

Federal Court



Cour fédérale

**Date: 20160623**

**Docket: IMM-3148-15**

**Citation: 2016 FC 709**

**Ottawa, Ontario, June 23, 2016**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Applicant**

**and**

**YACIN DJAMA ALI**

**Respondent**

**JUDGMENT AND REASONS**

[1] The applicant, the Minister of Citizenship and Immigration (now referred to as the Minister of Immigration, Refugees and Citizenship) [the Minister] seeks judicial review pursuant to section 72 of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Refugee Appeal Division [RAD] dated June 1, 2015, which reversed the finding of the Refugee Protection Division [RPD] to find that the respondent, Yacin Djama Ali, is a Convention refugee.

[2] The issue in dispute focuses on Mr. Ali's identity, more specifically whether he is a citizen of Somalia or Djibouti, the determination of which provides the reference country to assess whether he would face a risk of persecution upon return to his country of citizenship.

[3] The RPD had found that it is more likely than not that Mr. Ali successfully applied for and obtained Djiboutian citizenship based on his father's birth in Djibouti and his claim to have obtained and used a Djiboutian passport. The RPD found that his explanations about his citizenship and his passport were not consistent. The RPD concluded that he is a citizen of Djibouti and that he is not at risk in Djibouti.

[4] On appeal to the RAD, Mr. Ali submitted an affidavit from his father. The affidavit states that neither Mr. Ali nor his father is a citizen of Djibouti. The RAD accepted this as new evidence, attached significant weight to it, and concluded that the RPD erred in finding that Mr. Ali is a citizen of Djibouti. The RAD found that he is a citizen of Somalia and no other country and would face a risk of persecution in Somalia because he is a member of a minority clan.

[5] On judicial review, the Minister argues that the RAD erred in its application of the standard of review, erred in its application of subsection 110(4) of the Act, regarding new evidence, and erred by not independently assessing all the evidence and by not deferring to the RPD's factual and credibility findings.

[6] For the reasons that follow I find that the RAD's decision is reasonable. The RAD reasonably accepted the new evidence, conducted a sufficiently thorough independent

assessment of all the evidence, and found that the RPD had erred. The RAD, therefore, substituted its decision as contemplated by paragraph 111(1)(b) of the Act. The application is dismissed.

I. Background

[7] The respondent, Mr. Ali, claims to be a citizen of Somalia but has never lived in Somalia. He was born in the United Arab Emirates [UAE] but has no right of citizenship in the UAE and cannot return there due to allegations made against him by his employer. However, Mr. Ali had a Djiboutian passport which he used extensively. He claimed that he was not aware that it was not genuine until after he arrived in Canada. He also claimed that he was not aware that a person could only have a passport of the country of their citizenship.

[8] Mr. Ali alleges that he will be targeted by the terrorist group Al Shabaab in Somalia and that he will not be protected from Al Shabaab because he is a member of a minority clan, the Tumul.

[9] Mr. Ali travelled to the United States from the UAE on March 16, 2014 with a US visa and his Djiboutian passport. He did not claim asylum in the US. He states that he walked across the Canadian border at Buffalo undetected and then took a taxi to a relative's home in Toronto on April 9, 2014. He made a refugee claim on May 1, 2014.

[10] Mr. Ali used his Djiboutian passport in his US visa application, upon his arrival in the US, and in four previous United Kingdom visa applications. Upon arrival in Canada, he was also in possession of a UAE resident identity card, which indicated that he is a national of Djibouti.

[11] With respect to his citizenship and that of his parents, he claims that his father was born in Djibouti, but is a Somali citizen. If his father had a claim to Djiboutian citizenship, his father would have lost it when he obtained Somali citizenship. He also states that his mother was born in the UAE, but is a Somali citizen.

[12] The RPD noted the evidence of Mr. Ali's Somali passport issued in 1978, his mother's Somali passport, his parent's marriage contract, which notes they are Somali nationals, and Mr. Ali's medical record from 1991-92 which refers to his nationality as Somali.

[13] However, the RPD found, based on its analysis of the documentary evidence relating to Djiboutian law, that both Mr. Ali and his father could have a claim to Djiboutian citizenship.

[14] The RPD concluded that it is more likely than not that Mr. Ali applied for and obtained Djiboutian citizenship in 2004, based on his father's birth in Djibouti. The RPD noted that Mr. Ali represented himself as a citizen of Djibouti to national authorities of various countries who were satisfied that he is a Djiboutian citizen.

[15] The RPD gave more weight to Mr. Ali's initial assertion that he believed his Djiboutian passport was genuine than to his recantation after making a refugee claim. The RPD noted that

Mr. Ali's testimony was inconsistent and unreliable. However, the RPD found that it was likely true that Mr. Ali believed that he was a citizen of Djibouti until after his arrival in Canada.

[16] The RPD addressed the risk Mr. Ali would face in Djibouti and found that he is not a Convention refugee or a person in need of protection.

## II. The Decision Under Review

[17] The RAD reversed the finding of the RPD and found that Mr. Ali is a citizen of Somalia and would face a risk in Somalia.

[18] Mr. Ali submitted an affidavit from his father dated February 26, 2015 as new evidence to the RAD. In the affidavit, his father states:

- That he is not a citizen of Djibouti because he does not have a birth certificate and the Djiboutian authorities have not accepted his documentation.
- That his son, Mr. Ali, is not a citizen of Djibouti or France.
- That his recent Somali passport was stolen.
- That he had purchased a Djiboutian passport for Mr. Ali and provided it to him.
- That he had sent an earlier letter or affidavit stating the same which was not received by his son, Mr. Ali.

[19] The RAD noted the requirements of subsection 110(4) and the factors established in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 289 DLR (4th) 675 [*Raza*]. The RAD found that the affidavit was new evidence because it answered questions put to Mr. Ali during the RPD hearing.

[20] The RAD stated that it would follow the guidance of *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, [2014] 4 FCR 811 [*Huruglica FC*], and would conduct an independent assessment of the RPD's determination of whether Mr. Ali is a Convention refugee or a person in need of protection, and would defer to the RPD on issues of credibility or where the RPD had an advantage in reaching its conclusions.

[21] The RAD found that Mr. Ali's birth certificate (which identifies his parents as Somali), his parents' marriage certificate (which identifies his parents as Somali), and his student medical record for 1991-2004 (which identifies him as Somali), corroborated the statements in his father's affidavit.

[22] The RAD found that the RPD failed to give sufficient weight to the documentary evidence which shows that Mr. Ali's parents are Somali and that Mr. Ali is a Somali citizen.

[23] Based on the objective country condition evidence and the affidavit of Mr. Ali's relative stating that he was a member of a minority clan and that he would be at risk upon return to Somalia, the RAD concluded that Mr. Ali is a Convention refugee. The RAD set aside the determination of the RPD and substituted its decision.

### III. Issues

[24] This judicial review raises three related issues:

- Whether the RAD applied the appropriate standard of review in the appeal of the RPD decision;
- Whether the RAD erred in admitting the new evidence; and,
- Whether the RAD erred in its analysis of the evidence on the record and by not deferring to the RPD's factual and credibility findings.

### IV. The Standard of Review

[25] The RAD is tasked with conducting an appeal of the RPD's decision. The Court conducts a judicial review of the RAD's decision.

[26] In Canada (*Minister of Citizenship and Immigration*) v *Huruglica*, 2016 FCA 93 at para 103, [2016] FCJ No 313 (QL) [*Huruglica FCA*], Justice Gauthier clarified the uncertainty regarding the standard of review to be applied by the RAD; the RAD should fulfill its appellate role and apply the standard of correctness when reviewing an RPD decision.

[27] However, as the parties agree, although the RAD's decision preceded the decision in *Huruglica FCA*, the Court of Appeal confirmed the requirement for an independent assessment of the evidence that was established in the Federal Court's decision.

[28] As discussed below, the level of deference the RAD may owe to the RPD on credibility and other factual findings will vary depending on the case and the jurisprudence will evolve.

[29] The Court reviews the RAD's determinations of factual issues and issues of mixed fact and law on the reasonableness standard. This includes determinations regarding the admissibility of new evidence (*Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29, [2016] FCJ No 315 (QL) [*Singh FCA*]).

[30] The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). The Court will not re-weigh the evidence or re-make the decision.

V. Did the RAD apply the appropriate standard of review in its appeal?

[31] The Minister acknowledges that the RAD did not have the benefit of the Federal Court of Appeal's decision in *Huruglica FCA* at the time of its appeal, but submits that, regardless of whether the RAD applied a correctness or other standard, the RAD did not conduct the independent assessment of the evidence required.

[32] The RAD stated that it would conduct an independent assessment in accordance with *Huruglica FC* and would defer to the RPD on credibility and factual findings where the RPD had an advantage. The Minister submits that it did not do so.



[33] The respondent, Mr. Ali, submits that the RAD fulfilled its appellate role as contemplated by the Court of Appeal. Based on the RAD's assessment of the evidence on the record, including the new evidence, the RAD determined that the RPD was wrong in fact and corrected the error.

*The RAD's selection of the standard of review was reasonable*

[34] Regardless of whether the RAD identified the correctness standard or another standard, its approach was reasonable; it conducted an independent assessment of the evidence, which is the same approach called for in *Huruglica FCA*.

[35] *Huruglica FCA* does not dictate a single standard of review for issues of credibility or oral evidence. Justice Gauthier described several scenarios at paras 69-74 to highlight the situations where the RAD should be cautious in substituting its decision and, alternatively, where the RAD should consider deference to the RPD. Justice Gauthier did not set out specific criteria, noting at para 74 that the RAD should be given the opportunity to develop its own jurisprudence.

[36] Justice Gauthier stated at para 70, that, with respect to whether deference is owed to the RPD: "In each case, the RAD ought to determine whether the RPD truly benefited from an advantageous position, and if so, whether the RAD can nevertheless make a final decision in respect of the refugee claim."

[37] In the present case, the RAD did not defer to the RPD's factual and credibility findings. As found below, that approach was reasonable.

VI. Did the RPD err in accepting the affidavit as new evidence?

[38] The Minister argues that the RAD erred in its application of subsection 110(4) regarding the admission of new evidence and its application of the factors set out in *Raza*, above. The Minister submits that the affidavit did not meet the statutory criteria nor did it reflect the guidance in *Raza*.

[39] The RPD accepted evidence of Mr. Ali's father's Somali citizenship and did not find his father to be a citizen of Djibouti. The Minister submits that the affidavit affirming his citizenship as Somali was, therefore, not relevant and inconsequential. The RPD found that Mr. Ali could and probably did obtain Djiboutian citizenship as a result of his father's birth in Djibouti, not because of his father's citizenship.

[40] The Minister also submits that the RAD did not properly consider whether the affidavit was credible, particularly given that Mr. Ali's father had previously provided a fraudulent passport to Mr. Ali and did not tell Mr. Ali until after his arrival in Canada.

[41] Mr. Ali submits that the RPD's central and determinative finding was that he had a claim to Djiboutian citizenship and obtained Djiboutian citizenship based on his father's birth in Djibouti. His father's affidavit attests that neither Mr. Ali nor his father is a citizen of Djibouti. Mr. Ali submits that the RAD reasonably found that the new evidence was not available at the time of the RPD decision. The RAD accepted his explanation that the information had been previously sent but had not been received. Mr. Ali argues that the Court should defer to the

RAD's interpretation and application of the criteria in subsection 110(4) of the Act (*Singh FCA* at para 29).

*The RAD did not err in accepting the new evidence*

[42] Subsection 110(4) of the Act provides:

110. (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim <u>or</u> that was not reasonably available, <u>or</u> 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 <u>ou</u> qui n'étaient alors pas normalement accessibles <u>ou</u> , s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.
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[Emphasis added.]

[43] In *Singh FCA*, Justice de Montigny noted that the RAD cannot disregard the statutory criteria of subsection 110(4) and that the *Raza* factors (credibility, relevance, newness, and materiality) remain applicable to determinations by the RAD to admit new evidence, with some adaptation regarding the materiality factor (see paras 47-49 regarding materiality).

[44] Justice de Montigny stated at para 49: "Not only are the requirements set out in *Raza* self-evident and widely applied by the courts in a range of legal contexts, but there are very good reasons why Parliament would favour a restrictive approach to the admissibility of new evidence on appeal."

[45] Although Justice de Montigny acknowledged that a restrictive approach to admitting new evidence was intended and justified, he also noted, at para 64, that the RAD has the flexibility to apply the relevant criteria depending on the circumstances of each case: "It goes without saying that the RAD always has the freedom to apply the conditions of subsection 110(4) with more or less flexibility depending on the circumstances of the case."

[46] In the present case, the RAD flexibly applied the *Raza* factors in its application of the statutory criteria. The RAD found that the evidence could not reasonably have been provided previously. It accepted the explanation provided by Mr. Ali's father that he had previously sent this information to Mr. Ali and it failed to arrive from Kenya, finding that there was no reason to disbelieve the affiant. The RAD also found that the evidence was relevant and material in its assessment of whether Mr. Ali is a Somali citizen.

[47] With respect to the Minister's submission that the affidavit does not contradict any of the RPD's findings because the RPD accepted Mr. Ali's father's Somali citizenship, the RPD's finding was not that clear or specific. Rather, the RPD found that Mr. Ali is a citizen of Djibouti based on his father's birth there and his use of the Djiboutian passport. The affidavit clearly responds to this, indicating both that Mr. Ali's father is not Djiboutian and that Mr. Ali is not Djiboutian.

[48] The role of the Court is not to re-weigh the evidence or re-determine whether the new evidence should have been accepted, but to determine whether the RAD's findings are reasonable. The Court would not necessarily arrive at the same conclusion regarding the new

evidence given the lack of information about the efforts made by Mr. Ali to obtain the first affidavit, how or when it was originally sent by Mr. Ali's father, why a copy of the original was not re-sent, and whether Mr. Ali advised the RPD that this evidence would be provided and was *en route*. However, it is not the role of the Court to make this determination.

[49] The RAD accepted Mr. Ali's explanation about his inability to provide the evidence earlier and that the evidence in the affidavit was credible. The RAD concluded that the evidence met the statutory criteria and was consistent with the guidance provided in *Raza*. That determination falls within a range of possible, acceptable outcomes based on the evidence as assessed by the RAD.

VII. Did the RAD err in its analysis of the evidence on the record and by not deferring to the RPD's factual and credibility findings?

[50] The Minister submits that the RAD did not conduct a thorough independent assessment of all the evidence on the record as required, and either glossed over or ignored the key parts. The RAD did not defer to the credibility or other findings of the RPD even though the RPD had heard from Mr. Ali directly and had conducted a detailed assessment of the evidence on the record.

[51] The Minister notes several findings of the RPD that were simply not addressed by the RAD. For example, Mr. Ali's reliance on his Djiboutian passport to obtain visas, its renewal, and the UAE residence card and other documents which noted him to be Djiboutian were not addressed. In addition, Mr. Ali testified that his father's friend in the Djiboutian government

assisted his father to obtain the passport, but this does not explain why Mr. Ali's passport first issued in the UAE in 2004 was later renewed in 2009. The RAD also failed to address the RPD's credibility findings relating to Mr. Ali's account of when he discovered that his Djiboutian passport was not genuine.

[52] Mr. Ali responds that the RAD is not required to defer to all the RPD's factual findings given the RPD's error regarding his citizenship. The Federal Court of Appeal in *Huruglica FCA* noted that the RAD should be given the opportunity to develop its own jurisprudence regarding the level of deference.

[53] Mr. Ali submits that the RPD did not enjoy any advantage over the RAD in the assessment of his citizenship. The RAD was equally able to assess the foreign documents and the Djiboutian and Somali laws.

[54] Mr. Ali adds that once the RAD concluded that the RPD erred in making the finding that he is a citizen of Djibouti, the RAD was required to assess his objective risk regardless of any negative credibility determination (*Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444 (QL), 99 NR 168 (FCA)).

*The RAD did not err in its analysis of the evidence on the record*

[55] The RAD stated, based on *Huruglica FC*, that it would defer to the RPD on issues of credibility or where the RPD had an advantage in reaching its conclusions. That was a reasonable approach.

[56] Although there is no specific mention in the RAD decision that the RAD considered whether the RPD had such an advantage and whether any deference was owed, it is implicit that the RAD found that no deference was owed to the RPD's factual findings. The RPD did not enjoy any advantage over the RAD in its analysis of the National Documentation Package, which described the laws and traditions regarding citizenship in Somalia and Djibouti. Based on the RAD's assessment, which included the new evidence, it reached a different conclusion.

[57] The RAD's analysis of the evidence on the record appears superficial in comparison with the RPD's analysis. However, once the RAD accepted the new evidence, which clarified that Mr. Ali was not a citizen of Djibouti, the evidence before the RAD changed and its assessment of the record in light of the new evidence also changed.

[58] As Mr. Ali notes, even if there were credibility findings, the evidence accepted by the RAD confirmed that Mr. Ali is Somali and the RAD was required to objectively assess the risk he would face upon return to Somalia.

[59] The RAD did what the Act permits and expects; it found that the RPD had erred and that it could correct the error and substitute the decision that should have been made pursuant to paragraph 111(1)(b) of the Act.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed. No question is proposed for certification.

"Catherine M. Kane"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3148-15

**STYLE OF CAUSE:** MINISTER OF CITIZENSHIP AND IMMIGRATION v  
YACIN DJAMA ALI

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 2, 2016

**JUDGMENT AND REASONS** KANE J.

**DATED:** JUNE 23, 2016

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