

CANADA / JUDGMENT

TB8-20663

COURT

Refugee Appeal Division

DECIDED

16 December 2020

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RAD File / Dossier de la SAR : TB8-20663 TB8-20664 Private Proceeding / Huis clos Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX XXXX XXXX XXXXXXXX XXXX XXXX Personnes en cause (a.k.a. XXXX XXXX XXXX) Appeal considered / heard at Ottawa, ON Appel instruit / entendu à Date of decision December 16, 2020 Date de la décision Panel Delia Lewis Tribunal Counsel for the persons who are the subject of the appeal Maureen Silcoff 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 DECISION

- [1] I allow this appeal and substitute my own decision that the Appellants are persons in need of protection. OVERVIEW
- [2] XXXX XXXX XXXX XXXX (Principal Appellant) and XXXX XXXX XXXX (Associate Appellant) are citizens of Kenya. They allege that they fear persecution in Kenya from members of the Pokot community. They claim that the Principal Appellant, who is a XXXX and an XXXX, was assaulted by Pokot herders when he refused to allow them to graze their cattle on his family's land. The Appellants allege that after this confrontation some of the cattle were killed and the herdsmen threatened and searched for the Appellants who fled to XXXX and then to XXXX before traveling to Canada. The Appellants claim that since their arrival in Canada, Pokot community members have searched for them in Kenya, continued to threaten the Appellants and their family members and carried out a violent attack against their son.
- [3] The Refugee Protection Division (RPD) found that the determinative issue in this claim was whether the Appellants have an internal flight alternative (IFA) within Kenya. The RPD determined that the Appellants had a viable IFA in Mombasa or Nairobi and therefore they were not Convention refugees or persons in need of protection. The Appellants allege that the RPD erred in its IFA assessment. In addition, they request that the Refugee Appeal Division (RAD) admit new evidence on appeal regarding a violent attack against their family members and ongoing threats. I have conducted an independent assessment of this appeal. For the reasons that follow, I admit the new evidence, allow the appeal and find that the Appellants are persons in need of protection. NEW EVIDENCE The evidence presented by the Appellants is accepted

- [4] According to the law,¹ 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. that the claimants could not reasonably have been expected in the circumstances to bring to the RPD before the decision.
- [5] 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.²
- [6] The Appellants request that the Refugee Appeal Division (RAD) accept new evidence which includes a sworn statement from the Principal Appellant. In the statement, he explains that on XXXX XXXX, 2018, men who he believes are members of the Pokot community located his sister in Kenya and threatened to harm his son.³ The Principal Appellant claims that, approximately a week later, Pokot men found where his sister and XXXX had relocated to and XXXX XXXX XXXX XXXX XXXX. The Appellants submit that these allegations are corroborated by an affidavit from the Principal Appellant's sister⁴, two police reports⁵ and a XXXX XXXX⁶ for the Principal Appellant's XXXX which they also seek to have admitted as new evidence.
- [7] The new evidence post-dates the RPD's decision which is dated XXXX XXXX XXXX 2018. The Appellants argue that the new evidence should be admitted because it is relevant and probative to the issue of IFA in this case. They submit that this evidence demonstrates that the Pokot have continued to search for the Principal Appellant and targeted his family with violence. The Appellants also claim that this evidence establishes that the Pokot are motivated to find the Appellants throughout Kenya. Therefore, they would be at risk of harm should they return to Kenya.
- [8] I find that given the timeline of events these new documents could not have been submitted to the RPD before it made its determination. I have reviewed each of the new pieces of documentary evidence and find that they are relevant to this appeal for the same reasons as those articulated by the Appellants. I find that the Principal Appellant's statement and his sister's affidavit are credible on a balance of probabilities. These documents contain information regarding the identity of the Principal Appellant's sister and his son, where the Principal Appellant's sister lives, and the fact that the Principal Appellant's son was left in his sister's care which is internally consistent with previous documentary evidence submitted in this claim. In addition, the Principal Appellant's statement is a sworn statement and his sister's affidavit is notarized. I find that the death certificate and police reports are credible on a balance of probabilities as they appear to be authentic on their face and do not contain inconsistencies or errors which may be signs that they are fraudulent documents. Therefore, I admit these documents as new evidence. No oral hearing before the RAD
- [9] The Appellants have requested that the RAD hold an oral hearing if there are credibility concerns with the new evidence. In considering this request, I have reviewed the new evidence and the record. Much of the new evidence corroborates the Appellants' allegations and emanates from independent third parties which I find to be credible on a balance of

probabilities. Therefore, in my view, the new evidence does not raise a serious issue about the Appellants' credibility that is central to the determination of this appeal and would require an oral hearing.

ANALYSIS

Merits of the Appeal

- [10] My role is to look at all the evidence and decide if the RPD made the correct decision.⁷ The RPD erred in its IFA Assessment
- [11] I find that the RPD erred in its IFA assessment and that the new evidence further demonstrates that the Appellants do not have a viable IFA in Kenya.
- [12] The RPD accepted that the Appellants were singled out and targeted by Pokot tribesmen. The Principal Appellant was targeted by the Pokot men after he had a confrontation in which the Principal Appellant refused to let the Pokot herdsmen graze their cattle on his land in Laikipia. The RPD accepted that Pokot men continued to search for the Principal Appellant at his XXXX and later searched for him in XXXX, approximately 250 km from his hometown.⁸ The RPD also acknowledged the history of conflicts involving Pokot herdsmen in Kenya which is addressed in the national documentation and in several articles that the Appellants submitted as supporting documentary evidence. However, the RPD found that the determinative issue in this claim was IFA and rejected the Appellants' claim because it found that they could live in Nairobi or Mombasa without a risk of harm.
- [13] The Appellants submit that the RPD erred in its IFA analysis because it improperly reasoned that because there was no documentary evidence that armed groups of cattle herders generally went into urban areas to search for their victims, the Appellants would not face a risk of harm in Nairobi or Mombasa. The Appellants allege that in their case, the Pokot did go beyond the Appellants' home area where the initial confrontation occurred and searched for them in XXXX.
- [14] The Appellants submit that the RPD erred when it accepted this fact but discounted it on the basis that XXXX has a known athletic training centre so the Principal Appellant could easily avoid detection by going elsewhere and not running. The Appellants submit that this reasoning is wrong and the RPD erred because they need not be required to hide or curtail their activities in order for an IFA to be viable. The Appellants also submit that the new evidence demonstrates that they do not have a viable IFA in Kenya because the Pokot have continued to search for the Principal Appellant and his wife, threatened their family members and targeted their family with violence which has resulted in the XXXX of XXXX XXXX.
- [15] The IFA test has two prongs. First, 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

subjected to a risk to life or risk of cruel and unusual treatment or punishment or danger of torture in the IFA. Second, the conditions in the IFA must be such that it would not be unreasonable in all the circumstances, including those particular to the claim, for the claimant to seek refuge there. Both parts of the test must be met for an IFA to be viable.

- [16] In conducting its IFA analysis, the RPD reviewed the history of conflicts between herders and the invasion of private ranches and farms in Laikipia by Pokot herders. I note, as did the RPD that the Appellants have provided several articles that document the ongoing conflicts in Laikipia in which armed groups of cattle herders have invaded farms and ranches in the district. The RPD stated that "the claimants have provided no evidence that the armed groups of cattle herders have ever sought out any of their victims in large urban centers far removed from Laikipia such as Nairobi or Mombasa."⁹ While this is the case, I find that the Appellants provided the RPD with credible evidence that, on a balance of probabilities, the Pokot have continued to pursue the Principal Appellant and his family and travelled between locations that are several hours apart within Kenya in order to try to locate the Principal Appellant. In light of this evidence, I find that on a balance of probabilities, it is likely that in their personal circumstances the Pokot men would continue to search for the Appellants throughout Kenya.
- [17] I also find that the RPD erred when it found that the Appellants should be safe in Nairobi or Mombasa if the Principal Appellant no longer XXXX or XXXX as an XXXX because his connection to the XXXX XXXX in XXXX could have easily become known due to his XXXX as an XXXX and links to the XXXX XXXX. A claimant must not necessarily be able to practice the profession of their choice in a new location for that location to be found to be a viable IFA. However, I find that in this case the RPD was effectively requiring that the Principal Appellant keep a low profile in order to be safe in the IFA and the Federal Court has found that an IFA is not viable if a person has to remain in hiding in order to be safe.¹⁰
- [18] The Appellants came to Canada in XXXX 2017 to XXXX in an XXXX event. They claim that since their arrival in Canada, Pokot community members have continued to threaten the Principal Appellant and his family. I find that the new evidence submitted by the Appellants credibly establishes that, on a balance of probabilities, the Pokot have continued to search for them in Kenya. The documentary evidence indicates that the Principal Appellant's sister sought state protection from the Kenyan police after receiving threats which she believed came from the Pokot. While the police documented her complaints, the police have been unable to stop the threats or protect the Appellants' family members from being targeted.
- [19] The police report dated XXXX XXXX, 2018¹¹ states that the Principal Appellant's sister reported to the police station about the XXXX of her XXXX, the Appellants' XXXX, XXXX XXXX XXXX. The Principal Appellant's sister lives in XXXX but because she had received threats at her home, she relocated to XXXX. The police report and the Principal Appellant's affidavit states that at around 11:00 pm two men broke into their rented home in XXXX, pulled them out of the house, XXXX the Appellants' XXXX and said they would also kill the Principal Appellant. The Principal Appellant's sister believed that the men were the same

ones who had threatened them in XXXX. The police report states that the matter is under investigation, but the documentary evidence does not indicate whether the attackers were identified, whether any arrest has been made nor does it provide the current status of the police investigation.

- [20] I note that the national documentation indicates that violent and sometimes fatal criminal attacks, including home invasions, burglaries, armed car-jackings, and kidnappings can occur at any time and in any location in Kenya and criminals frequently use weapons during the commission of their crime.¹² Given the rate of crime in Kenya, it is possible that this attack which resulted in the XXXX of the Principal Appellant's XXXX was not related to the Pokot herdsmen. However, I find that, on a balance of probabilities, because of the Appellants' history of conflict and threats of harm from the Pokot, this attack was likely related to their alleged persecutors.
- [21] In light of the new evidence, and my acceptance of the Appellants' previous evidence regarding the continued efforts by Pokot herdsmen to harm them, I find that the Appellants would, on a balance of probabilities, face a risk of torture, a risk to life or a risk of cruel and unusual treatment or punishment in Kenya. I find that state protection in Kenya is inadequate to protect them from this forward-facing risk. The past efforts of the Principal Appellant and his family members to obtain protection from the police in Kenya have failed to adequately protect them from harm.
- [22] The most recent national documentation for Kenya indicates that the police have been making positive steps towards strengthening their services and effectiveness.¹³ However, despite these positive steps, police often lack equipment, resources, training, and personnel to respond to calls for assistance or other emergencies.¹⁴ Moreover, the police often lack resources and sufficient training in solving serious crimes and weaknesses in the judicial system contribute to slow prosecutions and large numbers of acquittals.¹⁵ Therefore, I find that the Appellants are persons in need of protection who would be harmed or subjected personally, on a balance of probabilities, to a risk of torture, a risk to life or a risk of cruel and unusual treatment or punishment should they return to Kenya.

CONCLUSION

- [23] The appeal is allowed. I substitute my own decision that the Appellants are persons in need of protection. (signed) Delia Lewis Delia Lewis December 16, 2020 Date 1 Subsection 110(4) of the IRPA. 2 Canada (Citizenship and Immigration v. Singh, 2016 FCA 96; Canada (Citizenship and Immigration) v. Raza FC 385 3 P-2, Principal Appellant's affidavit, Appellant Record at pages 115 - 117. 4 P-2, Principal Appellant's sister's affidavit, Appellant Record at page 122. 5 P-2, Police reports, Appellant Record at pages 120 and 126. 6 P-2, Principal Appellant's son's death certificate, Appellant Record at page 124. 7 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93; Rozas del Solar v. Canada (Citizenship and Immigration), 2018 FC 1145 8 RPD-1, RPD Record, RPD Reasons at paragraph 13, p. 7. 9 RPD-1, RPD Record, RPD Reasons at paragraph 12, p. 6. 10 Fosu v. Canada, 2008 FC 1135. 11

P-2, Appellant Record at page 126. 12 RAD -1, NDP Kenya 30 September 2020, item 7.9: ?
Kenya. 2019 Crime and Safety Report, United States. Overseas Security Advisory Council, 14
March 2019. 13 Ibid. 14 Ibid. 15 Ibid.

RAD File / Dossier de la SAR : TB8-20663 TB8-20664 RAD.25.02 (January, 2020) Disponible en
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Prepared on 28 October 2026 · Esheria