

CANADA / JUDGMENT

VB9-06352

COURT

Refugee Appeal Division

DECIDED

13 February 2020

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RAD File / Dossier de la SAR : VB9-06352

VB9-06353 / VB9-06354

Private Proceeding / Huis clos

Reasons and decision ? Motifs et décision

Persons who are the subject of the appeal

XXXX XXXX XXXX XXXXXXXXXX XXXX XXXX XXXXXXXXXX XXXX XXXX

Personnes en cause

Appeal considered / heard at

Vancouver, BC

Appel instruit / entendu à

Date of decision

February 13, 2020

Date de la décision

Panel

Ron Liberman

Tribunal

Counsel for the persons who are the subject of the appeal

Mark Gruszczynski

Barrister and Solicitor

Conseil des personnes en cause

Designated representative

XXXX XXXX XXXXforXXXXXXXXXX XXXX XXXX

Représentant(e) désigné(e)

Counsel for the Minister

N/A

Conseil du ministre

REASONS FOR DECISION

INTRODUCTION

- [1] XXXX XXXX XXXX (Principal Appellant), her adult sister XXXX XXXX XXXX (Co-Appellant), and their minor brother, XXXX XXXX XXXX (Minor Appellant), (collectively the Appellants), citizens of Nigeria, appeal the decision of the Refugee Protection Division (RPD) dated July 5, 2019, denying the claims for refugee protection under section 96 and finding them not to be persons in need of protection under section 97(1) of the Immigration and Refugee Protection Act (IRPA).¹
- [2] The Appellants did not include new evidence with this appeal, and did not request an oral hearing. The Principal Appellant was the Designated Representative for the Minor Appellant at the RPD hearing.
- [2] I have conducted an independent analysis of the evidence concerned, including listening to an audio recording of the RPD hearing, as well as considering the Appellants' Appeal Record, the RPD Decision, the Appellants' Basis of Claim (BOC) Forms, and the entire balance of the RPD Record. In reaching my decision, I have considered the Chairperson's Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution (Gender Guideline)² and also the Chairperson's Guideline 3 - Child Refugee Claimants: Procedural and Evidentiary Issues.³
- [3] I find that the Appellants are not Convention⁴ Refugees, or Persons in Need of Protection. The determinative issues in this case were credibility and whether the Appellants' fear of persecution was well-founded.

OVERVIEW AND FACTUAL BACKGROUND

- [4] The Principal Appellant and the Co-Appellant allege they are in danger of having Female Genital Mutilation (FGM) perpetrated on them by their father's extended family, who also threaten the Minor Appellant with circumcision. The Appellants are also threatened in the alternative with imposition of tribal markings that are likely to result in scars. They allege persecution because they refuse to submit to these procedures, and also because their parents are pastors and have faced violence and threats from individuals who oppose Christianity. The Appellants also allege they face threats as a result of their parents' political involvement, opposition to corruption, and their mother's refusal to accept bribes to further

the aims of specific candidates for the elections. They further allege that the whereabouts of their parents are unknown; the Appellants have had no contact with their mother since shortly after their mother's separate Pre-Removal Risk Assessment Application (PRAA) in Canada was denied, and since learning from an uncle that their father had been attacked they have been unable to contact their father. Their youngest brother was killed in XXXX 2018 as a result of an attack by a mob, and their grandmother died after being attacked in her home. The Appellants spent a few weeks at the home of their uncle in the United States (US) before crossing into Canada.

RPD Decision

[5] In summary, the findings of the Member are below:

- * The RPD found it credible that the Appellants' parents were pastors and were politically active, but found it not credible that the Appellants no longer had contact with their parents;
- * The Appellants lacked knowledge about risks currently facing their mother; there was insufficient evidence the threats would extend to the Appellants;
- * The RPD found the Appellants presented information about the alleged disappearance of both parents simply to bolster their claim;
- * The RPD found no forward-looking risk as the parents likely still have a connection with their children and would oppose FGM, and given that the voodoo threatened would not present an actual risk.

[6] As a result, the claims did not qualify under section 96 or section 97(1) of the IRPA.

Appellant's arguments

[7] Counsel for the Appellant argued:

- * The RPD failed to consider the harassment, threats, and destruction of church property the family experienced at the hands of the community;
- * The RPD must consider the totality of the evidence, not just engage in microscopic examination of selective evidence; the RPD ignored the evidence in Exhibit C-4;
- * The RPD failed to properly consider the Appellant's fear of FGM and subjective fear of voodoo;
- * The RPD relied selectively on a version of the National Documentation Package (NDP) to which the Appellants had no access; and,
- * The RPD failed to provide sufficiently clear, precise, and intelligible reasons as to why it did not accept explanations provided by the Appellants.

ROLE OF THE RAD

- [8] After conducting an independent assessment of the evidence before me, I have applied the correctness standard to review the decision of the RPD.⁵

ANALYSIS

Request for an oral hearing

- [9] No new evidence was submitted with this appeal, and this is confirmed in the Memorandum of Counsel, which states that no new evidence is being submitted under section 110(4) of IRPA, but nevertheless requests an oral hearing be held under section 110(6) of IRPA. The ability of the RAD to hold an oral hearing is limited. Section 110(6) of IRPA imposes the requirement that new documentary evidence be presented. As no documentary evidence has been provided, despite Counsel's request, in this instance the RAD is unable to hold an oral hearing.

Credibility

- [10] I begin by acknowledging the RPD found that the Appellants' parents were pastors who also engaged in political activities. There is documentary evidence to this effect in the Record, and these assertions are further confirmed both in the Basis of Claim Form (BOC) of the Principal Appellant and in her oral testimony. As the RPD states, a presumption of truthfulness attaches to sworn testimony,⁶ and as there is no contrary evidence, I too accept these facts.
- [11] The RPD did not address the Appellants' allegations of persecution arising from destruction of church property, and their harassment because of their Christian religion, in its Reasons. I find it was an error for the RPD not to do so. The RPD asked detailed questions on this topic, but did not confront the Principal Appellant with inconsistencies between her testimony and the BOC. I have considered the factors suggested in Ngongo⁷ to determine whether the RPD or the RAD are required in law to confront the Principal Appellant with these inconsistencies. In this case, I consider that the inconsistencies were readily apparent. The testimony was in English, which the Principal Appellant appears to speak and understand well, and the Appellants were represented by Counsel, who could have questioned the Principal Appellant on the inconsistencies, but did not do so. In view of these factors I find that RPD was not required to put the inconsistencies in her testimony to the Principal Appellant, and that the RAD is also not required to do so. I therefore find the RAD is able to effectively consider the allegations of persecution because of the Appellants' religion without re-hearing the evidence.

- [12] I find the RPD erred by failing to address or mention the affidavits which are found in the Record, and I find this was unfair to the Appellants. However, the RAD is required to examine all the evidence, and I find I am able to do so and to resolve this matter without an oral hearing. Therefore, I also analyze the affidavits in the course of my decision below

Disruption and destruction of church property and associated threats

- [13] In her BOC, the Principal Appellant stated that the family discovered that the area in which the church was established was "filled with unbelievers". The BOC details a number of activities in which these persons engaged in order to vandalize church property and deter attendees. The BOC also states that matters were reported to the police, but to no avail. There was not a "specific performer of the crime". No police reports were introduced into evidence.
- [14] In her oral testimony, the Principal Appellant explained events differently. She stated that in 2010 they moved to a new house which was at the back of the church. After this, people came to "disrupt the church services"; they were landowners who believed the church was not supposed to be situated where it was. The landowners were also opposed to the church because they were members of a different political party (PDP) from her parents. The combination of these factors, together with the fact that most of them were atheists, caused them to act in the manner they did. The Principal Appellant in her oral testimony did not mention the burning and tearing of church awareness banners, placing fetish sacrifices around "the church abode", insulting and attacking the church members on their way to church, or destroying their cars.
- [15] The BOC fails to mention that attacks were motivated by the church being situated on land which the owners of the community believe did not belong to it. The oral testimony fails to mention anything about fetish sacrifices, physical attacks on church attendees, or vandalizing of their cars; all of these are mentioned in the BOC in the context of significant attacks on the church and church members. I find that omission from the BOC of a major characteristic of the agents of harm, namely that they claimed to own the land on which the church stood, combined with the omission from oral testimony of notable events: attacks on church members, destruction of their property, and actions taken to defile the church by placing sacrifices around it, weighs against the credibility of the Appellants being persecuted as a result of the church. Additionally, the affidavit of the Appellant's uncle, which I assess below, states that he is "aware that the land grabbers vandalized the church and assaulted the family and the family in question, all in the process of demanding the church be moved". I acknowledge that the differences could be viewed as supplementing the BOC, or narrowing down of the oral testimony, but nevertheless I apprehend a significant difference between the substance of the allegations made in the BOC and in the testimony. I accept, based on the oral testimony and the affidavit of the uncle, that there was some discrimination against the Appellants owing to their religion, but it is not clear from the evidence exactly what events occurred - and whether the events were as a result of the

Appellant's religion, or resulted from a dispute over who owned the land on which the church was built. While desecration of church property is reprehensible, and attacks on individuals and their property are criminal, it is unclear from the evidence whether the vandalism and the acts of the "hooligans" (as the Principal Appellant described them) are because of the Appellants' religion, or if they even rise to the level of persecution. I have considered also that the events are alleged to have commenced in XXXX XXXX 2010, but that it is only in XXXX XXXX 2017, nearly 7 years later, that the Appellants abandoned the church because of unrelated events. Given their delay in fleeing, I find the Appellants did not have a subjective fear of persecution related to events at the church. Having considered all the relevant evidence, and the failure to provide copies of police reports, I find on a balance of probabilities that the Appellants have provided insufficient credible evidence to establish that events connected to the church occurred as described or that they amount to a serious possibility of persecution.

- [16] As mentioned, I have considered the Affidavit from XXXX XXXX XXXX XXXX XXXX,⁸ who confirms he is the uncle of the Appellants and resides in the US. Since this is a sworn statement made under conditions similar to those applying in Canada, I find this affidavit is credible overall and I give this document some weight. I accept, based on the affidavit and the testimony of the Principal Appellant, that the Appellants face threats of FGM or the force imposition of tribal markings, and I consider them below.

Threats related to FGM and imposition of tribal markings

- [17] The Principal Appellant also expressed a fear that she and the Co-Appellant, her sister XXXX, would be subjected to FGM by her father's extended family. Although the Principal Appellant and the Co-Appellant are in their early twenties, and FGM is typically carried out at an early age, the Principal Appellant indicated in her oral testimony that her father's family viewed it as important that the FGM be completed before the female Appellants marry anyone, and that the Minor Appellant must have tribal markings on his face (which the Appellants state will lead to scarring). Tribal markings would also be an alternative, in the case of the female Appellants, to FGM.
- [18] I take cognizance that the above-mentioned Affidavit of XXXX XXXX XXXX XXXX XXXX attests in paragraphs 6 to 8 to threats to perform FGM on the female Appellants, and to inscribe tribal markings on the face of the Minor Appellant. The Affidavit indicates that if the Appellants refuse to surrender themselves they will be "pronounced bastards" and that they will be disowned by the family if they marry outside their tribe. While I accept these particular allegations as true, at paragraph 13 of the Affidavit the uncle states he is aware that the Appellants return to Nigeria can result in "kidnapping, being forcefully circumcised, torture, brutal tribal marks, rape, forced marriage that can cause depression & result to death." I find no allegations of torture, rape or forced marriage were made by the Appellants in the BOC or in their oral testimony. No explanation has been provided for this omission. Therefore, while I give this affidavit some weight in respect of the allegations of forced FGM

and tribal markings, I find that the threats of torture, rape, or forced marriage amounts to speculation as to what might happen, and I give that part of the Affidavit no evidentiary weight.

- [19] There is another Affidavit in the Record, that of XXXX XXXX XXXX XXXX, which was sworn at Ikeja in Nigeria. I have examined this Affidavit, but no identification is offered with this Affidavit to support the identity of the Affiant, and on examining this Affidavit I find it does not state that the Affiant has first-hand knowledge of the matters attested to, and I find that most, if not all, of the matters described in the Affidavit are matters concerning which the Affiant does not purport to have first-hand knowledge. While the RPD may accept hearsay evidence, this Affidavit in effect consists mostly of a recitation of the Appellants' allegations. It adds little to the facts of this case, and so I give it little weight.
- [20] Finally, there is a letter in the Affidavit from a Nigerian Solicitor and Advocate, XXXX XXXX XXXX XXXX,⁹ but I find the contents constitute advocacy on behalf of the Appellants; it serves to re-iterate their allegations and it requests they be granted asylum in Canada on those grounds. The letter, which is written on the letterhead of the solicitor, states it is written at the request of the Appellants and is addressed "To whom it may concern". No identity documents have been provided in respect of XXXX XXXX. Counsel's Memorandum states this is "subjective evidence submitted on behalf of the appellants, that confirmed the appellants fear of FGM". I find this letter is not sworn evidence, and even if the writer is the person he claims to be, there is no indication that he has first-hand knowledge of the events it describes. I find this document is not evidentiary in nature, and I give it no weight for that purpose.

Alleged inability to contact parents

- [21] When considering the threats of FGM and involuntary imposition of tribal markings on the male Minor Appellant, as explained below it is certainly relevant, and as per the country documentation, determinative of whether the threats will be carried out, whether or not they have the protection of their parents. I disagree with Counsel's submission that the RPD misapprehended the country documentation in this regard.
- [22] The RPD found it not credible that while they were hiding in Badagry and Benin, and prior to coming to Canada, from XXXX 2017 to XXXX 2017, the Appellants were unable to contact their mother because the Appellants acknowledged that they had the use of Internet and e-mail, and they were in contact with their uncle, who in turn was in contact with their mother. Once they reached Canada, the Appellants were re-united with their mother. The RPD found it not credible that the Appellants, despite several months spent in Canada with their mother, would not have found out why she had disappeared in XXXX 2017, or what had happened to her in the interim. The RPD also found it not credible that, following the rejection of her PRRA claim, the mother would suddenly disappear and not contact her children. I agree.

- [23] In similar vein, the RPD found it not credible that the Appellants have been unable to contact their father at all since they left for Badagry in XXXX 2017 and that they have no news of him, despite their uncle making enquiries near their previous home in Nigeria. I adopt the RPD's analysis in this regard also, and note that the Appellants have not challenged this aspect of the RPD's findings either.
- [24] The Appellants dispute the RPD's findings that the Principal Appellant, when explaining why they would not be safe in Nigeria, used the present tense when describing their parents and stated "they are on TV", "they belong to the Rotary Club", and "my father writes articles and grants interviews". I find this is incongruous and contradictory because on the one hand the parents are said to be missing, but when the Appellants are asked how they would be found in Nigeria it is because the parents are easy to find. Additionally, the use of the present tense by the Appellants points to activities or social gatherings in which the parents are said to be participating at the time of the RPD hearing, which would all be methods by which the parents could be located.
- [25] Accordingly, I find on a balance of probability, and in common with the RPD, that the Appellants are able to contact their parents. This is important, because the objective evidence shows, as further detailed below, that where parents are opposed to FGM being carried out on their children, except in very unusual circumstances, the children do not face any threat¹⁰.

Whether targeting of mother extends to children

- [26] The Appellants also allege that they face risks based on their mother's political opinion, and that their mother was targeted because of her political profile, and her refusal to accept bribes in connection with an election in Nigeria.
- [27] While there is evidence in the Record that the mother was present when violence and riots erupted, no evidence has been provided to show that she was attacked or harmed. While I accept that the Appellants' grandmother died in XXXX 2017, after the violent political events, and it is alleged she was attacked by political-motivated thugs, her death certificate shows she died after repeated strokes, and this death is roughly two months after the Appellants' mother disappeared. No explanation has been provided which would directly link the two events. The Appellants' youngest brother also unfortunately passed away, and his death certificate shows he was killed in a mob attack and died on XXXX XXXX XXXX 2018. This is more than nine months after XXXX 2018 when the mother was present at the politically-motivated riots and violence. The Appellants have not provided evidence to link these unfortunate deaths to their mother's political profile. The Appellants, as I indicated previously, have been silent on what happened to their mother since the night she failed to return to the family home. It is for the Appellants to establish their claim, and I find they have not provided any evidence about an attack on their mother, and that, other than a vague assertion that they too will be targeted, there is no evidence in the Record to support the contention that their mother has been harmed because of her political activities, or that

there is an imputed politically-based risk faced by her children.

Founded Fear of Persecution

- [28] While I accept that these young Appellants have experienced many upsetting occurrences and have a subjective fear of persecution, based on my preceding findings I concur with the RPD that the Appellants do not face a serious possibility of persecution on grounds of religion, or on the basis of political opinion. While they may fear that voodoo will be applied to harm their parents, I also find there is no evidence before me that voodoo is effective, and will result in persecution of the Appellants.
- [29] I also agree with the RPD that, while the Appellants fear the imposition of FGM or tribal markings, the country documentation (as discussed in the section on Procedural Fairness that follows) indicates an absence of risk to them if their parents are opposed to FGM. Therefore, I find that the female Appellants do not face a serious possibility of persecution from being forced to undergo FGM. This would apply mutatis mutandis to the possibility that the male Appellant would have tribal markings, which are an alternative to FGM, imposed on him.

Procedural Fairness Issue

- [30] Counsel has objected because the RPD Member, when assessing the forward-facing risk of persecution in Nigeria, relied on Item 5.12, Response to Information Request NGA 106183.FE (RIR) in the version of the National Documentation Package (NDP) for Nigeria, dated May 31, 2019. I agree with Counsel that the RPD made an error in referencing the date of the NDP in the RPD decision, but I find this error is not a material one, because the Appellants were provided with access to the NDP for Nigeria, dated April 30, 2019, and the identical Response to Information Request (RIR) is provided in that package. Moreover, Counsel has explicitly referenced that RIR and information contained within it in replying to the RPD's findings.
- [31] I disagree with Counsel's interpretation, at paragraph 14 of the Memorandum, as it relates to the RIR, "Whether Parents Can Refuse Female Genital Mutilation (FGM) of their daughter ...".¹¹ The RIR reports one incident where a grandparent "allegedly took her granddaughter to be cut against the mother's wishes" but there is no other incident reported involving grandparents, and it is clear from the RIR that in general parents can make the decision about such matters themselves, they do not need to involve other family members, and that "parents who refuse to let their daughters be mutilated do not face any consequences, that is, neither retaliation nor threats". Although the NDP points to a great many instances of FGM being carried out, there is only a single isolated instance where the grandparents were reputed to have ensured it was carried out despite the mother's wishes, and I find the evidence shows it is very much the exception for this to occur.

- [32] I agree that in general, as per the RIR, girls may be "ostracized, shunned or assaulted by their community if they have not undergone FGM,". I note however that in the Affidavit of their uncle, the only threat made is to have the female Appellants "disowned". While this treatment would be upsetting, hurtful, and discriminatory were it to occur, I find it would not rise to the level of persecution. Additionally, I note that the girls are already in their twenties, and their brother is currently aged seventeen, but despite the passage of considerable time from the age at which FGM and tribal markings are expected to be enforced, the family has not succeeded in forcing the Appellants to undergo this and there is also no evidence that the Appellants been disowned. I find that there is no more than a minimal possibility that these feared events will occur should the family return to Nigeria.
- [33] Accordingly, I concur with the RPD that there is no serious possibility that the Appellants face a forward-facing risk due to the father's family.
- [34] I also find, in common with the RPD, that, on a balance of probabilities, the Appellants do not face a risk of torture, a risk to life, or a risk of cruel and unusual punishment should they be returned to Nigeria.

CONCLUSION

- [35] The RAD dismisses the appeal and confirms the decision of the RPD that the Appellants are neither Convention refugees nor persons in need of protection, pursuant to section 111(1)(a) of the Immigration and Refugee Protection Act.

(signed)

"Ron Liberman"

Ron Liberman

February 13, 2020

Date

1 Immigration and Refugee Protection Act, SC 2001, c.27.

2 Immigration and Refugee Board of Canada, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution, Effective date: 13 November 1996.

3 Immigration and Refugee Board of Canada, Guidelines issued by the Chairperson pursuant to Section 65(3) of the Immigration Act: Guideline 3 - Child Refugee Claimants: Procedural and Evidentiary Issues, Effective date: September 30, 1996.

4 1951 Convention Relating to the Status of Refugees: Office of the United Nations High Commissioner for Refugees, "Handbook on Procedures and Criteria for Determining Refugee Status", under the 1951 Convention.

5 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93.

6 Maldonado v. Minister of Employment and Immigration, [1980] 2 F.C. 302, (1979), 31 N.R. 34 (C.A.)

7 Ngongo v. . Minister of Employment and Immigration, 1999 Canlii 8885

8 Exhibit RPD-1, RPD Record, p. 124.

9 Exhibit RPD-1, RPD Record, p. 110.

10 Exhibit RPD-1, RPD Record, National Documentation Package for Nigeria (20 August, 2019), Item 5.12, NGA 106183.FE

11 Ibid.

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Immigration and Refugee

Board of Canada

Refugee Appeal Division

Commission de l'immigration

et du statut de réfugié du Canada

Section d'appel des réfugiés

RAD.25.02 (April 04, 2019)

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