

CANADA / JUDGMENT

TB8-31452

COURT

Refugee Appeal Division

DECIDED

7 February 2020

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RAD File / Dossier de la SAR : TB8-31452 TB8-31453 / TB8-31454 / TB8-31455 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 Personnes en cause Appeal considered / heard at Ottawa, ON Appel instruit / entendu à Date of decision February 7, 2020 Date de la décision Panel Delia Lewis Tribunal Counsel for the persons who are the subject of the appeal Bola Adetunji Conseil de la|des personne|s en cause Designated representative XXXX XXXX XXXX Représentant(e) désigné(e) Counsel for the Minister N/A Conseil du ministre REASONS FOR DECISION DECISION

- [1] The appeal is allowed. The Refugee Appeal Division (RAD) sets aside the determination of the Refugee Protection Division (RPD) and substitutes its own determination that the Appellants are Convention refugees and persons in need of protection. OVERVIEW
- [2] XXXX XXXX XXXX (Principal Appellant) and her children, XXXX XXXX XXXX XXXX XXXX XXXX XXXX, and XXXX XXXX XXXX (Associate Appellants) are citizens of Kenya. They appeal a decision of the Refugee Protection Division (RPD) rejecting their claims for refugee protection. The Principal Appellant is the designated representative for XXXX XXXX XXXX who is a minor.
- [3] The Appellants allege that they face persecution and harm in Kenya because of the Principal Appellant's sexual orientation and because they fear domestic abuse at the hands of the Principal Appellant's husband who is the Associate Appellants' father. The RPD found that the determinative issue in these claims was credibility and that the Appellants did not provide sufficient credible evidence to establish their allegations. The Appellants claim that the RPD erred in its credibility assessment and misconstrued the evidence.
- [4] I have conducted an independent assessment of the appeal and consulted the Chairperson's Guideline 9 - Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression¹ (SOGIE Guideline) and the Chairperson's Guideline on Women Refugee Claimants Fearing Gender-Related Persecution because this appeal concerns sexual orientation, female claimants and domestic abuse.² For the following reasons, I find that the RPD erred in its credibility assessment and failed to give adequate weight to material evidence.

ANALYSIS

Role of the RAD

- [5] The RAD reviews RPD decisions on a standard of correctness. In limited circumstances, the RPD may have a meaningful advantage over the RAD in assessing evidence that was before the RPD. In those cases, the RAD will show deference to the RPD. In this appeal, I have applied the correctness standard unless specifically stated otherwise. Admissibility of New Evidence and Oral Hearing Request
- [6] Pursuant to s. 110(4) of the Immigration and Refugee Protection Act (IRPA) an appellant may only present new evidence that arose after the rejection of their claim, that was not reasonably available, or that they could not reasonably have been expected in the circumstances to have presented at the time of the rejection. The appellant must make full submissions in their Appeal Memorandum concerning how any proposed new evidence meets the requirements of s. 110(4) and how the evidence relates to their claim under RAD Rule 3(3)(g)(iii). When evaluating whether new evidence is admissible, if evidence passes the s. 110(4) test, the RAD must also consider the factors from Raza/Singh³ which are whether the evidence is credible, capable of proving a fact relevant to the claim for protection and new.
- [7] The Appellants are seeking to have certified copies of police documents admitted as new evidence.⁴ These documents pre-date the RPD's determination of the Appellants' claims and uncertified copies of these documents were submitted to the RPD. However, the Appellants argue that these certified copies should be admitted as new evidence because they were not previously in their possessing and the Appellants did not anticipate that the RPD would reject the copies which were previously provided because they were not certified. I find that these documents pass the s.110(4) test and the Raza/Singh factors as they are relevant and I accept the Appellants' argument as to why they were not previously provided.
- [8] I do not find that an oral hearing is required before the RAD based on these new documents because in my view these documents are not central to the determinative issue in this appeal. Nor do they raise a serious issue about the Appellant's credibility that would require the Appellant to provide further testimony. Accordingly, the Appellant's request for an oral hearing is dismissed. Merits of the Appeal The RPD erred in its credibility findings Domestic abuse allegations
- [9] I find that the RPD erred because it failed to consider the totality of the evidence regarding the Appellants' allegations of domestic abuse in its assessment. I also find that the RPD erred when it found that on a balance of probabilities the alleged physical assault of August 2014 did not occur.
- [10] The RPD found that the Appellants' evidence regarding alleged incidents of domestic abuse was inconsistent. In particular, the Panel made a negative credibility inference because of inconsistencies concerning whether one of the alleged assaults against the Principal

Appellant occurred in August of 2016, or August 2014. The RPD also found that the Principal Appellant was not credible because her recollection of her interaction with the police was not consistent with the instructions on the police forms which were submitted as evidence. The instructions stated that the forms were to be completed by the medical officer who examined the assault victim. Not that the police would review the medical reports from the outpatient centre to complete the forms as the Principal Appellant claimed had occurred.

- [illegible]

- [16] Furthermore, I find that the RPD erred because it did not give adequate weight to: a letter from Dr. XXXX, who has been treating the Principal Appellant since she arrived in Canada; and the Principal Appellant's admission that sometimes she is forgetful when it assessed her testimony. The doctor's letter states that the Principal Appellant has been diagnosed with significant hearing impairment in her left ear due to nerve damage which is most likely the direct result of abuse she experience by her husband.⁷ Dr. XXXX also states in this letter that the Principal Appellant describes a very significant beating that occurred in 2016, which included direct blows to the head which could certainly have caused the damage to her hearing as she does not report previous hearing loss prior to that incident.⁸ I also note that this type forgetfulness may be consistent with head trauma suffered by women who have been the victims of domestic abuse.
- [17] In my view, the totality of the evidence discussed above credibly demonstrates that, on a balance of probabilities, the Principal Appellant was the victim of domestic abuse at the hands of her husband. Sexual orientation allegations
- [18] I find that the RPD erred when it determined that, on a balance of probabilities, the Principal Appellant was not credible about her sexual orientation.
- [19] The Principal Appellant alleges that during her marriage she gradually realized that she was not sexually attracted to men and she began a relationship with a woman in 2016. She claims that in 2017, her husband began to suspect that she was in a relationship and confronted her. After which, the Principal Appellant alleges that she feared the consequences if her sexual orientation was revealed in Kenya. Therefore, the Appellants travelled to Canada in 2017, on a trip that was initially set-up for a performance and made refugee claims.
- [20] The Principal Appellant describes how she realized her sexual orientation in her Basis of Claim narrative, she provided oral testimony during the RPD hearing about her sexual orientation and her documentary evidence included an affidavit and e-mail from her former same-sex partner. The RPD concluded that the Principal Appellant had not credibly established her sexual orientation on a balance of probabilities because the affidavit she submitted was a copy and not the original, and some of the Principal Appellant's evidence regarding the details of this relationship, such as when she found out that her former partner was in love with her, was vague.
- [21] The RPD Panel also made a negative credibility inference regarding this alleged same-sex relationship because the Principal Appellant did not tell her partner that she was planning to make a refugee claim in Canada. The Panel found that the Principal Appellant's failure to tell her same-sex partner that she was leaving Kenya was inconsistent with her testimony about the nature of her relationship with her partner who she claimed she trusted and loved.

- [22] The Appellants claim that the RPD erred because it determined that the Principal Appellant's evidence regarding her sexual orientation was not credible without addressing her son's testimony that his father accused his mother of being a lesbian; that the community also believed she is a lesbian; and that, before he left Kenya, he was accused of being gay because of his connection to his mother.
- [23] The Appellants also claim that the RPD erred because it again failed to consider the Principal Appellant's testimony that at times she is forgetful⁹ and gets confused. As well as the medical evidence that she suffered head trauma when it assessed her credibility and her inability to recollect some details of her same-sex relationship. Finally, the Appellants claim that the RPD erred when it rejected the Principal Appellant's explanation that she had not told XXXX about her plan to leave Kenya because they were very close and XXXX would have been concerned for the Principal Appellant's safety, the Principal Appellant did not want XXXX to be outed, and it wasn't easy for her to leave her because she was left wondering how XXXX would make it after she left for Canada.¹⁰
- [24] I find that when I weigh all of the relevant evidence it credibly establishes the Principal Appellant's sexual orientation on a balance of probabilities. In my view, the Principal Appellant's description of her personal circumstances, how and when she met her partner and her current feelings about her partner are consistent with the Principal Appellant's claim that she is attracted to women and has been in a same-sex relationship in the past. The evidence suggests that the Principal Appellant has not kept in close contact with XXXX since she has been in Canada. However, the Principal Appellant did testify that she has spoken to XXXX since she left Kenya and told her that she needs her to understand that she cares about her and is concerned for her safety.¹¹
- [25] In her BOC narrative the Principal Appellant described her sexual attraction to women. She states that she tried to ignore her feelings because she considered them to be the result of a demonic spirit and temptation and initially wanted her marriage to work.¹² The Principal Appellant states that she also fought within herself regarding her sexual interests because she wanted to protect her image as a public figure and the image of her Church.¹³ She states that the XXXX XXXX began when she tried to discretely connect with like-minded women in the church but that what she wanted to be a private meeting became a gathering of women.¹⁴ The Principal Appellant eventually met her same-sex partner XXXX XXXX who attended XXXX Night meetings.¹⁵ She stated that she was able to share a hotel room with XXXX when they would travel for XXXX Night meetings since a lot of other women in the ministry would also stay in the same hotel and would share rooms for cost reasons.¹⁶ She claims that over time they became lovers and XXXX was nice to her.¹⁷ The Principal Appellant testified that her husband began to suspect that she was cheating on him and physically assaulted her by hitting her on the head when he confronted her. She also testified that he suspected she was a lesbian because of rumours that were circulating about the XXXX XXXX.

- [26] In making its credibility findings regarding the Appellants' allegations the RPD focused on other issues as well, including delay, which I consider to be peripheral in this case. I find that the Principal Appellant's explanation for the timing of her asylum claim is credible on a balance of probabilities. The Principal Appellant claims that her husband abused her and threatened to kill her before and accused her of many things when she sought a separation from him. However, she claims that she is most worried about his accusation that she has formed a lesbian organization. She states that she does not want the XXXX XXXX work to be tarnished by her own weaknesses.¹⁸ The Principal Appellant also testified that she fears for her safety and for the safety of her children if her sexual orientation is discovered in Kenya. The RPD err in its findings regarding the Associate Appellants' risks of harm and persecution
- [27] I agree with the Appellants that the RPD erred because it did not properly weigh the evidence provided by the Associate Appellants regarding their risk of harm or independently assess their credibility as witnesses.
- [28] The Principal Appellant's daughter XXXX testified before the RPD. She stated that she last spoke to her father in 2017. She fears that her life would be in danger if she returned to Kenya because her father is on a revenge mission against her mother which makes her a target.¹⁹
- [29] XXXX testified that her father had hurt her before and described one particularly violent incident that occurred in 2014, when she was 17. She stated that she and her mother had been staying with her grandmother for a few weeks when she received a call from her father that he had a present for her and wanted her to come home to pick it up. XXXX described the events that happened next as follows: "And so I went home, I asked my mom if she could take me, and she took me, and she had to wait for me out there because she didn't trust me with him. So when I went inside to talk to him and pick my birthday present he just started verbally abusing me. So I went upstairs and I started screaming out for my mom outside the window because I knew that's where she would hear me out because there was no way I could like run back outside since I was already inside. And so when my mom came -- that's when she came running up for me to try and rescue me from him. And so when my mom tried to rescue me he also tried pushing her down the stairs and I tried to protect her but he came for me and I had to run up the stairs because there were three floors and I had run up on the last floor inside the room, which I wasn't able to close to the door before he got there, and he opened the door and he locked the door before my mom could like -- could come in, so that's where he beat me up from. And he beat me up like a dog because I remember at a point I wasn't even crying and he thought that he wasn't really hurting me and so he still continued to beat me up to the point of I actually pee'd or poo'd on myself."²⁰
- [30] Both the XXXX and her mother sought medical treatment after this attack and reported the attack to the police. XXXX testified that she knew of other incidents in October 2014, and April 2017, when her father beat her mother up and she had to call neighbours to help. However, she has not had direct contact with her father since 2014. The RPD Member asked

XXXX why her father would want to harm her after all this time had passed. XXXX testified that she is on her mother's side and part of her mother's XXXX which he though was something that it was not and that she is a target because he hates her mother so much.

- [31] The Principal Appellant's son XXXX also testified before the RPD. He claimed that he is not gay but was bullied and treated differently at school in Kenya because of rumours about his mother. His testimony included the following statements: First of all it started with my mom's XXXX, and really my dad has always been against it, so conspiracies went around about our mother being a lesbian, which was very shocking when I heard that, and it was actually one of my friend's, one of the people who bullied me, who popped out the question and he asked me and he asked me "Are you gay" and I was -- and I got shocked, and after that they -- I knew they were saying that because of what has been happening back home because of the information they've been fed with and what they're looking at in the internet. And so they said "If your mother's a lesbian and so are you and you're gay".²¹
- [32] XXXX also testified that he has been verbally and physically abused by his father. He stated that his father has done a lot of damage to his life since he was young. XXXX described one incident which occurred when he was 14 when his father grabbed him and tried to forcefully remove one of his teeth with pliers and he had to be taken to the hospital afterward for medical attention.²² XXXX stated that his father had not tried to harm him between 2014, and when he left Kenya in 2017. However, he fears his father because he has stood by his mother. He fears the community would harm him as well because of what his father would tell the community and what people will think of him. XXXX testified that his father has a gun and would harm or kill them if they were to return to Kenya. He claims that the police would not protect them because his father is influential and known in Kenya so he would get away with anything he pleases and could easily bribe the police.²³ Risk of persecution and harm to the Appellants in Kenya
- [33] I find that, on a balance of probabilities, the Appellants have established that the Principal Appellant's husband is violent, has a history of physically abusing the Appellants, and adequate state protection is not available to them. I find that the Appellants have established on a balance of probabilities that the Principal Appellant's husband has the means to locate them should they return to Kenya because of his social connections and position as a public figure. I also find that the Appellants have established on a balance of probabilities that the Principal Appellant's husband would be motivated to harm the Appellants because of the Principal Appellant's sexual orientation and because his children have supported her.
- [34] In addition, based on the national documentation and the SOGIE Guidelines I find that the Principal Appellant and her children would be at risk of persecution because of her sexual orientation, and the Associate Appellants would face an imputed or perceived SOGIE because of their connection to their mother.²⁴ In Kenya the Penal Code criminalizes homosexuality and many religious leaders and politicians are anti-gay.²⁵ As a result, despite an emerging human rights movement, sexual minorities in Kenya do not have state protection and risk state sanctioned discrimination and violence.

[35] Therefore, I find that the Appellants are Convention refugees because they face a serious risk of persecution in Kenya. I also find that, the Appellants have established, on a balance of probabilities, that they are persons in need of protection, who would face a risk to life, or a risk of cruel and unusual treatment at the hands of the Principal Appellant's husband should they return to Kenya.

CONCLUSION

[36] The appeal is allowed. Pursuant to section 111(1)(b) of the IRPA, the RAD sets aside the determination of the RPD and substitutes its own determination that the Appellants are Convention refugees and persons in need of protection. (signed) Delia Lewis Delia Lewis February 7, 2020 Date 1 Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression, May 1, 2017 (SOGIE Guideline). 2 Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution, September 1996 (Gender Guideline). 3 Raza v. Canada (Minister of Citizenship and Immigration), 2007 FCA 385 and Singh v. Canada (Minister of Citizenship and Immigration) 2016 FCA 96. 4 P-2, Appellant's Record, Police report, at pages 27 - 28. 5 RPD-1, RPD Record at pages 437 - 441. 6 RPD-1, RPD Record article from "The Nairobiian" October 11 -17, 2013, issue at pages 41 and 81 and, "The Nairobiian" October 25 -31, 2013 issue. 7 RPD-1, RPD record, Medical certificat, at page 489. 8 Ibid. 9 Transcript of the hearing before the RPD on October 22, 2018 at page 5. 10 Ibid at page 7. 11 Transcript of the RPD hearing on October 22, 2018 at page 9. 12 RPD-1, RPD record, Basis of claim at page 23 - 24 13 Ibid. at page 25. 14 Ibid. at page 26. 15 Ibid. at page 29. 16 Ibid. at page 30. 17 Ibid. 18 Ibid. at page 33. 19 Transcript of the hearing before the RPD on August15, 2018 at page 7. 20 Ibid. 21 Ibid. at page 17. 22 Ibid. at page 18. 23 Ibid. at pages 19 -20. 24 Supra, note 1. SOGIE Guideline section 8.3. 25 National Documentation Package NDP, Kenya, version: 29 March 2019, item 6.2 Kenya. Speaking Out. The Rights of LGBTI People Across the Commonwealth. Kaleidoscope Trust, 2015.

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