

CANADA / JUDGMENT

TB9-09177

COURT

Refugee Appeal Division

DECIDED

15 January 2020

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RAD File / Dossier de la SAR : TB9-09177 TB9-09178 / TB9-09179 / TB9-09180 TB9-09181 Private Proceeding / Huis clos Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX (a.k.a XXXX XXXX XXXX) XXXX XXXX XXXX Personnes en cause Appeal considered / heard at Ottawa, ON Appel instruit / entendu à Date of decision January 15, 2020 Date de la décision Panel Jillan Sadek Tribunal Counsel for the persons who are the subject of the appeal Bolanle Olusina (Sina) Ogunleye Conseil des personnes en cause Designated representative XXXX XXXX XXXX Représentant(e) désigné(e) Counsel for the Minister N/A Conseil du ministre REASONS FOR DECISION OVERVIEW

- [1] The Principal Appellant (XXXX XXXX XXXX) and her common-law husband, the Associate Appellant (XXXX XXXX XXXX) are citizens of Nigeria. Their children, the minor Appellants (XXXX XXXX XXXX, XXXX XXXX XXXX, XXXX XXXX XXXX) are citizens of the United States. The Associate Appellant is the designated representative of the minor Appellants.
- [2] The Principal Appellant alleges that she may not return to Nigeria because she fears her children will be circumcised and because she fears her uncles will continue to abuse her sexually or even kill her. The Associate Appellant alleges that he may not return to Nigeria as he fears being mistreated by both his own family and the Principal Appellant's family as they do not approve of their union.
- [3] In XXXX 2010, the adult Appellants left Nigeria to come to the United States. The Associate Appellant married an American woman in 2012 and acquired a green card. The Principal Appellant had three children by the Associate Appellant while living in the United States, but did not acquire status in that country, nor did she claim asylum. The adult Appellants and their US born children entered Canada in XXXX 2018 where they claimed asylum.
- [4] The Refugee Protection Division (RPD) determined that the Associate Appellant was excluded from refugee protection on the basis of Article 1E of the Convention Relating to the Status of Refugees due to his status in the United States. The RPD determined that the Principal Appellant's allegations lacked credibility and determined that the children had not established any claim against the United States. All claims were rejected.

- [5] The Appellants contest the exclusion of the Associate Appellant and the RPD's credibility analysis. I have determined that the RPD was correct to reject the claims. The appeals are dismissed. ROLE OF THE RAD
- [6] The Refugee Appeal Division (RAD) reviews decisions of the RPD on a standard of correctness after conducting an independent assessment of the evidence before it.¹ The exception to this rule is where the RPD enjoys a meaningful advantage in the assessment and weighing of oral testimony heard, which, in particular cases, may attract deference. Unless specifically stated below, I have applied a correctness standard.

ANALYSIS

- [7] The RPD determined that there was no evidence that the minor Appellants had any claim against the United States, that the Principal Appellant's allegations lacked credibility and her behaviour was indicative of a lack of subjective fear. The RPD also determined that the Associate Appellant was excluded based on Article 1E of the Convention as he had not provided sufficient evidence that he had lost his U.S. permanent residence.
- [8] The Appellants submit that the RPD erred in its exclusion analysis and its analysis of the credibility of the Appellants.
- [9] I have attentively listened to the recording of the RPD hearing, and have carefully reviewed the entire record. I have also taken into account the Chairperson's Guideline 9: Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression.² I agree with the RPD that the Associate Appellant should be excluded, that there is no evidence that the minor Appellants face any risks in returning to the United States and that the Principal Appellant's allegations are not credible. I agree that all claims should be rejected. The RPD was correct to exclude the Associate Appellant
- [10] The Appellants assert that the Associate Appellant only had conditional permanent residence in the United States as a spouse of a US citizen; a copy of his green card, valid for only a period of two years, from 2012 to 2014, was presented. The Appellants submit that a conditional permanent resident must file a petition to remove the condition during the 90 days prior to the expiry of the card and that a conditional card cannot be renewed. The Appellants assert that as the Associate Appellant failed to be successful in his petition to remove the condition, he has lost his permanent residence in the U.S.³ The Appellants note that the Minister's intervention materials included proof that the Associate Appellant submitted a petition to US authorities to lift his condition on September 28, 2014, and the status of that application, at the time it was checked in November 2018, was "pending"⁴. However, the Appellants assert that this renewal application does not mean he did not lose his status.
- [11] The Appellants take issue with the information contained in the Minister's intervention package which included a statement from a Canadian Immigration Officer verifying that the U.S. Immigration and Customs Enforcement's (I.C.E.) database had been checked in July

2018 and indicated the following with regards to the Associate Appellant: "subject is legally residing in the United States as a permanent resident and may live and work in the U.S."⁵ The Appellants state that there is no indication that the statement relates to the period after the expiration of his Conditional Permanent Resident status. The Appellants also submit: "the document appeared on its face to have been deposed and commissioned by the "declarant" and witnessed by her colleague, instead of being commissioned by a Notary or Commissioner for Oaths."⁶ The Appellants submit that the document is neither "credible" nor "trustworthy" because the I.C.E.'s statement quoted in the declaration "is vague and lacked context and the declaration was not properly sworn."⁷

- [12] I disagree with the Appellants that the Immigration Officer's solemn declaration is not a credible or trustworthy source. Without any evidence suggesting the contrary, an Immigration Officer is presumed to be acting impartially within the scope of his or her duties and in an area falling within his or her expertise. As indicated in the Minister's submissions, the issue of the Associate Appellant's permanent residence in the United States was discovered due to a biometric fingerprint match and was not disclosed up front by the Associate Appellant himself. The information obtained from U.S. authorities matches his name, identity and other personal details. There is no reason to believe an error was made when the I.C.E.'s database was checked in July 2018, nor when additional information sharing checks were performed.
- [13] The Appellants also submit that the RPD erred when it indicated that the onus is on the claimant to establish that he had lost his Permanent Resident status in the US, as the Minister failed to present a prima facie case that the Associate Appellant's green card was valid after September 2014.
- [14] With respect, the 1E case law indicates that once there is a prima facie case that the claimant has status in another country, the onus shifts to the claimant to establish that their status has been lost.⁸ In this case, the Minister's prima facie case was met. There is no additional burden on the Minister to provide evidence that a claimant's permanent resident card was valid on a certain date. I agree with the RPD that the onus was squarely on the Associate Appellant to prove that his status was lost.
- [15] In fact, at the end of the first sitting on December 10, 2018, the RPD put to the Associate Appellant that the information from the Minister indicated he still had status in the U.S., the Associate Appellant replied that he did not know.⁹ The RPD asked the Associate Appellant if he had any proof that he had lost his status. The Associate Appellant replied that he did not.¹⁰ The RPD then asked the Associate Appellant whether he had gone to the U.S. Embassy to check whether he still had status. The Associate Appellant replied that he had not.¹¹ The RPD then decided to suspend the hearing and informed the Associate Appellant to inquire with U.S. authorities as to his status in order to bring greater clarity to the exclusion assessment.

- [16] When the hearing was resumed on March 1, 2018, the Associate Appellant had not gone to inquire about his status with US authorities and no further documentation was provided to the RPD on the issue, other than a photocopy of his expired green card.
- [17] The Minister, on the other hand, did provide further submissions in writing for the second sitting: The Minister submits that the evidence provided by the Minister establishes that the Principle Claimant acquired permanent resident status in the United States. As indicated in Wasel, once there is prima facie evidence that the claimant has status in another country, the Minister's burden of proof for exclusion has been met. The onus shifts to the claimant to establish that his status has been lost or that he does not enjoy the rights and benefits by the Federal Court in Shamlou and Shahpari. The Minister suggests that the Claimant should be requested to provide proof of his current immigration status in the United States of America. This information may be accessed from the US Department of State by filing a request pursuant to the Freedom of Information Act (FOIA). The Minister submits that since the Principle Claimant's application to remove conditions on his US permanent residence is still pending a decision, his status has not been lost.¹²
- [18] No reason was provided by the Associate Appellant for his lack of documentation to prove his assertion that he attempted to renew his card and was unsuccessful.¹³ I agree with the RPD, the Associate Appellant has not established that he no longer has status in the United States, the RPD was therefore correct to exclude him from refugee protection in Canada. The RPD did not err in finding the Principal Claimant's allegations lacked credibility
- [19] The Appellants' submissions on their perceived problems with the RPD's credibility analysis are very vague. They submit the following: The Appellants aver that the RPD panel erred in its negative credibility findings in paras 35 to 43 of its Decision. The 1st and 2nd Appellants contend that they testified truthfully before the RPD and adduced corroborative documentary evidence in support of our claim to establish our fear of persecution in Nigeria such as: Marriage certificates and Divorce orders; Sworn affidavits from XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX, Certificates of Death, Medical report from Dr, XXXX XXXX XXXX XXXX XXXX XXXX and the copy of the expired Green Card. The Appellants aver that their testimonies are internally consistent with the documents adduced in support of their claim. The Appellants aver to the RAD that the RPD panel misevaluated the sworn affidavits from XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX Certificates of Death and the Medical report from Dr, XXXX XXXX XXXX XXXX XXXX XXXX adduced in support of their claim. The Appellants submit that the RPD's finding that "the claimant has fabricated her story about being sexually abused by her uncles..." is unsupportable by the evidence as the claimant provided credible testimonies and corroborative documentary evidence to establish their claim. The 2nd Appellant testified truthfully before the RPD that she had no knowledge of the asylum process in USA. It is submitted that the 2nd Appellant has established with credible evidence that she fears persecution in Nigeria. Therefore, the failure to claim in the U.S. is not determinative that she lacks subjective fear in her particular circumstances.¹⁴

- [20] I disagree with the Appellants. The RPD's findings are well reasoned.
- [21] I agree with the RPD that the behavior of the Principal Appellant is not compatible with a person who had a subjective fear of returning to Nigeria. She remained in the United States for more than seven years without attempting to obtain legal status in that country or even enquire as to how to make a refugee claim there, yet she alleges that she departed Nigeria in XXXX 2010 with the specific intention of coming to safety and getting away from Nigeria.¹⁵ It should be noted that both Appellants are fluent in English, they testified before the RPD without the use of an interpreter and are evidently able to express themselves fully in that language. Furthermore, the Principal Appellant completed the first year of her University studies in linguistics. Yet, she testified that she never attempted to try and find a lawyer or someone who could advise her on how to make a refugee claim in the United States.¹⁶ I agree with the RPD that these facts severely damage the credibility of her allegations.
- [22] In terms of her allegations of being sexually abused by her uncles in Nigeria in accordance with "Oro Ile" traditions whereby uncles are entitled to have sex with their brother's orphans, the RPD was correct to point out that the Principal Appellant was unable to present any documentary evidence of such traditional practices. This, despite the fact that the Principal Appellant also testified that these cultural practices were so widely accepted that the police refused to assist her because they were aware of such cultural practices.¹⁷
- [23] The RPD was also correct to point out that her evidence of who abused her was inconsistent. In the affidavit she provided from her cousin, it mentions that she was sexually abused by two uncles¹⁸ but in her Basis of Claim form and testimony, she stated she was abused by five different uncles.¹⁹
- [24] For these reasons, I agree with the RPD that the Principal Appellant's allegations regarding why she fears to return to Nigeria are not credible. The RPD did not err in its credibility analysis.

CONCLUSION

- [25] No evidence was adduced to establish any serious possibility that the minor Appellants would be persecuted if they returned to the United States, nor that, on a balance of probabilities, they would be personally subjected to a danger of torture, a risk to their lives or a risk of cruel and unusual treatment or punishment should they return to the United States. Consequently, I am satisfied, based on the evidence, that they would not be personally subjected to a risk of torture, a risk to their life or a risk of cruel and unusual treatment or punishment should they return to the United States. I am also not satisfied that they would face a serious possibility of persecution on a Convention ground if they returned to the United States at this time.
- [26] In terms of the Principal Appellant, after my independent review of the evidence in her case, I find the RPD did not err in its finding that her allegations are not credible. I am satisfied, based on the evidence, that she would not be personally subjected to a risk of

torture, a risk to her life or a risk of cruel and unusual treatment or punishment should she return to Nigeria. I am also not satisfied that she has demonstrated that there is a serious possibility that she would be persecuted on a Convention ground if she returned to Nigeria at this time.

- [27] Finally, for the aforementioned reasons, I conclude that the RPD was correct to exclude the Associate Appellant from refugee protection on the basis of Article 1E of the Convention Relating to the Status of Refugees due to his status in the United States.

DETERMINATION

- [28] I dismiss these appeals and confirm the decision of the RPD that the Appellants are neither Convention refugees nor persons in need of protection, pursuant to paragraph 111(1)(a) of the Immigration and Refugee Protection Act. (signed) "Jillan Sadek" Jillan Sadek January 15, 2020 Date 1 M.C.I. v. Huruglica, Bujar (F.C.A., no. A-470-14), Gauthier, Webb, Near, March 29, 2016, 2016 FCA 93, at para 103. 2 The Chairperson's Guideline 9: Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression, May 1, 2017. 3 P-2, Appellants' Memorandum, Appellants' record, p.168 4 RPD-1, DHS response, RPD record, p. 175 5 RPD-1, I.C.E. record, RPD record, p. 158 6 P-2, Appellants' Memorandum, Appellants' record, p.170 7 P-2, Appellants' Memorandum, Appellants' record, p.170 8 Wasell v. Canada (Citizenship and Immigration), 2015 FC 1409 (Can LII). Shamlou v. Canada (Minister of Citizenship and Immigration) (1995), 32 Imm. L.R. (2d) 135 (F.C.T.D.) at 152); 9 At minute 1h46 of the recording of the first sitting of the hearing on December 10, 2018 10 At minute 1h52 of the recording of the first sitting of the hearing on December 10, 2018 11 At minute 1h53 of the recording of the first sitting of the hearing on December 10, 2018 12 RPD-1, Letter from Canada Border Services Agency Officer, RPD record, p. 240 13 At minute 0h07 of the recording of the second sitting of the hearing, March 1, 2019 14 P-2, Appellants' Memorandum, Appellants' record, p.173 15 At minute 1h20 of the recording of the first sitting of the hearing on December 10, 2018 16 At minute 1h22 of the recording of the first sitting of the hearing on December 10, 2018 17 At minute 0h39 of the recording of the first sitting of the hearing on December 10, 2018 18 RPD-1, Affidavit of XXXX XXXXX, RPD record, p. 206 19 At minute 0h27 of the recording of the first sitting of the hearing on December 10, 2018

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Appeal Division Commission de l'immigration et du statut de réfugié du Canada Section d'appel
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