

CANADA / JUDGMENT

TB9-19688

COURT

Refugee Appeal Division

DECIDED

30 July 2020

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RAD File / Dossier de la SAR : TB9-19688

TB9-19689

TB9-19690

TB9-19691

Private Proceeding / Huis clos

Reasons and decision ? Motifs et décision

Persons who are the subject of the appeal

XXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX XXXXXXXXXXX XXXX

Personnes en cause

Appeal considered / heard at

Toronto, ON

Appel instruit / entendu à

Date of decision

July 30, 2020

Date de la décision

Panel

David Morris

Tribunal

Counsel for the persons who are the subject of the appeal

Umme Habiba

Conseil des personnes 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] These are my reasons for dismissing the appeals of XXXX XXXX XXXX (the Principal Appellant), XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX (the Minor Appellants), XXXX XXXX XXXX XXXX XXXX XXXX (the Associate Appellant), from a decision of the Refugee Protection Division (RPD), dated July 10, 2019, which rejected their claims for refugee protection.

BACKGROUND

- [2] The Minor Appellants fear being forced to undergo female genital mutilation (FGM) by the Associate Appellant's mother (the mother) and family. The Appellants fear being harmed or killed by the same actors for refusing to have their daughters, the Minor Appellants, undergo FGM.
- [3] The RPD found the determinative issues in the Appellants' claims were internal flight alternative (IFA) and the Appellant's credibility in relation to the IFA.
- [4] The RPD considered the Jurisprudential Guide (the JG) with respect to persons fearing non-state actors in Nigeria.¹ It determined that a viable IFA existed for the Appellants in Ibadan. The RPD found that:
- (1) The Appellants failed to establish a serious possibility that the Associate Appellant's mother or his family have the influence and power to locate the Appellants in Ibadan;
 - (2) A weighing of the relevant factors, including language, travel and transportation, indigeneship and ethnicity, employment and education, religion, medical and mental health care did not demonstrate, on a balance of probabilities, that relocation to Ibadan would be unreasonable or unduly harsh to the Appellants.

ISSUES ON APPEAL

- [5] The Appellant alleges the RPD:
- (1) failed to address the risk of FGM;

- (2) erred and showed bias in selecting Ibadan as a viable IFA without giving any reasons;
- (3) did not provide reasons for finding there was no serious possibility of persecution in Ibadan;
- (4) erred in determining the Associate Appellant's mother or relatives did not have the ability to locate the Appellants in Ibadan; and
- (5) with regard to the reasonableness of the IFA, gave undue emphasis to the Appellants' ability to speak and understand English.

ANALYSIS

- [6] My role is to look at all the evidence and decide if the RPD made the correct decision.²
- [7] I have reviewed the entire Record, including the audio recording of the RPD proceedings and the documents and submissions of the Appellants. I find the RPD enjoyed no meaningful advantage with respect to the assessment of this evidence. I therefore find I owe no deference to the RPD.

New evidence

- [8] I find that some of the new evidence submitted by the Appellants is, on a balance of probabilities, fraudulent. I have excluded this evidence, as I find it is not credible as regards the source and circumstance of its creation. However, I find much of the other documentation is admissible.
- [9] I may only admit new evidence if: 1) the evidence arose after the rejection of the claim; 2) the evidence was not reasonably available before the rejection; or 3) the appellant could not have reasonably been expected to present the evidence before the rejection.³ If one of these criteria is met, I must then determine whether the evidence is new, credible and relevant.⁴
- [10] The Appellants tendered several documents along with their Record as proposed new evidence. These documents include:
 - (1) XXXX XXXX XXXX of the Associate Appellant's mother showing her as the XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX;
 - (2) a printout of an internet search of the XXXX XXXX XXXX XXXX XXXX XXXX XXXX;
 - (3) a poster indicating that the Associate Appellant's father XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX as a member of the People's Democratic Party (the poster);
 - (4) a notice from the XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX calling a family meeting and offering a reward for information leading to the "capture" of the Associate Appellant and his family;

- (5) a printout of jobs postings XXXX XXXX;
 - (6) a notice from the XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX
XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX;
 - (7) an affidavit from a friend, dated 6 August 2019 (the affidavit of XXXX).
 - (8) two online articles:
 - (i) XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX
XXXX XXXX XXXX XXXX;
 - (ii) XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX
XXXX XXXX XXXX XXXX XXXX.
- [11] The Appellants submit that the new evidence tendered with their Record refers to facts and circumstances which are central to the RPD's decision. They submit this evidence demonstrates they are at risk of persecution throughout Nigeria, including Ibadan.
- [12] The Appellants now submit that the Associate Appellant's father (the father) XXXX XXXX
XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX"5 In support of this submission, the Appellants tendered a campaign poster which indicates the father XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX member of the People's Democratic Party (PDP).
- [13] The father's involvement in politics and his XXXX XXXX XXXX XXXX XXXX XXXX were raised for the first time in the Appellants' Appeal Record.
- [14] The Refugee Appeal Division (RAD) therefore asked the Research Directorate for any information that could be found on XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX. It also asked for information on XXXX - including the names of its owners and directors. The Research Directorate's response to this request showed that no information on the father XXXX XXXX XXXX XXXX XXXX XXXX could be found - although there was information on a number of other potential candidates for the PDP.
- [15] Likewise, while information was found relating to XXXX, this information did not provide the names of the owners and directors. The Appellants were given the opportunity to respond to this information through written submissions.⁶
- [16] The Appellants provided their submissions along with the following documents:
- (1) a Statutory Declaration of the Associate Appellant, dated 17 March 2020 (the Statutory Declaration of AA);
 - (2) a letter of Offer of Employment XXXX XXXX to a third party, dated 17 October 2019;
 - (3) a photograph of the information board from XXXX;
 - (4) a memo from the PDP, dated 13 September 2019 (the Memo); and

- ## The Associate Appellant's Statutory Declaration is admissible

The Memo and XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX are not admissible

[illegible]

- [24] I find the Associate Appellant's submissions with regard to his father's XXXX XXXX XXXX XXXX XXXX were intended to deliberately mislead the RAD. I find the poster and Memo were, on a balance of probabilities, created for purpose of this appeal. The source and circumstance of their creation is therefore not credible. They will not be admitted into evidence.

Documentation relating to XXXX is admissible

- [25] The mother's business card and the internet printout which shows XXXX XXXX XXXX XXXX XXXX contains essentially the same information that was disclosed to the Appellants on 5 March 2020.
- [26] All of the other documentation relating to XXXX originated after the RPD issued its reasons. I therefore accept these documents could not reasonably have been submitted prior to the rejection of the Appellants' claims.
- [27] The information contained in these documents is new and relevant, because it relates to the issues which the RPD identified as determinative: namely, IFA and the Appellants' credibility with respect to IFA. I also find the documentation presented is credible to the limited extent that it appears on its face to be from the sources claimed. However, significant questions remain as to the credibility of the information contained in these documents, which I will deal with below.
- [28] I find the same reasoning applies to the notice from XXXX XXXX calling for a family meeting.
- [29] The business card, online incorporation information, online job advertisements, both newspaper notices, the offer of employment and the photos from XXXX notice board will therefore all be admitted.

The Affidavit of XXXX is not admissible

- [30] This affidavit is dated 6 August 2017 and therefore postdates the rejection of the Appellants' claim. However, in assessing the admissibility of an affidavit, I must look to its content, and not simply the date it was sworn.
- [31] The affiant indicates she has known the Associate Appellant and his family for several years. The basic thrust of the affidavit is that the Associate Appellant has a very large and powerful extended family spread throughout Nigeria and that, in January 2018, the Associate Appellant's mother informed the affiant that the family is searching for the Appellants in order to perform circumcision on the Minor Appellants.
- [32] The Appellants argue, in essence, that they could not reasonably be expected to have presented this evidence before rejection of their claim. They submit they, "... were not properly and timely advised by the previous counsel that they should try to procure and produce evidence about these issues. The Claimants were never guided or advised by the

previous counsel to make any search regarding the male claimant's mother's business, power or wealth or regarding her or her family members' ability to find the Claimants anywhere (sic) in Nigeria."¹¹

[33] I do not accept these arguments. IFA was clearly in issue at the hearing. In fact, it was the Appellants' own Basis of Claim narratives and their testimony that first raised the issue of the power and influence of the mother and the family and their ability to locate the Appellants.¹² I find no basis for the Appellants' contention that they were not aware they may need evidence to support one of the core allegations underlying their claim.

[34] The Appellants have also not complied with the Immigration and Refugee Board of Canada's (IRB's) Practice Notice with regard to their allegations against former Counsel which requires, amongst other things, that former Counsel be notified of the allegations against him and provided an opportunity to respond.¹³

[35] I find the Appellants could reasonably have been expected to present the affidavit of XXXX and the evidence contained therein prior to the rejection of their claim. The affidavit will not be entered into evidence.

The online articles are admissible

[36] The two online articles relate to conditions in the proposed IFA subsequent to the rejection of the Appellants' claims. They will therefore be admitted.

No need to admit birth certificate of the Appellants' Canadian-born child

[37] The Appellants' Canadian-born child is a citizen of Canada and has made no claim for refugee protection. The birth certificate is not relevant to any issue in this appeal. It will not be admitted.

Notice regarding documentation or submissions in light of the COVID-19 pandemic

[38] On June 15, 2020, the RAD provided Counsel with a notice related to the COVID-19 pandemic. This notice advised Counsel that they had 30 days from the date that the notice was received to submit any document or written submission. Counsel has not submitted any document or written submissions in response to this notice.

Oral Hearing

[39] I find I am able to assess the evidence and reach a determination in this appeal without holding an oral hearing. The request for an oral hearing is denied.

IFA is the determinative issue

[40] The Appellants argue that, in finding IFA was the determinative issue, the RPD had, "...a pre determined (sic) mindset to deny the claims."¹⁴

- [41] I find no support for this allegation. Simply finding that IFA was determinative does not indicate any pre-disposition to reject the claims.
- [42] The Appellants submit that the RPD erred by failing to make any findings or analysis on the "main claims."¹⁵ While it perhaps would have been preferable for the RPD to state specifically whether it found the central allegations of the claim had been established or not, the RPD committed no error simply because it focussed on the issue which was determinative of the Appellants' claims.
- [43] I accept the Appellants' submission that, having found IFA to be determinative, it is reasonable to assume the RPD found that the Appellants had established a genuine fear the Minor Appellants would be subjected to FGM.¹⁶ For purposes of my analysis, I find that the children were threatened with FGM by the mother and the family of the Associate Appellant. However, I find the RPD's IFA analysis was correct.

The Appellants have a viable IFA in XXXX

- [44] The test for assessing an IFA is two-pronged and is set out in the Federal Court of Appeal's decision in *Rasaratnam*.¹⁷
- (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.
- [45] Both prongs must be satisfied to find that the Appellants have an IFA. Once the issue of IFA has been raised and the potential IFAs have been identified, the burden of proof rests with the Appellants to show that they do not have an IFA.¹⁸
- [46] The Appellants argue that the RPD showed bias in finding XXXX is a viable IFA without giving any reasons. There is no merit to this argument. The RPD set out in detail why the Appellants failed on both prongs of the IFA test - making clear reference to both the documentary evidence and the testimony of the Appellants.
- [47] The Appellants argue, in essence, that the RPD erred in determining there was insufficient evidence to establish, on a balance of probabilities, that the Associate Appellant's mother or extended family could locate them in Ibadan.

- [48] Specifically, the RPD found the Appellants had not provided any evidence to support their allegation that the mother operated a large timber business which gave her the power to locate the Appellants anywhere in Nigeria or that the mother XXXX XXXX XXXX XXXX XXXX who could assist in locating the Appellants. The RPD found, for example, that the Appellant easily could have provided proof of the company's website.
- [49] The Appellants now allege they were not properly advised by Counsel to produce evidence with respect to the mother or the family.
- [50] I see no merit in the argument that the Appellant's were not properly advised. In part, this is because the Appellants have failed to inform former Counsel of their allegations against him and to allow him to respond.
- [51] As well, the Appellants have now provided the evidence they say former Counsel failed to advise them to produce at their hearing. I have considered all of this evidence, determined that much of it is admissible and find I am able to adequately assess it. In other words, even if the Appellants were not properly advised by their previous Counsel, which I find, on a balance of probabilities, has not been established, I find I have remedied this issue on appeal by admitting much of the new evidence.
- [52] However, I find the content of these documents is simply too fortuitous to believe. I find that, on a balance of probabilities, they are not genuine but were produced to counter specific findings made by the RPD with respect to IFA.
- [53] For example, the RPD mentioned the Appellants could have provided evidence of XXXX XXXX. The Appellants now submit a notice from a newspaper in Nigeria purportedly giving notice to customers that the XXXX XXXX XXXX XXXX XXXX.¹⁹
- [54] The RPD identified Ibadan as a viable IFA. The Appellants now produce documents which purport to show that XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX.²⁰
- [55] The RPD found there was no evidence to support the extended family's ability to locate the Appellants in Ibadan. The Appellants now produce a newspaper notice purporting to show that they are from a large and influential Royal Family, asking for information leading to the capture of the Appellants and indicating that the family has recently acquired land in several parts of Nigeria, including Ibadan.²¹
- [56] I find that the timing of this documentation, all of which post-dates the rejection of the claims, despite the Principal Appellant and Minor Appellants having fled XXXX XXXX XXXX XXXX XXXX,²² is too suspiciously coincidental to be credible.²³
- [57] Even if I accept that the mother XXXX XXXX XXXX XXXX XXXX, I find that the evidence is not reliable enough to support the Appellants' allegations that XXXX XXXX XXXX XXXX XXXX XXXX or that the mother or the family have any power or influence in Ibadan.

- [58] Considering all of the above, I find the Appellants have failed to show, on a balance of probabilities, that the mother or extended family have the ability to locate them or to harm them in the proposed IFA.
- [59] The Appellants fail on the first prong of the test.
- [60] With regard to the second part of the test, in its decision, the RPD applied the then JG on possible internal flight alternatives for persons fearing non-state actors. Although the JG has since been revoked, it may still provide a useful framework for consideration of an IFA. However, each case must be assessed on its own facts.
- [61] The only argument raised by the Appellants with respect to the RPD's IFA analysis under the second prong is that, "[i]t was very wrong in part of the [RPD] to give more emphasis on the Claimant's ability to speak and understand English or livelihood."²⁴
- [62] However, the RPD did not limit its consideration to language ability or livelihood. Rather, in addition to language and livelihood, it considered travel and transportation to the proposed IFA, the Appellants' religion, education, indigeneship and ethnicity, and the availability of medical and mental health care.
- [63] I find the RPD's assessment was comprehensive. I find the RPD was correct, both in determining the relevant factors for consideration and in its conclusion that, on a balance of probabilities, the proposed IFA is neither unduly harsh nor objectively unreasonable.
- [64] The Appellants have presented two articles on appeal which report two violent incidents in Ibadan. While crime is an issue in Ibadan, as it is elsewhere in Nigeria, I do not find these articles in themselves sufficient to establish, on a balance, that Ibadan would be so unsafe for the Appellants as to make it an unreasonable IFA.
- [65] The Appellants therefore also fail on the second prong of the IFA test. This is determinative of the Appellants' claims under both section 96 and 97 of the Immigration and Refugee Protection Act (IRPA).

CONCLUSION

- [66] The RAD dismisses the appeal and confirms the decision of the RPD that the Appellants are neither Convention refugees nor persons in need of protection, pursuant to paragraph 111(1)(a) of the IRPA.

David Morris

(signed)

David Morris

July 30, 2020

Date

1 Refugee Appeal Division, TB7-19851, Reasons and Decision, 17 May 2018.

2 M.C.I. v. Huruglica, Bujar (F.C.A., no. A-470-14), Gauthier, Webb, Near, March 29, 2016, 2016 FCA 93; Rozas Del Solar, Paola v. M.C.I. (F.C., no. IMM-2645-17), Diner, November 14, 2018, 2018 FC 1145.

3 Subsection 110(4) of the IRPA.

4 Raza v. M.C.I. (F.C.A., no. A-11-07), Linden, Sharlow, Ryer, December 6, 2007, 2007 FCA 385, as endorsed in M.C.I. v. Singh (F.C.A., no. A-512-14), Nadon, Gauthier, de Montigny, March 29, 2016, 2016 FCA 96; [2016] 4 FCR 230.

5 Exhibit P-2, Appellants' Record, at p. 7, para. 3.2.

6 Exhibit RAD-1, Member's Request for Submissions, 5 March 2020.

7 Exhibit P-3, Appellants' Response to the RAD's Request for Submissions, with attached documents, received 17 March 2020.

8 Which includes the poster from the new evidence submitted with the Appellants' Record, and the Memo and paragraphs 16 through 19 of the Statutory Declaration of the Associate Appellant which were submitted along with Exhibit P-3, the Appellants' Response to the RAD's Request for Submissions.

9 Exhibit P-3, Appellants' Response to the RAD's Request for Submissions, 17 March 2020, XXXX XXXX XXXX XXXX dated 17 March 2020, paras. 16 and 18.

10 Exhibit P-3, Appellants' Response to the RAD's Request for Submissions, 17 March 2020, XXXX XXXX XXXX XXXX, dated 17 March 2020, Exhibit "C".

11 Exhibit P-2, Appellants' Record, at p. 6.

12 Exhibit RPD-1, RPD Record, Exhibit 2, at pp. 19-20 and 36-37; RPD Hearing Recording, 12 June 2019, from 01:13:53 through 01:28:37.

13 IRB, Practice Notice - Allegations Against Former Counsel, effective 10 September 2018; <https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/allegations-former-counsel.aspx>.

14 Exhibit P-2, Appellants' Record, at p. 4.

15 Ibid.

16 Ibid.

17 Rasaratnam v. M.E.I. (F.C.A., no. A-232-91), Mahoney, Stone, Linden, December 5, 1991; [1992] 1 F.C. 706 (C.A.).

18 Thirunavukkarasu v. M.E.I. (F.C.A., no. A-81-92), Heald, Linden, Holland, November 10, 1993; [1994] 1 F.C. 589 (C.A.); (1993), 22 Imm. L.R. (2d) 241 (F.C.A.).

19 Exhibit P-2, Appellants' Record, at p. 29.

20 Exhibit P-2, Appellants' Record, at pp. 14-23 and 29.

21 Exhibit P-2, Appellants' Record, at p. 31.

22 Exhibit RPD-1, RPD Record, Exhibit 4, at p. 123.

23 Meng, Renxian v. M.C.I. (F.C., no. IMM-1102-14), de Montigny, March 23, 2015, 2015 FC 365, at para 22.

24 Exhibit P-2, Appellants' Record, at p. 4.

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RAD.25.02 (April 04, 2019)

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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.25.02 (April 04, 2019)

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