

CANADA / JUDGMENT

TB9-02808

COURT

Refugee Appeal Division

DECIDED

6 February 2020

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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 File / Dossier de la SAR : TB9-02808 TB9-02809 / TB9-02810 / TB9-02811 Private Proceeding / Huis clos Reasons and decision ? Motifs et décision Person(s) who is(are) the subject of the appeal XXXX XXXX XXXX XXXXXXXX XXXX XXXXXXXX XXXX XXXX XXXXXXXX XXXX XXXX Personne(s) en cause Appeal considered / heard at Toronto, Ontario Appel instruit / entendu à Date(s) of Hearing December 13, 2019 Date(s) de l'audience Date of decision February 6, 2020 Date de la décision Panel J. Pollock Tribunal Counsel for the person(s) who is(are) the subject of the appeal Mbong Elvira Akinyemi Conseil(s) (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 OVERVIEW

- [1] XXXX XXXX XXXX (the Principal Appellant), her husband, XXXX XXXX (the Associate Appellant), their XXXX XXXX-year-old daughter, XXXX XXXX XXXX (the Minor Female Appellant), and their XXXX-year-old son, XXXX XXXX XXXX (the Minor Male Appellant), are citizens of Nigeria. The Appellants allege a fear of persecution from the Associate Appellants family. Specifically, they allege that their agents of harm seek to force them to convert from Christianity to Islam and to engage in various customary rites, including Female Genital Mutilation or Cutting/Circumcision (FGM/C) of the Minor Female Appellant. They appeal a decision of the Refugee Protection Division (RPD) rejecting their claims for refugee protection. The Appellants argue that the RPD's finding that they have a viable Internal Flight Alternative (IFA) in Port Harcourt is in error. They submit new evidence on appeal which they argue establishes that Port Harcourt is not a viable IFA. I have admitted some of the Appellants' proposed new evidence and I held a hearing on December 13, 2019. Having independently assessed the complete RPD Record, as well as the new evidence and RAD hearing testimony, I find that Port Harcourt is not a viable IFA. I have addressed why the RPD's IFA finding is no longer correct in light of the new evidence before providing my reasons for allowing the appeal and accepting the Appellants' claims. DECISION
- [2] The appeal is allowed. I substitute my own decision that the Appellants are Convention refugees.

BACKGROUND

The Appellants' allegations

- [3] The Appellants are from Lagos, Nigeria and they allege that their agents of harm belong to the Idowu royal family, based in XXXX, Ogun State. The Appellants allege that their problems began in XXXX 2015 when the Associate Appellant's mother demanded that the Minor Female Appellant undergo FGM/C upon her XXXX birthday. Both the Principal Appellant and Associate Appellant are opposed to FGM/C. They allege that their refusal was followed by a series of death threats and physical assaults. They further allege that they relocated from Lagos to Abuja, Kano, and Benin City but were located by their agents of harm. Finally, they allege that the agents of harm approached the Principal Appellant's brother in Abuja and the Principal Appellant's sister in Port Harcourt to inquire about their location. They allege a fear of persecution upon return to Nigeria based on their refusal to convert to Islam and engage in the demanded customary rites. The RPD's decision
- [4] The RPD heard the Appellants' claim over two sittings, held on August 8, 2018 and November 30, 2018. The RPD found that the Appellants were not credible about the power and influence of their agent of persecution. The Appellants omitted their agent of harm's alleged connections to the Nigerian customs authority and his businesses throughout Nigeria from their Basis of Claim (BOC) forms and multiple amendments. However, the RPD did not make any negative credibility findings regarding the Appellants' alleged past persecution, including their location in four cities in Nigeria. The RPD also did not impugn the Appellants' allegation that they were sought through two family members, one of whom lives in the proposed IFA location. The RPD found that Port Harcourt would be a viable IFA if the Appellants do not reside with the Principal Appellant's sister. The RPD found that there is insufficient credible evidence that the Associate Appellants' family have the means to locate the Appellants in Port Harcourt. NEW EVIDENCE AND REFUGEE APPEAL DIVISION (RAD) HEARING
- [5] The Appellants' claims were rejected on December 28, 2018. The Appellants did not include any new evidence with their February 25, 2019 Appeal Record to the Refugee Appeal Division (RAD). Instead, the Appellants submitted new evidence in seven separate post-perfection submissions between June 2019 and December 2019.¹ Many of these items were provided in a disorganized fashion and duplicated multiple times in separate packages to the RAD. I have organized the proposed new evidence as follows:
- a. Reference in Counsel's covering letter to an item entitled "disclosure that travel to Niger Delta is difficult";
 - b. An online article, Oyo still ranks high on FGM, dated October 5, 2017;
 - c. Two print articles on the practice of FGM/C in Nigeria, dated February 7, 2017
 - d. Nigerian travel advisories, dated April 26, 2019 and October 2, 2019;

- e. United Kingdom (UK) Home Office report, dated August 2019;
 - f. Oasis Magazine article, dated January 29, 2019;
 - g. This Day notice, dated February 7, 2019;
 - h. Sharp Edge News article, dated September 5, 2019;
 - i. Email and sworn statement from O.O.,² dated October 7, 2019; and
 - j. Emails from O.I., dated October 2, 2019 and October 3, 2019.
- [6] According to RAD Rule 29,³ evidence and submissions filed after the perfection of the appeal are not admissible unless I allow them into evidence. In making the decision of whether or not to allow the document, I must consider any relevant factor, including:
- i. Whether the document is relevant and probative; and ii. Whether the document brings any new evidence to the appeal; and iii. Whether the document could have been provided with reasonable effort with the Appeal Record.
- [7] If I accept evidence under RAD Rule 29, I must consider subsection 110(4) of the IRPA,⁴ which states that I can only accept evidence that:
- i. Arose after the RPD decision; or ii. Was not reasonably available at the time of the decision; or iii. Could not reasonably have been expected in the circumstances to have been presented to the RPD before the decision.
- [8] If the evidence meets one or more of these requirements, I must decide if the evidence is new, credible, and relevant before I can accept it.⁵ According to subsection 110(6) of the IRPA,⁶ I may only hold an oral hearing where the accepted new evidence:
- i. Raises a serious issue with respect to the credibility of the person who is the subject of the appeal; and ii. Is central to the decision of the claim; and iii. If accepted, justifies allowing or rejecting the claim.
- [9] If the new evidence meets each requirement I must decide whether to hold a hearing.
- [10] I find that the evidence described in items (a), (b) and (c) is inadmissible. I find the evidence described in items (d) and (e) is admissible but does not require an oral hearing. I find that the evidence described in items (f), (g), (h), (i), and (j) is admissible and requires an oral hearing. Counsel made a further application to call O.O., the author of the email and affidavit in item (i), as a witness. I granted this application and held a hearing on December 13, 2019. The evidence in items (a), (b), and (c) is inadmissible

- [11] In her October 7, 2019 package Counsel refers to an item entitled "disclosure that travel to Niger Delta is difficult."7 She indicates that this item is "Exhibit 10" and that it appears at "pages 141-144." No such document appears anywhere in this package or anywhere else in the Appellants' evidence. In accordance with Rule 27, each proposed piece of new evidence must be filed before the RAD. Item (a) is not properly before me and is therefore inadmissible.
- [12] The online article, Oyo still ranks high on FGM is dated October 5, 2017, over one year before the RPD's decision and nearly one and a half years before the date of the Appeal Record. This article is readily accessible online. Counsel has not explained how this article is new or could not have been provided with reasonable effort with the Appeal Record under Rule 29. Counsel has also not argued that this article was not reasonably available, or could not reasonably have been expected in the circumstances to be presented at the time of the RPD rejection. Item (b) is inadmissible.
- [13] The two articles in item (c) pre-date the perfection of the appeal. In addition, both of these articles repeat information about FGM/C, including its prevalence throughout Nigeria, which is already well documented in the Record. Neither document speaks to the IFA city of Port Harcourt. Item (c) is inadmissible. The evidence in items (d) and (e) is admitted but does not require a hearing
- [14] The Nigerian travel advisories and UK Home Office Report at items (d) and (e) are dated after the Appellants perfected their appeal. As such, they could not have been provided with the Appeal Record. They are also both relevant to the conditions in the proposed IFA and are new in that they speak to recent country conditions. These items meet the requirements of Rule 29. They also are dated after the RPD rejection and meet the requirements of 110(4). I further find that these documents are credible, relevant to the claim, and new. They are issued by the Canadian and UK governments and speak to recent country conditions. Items (d) and (e) are admitted into evidence. However, I do not find that these items require a hearing as they are not determinative the claim and they do not raise a serious issue as to the Appellants' credibility. The evidence in items (f), (g), (h), (i), and (j) is admitted and I held a hearing
- [15] The Appellants provided two newspaper articles readily available online, as well as a print newspaper notice, at items (f), (g), and (h). These items have been published by This Day, Oasis Magazine, and Sharp Edge News. These items indicate that the Appellants' agents of harm remain interested in locating them in order to perform FGM/C and other customary rites. The articles include the Appellants' full names and photographs as well as threats from their agents of harm. This evidence, if credible, establishes that the Idowu royal family remains motivated to locate the Appellants and is willing and able to use the news media in their search. Items (i) and (j) corroborate the Appellants' allegations about how they learned about this evidence.

- [16] The evidence in items (f) and (g) pre-date the perfection of the appeal. However, Counsel argues that the Appellants only became aware of the existence of these articles in May 2019 after speaking with a friend and the Associate Appellant's brother in Nigeria and with O.O. during his visit to Canada. This is corroborated by the Appellants' appeal affidavit. As such, I find that these articles could not have been filed with reasonable effort by the Appellants in their Appeal Record. They are also both relevant and probative and bring new evidence to the appeal. These items meet the requirements of Rule 29. They are also dated after the RPD rejection and meet the requirements of 110(4). I further find that these documents are prima facie credible, relevant to the claim, and new. Item (f) is readily available online and the Board's Research Directorate located item (g) in the Daily News archives, confirming that this notice was published.⁸
- [17] The evidence in items (h), (i), and (j) arose after the Appellants perfected their appeal. As such, they could not have been provided with the Appeal Record. They are also relevant, probative, and bring new evidence to the appeal. These items meet the requirements of Rule 29. Their contents arose after the RPD rejection and they meet the requirements of 110(4). I further find that these documents are prima facie credible, relevant to the claim, and new. Item (h) is an article readily available online and item (i) includes a sworn statement.
- [18] Items (f), (g), (h), (i), and (j) are admitted into evidence. These items are central to the claim as they relate to the viability of the IFA location, in particular to the means and motivation of the agents of harm to locate the Appellants. I am mindful that information in the National Documentation Package (NDP) for Nigeria indicates that brown envelope journalism is practiced in Nigeria and that it is "very common" for "ordinary citizens in Nigeria to bribe journalists to create or modify news stories."⁹ As such, this new evidence raises a serious issue as to the Appellants' credibility. Finally, these items, if accepted, are determinative of the viability of the IFA and justify allowing the Appellants' claim. If accepted, this new evidence demonstrates both the means and motivation of the agents of harm to locate the Appellants throughout Nigeria. As such, I held a hearing on December 13, 2019. This hearing was limited to the new evidence in items (f), (g), (h), (i), and (j). During the RAD hearing I did not have the jurisdiction to hear and test the credibility of evidence already presented to the RPD.
- [19] The Appellants' testimony at the RAD hearing was consistent with the new evidence presented on appeal. Their explanations for how they learned about the newspaper articles and notice was consistent with the timeline of the articles as well as the other supporting evidence filed, including emails and an affidavit. The Appellants testified under oath and in a consistent manner about the provenance of the three newspaper articles. They insist that they played no part in the publication of any of the three articles. Absent any reason to doubt the credibility of the Appellants' allegation, I accept, on a balance of probabilities, that they were not behind the publication of these articles. In addition, the testimony of the Appellants' witness, O.O., a sailor in the US navy, was also consistent and credible. He spoke in detail about discovering the notice in This Day and learning about the agents of harm and

their continued interest in the Appellants during his recent trip to Nigeria. His testimony corroborates the Appellants' allegations that their agents of harm have the means and motivation to search for them in Nigeria.

ANALYSIS

- [20] My role is to look at all the evidence and decide if the RPD made the correct decision.¹⁰
- [21] Counsel's written submissions on appeal are often difficult to follow and misapprehend the very basis for the Appellants' appeal. For instance, Counsel writes: "I urge the RAD to take a close look at the questioning of the [RPD] panel. It was detailed and required follow up answers and."¹¹ The sentence is incomplete. It is unclear what Counsel's concern is with the RPD's questioning. Having undertaken my own independent assessment of the Record, I find that the RPD's questioning at the hearing was fair, thorough, and responsive to the Appellants' testimony. Moreover, Counsel argues that the "Appellants had canvassed the issue of IFA at their refugee hearing and the RPD Panel took it off the table."¹² This is incorrect on its face. The RPD rejected the Appellants' claims based on its finding that Port Harcourt is a viable IFA. The availability of an IFA was the only determinative issue and it was never "taken off the table."
- [22] I have undertaken my own independent assessment of the entire Record. In light of the new evidence presented on appeal, I find that Port Harcourt is no longer a viable IFA. The Appellants do not have a viable IFA in Port Harcourt in light of the new evidence
- [23] The RPD correctly set out the two-prongs of the IFA test. After engaging in a thorough analysis that is responsive to the Appellants' particular circumstances, the RPD found that Port Harcourt is a viable IFA. Having independently assessed the evidence, I find that the IFA location fails on the first prong in light of the new evidence. I find that the Appellants do not have a viable IFA.
- [24] The Chairperson of the Immigration and Refugee Board of Canada (IRB) released a Jurisprudential Guide (JG) regarding IFA locations in major cities in south and central Nigeria for Claimants fleeing non-state actors.¹³ The RPD correctly considered and applied the JG in its analysis. Generally, pursuant to the JG, an IFA is available to Nigerians fleeing non-state actors. However, in my view, given the new evidence on appeal, there are circumstances in this case which bring the facts outside those of the JG.
- [25] Unlike in the JG, the Appellants before me have provided credible evidence that their agents of harm have undertaken significant and sustained efforts to locate them throughout Nigeria. These efforts have continued even after the Appellants fled Nigeria. Specifically, the Appellants' unchallenged allegation is that their agents of harm:

- i. Subjected them to a series of death threats and physical assaults throughout Nigeria, including in Lagos, Abuja, Kano, and Benin City; ii. Approached the Principal Appellant's brother in Abuja in order to enquire about their current location; iii. Approached the Principal Appellant's sister in Port Harcourt, the IFA location, in order to enquire about their current location; and iv. Utilized three separate news agencies to publish articles and notices in an attempt to locate the Appellants.
- [26] I am satisfied, on a balance of probabilities, that the Appellants' agents of harm possess both the means and motivation to locate the Appellants in Port Harcourt. Where the agents of harm have demonstrated the means and motivation to pursue their victims in multiple cities, including in the proposed IFA location, then the IFA is not viable. The Appellants need not establish that their agents of harm "would be able to find [them]," but merely that they face a serious possibility of persecution.¹⁴ This is a low threshold. I find that the Appellants face a serious possibility of persecution on return to Nigeria and that they do not have a viable IFA. The Appellants' claim is well founded and they do not have access to state protection
- [27] The RPD did not decide on the issues of nexus, objective basis, and state protection. Having undertaken my own assessment of all of the evidence, I find that the Appellants have a nexus, that their claims are well-founded, and that they do not have access to operationally adequate state protection in Nigeria. The Appellants have a nexus to a Convention ground
- [28] All of the Appellants possess a nexus to a Convention ground based on their religion, through their objection to the performance of customary rites and forced religious conversion. The Minor Female Appellant also possesses a nexus to a Convention ground based on her particular social group, as a female child at risk of FGM/C. The Principal Appellant and Associate Appellant have also established derivative claims based on their particular social group, as the Minor Female Appellants' parents who object to the performance of FGM/C and fear persecution as a result. The Appellants claims are well-founded
- [29] The objective evidence supports the well-foundedness of the Appellants' claims. The Board's research documents indicate that where both parents agree, "nobody will walk into [somebody else's] home' to perform FGM on their daughters and that 'parents are free to refuse it.'"¹⁵ However, while unusual, there is evidence in the NDP that family elders in Nigeria have kidnapped children to forcibly perform FGM/C, even where the parents of a minor child are not in support of the practice.¹⁶ The Appellants specifically testified about their fear that the Minor Appellants could be kidnapped by their agents of harm. There is evidence in the most recent NDP that family elders may forcibly perform FGM/C on female children without their parent's knowledge.¹⁷ There is also evidence in the NDP that parents who refuse the performance of FGM/C may be subjected to "ostracism, stigmatisation and blackmailing, denial of intracultural benefits and physical abuse."¹⁸ The most recent NDP indicates that parents opposed to FGM/C could face "persecution or serious harm" where the act of FGM/C is enforced on a child.¹⁹ I find that the Appellants' claims are objectively well

founded and that they face a serious possibility of persecution upon return to Nigeria. The Appellants do not have access to operationally adequate state protection

- [30] The Appellants allege that they sought police protection multiple times in Nigeria but were told by authorities that their concerns are 'domestic in nature' and that they should abide by family traditions. The NDP corroborates the Appellants' allegation that police are reluctant to intervene in 'family matters.' Persons fleeing ritual practices may face discrimination in accessing police protection as the police may be reluctant to interfere with custodians of cultural rites in Nigeria and unwilling to provide protection.²⁰ There are serious deficiencies in state protection for victims of customary rites in Nigeria.
- [31] While FGM/C is criminalized in Nigerian federal law, through the Violence Against Persons Prohibition (VAPP) Act and state legislation, there has been no institutional response to the practice of FGM/C from either the Nigeria police or the Nigerian state; the law is not effectively enforced and FGM/C is considered a private matter.²¹ Indeed, "until the completion of the legislative process within the 36 Nigerian states, the [VAPP] Act 'is a mere paper document outside the Federal Capital Territory [FCT].'"²² Following the VAPP, the Nigerian government "took no legal action to curb the practice" and beyond public awareness campaigns, "evidence of [the VAPP's] enforcement since it came into force has not yet emerged."²³ Implementation of the VAPP is "uneven" and "[m]ost likely, police will also consider it a family affair and refuse to interfere."²⁴ The most recent NDP indicates that "it remains extremely difficult for women and girls to obtain protection from FGM."²⁵ The "practice of FGM 'continues to thrive' and several thousand girls and women are subjected to the practice despite its illegality."²⁶
- [32] While some efforts have been made to address FGM/C and the forcible performance of customary rites, the documentary evidence suggests that these efforts have not translated into state protection at the operational level. I find that the Appellants do not have access to operationally adequate state protection in Nigeria.

CONCLUSION

- [33] The appeal is allowed. I substitute my own decision that the Appellants are Convention refugees.²⁷ (signed) "J. Pollock" J. Pollock February 6, 2020 Date 1 Exhibit P-3, Appellants' proposed new evidence, June 5, 2019; Exhibit P-4, Appellants' proposed new evidence, June 24, 2019; Exhibit P-5, Appellants' proposed new evidence, August 21, 2019; Exhibit P-6, Appellants' proposed new evidence, September 20, 2019; Exhibit P-7, Appellants' proposed new evidence, October 7, 2019; Exhibit P-8, Appellants' proposed new evidence, October 11, 2019; and Exhibit P-10, Appellants' witness Application, December 3, 2019. 2 Personal identifiers have been removed, except where necessary to explain the reasoning of the decision. 3 Refugee Appeal Division Rules, SOR/2012-257, Rule 29(4). 4 Immigration and Refugee Protection Act (IRPA), SC 2001, c 27, as amended, at ss. 110(4). 5 Canada (MCI) v. Singh, 2016 FCA 96; Nteta-Tshamala v. Canada (MCI), 2019 FC 1191, at para. 25. 6 IRPA, at ss. 110(6). 7 Exhibit P-7, Appellants' proposed new evidence, October 7, 2019. 8 Exhibit RAD-3,

IRB Research Directorate Document NGA-QR-00026-E, provided to Appellants November 15, 2019. 9 Exhibit RPD-1, RPD Record, Exhibit 6, National Documentation Package (NDP) for Nigeria (10 July 2018), Item 3.24. 10 Canada (MCI) v. Huruglica, 2016 FCA 93, at para. 103. 11 Exhibit P-2, Appellants' Memorandum, at p. 18, para. 39. 12 Exhibit P-7, Appellants' proposed new evidence, October 7, 2019, at p. 3. 13 X (Re), 2018 CanLII 52123 (CA IRB), Identified by the Chairperson as a Jurisprudential Guide on July 6, 2018. 14 Henguva v. Canada (MCI), 2013 FC 483, at para. 16. 15 Exhibit RPD-1, RPD Record, Exhibit 6, NDP for Nigeria (10 July 2018), Item 5.12. 16 Exhibit RAD-5, NDP for Nigeria (29 November 2019), Item 1.4, at p. 41; Item 5.12, at p. 2; Item 5.28, at p. 11; Item 16.10, at p. 75. 17 Exhibit RAD-5, NDP for Nigeria (29 November 2019), Item 5.34, at paras. 2.4.15, 7.1.1., 7.1.3. 18 Exhibit RPD-1, RPD Record, Exhibit 6, NDP for Nigeria (10 July 2018), Item 5.28, at p. 12; Iduozee v. Canada (MCI), 2019 FC 38, at paras. 29-31. 19 Exhibit RAD-5, NDP for Nigeria (29 November 2019), Item 5.16, at para. 2.4.16. 20 Exhibit RPD-1, RPD Record, Exhibit 6, NDP for Nigeria (10 July 2018), Item 16.10, at p. 155-156; Item 10.8, at pp. 3-4. 21 Exhibit RPD-1, RPD Record, Exhibit 6, NDP for Nigeria (10 July 2018), Item 5.10, at p. 77; Item 5.21; Item 5.28. 22 Exhibit RPD-1, RPD Record, Exhibit 6, NDP for Nigeria (10 July 2018), Item 5.21. 23 Exhibit RPD-1, RPD Record, Exhibit 6, NDP for Nigeria (10 July 2018), Item 5.28; Item 5.21. 24 Exhibit RPD-1, RPD Record, Exhibit 6, NDP for Nigeria (10 July 2018), Item 5.30, at paras. 3.1.2, 8.1.5. 25 Exhibit RAD-5, NDP for Nigeria (29 November 2019), Item 5.12, at p. 6. 26 Exhibit RAD-5, NDP for Nigeria (29 November 2019), Item 5.21, at p. 3 27 IRPA, at ss. 111(1)(b).

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