

CANADA / JUDGMENT

TC0-03526

COURT

Refugee Appeal Division

DECIDED

30 November 2020

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RAD File / Dossier de la SAR : TC0-03526 TC0-03527 Private Proceeding / Huis clos Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX XXXXXXXX XXXX XXXX Personnes en cause Appeal considered / heard at Toronto, ON Appel instruit / entendu à Date of decision November 30, 2020 Date de la décision Panel Patricia Broad Tribunal Counsel for the persons who are the subject of the appeal Henry Igbino Counsel 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] I allow this appeal. XXXX XXXX (Principal Appellant) and XXXX XXXX XXXX (Associate Appellant) are citizens of Nigeria. They have appealed a denial for their claim for protection. They argue that they face persecution from the Principal Appellant's family. The Refugee Protection Division (RPD) denied their claim. Having reviewed the record, I have allowed the appeal. I substitute my own decision that the Appellants are Convention refugees.

BACKGROUND

- [2] The Principal Appellant and his wife, the Associate Appellant, base their claims on the following.
- [3] The Appellants XXXX XXXX XXXX in Lagos. The Associate Appellant experienced a miscarriage. In the spring of 2017, the Principal Appellant's family began to put pressure on them to seek spiritual help. The Appellants visited a village and consulted a spiritualist. They did not know the recommendation until they returned to Lagos. After then, the uncle informed them that the spiritualist had advised that the Associate Appellant undergo Female Genital Mutilation (FGM). He began to put pressure on them to do so; it is a family custom. The uncle began to visit with relatives to put pressure on them. The police were not helpful. The Associate Appellant lost a second child because of the harassment. In September 2017, the Associate Appellant had to leave through the back door when they visited. They assaulted the Principal Appellant, but neighbours intervened, and the assault stopped. The Associate Appellant went to Benin City, where her family was, to stay. Her family was divided on the issue. The Appellants fled to Canada and claimed protection. On XXXX XXXX, 2019, the Appellants had a baby daughter. She was born with XXXX XXXX XXXX and has a XXXX XXXX. Post Hearing Submissions; New and Late Evidence

- [4] Initially, the Appellants did not provide new evidence. However, in a Notice dated October 27, 2020, the Refugee Appeal Division (RAD) provided the Appellants with the opportunity to provide further submissions regarding credibility, the well-foundedness of their fear, and the National Documentation Package (NDP) in place at the time of writing the decision.¹
- [5] The Appellants did not provide any new submissions on these issues. They argued that the Notice was deficient. They stated that credibility was now in forefront. This argument is specious. It was always in forefront; the RPD wrote clearly that the claims could not succeed because of it.² In addition, the RAD can make additional credibility findings.³ The RAD had provided the Appellants with an opportunity to provide any submissions from the new NDP to support their claims; instead, they chose not to and relied on their submissions from February 2020. These submissions are not helpful.
- [6] Similarly, while the Appellants did not provide any new evidence with the Appeal Record, they did provide an affidavit from the Associate Appellant's brother with their response to the RAD Notice, stating that the Principal Appellant's family had visited her and threatened her. However, they did not provide submissions that address Rule 29 regarding the admission of late evidence. It is noted that the RAD Communiqué relating to Covid⁴ states that the Appellants must bring submissions in compliance with Rule 29. The Appellants must also show that the evidence meets the requirements of section 110(4) and the Raza principles, as modified in Singh.⁵ The Appellants note that the evidence post-dates the hearing, shows that the agents of persecution are still hunting them, and that it "brings currency to the appellants' travails in Nigeria". The meaning of the last phrase is unclear. The affidavit post-dates the hearing, but what is relevant for the purpose of Rule 29 is that it post-dates the date that the appeal was perfected, as does the incident it describes. The relevance and probative value are the behaviour of the agents of persecution. The content is new evidence. These considerations do relate to sections Rule 29, section 110(4), and some of the Raza principles. However, there are insufficient evidence and submissions to find that the evidence is from a credible source. The Appellants do not explain how they received this document. This is in the context of documentary evidence that fraudulent affidavits are easily available.⁶ Even court officials procure them openly.⁷ There is insufficient supportive evidence to find that the source and the circumstances of this affidavit are credible. As the affidavit does not meet the standard of credibility as set out in the Raza principles, it is not admitted onto the record. ORAL HEARING
- [7] The Appellants did not request an oral hearing initially; however, in response to the request for submissions, they have done so. As there is not any new evidence, I do not have jurisdiction to hold a hearing.⁸

ANALYSIS

- [8] In this appeal, the determinative issue is whether there is an Internal Flight Alternative (IFA). I have reviewed the entire record which includes listening to the recording of the hearing. A copy of this recording is on record. The RPD's Credibility Findings and Deference
- [9] In this appeal, the RPD's credibility findings are not owed deference. The RPD's credibility findings centre on the Appellants' failure to claim in the US. I note that the Appellants arrived in the US on XXXX XXXX, 2017 and left on XXXX XXXX, 2017.⁹ Given the limited nature of the RPD's findings, I do not find that the RPD is owed deference. It did not make any findings based on demeanour or any aspect where it had a meaningful advantage over the RAD. Do the Appellants have an IFA in Abuja?
- [10] The test for assessing an IFA is two-pronged and is set out in the Federal Court of Appeal decision in *Rasaratnam*:¹⁰
- (1) The Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists and/or the claimant would not be personally subject to a risk to life or risk of cruel and unusual treatment or punishment or danger, believed on substantial grounds to exist, of torture in the IFA.
 - (2) Moreover, the conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable in all the circumstances, including those particular to the claim, for him to seek refuge there.¹¹
- [11] Both prongs must be satisfied to find that the Appellant has an IFA. Once the issue of IFA has been raised and the potential IFAs have been identified, the burden of proof rests with the Appellant to show that she does not have an IFA. The finding of an IFA must be based on a distinct evaluation of the region for that purpose taking into account the Appellant's personal circumstances. An IFA must be a realistic and attainable option. An Appellant cannot be required to encounter great physical danger or undergo undue hardship in traveling there and staying there. Is there a serious possibility of persecution in Abuja? Familial pressure for FGM
- [12] The evidence relating to familial pressure to undergo FGM is credible. I find that the Appellants' account of consulting the spiritualist is credible and that there was significant pressure on the Associate Appellant to undergo FGM. The Appellants stated that while they consulted the spiritualist, they were not told the information regarding FGM until later. This is a unique detail which enhances credibility. While there may have been some exaggeration in their narrative, the account of the spiritualist included details that enhanced the overall account of the pressure from the family to undergo FGM. Similarly, the account of the miscarriage also enhances the Appellants' credibility. It provides a basis for the family's beliefs that there was a problem that needed to be remedied. For these reasons, I find that it is more likely than not that the account of family pressure to undergo FGM is credible.

Family in Abuja

- [13] Also, there is sufficient evidence to find that the family of the Principal Appellant, the agents of persecution, has a presence in Abuja. The Principal Appellant testified that he has family members living in major cities, but did not identify Abuja.¹² He stated that, "as far as I know, I have uncles, aunties spread all over the country as well. So, information could reach any of them easily if I move to any of those."¹³
- [14] There is more specific evidence that the Principal Appellant has family in Abuja. In his Basis of Claim (BOC), the Principal Appellant noted that he has a brother in Abuja.¹⁴ He also testified that he had stayed with his uncle, his father's brother, in Abuja.¹⁵ It is a different uncle than the one seeking FGM; however, both uncles are brothers of the Principal Appellant's father. Given that it is his father's family that has put pressure on the Appellants for FGM, having family present in Abuja does present a likelihood that they would be able to find them. Further, in this case, given that they would have their daughter with them, it is likely that the agents of persecution would have more motivation to find them. I have considered this in the context of the Principal Appellant's testimony that the Isoko tribe is large.¹⁶ Further, the agents of persecution have shown the capacity to find the Appellants in other towns, as they found the Appellants in Lagos. The presence of family in Abuja does increase the likelihood of persecution there.
- [15] Not all of the Appellants' arguments about how the agents of persecution could find them are compelling. Arguments regarding registration of cell phones, social media, and bank registration are not convincing. However, I do accept that the Isoko tribe is large and that the Principal Appellant has family in Abuja. That is sufficient to find a likelihood that the Appellants could be found. Objective Documentary Evidence
- [16] The objective documentary evidence regarding whether parents can refuse FGM is not consistent. However, sources appear to agree that it could include "ostracism, stigmatization and blackmailing, denial of intracultural benefits and physical assault,"¹⁷ as well as indicating that girls and women may be unable to marry and be considered dirty and promiscuous.¹⁸ I note that the Associate Appellant fits the profile of a woman who would be subjected to FGM. It is less prevalent with uneducated women.¹⁹ The prevalence appears to be highest among the wealthier, better-educated women in urban areas.²⁰ The Appellants are educated, middle class, and urban. The Principal Appellant has post-secondary degrees;²¹ the Associate Appellant started university.²² Also, they lived in the southern part of Nigeria. On record is documentary evidence that states that FGM is more widely practiced in the southern part of the country, with a prevalence from 65 to 77%. I find that the objective documentary evidence indicates that the Associate Appellant fits the profile of women are likely to be forced to undergo FGM. This evidence supports the likelihood that she would be forced to undergo FGM. Summary of whether there is a serious possibility of persecution in Abuja

- [17] There are some credibility concerns that detract from the credibility of the claim. As an example, the neighbour's affidavit has two different addresses on it.²³ This does not enhance the claim. However, in its essence, there is sufficient credible evidence to find that it is more likely than not that the Associate Appellant is being pressured for FGM. Further, while the documentary evidence is mixed, there is, in this case and, in these particular circumstances, sufficient documentary evidence to find that there is a serious possibility of serious harm in Abuja. I accept that the Appellants experienced ongoing threats. In other words, the weight of the credible evidence on central issues supports the Appellants' claim. While some of the evidence regarding past assault²⁴ and escaping through the back door may not be as credible, I do accept that the Appellants felt so threatened by the family pressure that the Associate Appellant went to Benin City to hide from the family. Evidence of past persecution is not necessary for a finding of a forward-looking risk of persecution. And, as the Appellants now have a daughter, this risk is increased. For these reasons, and in these circumstances, I find that there is a serious possibility of persecution in Abuja. State protection
- [18] The testimony about the police involvement is not clear. As an example, the testimony about the police report was vague.²⁵ However, the evidence still leads to the conclusion that it is not likely that the police would not help the Appellants, even in Abuja. The Nigerian Violence Against Persons (Prohibition) Act, 2015 (VAPP) does criminalize harmful traditional practices, including FGM, and is adopted by Abuja. However, as of June 2018 there had been no prosecutions under VAPP.²⁶ Although laws banning FGM exist in many states, the practice remains widespread and reporting and prosecution are low.²⁷ I do find that the Appellants would not have state protection in Abuja. Is it reasonable for the Appellants to relocate in Abuja?
- [19] I have considered whether the Appellants would experience undue hardship to relocate and stay in Abuja. For each claim, different factors take on different levels of relevance. This depends on their individual characteristics.
- [20] The Appellants are educated and ran a hotel in Lagos. They are Isoko, which is not a major ethnic group;²⁸ however, I accept the testimony that it is a large tribe.
- [21] Some considerations do not present barriers. Indigeneship is an issue in Nigeria; however, Abuja is diverse, and discrimination does not occur for access to public services.²⁹ The Appellants speak English, so language is not a barrier. Both are Christian, which is a major religion in Nigeria; this would not be a barrier to relocation. Employment
- [22] I find that there would be significant hardship for the Appellants to find work in Abuja. There is evidence that one can acquire civil service jobs,³⁰ but there is also evidence that there can be discrimination for government jobs³¹ and that there are quotas for them.³² The job market in Abuja is competitive.³³ The Principal Appellant stated that he could not set up a business in Abuja because he did not have the financial capacity to do so.³⁴ Further, there is insufficient evidence that the Appellants have the connections needed to find work.

While the Principal Appellant has a brother in Abuja and he lived with his father's younger brother in Abuja,³⁵ these are people who are related to the agents of persecution. It is unreasonable to expect the Appellants to rely on their support to relocate. I find that employment is a significant barrier for the Appellants. Housing

- [23] Further, while there may not be discrimination for housing, there are significant issues with housing. Rent is notoriously steep, and there is a rising housing shortage. According to an Immigration and Refugee Board (IRB) Response to Information Request (RIR): The EASO states that a "housing problem" exists both in Abuja and in Lagos, where there is an estimated deficit of 600,000 and 2.5 million houses, respectively (EU Nov. 2018, 39). A 2016 World Bank report on the housing situation in Nigeria states the following: In Lagos, Ibadan, Kano, and Abuja, the need for housing is rising by about 20 percent a year. Current total output in the formal housing sector is estimated at no more than 100,000 units. While no good data exist, it is clear that the formal sector is only producing a fraction of the total number of urban units needed each year. (The World Bank 2016, para. 18)³⁶
- [24] The documentary evidence leads to the conclusion that finding housing would be a significant barrier for the Appellants. Separation of child from parents
- [25] The Appellants' daughter is a Canadian citizen. Should the parents relocate to Abuja, they would have to choose whether to leave the child in Canada, where she would receive better medical attention, or whether she should return with them to a country where she would not have the same medical treatment. A difference in medical treatment is not a reason to find that an IFA is unreasonable. However, in this case, the child's illness does increase the likelihood that the child would be left in Canada to receive sufficient medical care. The question then becomes whether it is reasonable to separate the parents from their child; or, in other words, whether this separation is an undue hardship.
- [26] The RPD pointed out that the RAD is not the forum to adjudicate Humanitarian and Compassionate matters. This position was noted in Kanagaratnam.³⁷ However, the Federal Court later considered the issue of separating children from parents in the context of an IFA where the issue was parental separation from a child and undue hardship. ³⁸ This more recent decision, Ramachanthran, is directly on point. The Federal Court directed decision-makers to consider whether the separation from an Appellant's children was unduly harsh and not reasonable; to not do so is an error. I find this point applies in this appeal. Further, I have considered Ranganathan,³⁹ where the Federal Court of Appeal has noted that the line between Humanitarian and Compassionate grounds should not be blurred. However, the facts in Ranganathan are significantly different where the issue is not the separation between parents and children. The central issue before me is the separation; I find that it is distinguishable from the facts in Ranganathan. Further, I am not considering the best interests of the child; I am considering the effect of the separation on the Appellants.

- [27] I find that the holding in Ramachanthran applies directly to this appeal. I have considered the effect of living without their daughter would have on the Appellants. I find that this would constitute undue hardship to the Appellants.
- [28] Further, should the parents decide to bring their daughter to Abuja with them, they do not only face a different medical system. Their ability to find work and accommodation would be impacted by their responsibilities to a child with a significant medical condition. It would increase the level of hardship to the point where there would be undue hardship. Summary for reasonableness of relocation to Abuja
- [29] In this case, the cumulative effect of the housing and employment issues are such that the Appellants would face undue hardship should they be forced to relocate to Abuja. The barriers they would face would be intensified as they have the additional responsibility of a child who has a significant medical condition. This is in the context of documentary evidence that a lack of support can increase the level of difficulty to relocate.⁴⁰ While there is evidence that the Principal Appellant has a brother and an uncle in Abuja, they are related to the agents of persecution and are not likely to be supportive. Alternatively, separation from their child, who requires special care, is an additional hardship. When I consider the effect of this hardship, as well as those associated with the employment and housing issues, I find that relocating to Abuja constitutes undue hardship. I find it is not reasonable for the Appellants to relocate and stay in Abuja. Is there another IFA for the Appellants?
- [30] I accept that the Appellants have family all over Nigeria. The Isoko tribe, while it is a minority tribe, is large. The VAPP is not adopted in all of the states. It is unlikely that state protection would improve. Further, it is likely that there would be more issues of discrimination because of indigeneship in other areas.⁴¹
- [31] There is insufficient evidence to consider another IFA or to consider referring this matter back to the RPD for redetermination.

CONCLUSION

- [32] The appeal is allowed. I substitute my own decision that the Appellants are Convention refugees. (signed) Patricia Broad Patricia Broad November 30, 2020 Date 1 Exhibit RAD-1, National Documentation Package (NDP) for Nigeria, July 31, 2020. 2 Exhibit RPD-1, RPD Record, RPD Reasons and Decision, p. 7 at para. 21. 3 Akram v. MCI, 2018 FC 785 at paras. 5 and 17. 4 Communiqué to counsel, designated representatives and Minister's counsel, <https://irb-cisr.gc.ca/en/refugee-appeals/Pages/communique-graduated-return-business.aspx>. 5 M.C.I. v. Singh, Parminder (F.C.A., no. A-512-14), Nadon, Gauthier, de Montigny, March 29, 2016, 2016 FCA 96. 6 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, item 9.2. Immigration and Refugee Board of Canada, (IRB), Response to Information Request (RIR). NGA104978.E. November 4, 2014. 7 Ibid., at p. 13. 8 Section 110(6) of the Immigration and Refugee Protection Act (the Act). 9 Transcript of RPD hearing, p. 8. 10 Rasaratnam, Sivaganthan v. M.E.I. (F.C.A., no. A-232-91), Mahoney, Stone, Linden, December 5, 1991.

Reported: *Rasaratnam v. Canada* (Minister of Employment and Immigration), [1992] 1 F.C. 706 (C.A.). 11 *Thirunavukkarasu, Sathiyathan v. M.E.I.* (F.C.A., no. A-81-92), Heald, Linden, Holland, November 10, 1993. Reported: *Thirunavukkarasu v. Canada* (Minister of Employment and Immigration), [1994] 1 F.C. 589 (C.A.); (1993), 22 Imm. L.R. (2d) 241 (F.C.A.). 12 Transcript of RPD hearing, p. 44. 13 Transcript of RPD hearing, p. 45. 14 Exhibit RPD-1, RPD Record, Exhibit 2, p. 18. 15 Transcript of RPD hearing, p. 39. 16 Transcript of RPD hearing, p. 45. 17 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, item 5.28, Immigration and Refugee Board, RIR NGA105628.E, 13 September 2016, at p. 12. 18 Exhibit RPD-1, RPD Record, Exhibit 6, National Documentation Package (NDP) for Nigeria (29 March 2019), item 5.12, Immigration and Refugee Board, RIR NGA106183.FE, 29 October 2018, at p. 4. 19 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, item 5.28. 20 Exhibit RAD-1, NDP for Nigeria, July 31, 2020 item 5.22, ?Country Profile: FGM in Nigeria. 28 Too Many. October 2016, p. 8. 21 Exhibit RPD-1, RPD Record, Exhibit 1, p. 53. 22 Transcript of RPD Hearing, p. 38. 23 Exhibit RPD-1, RPD Record, Exhibit 13, p. 215. 24 Exhibit RPD-1, RPD Record, Exhibit 13, pp. 206-210. 25 Transcript of RPD Hearing, pp. 28-30. 26 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, item 5.2, Nigeria: The Law and FGM, 28 Too Many, June 2018, at p. 2. 27 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, item 5.28, at p. 9. 28 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, item 1.6, Nigeria. The World Factbook, United States. Central Intelligence Agency, at p. 3. 29 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, item 13.1, Immigration and Refugee Board, RIR, NGA106361.E, October 30, 2019, at p. 16. 30 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, item 13.1, at p. 15. 31 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, items 2.1, Nigeria. Country Reports on Human Rights Practices for 2019, United States. Department of State, March 11, 2020, at p. 38; item 13.1 at p. 7. 32 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, item 13.1 at p. 8. 33 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, item 13.1 at p. 16. 34 Transcript of RPD Hearing, at p. 34. 35 Transcript of RPD Hearing, at p. 39. 36 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, item 5.9, Immigration and Refugee Board, RIR, NGA106362.E, November 20, 2019, at p. 10. 37 *Kanagaratnam, Parameswary v. M.E.I.* (F.C.T.D., no. IMM-2542-93), Rothstein, July 8, 1994. 38 *Ramachanthran v. Canada* (Minister of Citizenship and Immigration), 2003 FCT 673 (CanLII) [hereinafter *Ramachanthran*]. 39 *Ranganathan v. Canada* (Minister of Citizenship and Immigration), 2000 CanLII 16789 (FCA), [2001] 2 FC 164. 40 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, item 13.1, at p. 12. 41 Exhibit RAD-1, NDP for Nigeria, July 31, 2020, items 2.1 and 13.1.

RAD File / Dossier de la SAR : TC0-03526 TC0-03527 RAD.25.02 (January, 2020) Disponible en français 2 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 (January, 2020) Disponible en français

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