

CANADA / JUDGMENT

TB9-20799

COURT

Refugee Appeal Division

DECIDED

24 January 2020

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RAD File / Dossier de la SAR : TB9-20799

TB9-20800 / TB9-20801

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

Personnes en cause

Appeal considered / heard at

Toronto, ON

Appel instruit / entendu à

Date of decision

January 24, 2020

Date de la décision

Panel

K. Wallace

Tribunal

Counsel for the persons who are the subject of the appeal

Ugochukwu Udogu

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] XXXX XXXX XXXX (the 'Appellant') is the Principal Appellant. She is the Mother and Designated Representative of her two minor children, XXXX XXXX XXXX and XXXX XXXX XXXX (the Associate Appellants).
- [2] The Appellants appeal the decision of the Refugee Protection Division (RPD), dated July 4, 2019, which rejects their claims for refugee protection.
- [3] The Appellant's husband's claim was also rejected in the RPD decision. However, the Appellants' appeal of the decision has been disjoined from the appeal of the husband. The couple have separated.
- [4] The Appellant is a citizen of Nigeria. The two minor children are citizens of the United States.
- [5] New evidence has been submitted in this appeal. An oral hearing is requested.
- [6] The determinative issue in this appeal, regarding the Appellant, is whether the RPD erred in its credibility findings.

DETERMINATION

- [7] The appeals of the two United States born Associate Appellants (Files TB9-20800 and TB9-20801) are dismissed. Pursuant to paragraph 111(1)(a) of the Immigration and Refugee Protection Act (IRPA), I confirm the decision of the RPD that the Associate Appellants are not Convention refugees nor persons in need of protection.
- [8] The appeal of the Nigerian born Appellant (File TB9-20799) is allowed. Pursuant to section 111(1)(b) of the IRPA, I set aside the determination of the RPD and substitute my own determination that the Appellant is a Convention refugee.

BACKGROUND

- [9] The Appellant's initial claim for refugee protection was based on her husband's claim. He feared harm or persecution in Nigeria due to his refusal to accept the position of King.

- [10] The Appellant amended her claim shortly before the RPD hearing to add an additional ground based on her sexual orientation. She alleges that, in XXXX 2019, she found out that her involvement in a same sex relationship in Nigeria had become known to her family, her husband's family and to the police.
- [11] The Appellant alleges that she is at risk of persecution or harm if she returns to Nigeria due to her sexual orientation as a bisexual woman.
- [12] The Appellant's two children were born in the United States. The RPD denied their claims because they did not make any claim against the United States. That refusal has not been challenged or argued by the Appellants in this appeal.
- [13] The RPD's denial of the claim based on the husband's refusal to accept the position of King is also not challenged and is therefore not addressed in this appeal.
- [14] This appeal is based solely on the Appellant's claim for protection based on her sexual orientation.

ANALYSIS

- [15] In considering this appeal, I have applied a standard of correctness to the RPD's findings as per the Federal Court of Appeal decision in *Huruglica*¹. I have conducted my own independent analysis of the evidence. This included reviewing the transcript of the hearing, listening to the recording of the hearing and reviewing all of the documentation on record.

The RPD Decision

- [16] The RPD rejected the claim for refugee protection, based on the Appellant's sexual orientation, because they did not find the Appellant credible for several reasons including:
- * The Appellant did not provide the date in her Basis of Claim or her testimony that she and her same sex partner first became intimately involved;
 - * The Appellant did not credibly explain how her sexual orientation was discovered in Nigeria;
 - * The Appellant did not know the date that her same sex partner was arrested in Nigeria or the outcome of that arrest;
 - * The Appellant did not provide any documentation to show that she is wanted by the police as a result of her involvement in a same sex relationship; and
 - * The Appellant failed to claim refugee protection in the United States.

The Appellants' Position

- [17] The Appellants argue that the RPD made the following errors:

* The RPD erred in its credibility analysis. In particular, the RPD undertook a microscopic examination of the documentary evidence and imposed too strict a burden of proof on the Appellant; and

* The RPD failed to apply the Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression (the SOGIE Guideline) in assessing credibility.

Appeals of the United States Born Children are Dismissed

- [18] The RPD was correct to deny the claims of the United States (US) born children.
- [19] No arguments have been provided in this appeal regarding this denial. Yet, the children are identified as appellants in this appeal.
- [20] The children have no grounds to seek refuge or safety from the US. No evidence of any claim against the US was presented. There is no identified agent of persecution in the US.
- [21] As a result, this portion of the RPD decision is correct and the appeals from the US born children are dismissed.

New Evidence is Accepted

- [22] New Evidence has been submitted in this appeal. The new evidence is an updated psychological report with a cover letter from the psychologist dated XXXX XXXX, 2019. The letter states that the psychologist is clarifying a point in their original report.
- [23] The letter and updated report are accepted as new evidence.
- [24] The report corrects a mistake in the original report. The original report² states that the Appellant fears persecution in Nigeria if the police become aware of her sexual orientation. The corrected report states that the police are already aware of her sexual orientation.
- [25] The psychologist's corrected report could not reasonably have been expected to be presented before the RPD rejected the claim. The RPD relied on the inconsistency regarding the police, in finding that the Appellant was not credible. However, it did not bring that inconsistency to the Appellant's attention at the hearing. The Appellant was not aware of the error in the report until she received the RPD decision.
- [26] The initial report is dated XXXX XXXX, 2019 which is just XXXX XXXX before the hearing that took place on June 5, 2019. As a result of this very short time frame, it is reasonable that the Appellant was not aware of the error in the report at the time of the hearing.
- [27] The documents are new evidence. The letter and updated report are dated after the RPD decision and contain new evidence that was not before the RPD at the time of the hearing.
- [28] The documents come from a licensed, accredited psychologist so the source is credible.

- [29] The new evidence is relevant. It directly addresses a finding of fact that the RPD made and based its decision on. It corrects an error in the report which impacts the finding that the RPD made. The RPD made a negative credibility finding based on the statement in the first report that the police were not aware of the Appellant's sexual orientation. This contradicted the Appellant's own testimony.
- [30] The requirements of subsection 110(4) of the IRPA and the Raza/Singh factors have been met and the new evidence is accepted.

Refusal of Request for an Oral Hearing

- [31] The request for an oral hearing is refused.
- [32] The updated psychological report is relevant. It relates to the consistency of the Appellant's evidence and her credibility. However, the report does not dispose of the claim. It is not determinative of the core issue in the claim which is whether or not the Appellant is bisexual. As a result, the requirement for a hearing under subsection 110(6) (c) of the IRPA has not been met.

RPD Credibility Errors

- [33] I agree with the Appellants that the RPD's credibility findings were problematic. In particular, I agree that the RPD erred by misapplying the standard of proof and placing too much weight on minor issues with the evidence.
- [34] The Appellant must establish that she is bisexual on a balance of probabilities. She then must establish a serious possibility or reasonable chance of persecution based on her sexual orientation.
- [35] Yet, the RPD's analysis shows that it misapplied the standard of proof by giving substantial weight to minor omissions or inconsistencies.
- [36] The RPD focused on minor omissions in the Appellant's Amended Basis of Claim and in her testimony as well as minor issues with the supporting documentation or lack of documentation. The RPD concluded that those omissions and issues were sufficient to undermine the Appellant's testimony and her overall credibility. I disagree.
- [37] I have reviewed the hearing transcript and listened to the recording of the hearing. There were no inconsistencies in the Appellant's testimony. She was clear and detailed. She provided very reasonable explanations for the concerns that the RPD raised at the hearing. For the reasons set out below, the omissions and issues with the supporting documents are insufficient to rebut the presumption of truthfulness in the Appellant's sworn testimony.

- [38] The RPD determined that the Appellant lacked credibility with respect to her husband's claim about his refusal to be king and that this undermined the credibility of her bisexuality allegation. However, the Appellant was not questioned about this aspect of the claim. Her evidence related to the bisexuality allegation.
- [39] Since there are no issues with the credibility of the Appellant's testimony at the hearing, there is no sufficient basis to reject her testimony as untruthful.

Omissions in the Amended Basis of Claim and Testimony

- [40] The RPD was concerned that the Appellant did not recall the exact date that she became intimately involved in her same sex relationship. The Appellant could not recall the exact date or month and only remembered that it was later in the year 2015. She did describe the circumstances of the first intimate encounter with her partner in detail such as where it occurred.³
- [41] In the context of the total testimony, the Appellant's failure to recall the exact date she became intimately involved with her partner over four years ago is a minor omission that is insufficient to support a negative credibility finding.
- [42] The RPD was also concerned that the Appellant did not specifically state in her Basis of Claim that she is the woman depicted in the photos in her partner's cell phone.
- [43] The Appellant provided a very reasonable explanation for this. She stated that it is clear from her description of the event that she is the person in the photos or there would have been no reason for the husband of her partner to call her husband about the photos.⁴ She would not have been implicated at all if it was not her in the photos. I accept this explanation and find that the RPD erred in making a negative credibility finding on this very minor omission in the Basis of Claim.

Lack of Police Documentation

- [44] The RPD was concerned about the lack of documentation to show that the police are seeking the Appellant for questioning due to her involvement in a same sex relationship. They made a negative credibility finding based on this. Yet, the Appellant explained at the hearing that it is not common for the police to give any documentation even when you are arrested.⁵
- [45] The Appellant's explanation for the lack of police documentation is supported by the National Documentation Package for Nigeria.⁶ This objective documentation states that the police do not usually provide a warrant of arrest in cases related to same sex activity and there is hardly ever any documentation in investigations involving same sex activity unless the case goes to court.

- [46] This lack of documentation is tied to the common practice of the police blackmailing or extorting a payment from a person accused of same sex activity. Formal charges may not be pursued in exchange for payment.⁷
- [47] Due to the confirmation in the National Documentation Package that police documentation is uncommon, the RPD erred in making a negative credibility finding based on the lack of documentation that the police are looking to question the Appellant.
- [48] This practice of the police also explains the lack of any documentation to show the Appellant's partner's arrest or the outcome of the charges against her.
- [49] The Appellant's inability to contact her partner, as set out below, also explains why she had limited details about the charges against her partner.

Knowledge of the Appellant's Same Sex Relationship

- [50] The RPD found that the Appellant did not provide a credible explanation about how her same sex relationship was discovered. Yet, the hearing transcript establishes that the Appellant provided an explanation which I find to be credible.⁸ There is also a detailed description in her Amended Basis of Claim⁹.
- [51] The RPD questioned how compromising photos and texts could have been found in the phone of the Appellant's partner when the Appellant stated that she and her partner had an agreement to delete anything incriminating in their phones.
- [52] The Appellant stated that she does not know why her partner would not delete the photos and texts when it was their agreement to do so.¹⁰ She attempted to reach her partner but was unable to do so. ¹¹ She also had her sister attempt to locate her but that was also unsuccessful.¹²
- [53] It is not clear how the Appellant could be expected to provide an explanation as to why her partner chose not abide by their agreement to delete incriminating photos or texts. Only the partner would be able to explain that. The RPD erred in making a negative credibility finding based on the lack of an explanation.

Failure to Claim in the United States

- [54] The Appellant and her children were in the United States (US) for almost XXXX weeks in 2018 before coming to Canada.
- [55] The RPD determined that the failure to make a claim in the US established a lack of subjective fear.
- [56] The Appellant was questioned about her failure to claim in the US at the hearing. She provided a reasonable explanation.

- [57] The Appellant explained that the anti-immigration policy in the US was well known. An immigration consultant did not recommend making a claim in the US. The Appellant was also afraid that she would be detained and separated from her children in the US.¹³ The RPD determined that this explanation was not "objectively supported".
- [58] Yet, the Appellant provided documentation from the National Documentation Package for the US at the hearing (Items 2.2 and 2.3). That documentation states that the US has moved backward on human rights and refugees have been targeted. There has also been an increase in the detention of asylum seekers and their families.
- [59] In this context, the Appellant provided a reasonable explanation for why she did not claim refugee protection in the United States.
- [60] I accept the reasonable explanation that was provided and find that the RPD erred when it made a negative credibility finding on this issue.
- [61] Furthermore, this appeal focuses on the ground of sexual orientation. The same sex relationship was not uncovered until XXXX 2019. Therefore, a failure to claim in the US in XXXX 2018 can not be relied on to support a finding of a lack of subjective fear based on the new ground of sexual orientation that only arose months after the Appellant came to Canada.

Letters from Appellant's Mother and Sister

- [62] The RPD rejected the letters from the Appellant's mother and sister¹⁴ entirely merely because they were not dated.
- [63] The letters corroborate many details in the Appellant's testimony. The mother and sister state that they were shocked to learn that the Appellant was involved in a same sex relationship and the entire family is now facing scorn and ridicule.
- [64] Although the letters are not dated, the mother's letter mentions finding out about the same sex relationship through a phone call from the Appellant's mother in law on XXXX XXXX XXXX 2019. The contents of the letter establish the general time frame that the letter was written. Clearly it was written in the XXXX-month period after the XXXX XXXX XXXX 2019 phone call and before XXXX XXXX XXXX 2019 when the hearing took place.
- [65] The letters provide corroboration of the Appellant's testimony that she was involved in a same sex relationship. The letters are unsworn. Due to this, they carry limited weight but they are considered in the totality of the evidence presented. It was an error for the RPD to reject the letters outright simply because they were not dated.

WhatsApp Chats

- [66] The RPD rejected the on-line WhatsApp Up chats¹⁵ between the Appellant and her sister. They discuss the Appellant's same sex relationship and the family's shock and negative reaction to this relationship. Due to the credibility concerns, the RPD found that these chats were written to buttress the claim and are not reflective of genuine chats.
- [67] Since I have determined that the RPD erred in its credibility findings, I find that the WhatsApp chats are genuine. They corroborate the Appellant's testimony regarding her same sex relationship. They are unsworn and are given limited weight but they do support the claim when considered in the totality of the evidence.

Supporting Evidence

- [68] Providing supporting or corroborative evidence of a person's sexual orientation is very challenging. This is especially so when a person comes from a country like Nigeria where same sex relationships are illegal and would take place under great secrecy.
- [69] Yet, the Appellant did provide some supporting evidence at the RPD hearing including: confirmation of her involvement with LGBTQ organizations in Toronto,¹⁶ photos of her with her same sex partner,¹⁷ letters from her mother and sister, and WhatsApp chats with her sister.
- [70] The RPD determined that the documentation from the LGBTQ organizations confirming the Appellant's involvement with the organizations was provided merely to buttress the claims rather than to support that she is bisexual. While I agree that involvement in the organizations does not establish that the Appellant is bisexual, the RPD assumed that the Appellant sought the services of the organizations merely to improve her claim. There is insufficient evidence and analysis in the decision to support that assumption.
- [71] None of the supporting documents are determinative of the issue of the Appellant's sexual orientation. Individually, they are given limited weight. However, when assessed cumulatively and together with the Appellant's testimony, they are consistent and assist in establishing that she is bisexual on a balance of probabilities.

Well-Founded Fear of Persecution

- [72] The Appellant has established, on a balance of probabilities, that she is bisexual. The Appellant's membership in a particular social group as a bisexual woman is the nexus and basis for harm or persecution in this case.
- [73] Having established her bisexuality, it must also be established that the Appellant faces a serious possibility or reasonable chance of persecution in Nigeria based on her sexual orientation.

- [74] I have considered the Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution (the Gender Guideline) and the Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression (the SOGIE Guideline) in deciding this appeal.
- [75] The Appellant has a subjective fear of harm or persecution from the police and the general community in Nigeria based on her sexual orientation. She provided sworn testimony that the police, her family and her husband's family are aware of her same sex relationship. Some corroborating evidence of this, as discussed above, was also provided.
- [76] The Appellant's fear is objectively well founded. Same sex relationships are illegal in Nigeria. There is wide spread homophobia, discrimination and intolerance of same sex relationships in Nigeria. Based on the evidence provided in the Appellant's direct testimony and in the National Documentation Package¹⁸ there is a serious possibility of persecution of the Appellant in Nigeria due to her sexual orientation.
- [77] The National Documentation Package¹⁹ establishes that Nigeria is known as one of the most homophobic countries in the world due to the criminalization of same sex relationships along with discriminatory and violent treatment of LGBTQ people by the police and the general public. Arbitrary arrests, blackmail, physical and psychological abuse are common.

State Protection

- [78] There is no state protection for the Appellant in Nigeria. Same sex relationships are illegal throughout Nigeria. The state and the police are agents of persecution.

Internal Flight Alternative

- [79] An Internal Flight Alternative (IFA) means that there is another city or area in Nigeria where the Appellant can live safely. If there is an IFA, then the Appellant does not need to seek refuge or safety in Canada. Therefore, her claim for refugee protection would be denied.
- [80] On a balance of probabilities, there is no IFA for the Appellant in Nigeria because same sex relationships are illegal throughout the country. The Appellant would face a serious possibility of persecution anywhere in the country if her sexual orientation is discovered.

CONCLUSION

- [81] The appeals of the two United States born Appellants (Files TB9-20800 and TB9-20801) are dismissed. Pursuant to paragraph 111(1)(a) of the IRPA, I confirm the decision of the RPD that the Appellants are not Convention refugees nor persons in need of protection.
- [82] The appeal of the Nigerian born Appellant (File TB9-20799) is allowed. Pursuant to section 111(1)(b) of the IRPA, I set aside the determination of the RPD and substitute my own determination that the Appellant is a Convention refugee.

(signed)

"K. Wallace"

K. Wallace

January 24, 2020

Date

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

2 Exhibit RPD-1, RPD Record, Exhibit 14, at p. 429.

3 Transcript of RPD Hearing Transcript, at p.41, paras 10 to 85, and p.42, paras 5 to 30.

4 Transcript of RPD Hearing Transcript, at p.44, paras 10 to 40.

5 Ibid, at p.56, paras 55 to 85.

6 National Documentation Package (NDP) for Nigeria (August 2019), Response to Information Request (RIR) NGA105655, Item 6.13.

7 NDP for Nigeria (November 2019), Item 6.12.

8 Transcript of RPD Hearing, at p.42, paras 35 to 80.

9 Exhibit RPD-1, RPD Record, Exhibit 9, at p.75.

10 Transcript to RPD Hearing, at p.43, para 20.

11 Ibid, at p.43, para 40.

12 Ibid, at p.44, para 85.

13 Ibid, at p.55, para 20.

14 Exhibit RPD-1, RPD Record, Exhibit 11, Items C9 and C11, at pp.271 to 272 and 274.

15 Ibid, Exhibit 11, Item C28, at pp.103 to 109.

16 Ibid, Exhibit 11, at p.362.

17 Ibid, at pp.364 to 379.

18 NDP for Nigeria (November 2019), Item 6.2.

19 Ibid.

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RAD.25.02 (April 04, 2019)

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Immigration and Refugee

Board of Canada

Refugee Appeal Division

Commission de l'immigration

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RAD.25.02 (April 04, 2019)

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