

CANADA / JUDGMENT

VB9-03759

COURT

Refugee Appeal Division

DECIDED

19 June 2020

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RAD File / Dossier de la SAR : VB9-03759 VB9-03760 Private Proceeding / Huis clos Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX XXXX XXXXXXXX XXXX XXXX Personnes en cause Appeal considered / heard at Toronto, ON Appel instruit / entendu à Date of decision June 19, 2020 Date de la décision Panel Christopher Marcinkiewicz Tribunal Counsel for the persons who are the subject of the appeal Edomwonyi Omorotionmwan Conseil des personnes en cause Designated representative N/A 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 the Associate Appellant, her husband XXXX XXXX XXXX, appeal a decision of the Refugee Protection Division (RPD) dated April 29, 2019, rejecting their claims for refugee protection. The Appellants ask the Refugee Appeal Division (RAD) to substitute a finding that they are Convention refugees or persons in need of protection, or refer the matter back to the RPD for redetermination.¹

DETERMINATION

- [2] Pursuant to paragraph 111(1)(b) of the Immigration and Refugee Protection Act (IRPA),² I am setting aside the decision of the RPD and substituting it with my own decision. Specifically, on the evidence before me, I find that the Principal Appellant is a Convention refugee and the Associate Appellant is a person in need of protection.

BACKGROUND

- [3] The Appellants fear returning to Nigeria as the Principal Appellant has avoided female genital mutilation (FGM) for many years and believes that upon her return, her immediate family consisting of her mother, grand-mother, and aunties, along with the larger community, will force her to undergo the rituals. The Principal Appellant along with her husband allege having moved and hid from her agents of persecution numerous times over the years in Nigeria, each time being located and threatened with harm or harmed. The husband has been assaulted as the agents of persecution blame him for not bringing forward his wife for the procedure, one he opposes as he views it as barbaric. The Appellants fled to the USA in late 2017 and eventually made their way to Canada in XXXX 2018, where they initiated claims for refugee protection. ROLE OF RAD

- [4] In circumstances where the RAD determines that the RPD had a meaningful advantage in assessing the credibility of oral testimony, I may defer to the RPD findings. 3 In this case, I find that the RPD did not benefit from a meaningful advantage in any manner in assessing the Appellant's evidence. As such, I have considered the RPD's findings on the correctness standard. NO NEW EVIDENCE AND NO ORAL HEARING
- [5] The Appellants have not stated anywhere in their memorandum that they wish to have new evidence entered for the purposes of this appeal despite both of them submitting affidavits, parts of which address the alleged errors of the RPD. They have not explained, as it is their obligation to do so pursuant to RAD Rule 3(d)(i), that they are relying on new evidence nor have they explained how this new evidence meets the requirements of section 110(4) of IRPA to be admitted. As a result, I decline to admit the affidavits as new evidence. Given the lack of admissible new evidence, I must proceed without holding an oral hearing.

ANALYSIS

- [6] While the RPD raised some credibility concerns relating to a possible lack of subjective fear, the RPD was clear that the determinative issue in this case was the availability of an internal flight alternative (IFA) to either Benin City or Port Harcourt.⁴
- [7] The Appellants argue that the RPD made errors in its credibility assessments as well as the IFA analysis and findings. Specifically, it is argued that the Appellants have discharged their burden of establishing that the proposed IFA's are unreasonable under both IFA prongs.⁵
The RPD Did Not Err Re: Credibility Findings
- [8] As part of its analysis, the RPD found certain actions of the Appellants' undermined their subjective fear. Appellants Attend Traditional Marriage Ceremony and Mother Attends Church Ceremony
- [9] The RPD found that the invitation of the Principal Appellant's mother to her own church wedding in XXXX 2012, after she was already aware of her mother's intention to have her undergo FGM and after attending and escaping from the mother's village after the traditional wedding in XXXX 2012 in order to avoid the FGM ritual, undermined the Appellants' subjective fear. The RPD was of the view it would be reasonable to expect the Appellants to avoid the Principal Appellant's mother as she was one of the agents of persecution.
- [10] The Appellant argues that the RPD misconstrued the evidence as the Principal Appellant's mother was not the main agent of persecution and while her mother informed her of the intended FGM in 2009, she was not "hell bent" on the Appellant undergoing the process at that time.⁶
- [11] I have independently reviewed the evidence and I find no errors in the RPD's analysis or findings. I agree that, given the mother's stated intentions in 2009 to have the Principal Appellant undergo FGM after her traditional marriage, it would be reasonable to expect the

Appellants to avoid the traditional ceremony in XXXX 2012 given the associated risk of FGM. Similarly, I agree with the RPD that after literally escaping the FGM ritual in XXXX 2012 and fleeing her mother's village, it is indicative of a lack of subjective fear for the Appellants to then invite her mother to her church wedding ceremony. The Principal Appellant testified that this was done as her siblings wanted close family members to attend so that the Principal Appellant's husband's family would respect her.⁷ I reject this explanation as it would be reasonable to expect her to prioritize her personal safety and not invite the agent of harm to her wedding given her mother's stated intention to have her undergo FGM even if that somehow disrespected her husband's family, especially in light of her husband's staunch support opposing FGM. Failure to Claim Asylum in the USA

- [12] The RPD found the Appellants' explanation for failing to claim asylum in the United States insufficient. Specifically, while acknowledging the Appellants spoke to a lawyer who advised them it may not be beneficial to claim asylum in the USA, the RPD found that there was no evidence the United States did not permit hearings of asylum claims and noted the country is a signatory to the 1951 Convention.
- [13] The Appellants make a legal argument that the RPD failed to consider the provisions of Regulation 159.5 of IRPA, which refers to eligibility criteria for those who have family members in Canada. More accurately, it does not make one ineligible to make a claim under section 101 of the IRPA if that individual has a family member in Canada. It is argued that this exempted the Appellants from the "safe third country agreement and [they] were not under any legal obligation to make an asylum claim in the US".⁸
- [14] With respect, I reject the Appellant's argument as it confuses eligibility to make a refugee claim with the refugee law principle that an individual ought to claim asylum in the first safe country they arrive in, subject to certain conditions of course. While it is true the Principal Appellant's husband has a brother in Canada, the Appellants' intention was not initially to come to Canada from the United States because of the family connection. They also had family in the USA as they resided with the husband's sister for 4 months and it was only after seeing videos on YouTube about Canada accepting refugees that they decided to come here to make a claim.⁹
- [15] Furthermore, the Appellants' stay in the USA was not brief in the sense of simply transiting or sojourning through the USA on their way to Canada. As pointed out by the RPD, the USA is a signatory to the Convention and there is no evidence that they stopped processing asylum claims at any point while the Appellants were there. Having said that, the Appellants' stay was not egregious or exceptional as to find it determinative of their claim, but the failure to claim in the USA does indicate some lack of subjective fear.
- [16] In summary, much like the RPD, I too find these actions undermine to some degree the Appellants' subjective fear and credibility. I note, however, that while finding some concerns with their actions, the RPD did not reject the claim on the basis of credibility but rather, as mentioned above, on the basis of a viable IFA. Specifically, the RPD found the Principal

Appellant's fears of her family's capacity to find her to be speculative. Internal Flight Alternative to Port Harcourt or Benin City - 1st Prong Analysis Do the Appellants Face A Serious Possibility of Persecution or a Risk to Life in the Proposed IFAs?

- [17] The RPD found that despite the Appellant's allegation that they have been found and persecuted in at least three different locations in Nigeria, they have failed to provide sufficient evidence that the family members who are the agents of persecution have the capacity to find the Appellants in Port Harcourt or Benin City. The RPD went on to consider the size and populous of Nigeria generally, the multilingual and multiethnic characteristics and significant populous of Port Harcourt and Benin City, and also considered the Appellant's personal circumstances, concluding that the Appellants "may be able to safely establish themselves" in these locations.¹⁰
- [18] The Appellants argue that they have already attempted to seek refuge in various regions of Nigeria without success. The Appellants, having been located, threatened and even harmed in various parts of Nigeria far from the agents of persecution, are not expected to continue to relocate, especially to the proposed IFA locations in the southern parts of Nigeria that are in close proximity to Akwa Ibom state where the agents of persecution are located. Finally, it is argued that if the Appellants were to relocate to the proposed IFA locations, they would have to go into hiding and by doing so they can not be considered safe.
- [19] I have independently reviewed the evidence, I agree with the Appellants. They have provided written evidence, as well as testimony, of having relocated numerous times within Nigeria and to numerous locations for various durations, all of which proved futile as they were located by those acting on behalf of the agents of persecution from the community. Specifically, the Appellant's evidence was that due to the constant threats they faced, they moved: to the northern region of Nigeria to Kaduna state in 2014 where they were located by three individuals from the Principal Appellant's home community who gave them an ultimatum to return to the village for the FGM ritual or they would return and forcibly take the Principal Appellant for the procedure;¹¹ relocated to the capital city of Abuja but were located within one month, threatened, and the Appellant's husband was beaten by a group of people who blamed him for not allowing his wife to conduct the ritual, so much so that he spent a week in hospital;¹² they moved to Ibadan and continued to receive threats which they reported to police;¹³ and were ambushed and there was an attempt to kidnap the Principal Appellant in XXXX 2016 by men she recognized from her mother's community.¹⁴
- [20] It must be noted that many of these incidents were reported to local police and the police extracts have also been provided by the Appellants.¹⁵ Further, this evidence, both documentary and testimonial, was either not considered by the RPD, or was considered but the RPD did not explain what weight, if any, was given to this evidence. What is clear is that the RPD did not make any negative credibility findings regarding these incidents. Given sworn testimony is presumed to be true and no negative findings were made in respect to the documentary evidence presented, I find that these various incidents occurred as alleged and I give this evidence significant weight. Moreover, this is evidence of the Appellants'

efforts to relocate and being found and harmed by the agents of persecution. While the Appellants are unable to explain how they were found, in my respectful view, it is not incumbent upon them to know the tactics or processes utilized by their agents of harm to locate them throughout Nigeria.

- [21] Finally, given the Appellants' relocations far from the location of the agents of persecution, to northern, central, and western Nigeria proved fruitless in avoiding further threats and harm, I agree with them that the only way that they may be able to avoid future harm is to live in hiding. As pointed out by the Appellants, living in hiding does not equate to a safe or viable IFA location, and it is even questionable that this would be effective given the prior history of the agents of harm finding the Appellants after they relocated.
- [22] As a result, for the above stated reasons, I find that the Appellants have met their burden and established that they face a serious possibility of persecution or risk to life throughout Nigeria. As the IFA test is disjunctive, I will not consider the 2nd prong of IFA analysis. No State Protection Available to the Appellants in Nigeria
- [23] The objective documentary evidence indicates that there are essentially no successful prosecutions of those who engage in FGM, despite national legislation banning the practice some years ago.¹⁶ The Violence Against Persons Prohibition (VAPP) is not enforced and many individuals, including local police, do not know or have a good understanding of the legislation, with still a lot of work being undertaken by NGO's to educate the public and law enforcement officials against the practice of FGM as it is largely viewed as a family customary or traditional issue which the police do not wish to get involved in.¹⁷
- [24] The Appellants' experience is very similar, as when they approached the police for help, the police seemed uninterested as this was a domestic family matter involving tradition.¹⁸ Also, corruption is still a significant issue in Nigeria and endemic in many aspects of governance, and the Nigerian police force is not immune to this societal issue.¹⁹ Similarly, the Appellants were told by the police that they could not protect them, however, for a significant bribe, the police would assign them an officer for their personal security.²⁰
- [25] In my view, in a country with police corruption and bribery commonplace, and where the attitudes of law enforcement regarding FGM is to view it as a family or traditional matter not to be interfered with, I do not believe the Appellants can obtain adequate state protection.
- [26] In summary, I find that the Principal Appellant has established a serious possibility of persecution. In my view, the Principal Appellant would be subjected to FGM at the hands of her mother and those from her mother's community who believe she must undergo the FGM rites. I find her nexus to a Convention ground to be that of a member of a particular social group, specifically a woman facing gender-related persecution. I do not find a nexus to a Convention ground for the Principal Appellant's husband, XXXX XXXX XXXX. However, I find based on his experiences of being threatened with death and beaten due to his opposition to his wife undergoing FGM and the ongoing threat from the agents of persecution, that he has established on a balance of probabilities that he faces a risk to his

life from the Principal Appellant's family members and community. As such, I find him to be a person in need of protection.

CONCLUSION

[27] The RAD, pursuant to paragraph 111(1)(b) of the IRPA, sets aside the decision of the RPD and substitutes a decision that the Principal Appellant is a Convention refugee and the Associate Appellant is a person in need of protection. (signed) "Christopher Marcinkiewicz" Christopher Marcinkiewicz June 19, 2020 Date 1 Exhibit P-2, Appellant's Record, Appellant's Memorandum, p. 14, para. 37. 2 Immigration and Refugee Protection Act (IRPA), SC 2001, c 27, as amended, at ss. 111(1)(b). 3 M.C.I. v. Huruglica, Bujar (F.C.A., no. A-470-14), Gauthier, Webb, Near, March 29, 2016, 2016 FCA 93. 4 Exhibit RPD-1, RPD Record, Reasons for Decision, p. 4, para. 8. 5 Exhibit P-2, Appellant's Record, Appellant's Memorandum, p. 13, paras. 33-34. 6 Exhibit P-2, Appellant's Record, Appellant's Memorandum, p. 7, paras. 14-16. 7 RPD Hearing Audio Recording at [30:00-31:30] 8 Exhibit P-2, Appellant's Record, Appellant's Memorandum, p. 7, para. 13. 9 Exhibit RPD-1, RPD Record, Exhibit 4, p. 118. 10 Exhibit RPD-1, RPD Record, Reasons for Decision, p. 5, para. 11. 11 Exhibit RPD-1, RPD Record, Exhibit 4, p. 117 12 Ibid. 13 Exhibit RPD-1, RPD Record, Exhibit 4, p. 145. 14 RPD Hearing Audio Recording at [19:00-21:00] 15 Exhibit RPD-1, RPD Record, Exhibit 5, pp. 163-167. 16 Exhibit RPD-1, RPD Record, Exhibit 3, NDP for Nigeria (29 March 2019), Item 5.12. Whether parents can refuse female genital mutilation (FGM) of their daughter, state protection available (2016-October 2018). 29 October 2018. 17 Ibid 18 Exhibit RPD-1, RPD Record, Exhibit 4, p. 117. 19 Exhibit RPD-1, RPD Record, Exhibit 3, NDP for Nigeria (29 March 2019), Item 1.22. Country Policy and Information Note. Nigeria: Female Genital Mutilation (FGM). Version 1. 0. United Kingdom. Home Office. February 2017, p. 11. See also: Exhibit RPD-1, RPD Record, Exhibit 3, NDP for Nigeria (29 March 2019), Item 2.1. US Department of State, Country Report on Human Rights Practices for 2018, p. 12-13, 30 20 Exhibit RPD-1, RPD Record, Exhibit 4, p. 117.

RAD.25.02 (January, 2020) Disponible en français Immigration and Refugee Board of Canada
Refugee Appeal Division Commission de l'immigration et du statut de réfugié du Canada Section
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