

CANADA / JUDGMENT

TB9-19007

COURT

Refugee Appeal Division

DECIDED

8 January 2020

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RAD File / Dossier de la SAR : TB9-19007 TB9-19008 / TB9-19009 Private Proceeding / Huis clos
Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX
XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX Personnes en cause Appeal considered / heard
at Ottawa, ON Appel instruit / entendu à Date of decision January 8, 2020 Date de la décision
Panel Alison Kennedy Tribunal Counsel for the persons who are the subject of the appeal
Josephat Nwabuokei Conseil des personnes en cause Designated representative XXXX XXXX
Représentant(e) désigné(e) Counsel for the Minister N/A Conseil du ministre REASONS FOR
DECISION OVERVIEW

- [1] XXXX XXXX (Principal Appellant/PA), XXXX XXXX XXXX XXXX (minor male Appellant), and
XXXX XXXX XXXX XXXX (minor female Appellant) are citizens of Nigeria. The minor female
Appellant is also a citizen of the United States of America. The Appellants are appealing a
decision of the Refugee Protection Division (RPD) rejecting their claims for refugee
protection.
- [2] The Appellants fear returning to Nigeria because the PA is bisexual and both the PA and her
daughter fear undergoing Female Genital Mutilation (FGM). The minor male Appellant fears
persecution on the basis of his mother's bisexuality.
- [3] I find that the determinative issue in this case is the PA's bisexuality. I find that the PA has
demonstrated that there is a serious possibility that she will be persecuted if she returns to
Nigeria on the basis of her sexuality. In light of this finding, and given the treatment that the
PA alleges her son will experience if he returns to Nigeria, the minor male Appellant's claim
is also allowed.
- [4] However, the minor female Appellant is a citizen of the United States. The Appellants did not
provide any evidence to suggest that she would be at risk if she were to return to the United
States. Consequently, the minor female Appellant is not a Convention Refugee nor is she a
person in need of protection. ROLE OF THE REFUGEE APPEAL DIVISION

- [5] The Refugee Appeal Division (RAD) reviews decisions of the RPD on a standard of correctness after conducting an independent assessment of the evidence before it.¹ The exception to this rule is where the RPD enjoys a meaningful advantage in the assessment and weighing of oral testimony heard, which may attract deference. I have applied a correctness standard, except where specifically stated.

ANALYSIS

The PA's sexual orientation RPD's findings

- [6] The RPD determined that the PA had not proven that she was bisexual. The PA testified that she had a relationship that lasted around one year starting in 1999 and provided the first name of her ex-lover. However, the PA was unable to provide the last name of her ex-lover. The RPD found that the PA had not provided a good reason why she was unable to provide her ex-lover's full name. The RPD found that, considering she had not had any other female lovers, that it was unlikely that she would have had a same sex relationship with someone whose full name she could not remember. Consequently, the RPD found that she was not bisexual as alleged. Appellants' arguments
- [7] The Appellants argue that the RPD failed to properly assess the PA's sexuality. They argue that the RPD failed to consider corroborating evidence of her sexuality, including pictures of the Appellant and her ex-partner, several affidavits attesting to her relationship, and an arrest warrant before deciding her claim.² RAD findings
- [8] The RPD's decision that the Appellant was not bisexual was based solely on her inability to recall the last name of her same sex partner. I do not agree with the RPD that this inability results in a finding that the Appellant is not bisexual.
- [9] When questioned by counsel as to why she could not remember her ex-partner's name, the Appellant testified that she "forget[s] a lot these days."³ The Appellant also provided the RPD with a psychological report noting that she has severe psychological issues, including a lack of concentration and difficulties with her memory.⁴ However, the RPD assigned no weight to this report because of a minor inconsistency in the report about the timing of the Appellant's relationship with her ex-partner.
- [10] I find that the RPD erred in failing to consider the content of the psychological report and how it related to the Appellant's testimony. The RPD should have considered the PA's inability to provide the full name of her ex-partner in light of the deficiencies in her mental and psychological functioning noted in this report. Instead, however, the RPD dismissed the entire report on the basis of one minor inconsistency, and in doing so failed to consider the substance of the psychologist's report and how it pertained to the PA's testimony.
- [11] I find that the RPD erred in determining the Appellant was not bisexual on the basis of her failing to provide the last name of her ex-partner of almost 20 years ago, especially given the psychological report on file which notes that the Appellant suffers from XXXX, and that

difficulty recalling past events, and concentration and memory problems are common among those exposed to XXXX XXXX.⁵ Furthermore, the psychological report also notes that "symptoms may arise during the hearing in the form of...inability to retrieve specific details of the past or an apparent inability to formulate a coherent response."⁶ The omission noted by the RPD - which was found to be fatal to the PA's identity as bisexual - is exactly within the realm of potential psychological shortcomings warned of by the psychologist in this instance. I find that the RPD erred in failing to consider this psychological report in assessing the PA's testimony. Had it done so, I find that the RPD would not have decided that the PA was not bisexual simply based on this one evidentiary shortcoming.

- [12] The RPD's finding that the PA was not bisexual was based entirely on her failure to provide the full name of her ex-partner and I have determined this was in error. The Appellant is entitled to a presumption that her sworn testimony is true.⁷ I find that the RPD erred in finding that this presumption was rebutted as a result of her failure to recall the last name of her same sex partner of almost 20 years ago. Rather, I find that, based on the evidence that the Appellant has provided - including her testimony, pictures, affidavits and other evidence in support of her claim - that she has proven, on a balance of probabilities, that she is bisexual as alleged.
- [13] As bisexuality is illegal in Nigeria, state protection and internal flight alternatives are not available to the PA. Consequently, I find that the PA had proven that she would face a serious possibility of persecution if she returns to Nigeria as a result of her bisexuality. Associate Appellants
- [14] The PA has also provided testimony about the risks that her children would face in Nigeria as a result of her bisexuality, including potential FGM and a cleansing ritual for her daughter and possible kidnapping for her son. Her allegations on this point are supported by affidavits written by the Associate Appellants' father⁸, their pastor's affidavit⁹, as well as affidavits from the PA's mother¹⁰, and their former lawyer in Nigeria¹¹.
- [15] I find that the minor male Appellant has a nexus to the Convention refugee definition because he is a member of a particular social group of family members of a bisexual parent in Nigeria. Based on the evidence provided by the PA, I find that the minor male Appellant faces more than a mere possibility of persecution in Nigeria by his father's family.
- [16] However, the minor female Appellant is a citizen of the United States. The Appellants did not provide any evidence to suggest that she would be at risk if she were to return to the United States. Consequently, the minor female Appellant is not a Convention Refugee nor is she a person in need of protection.

CONCLUSION

- [17] I find that the RPD erred when it found that the Principal Appellant was not bisexual as alleged. Rather, I find that the Principal Appellant has established, on a balance of probabilities, that she is bisexual and that she faces a serious possibility of persecution if she returns to Nigeria. Based on the evidence of the PA and other supporting evidence, I also find that the minor male Appellant faces a serious possibility of persecution in Nigeria as a result of his mother's bisexuality.
- [18] The minor female Appellant is a citizen of the United States. Given that the Appellants did not provide any evidence to suggest that she would be at risk if she were to return to the United States, I find that she is not a Convention Refugee or a person in need of protection.
- [19] The appeal is allowed in part. Pursuant to section 111(1)(b) of the Immigration and Refugee Protection Act (IRPA), I set aside the determination of the RPD and substitute my own determination that the Principal Appellant and the minor male Appellant are Convention refugees. However, I uphold the RPD's finding that the minor female Appellant is not a Convention Refugee or person in need of protection. (signed) "Alison Kennedy" Alison Kennedy January 8, 2020 Date 1 M.C.I. v. Huruglica, Bujar (F.C.A., no. A-470-14), Gauthier, Webb, Near, March 29, 2016, 2016 FCA 93, at para 103. 2 Exhibit P-2, Appellant's Record, Memorandum at p. 129. 3 RPD hearing audio, for instance, listen to hour 1:24 of the hearing. 4 Exhibit RPD-1, RPD Record, Psychological assessment at p. 183. 5 Psychological assessment, *ibid.* at p. 184. 6 Psychological assessment, *ibid.* 7 *Maldonado v. Canada (MEI)*, [1980] 2 F.C. 302 (C.A.); 31 N.R. 34 (F.C.A.). 8 Exhibit RPD-1, RPD Record, B.L.W. affidavit at pp. 165-166. 9 Exhibit RPD-1, RPD Record, D.K. affidavit at pp. 173-174. 10 Exhibit RPD-1, RPD Record, N.R.O. affidavit at pp. 168. 11 Exhibit RPD-1, RPD Record, J.A.A. affidavit at pp. 170-171.

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RAD.25.02 (April 04, 2019) Disponible en français

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