

CANADA / JUDGMENT

MB9-27032

COURT

Refugee Appeal Division

DECIDED

28 January 2020

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Dossier de la SAR / RAD File : MB9-27032 MB9-27033 / MB9-27034 Huis clos / Private Proceeding
Motifs et décision ? Reasons and decision Personnes en cause XXXX XXXX XXXX XXXXXXXXXX
XXXX XXXX XXXXXXXXXX XXXX XXXX XXXX Persons who are the subject of the appeal Appel
instruit / entendu à Ottawa, ON Appeal considered / heard at Date de la décision January 28, 2020
Date of decision Tribunal John Helis Panel Conseil des personnes en cause Luciano Mascaro
Counsel for the persons who are the subject of the appeal Représentant(e) désigné(e) XXXX XXXX
XXXX Designated representative Conseil du ministre S.O. Counsel for the Minister Reasons and
decision OVERVIEW

- [1] XXXX XXXX XXXX (the principal Appellant), a citizen of Nigeria, XXXX XXXX XXXX, and
XXXX XXXX XXXX XXXX (the associate Appellants), citizens of the United States of America,
appeal a decision of the Refugee Protection Division (RPD), dated October 24, 2019, rejecting
their claims for refugee protection.
- [2] The Appellants ask that the Refugee Appeal Division (RAD) set aside the decision of the RPD
and substitute its own determination that they are Convention refugees or persons in need
of protection, or make any other order appropriate in the circumstances.¹

DETERMINATION

- [3] The appeal is dismissed. I confirm the decision of the RPD that the Appellants are neither
Convention refugees nor persons in need of protection.² SUMMARY OF THE FACTS
- [4] The principal Appellant is a 34-year-old woman from Nigeria. The associate Appellants are
two of the principal Appellant's daughters, and are 4 and 3 years of age. The principal
Appellant is a citizen of Nigeria. The two associate Appellants were born in Georgia, and are
citizens of the United States. The principal Appellant's third daughter, who is only one year
old, is not a party to the appeal as she was born in Montreal and is a Canadian citizen.
- [5] The principal Appellant purportedly fears persecution or harm in Nigeria because of her
sexual orientation as a lesbian. She left Nigeria for Mexico in XXXX 2014. She alleges that
she was raped in Mexico by a man she befriended, and therefore decided to cross the border
and seek asylum in the United States on XXXX XXXX, 2014. She met a man in the United
States in 2015 and had two children. She left the United States prior to her scheduled hearing

before the Immigration Court and entered Canada with her children on XXXX XXXX, 2018. The three Appellants filed their claims for refugee protection in Canada on January 30, 2018.

THE RPD DECISION

- [6] The RPD determined that the principal Appellant was not credible with respect to her claim that she is a lesbian, and found that she did not display a subjective fear or persecution. The RPD's credibility assessment is based on several omissions and inconsistencies between the principal Appellant's testimony and her sworn Basis of Claim Form (BOC), as well as her departure from the United States prior to her scheduled asylum hearing. THE ISSUES
- [7] The issues in this appeal are whether the RPD erred in its credibility assessment, and whether the associate Appellants have established claims against the United States as their country of citizenship.
- [8] The Appellants have not submitted new evidence and are not requesting a hearing before the RAD. STANDARD OF REVIEW
- [9] The standard of correctness applies to this appeal as set out by the Federal Court of Appeal in Canada (Citizenship and Immigration) v Huruglica.³ This requires an independent assessment of the refugee claim to determine whether the RPD was correct in its findings and determinations. While deference can be afforded to the RPD on specific issues when it enjoys a meaningful advantage over the RAD in making findings of fact or mixed fact and law, such an advantage does not arise in the present case.

ANALYSIS

- [10] After conducting an independent review of the entire record, including listening to the recording of the hearing, I find that the determinative issues in the appeal are the principal Appellant's credibility and subjective fear of persecution, as well as the failure of the associate Appellants to assert a claim against the United States as their country of citizenship. The principal Appellant's credibility
- [11] I agree with the RPD that the principal Appellant did not credibly establish her sexual orientation as a lesbian, and did not display a subjective fear of persecution for the reasons outlined below. The principal Appellant's failure to mention her same-sex partner in her BOC
- [12] The principal Appellant's credibility was undermined by the complete lack of information about her same-sex partner in the BOC. The principal Appellant provided considerable details in oral testimony about a same-sex relationship which allegedly lasted from 2009 to 2014, until her departure to Mexico. She specifically referred to being in love with her partner, and that she has not had any same-sex relationships since that time. Despite the emphasis and importance that the principal Appellant attributed to this relationship in her testimony, there is no mention of her former partner in the BOC, where she only refers to being lesbian since secondary school.

- [13] Like the RPD, I do not accept the principal Appellant's explanation that she did not know that she had to mention her same-sex relationship in her BOC, or that it would be important to her claim. The onus is on the principal Appellant to establish her sexual orientation, on a balance of probabilities. The principal Appellant refers to her relationships with men in the BOC, including her relationship with her children's father, but yet did not mention an alleged same-sex relationship which goes to the heart of her claim that she is a lesbian and fears persecution in Nigeria because of her sexual orientation. The alleged same-sex relation was of long duration, and continued until the date of her departure from Nigeria. The principal Appellant was represented by counsel, and even amended her BOC on September 6, 2019. I therefore find that the RPD was correct to impugn the principal Appellant's credibility for failing to make any mention of her same-sex relationship in her BOC.
- [14] Nor do I accept counsel's argument that modesty may have played a role in explaining why the principal Appellant did not refer to her same-sexual relationship in her BOC because she devoutly attends church. I have considered Chairperson's Guideline 9, Proceedings Before the RPD Involving Sexual Orientation and Gender Identity and Expression (SOGIE), but cannot find that the principal Appellant's church attendance is a cultural or psychological barrier that may reasonably explain her failure to mention her same-sex relationship. Since the principal Appellant refers to being lesbian since secondary school in her BOC, and discussed her alleged same-sex relationship without hesitation during the hearing, the principal Appellant's religion is not a reasonable explanation for the exclusion of this information from her BOC. The Principal Appellant's Involvement in the gay community in Nigeria
- [15] I similarly agree with the RPD that inconsistent accounts of how the principal Appellant became involved in the gay community in Nigeria through the Big Girl's Association undermines her credibility regarding her sexual orientation. The principal Appellant's testimony that she was introduced to the XXXX XXXX XXXX by her friend, and that it was during her first attendance that she began to meet and mingle with other members of the gay community in Nigeria, is not reflected in the BOC. The only reference to this group in the BOC is that it was a place to "talk, and we could also meet other partner [sic]in the group, it was our fellowship."
- [16] The RPD correctly rejected the principal Appellant's assertion that the reference to being lesbian in the BOC was sufficient as an unsatisfactory explanation for the omission of this information in the BOC. Nor do I accept the related arguments from counsel that the mere mention of the association establishes the Appellant's sexual orientation, or that details about who introduced her to the group are of secondary importance. Contrary to these arguments, information about how the principal Appellant became involved in the gay community in Nigeria is central to her claim that she is a lesbian, and its omission from the BOC undermines her credibility on the question of her sexual orientation. The alleged incident that caused the principal Appellant to flee Nigeria

- [17] The omission of any reference in the BOC to the incident which according to the principal Appellant's testimony caused her to flee Nigeria also undermines her credibility. According to the principal Appellant's testimony, the members of the XXXX XXXX XXXX were allegedly attacked by people who found out that it was a group exclusively for women. The Appellant was not present during the attack, but found out about it through a friend. While the principal Appellant testified that this incident caused her to flee Nigeria, she could not even recall the date of the attack.
- [18] I do not accept the submission from counsel that the omission of the very incident that allegedly caused the Appellant to flee from Nigeria may be attributed to not seeing the need to mention the attack, or to difficulty in explaining her narrative chronologically and logically. The principal Appellant indeed could not provide an answer for this omission during the hearing, and merely acknowledged the omission from her BOC. The Appellant mentioned this incident only after being questioned by the RPD member about what caused her to leave Nigeria, which makes her testimony appear to be evolving. Failure to attend immigration hearing in the United States
- [19] The RPD was correct in its determination that the principal Appellant was not credible and did not display a subjective fear of persecution because she did not attend her immigration hearing in the United States. While the principal Appellant testified that she never filed an asylum claim in the United States, the documentary evidence establishes that she applied for admission into the United States on XXXX XXXX, 2014, and a hearing was scheduled before the Immigration Court in Atlanta on November 29, 2019. The principal Appellant did not attend the hearing, and instead entered Canada and requested refugee protection.
- [20] I agree with the RPD that the principal Appellant's explanation that she decided to leave the United States because the father of her children told her that she would have to take care of the children alone is not a reasonable explanation for her failure to attend her hearing. Nor is there merit to counsel's argument that it is not surprising that the principal Appellant left the United States for Canada because of the long wait for a hearing before the Immigration Court. Contrary to this argument, the principal Appellant's abandonment of her immigration case after living freely in the United States with her children for approximately three and a half years was not consistent with her stated fear, and it was therefore correct for the RPD to impugn her credibility and find that she did not display a subjective fear of persecution.
- [21] The concept of a subjective fear of persecution only applies to the analysis for persons in need of protection, although a finding that a claimant's failure to seek asylum at the earliest opportunity, contrary to their stated fears, has been equally held to be relevant to the question of whether a claimant is a Convention refugee.⁴ The documentary evidence

- [22] I do not agree with the argument that the RPD required the Appellants to present documentary evidence to corroborate their claims, or that it imposed a heavier burden of proof. Indeed, the RPD expressly held that "a claimant's mere failure to provide corroborating evidence in support of her claim cannot, on its own, be used to impugn her credibility."
- [23] The significant credibility concerns outlined above rebut the presumption of the principal Appellant's truthfulness, and are not adequately addressed by either her explanations or the documentary evidence.⁵ Of the documentary evidence submitted by the Appellants, only the supporting letter from an organization that assists LGBTQ migrants in Montreal refers to the Appellant's self-identification as a lesbian, and confirms that she completed an intake and attended a picnic and the Pride Parade. The evidence in this letter does not address the credibility concerns regarding the inconsistencies between the Appellant's testimony and the BOC. Nor does information about the principal Appellant's attendance at two LGBTQ social events establish, on a balance of probabilities, her sexual orientation as a lesbian. The Associate Appellants
- [24] I do not accept the argument that the potential separation of the associate Appellants from the principal Appellant amounts to persecution, nor, on a balance of probabilities, a risk to their lives, cruel or unusual treatment or punishment, or a danger of torture in the United States. The Appellants' argument is premised on the assumption that the associate Appellants will be forcibly separated from the principal Appellant if they return to the United States where she has no status. They submit that the separation of children from their parents is a traumatic and harmful experience that constitutes cruel and unusual punishment, and that the best interests of the children should be the primary consideration in the RAD appeal.
- [25] While wrapped in the language of cruel and unusual punishment, the Appellants' argument is really one of family unity which was firmly rejected by the Federal Court in *Dawlatty*, since "there is no concept of family unity incorporated into the definition of Convention refugee ... this Court having chosen to adopt a very narrow view of the definition."⁶ Justice Noel similarly stated in *Casetellanos* that: It is quite plain that there is no mention of family unity in the current definition. Therefore, in order to apply the principle of family unity in the case at bar, I would have to extend the definition of Convention refugee. There is no justification for doing so.⁷
- [26] It was further explained in MB6-06938 that arguments on the best interest of the child are humanitarian and compassionate considerations over which the RPD and RAD do not have jurisdiction.⁸ Nor would family unity lead to a finding that the associate Appellants are persons in need of protection. Although MB6-06938 is not binding, I find it highly persuasive and adopt its reasoning in this instance.

[27] The role of the RPD, and of the RAD on appeal, is to determine whether there is a serious possibility of persecution in the United States, or whether, on a balance of probabilities, the associate Appellant would be subject to a risk of cruel and unusual treatment or punishment or to a danger of torture, if they were to return to his country of citizenship. Neither of these two legal criteria have been met in the present circumstances. As established by the Supreme Court of Canada in *Ward*, persecuted persons are required to approach their home state for protection before the responsibility of other states is engaged.⁹

CONCLUSION

[28] The principal Appellant has not established her sexual orientation as a lesbian on a balance of probabilities, and the associate Appellants have not made out a claim against the United States as their country of citizenship. I therefore conclude that the Appellants do not face a serious possibility of persecution, nor, on balance of probabilities, a danger of torture, a risk to their lives, cruel and unusual treatment or punishment.

[29] I dismiss the appeal and confirm the decision of the RPD that the Appellants are neither Convention refugees nor persons in need of protection.¹⁰ (signed) "John Helis" John Helis January 28, 2020 Date 1 Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 111(1)(b) & 111(1)(c) [IRPA]. 2 IRPA s 111(1)(a). 7 *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93. 4 *Velez v. Canada (Citizenship and Immigration)*, 2010 FC 923 at paras. 25-28. 5 *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para. 6, citing *Maldonado v. M.E.I.*, [1980] 2 FC 302 (CA) at 305. 6 *Dawlatly v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7952 (FC). 7 *Casetellanos v. Canada (Solicitor General)*, [1995] 2 FC 190, 1994 CanLII 3546 (FC). 8 *X (Re)*, 2017 CanLII 142905 (CA IRB) at para. 43. 9 *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689 at 752. 10 IRPA s. 111(1)(a).

Dossier de la SAR / RAD File : MB9-27032 MB9-27033 / MB9-27034 RAD.25.02 (04 avril 2019)
Available in English 2 Commission de l'immigration et du statut de réfugié du Canada Section
d'appel des réfugiés Immigration and Refugee Board of Canada Refugee Appeal Division
RAD.25.02 (04 avril 2019) Available in English

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Prepared on 26 October 2026 · Esheria