Canada (Minister of Employment and Immigration) v Akl*, (1990) 140 NR 323 (FCA) for the principle that if an applicant has citizenship in more than one country, then he must demonstrate a well-founded fear of persecution in relation to each country of citizenship before he can seek asylum in a country where he is not a national. This principle was ultimately incorporated in s 96(a) of the IRPA by reference to "each of their countries of nationality".

[71] The Federal Court of Appeal in *Williams* stated:

> [21] In another decision rendered before the Supreme Court of Canada rendered its own in *Ward*, *Bouianova v. Minister of Employment and Immigration* (1993), 67 F.T.R. 74, Rothstein J. (sitting then in the Trial Division of the Federal Court of Canada)

broadened the holding of our Court in *Akl*. He held that if, at the time of the hearing, **an applicant is entitled to acquire the citizenship of a particular country by reason of his place of birth, and if that acquisition could be completed by mere formalities, thereby leaving no room for the State in question to refuse status, then the applicant is expected to seek the protection of that State and will be denied refugee status in Canada unless he has demonstrated that he also has a well-founded fear of persecution in relation to that additional country of nationality.**

[22] I fully endorse the reasons for judgment of Rothstein J., and in particular the following passage at page 77:

> The condition **of not having a country of nationality** must be one that is beyond the power of the applicant to control.
>
> The true test, in my view, is the following**: if it is within the control of the applicant to acquire the citizenship of a country with respect to which he has no well-founded fear of persecution, the claim for refugee status will be denied.** While words such as "acquisition of citizenship in a non-discretionary manner" or "by mere formalities" have been used, the **test is better phrased in terms of "power within the control of the applicant"** for it encompasses all sorts of situations, it prevents the introduction of a practice of "country shopping" which is incompatible with the "surrogate" dimension of international refugee protection recognized in *Ward* and it is not restricted, contrary to what counsel for the respondent has suggested, to mere technicalities such as filing appropriate documents. This "control" test also reflects the notion which is transparent in the definition of a refugee that the "unwillingness" of an applicant to take steps required from him to gain state protection is fatal to his refugee claim unless that unwillingness results from the very fear of persecution itself. Paragraph 106 of the *Handbook on Procedures and Criteria for Determining Refugee Status* emphasizes the point that whenever "available, national protection takes precedence over international protection," and the Supreme Court of Canada, in *Ward*, observed, at p. 752, that

> "[w]hen available, home state protection is a claimant's sole option."
>
> [23] The principle enunciated by Rothstein J. in *Bouianova* was followed and applied ever since in Canada. **Whether the citizenship of another country was obtained at birth, by naturalization or by State succession is of no consequence provided it is within the control of an applicant to obtain it.** (The latest pronouncements are those of Kelen J. in *Barros v. Minister of Citizenship and Immigration*, 2005 FC 283 and Snider J. in *Choi v. Canada (Solicitor General)*, 2004 FC 291.)
>
> (emphasis added)

[72] What is apparent from *Williams* is that it pertains to s 96(a) of the IRPA and a situation where, at the time of the hearing, citizenship in another country was readily available to a claimant. In that circumstance, the claimant is expected to make attempts to acquire it and will be denied refugee status if it is demonstrated that citizenship was within their power to obtain yet they declined to do so. In *Williams* the claimant, as of right, was entitled to citizenship in a country where he would not be at risk of persecution.

[73] In this case, the Respondents do not have a right of citizenship in the UAE nor is it within their control to acquire citizenship there. As recognized by the RAD, they are stateless Palestinians. The relevant provision of the IRPA is s 96(b).

[74] In *Thabet*, the Federal Court of Appeal set out the test for establishing refugee status for stateless persons being that:

> In order to be found to be a Convention refugee, a stateless person must show that, on a balance of probabilities he or she would suffer persecution in any country of former habitual residence, and that he or she cannot return to any of his or her other countries of former habitual residence.

[75] In reaching that formulation, the Federal Court of Appeal also stated:

> [28] Stateless people should be treated as analogously as possible with those who have more than one nationality. There is a need to maintain symmetry between these two groups, where possible. It is not enough to show persecution in any of the countries of habitual residence - one must also show that he or she is unable or unwilling to return to any of these countries. While the obligation to receive refugees and offer safe haven is proudly and happily accepted by Canada, there is no obligation to a person if an alternate and viable haven is available elsewhere. This is in harmony with the language in the definition and is also consistent with the teachings of the Supreme Court in *Ward*. **If it is likely that a person would be able to return to a country of former habitual residence where he or she would be safe from persecution, that person is not a refugee.** This means that the claimant would bear the burden, here as elsewhere, of showing on the balance of probabilities that he or she is unable or unwilling to return to any country of former habitual residence. This is not an unreasonable burden. This is merely to make explicit what is implicit in *Ward* and in the philosophy of refugee law in general. This is essentially the responsible position which counsel for the Crown argued before us, a position that is characteristically generous and consistent with Canada's international obligations, and the position which we adopt.
>
> (emphasis added)

[76] The Federal Court of Appeal then went on to deal with the assertion that the trial judge erred by finding that the RPD had erred by not asking itself, or discussing in any way, the fundamental question as to whether the denial of the appellant's (a stateless Palestinian) right of return to Kuwait was in itself an act of persecution. The Federal Court of Appeal stated that to ensure that a claimant properly qualifies for Convention refugee status, the RPD was compelled to ask itself why the appellant was being denied entry to a country of former habitual residence because the reason for the denial may, in certain circumstances, constitute an act of persecution by the state. The issue, therefore, was whether the RPD asked itself this question. Upon review of the RPD's reasons it concluded that the RPD did address the question as to why the appellant

was unable to return to Kuwait: he lacked a valid residence permit. This satisfied the requirement that the RPD inquire into the reasons for denial of entry into one's country of former habitual residence. In that case, the appellant had returned to Kuwait in 1986 seeking to renew his residence permit, which was denied.

[77] Thus, unlike *Zeng*, *Thabet* simply requires that the tribunal ask why the claimant cannot return to the country of their former residence. It does not go further. In this case that question was answered by the new evidence accepted by the RAD establishing that their temporary residence permits had been cancelled because they had been outside the UAE for more than six continuous months.

[78] This is perhaps explained in part by the fact that s 96 of the IRPA distinguishes between those claimants seeking Convention refugee status who have a nationality and those who are stateless:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[79] Subsection 96(a) speaks to a circumstance where a claimant is outside their countries of nationality and is unable or, by reason of a well-founded fear of persecution, unwilling "to avail themselves of the protection of" each of those countries. Subsection 96(b), however, recognises that persons who do not have a country of nationality cannot avail themselves of state protection. Rather, it requires only that they be unable or, by reason of that fear, unwilling to return to a country of former habitual residence.

[80] Thus, what distinguishes a s 96(b) stateless claimant from a person at risk of exclusion pursuant to Article 1E is the availability of state protection. Unless such a person has substantially the same rights as a national of their country of former habitual residence they may lack that protection. The lack of state protection is a key element of a stateless person's claim of refugee status and its availability is a key element of the potential exclusion of a claimant under Article 1E.

[81] Thus, in effect, what the Minister seeks is to broaden Article 1E to exclude persons whose status is less than that of a national. However, in my view, because of the difference in status, the principles guiding exclusion under Article 1E have questionable import in the test in *Thabet*, where the question is focused only on whether the stateless claimant has a right of return to a safe country of former habitual residence.

[82] Nor am I persuaded that an element of fault should be read into the requirements of s 96(b), the operative provision here and in *Thabet*, in assessing whether a stateless claimant is unable to return to a country of former habitual residence. There is nothing in the language of s 96(b) to suggest that the reason why a claimant lost that right is relevant to the application of the provision. Moreover, reading in an element of fault could have far reaching effects. It seems to me that if Parliament intended s 96(b) to include an element of fault then it would have explicitly addressed this. I would also note that the submissions of counsel for the Minister did not refer me to any guidelines or written policy to that effect.

[83] Accordingly, I do not agree with the Minister's submission that the RAD was under an obligation or a duty to apply the Article 1E analysis rather than the test in *Thabet*, or that it erred by failing to do so. Based on the facts and the law, the RAD's decision fell within a range of possible, acceptable outcomes.

[84] That said, the Minister raises a legitimate policy concern. And, contrary to the positions of the Respondents, I would not go so far as to say that the question of whether a claimant can renew their status, or reapply for status, is irrelevant to their claim for refugee status. To my mind, such questions could be relevant to the question of whether there is a right of return, particularly if the evidence established there is nothing preventing a claimant from reacquiring status in a country of former habitual residence. Nor does it raise the question of fault, but rather whether or not there is in fact a right of return, which is consistent with the test in *Thabet*.

[85] In the instant case, the RAD was satisfied the Respondents had no right to return to the UAE and would therefore likely be deported to Syria should they attempt to do so. The RAD did not consider whether the Respondents could reacquire status in the UAE, nor could it, as there was no evidence before it on that issue.

[86] It would have been open to the RAD to return the matter to the RPD for redetermination and to direct it to consider any evidence as to whether or not the Respondents could reinstate their temporary residency status in the UAE, or other relevant factors. However, the RAD found that: the Respondents were stateless Palestinians; they cannot return to the UAE, their country of former habitual residence; they hold Syrian travel documents; the documentary evidence was clear that, should they return to Syria, they would have a serious possibility of persecution due to their ethnicity and risk profile; the Principal Respondent's husband's work permit in the UAE was tenuous; and, the UAE deports Palestinians, sometimes arbitrarily. Accordingly, based on the facts and the law it was also open to the RAD to make its own determination, as it did in this case.

[87] The RAD's decision was reasonable and this Court shall not intervene.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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