

CANADA / JUDGMENT

VB9-09627

COURT

Refugee Appeal Division

DECIDED

22 January 2020

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RAD File / Dossier de la SAR : VB9-09627 VB9-09628 / VB9-09629 Private Proceeding / Huis clos
Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX
XXXX XXXXXXXXXX XXXX XXXX XXXXXXXXXX XXXX XXXX Personnes en cause Appeal considered /
heard at Ottawa, ON Appel instruit / entendu à Date of decision January 22, 2020 Date de la
décision Panel Susan Brown Tribunal Counsel for the persons who are the subject of the appeal
Claudette Menghile 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] The Appellants, XXXX XXXX XXXX (Principal Appellant) her spouse, XXXX XXXX XXXX, and their minor child, XXXX XXXX XXXX, citizens of Nigeria, appeal a decision of the Refugee Protection Division (RPD), dated November 15, 2019, rejecting their claims for refugee protection. The Principal Appellant is the designated representative of her minor child.
- [2] Due to the Principal Appellant's sexual orientation, the Appellants fear Nigerian society, the State and the male adult Appellant's family who want to undertake cleansing rituals. The RPD did not find that there was sufficient credible and reliable evidence presented to establish, on a balance of probabilities, that the Principal Appellant is a lesbian.
- [3] I find that the RPD erred in its credibility finding regarding the sexual orientation of the Principal Appellant. The RPD did not err when it found that the male and minor Appellants did not establish their claims. The appeal of the Principal Appellant is allowed and the appeals of the male and minor Appellants are dismissed.

BACKGROUND

- [4] According to their Basis of Claim Forms (BOCs),¹ the Appellants were born in 1986, 1989 and 2017.

- [5] The Principal Appellant's interest in girls started when she was 12 and she became involved with her first girlfriend. They were involved throughout secondary school and lost touch when the first girlfriend moved to the United States. The Principal Appellant met her second girlfriend in XXXX 2008 and they dated all through university. Both of the Principal Appellant's parents caught her with her second girlfriend. They scolded and punished her and told her to end the relationship but she did not.
- [6] The Principal Appellant was a friend of the male Appellant and he knew and accepted her sexual orientation. The Principal Appellant decided to marry the male Appellant due to pressure from her parents and to distract society from seeing her as a lesbian. The adult Appellants married traditionally in XXXX 2015 and legally on XXXX XXXX XXXX 2016. The Principal Appellant and her second girlfriend remained together with the agreement of the male Appellant.
- [7] In XXXX 2016 the Principal Appellant had a miscarriage when she was verbally and physically attacked by the male Appellant's aunt about her sexual orientation. In XXXX 2017 she gave birth to the minor Appellant.
- [8] The male Appellant's aunt caught her with her second girlfriend on XXXX XXXX, 2018 and the Principal Appellant was beaten and hospitalized. The aunt insisted on a cleansing and sacrifice involving the Principal Appellant and the minor Appellant, and threatened to give photographs of the Principal Appellant and her second girlfriend to the police if they did not attend the rituals. Fearful for her safety, the Principal Appellant moved into her parents' house on XXXX XXXX XXXX 2018.
- [9] The Appellants attended the male Appellant's brother's wedding in Kelowna, British Columbia on XXXX XXXX, 2018 and decided not to return to Nigeria. Their claims were received on October 30, 2018 and heard on November 8, 2019. The RPD gave its decision on November 15, 2019. STANDARD OF REVIEW
- [10] The RAD reviews decisions of the RPD on a standard of correctness after conducting an independent assessment of the evidence before it. The exception to this rule is where the RPD enjoys a meaningful advantage in assessing and weighing the oral testimony heard, which in particular cases attracts deference.² Unless specifically stated below, I have applied the correctness standard.

ANALYSIS

- [11] The RPD found credibility to be the determinative issue. The RPD found that the Principal Appellant's testimony about her sexual orientation and her same-sex long-term romantic relationship was generally vague, unspecific and contextually unrealistic and lacked probative corroborative evidence. The RPD found that adult Appellants' testimony about their relationship and open marriage was unidimensional and focused on the physical aspects their relationships. The RPD concluded that there was not sufficient credible and reliable evidence to establish the Principal Appellant's sexual orientation. The RPD noted

that neither the male nor minor Appellants claim to be sexual minorities and there were no allegations specific to the male or minor Appellants in returning to Nigeria.

- [12] The Appellants argue that the RPD made the following errors: it made an error of fact in confusing the Principal Appellant's two same-sex relationships; it erred in finding that living with her second girlfriend and adopting children was not an available option for the Principal Appellant; the Principal Appellant did not just testify about the physical aspects of her relationship with her second girlfriend; it erroneously relied on its preconceptions about open marriages; and it did not take the Chairperson's Guideline 9: Proceedings before the Immigration and Refugee Board of Canada involving Sexual Orientation and Gender Identity Expression³ (SOGIE Guideline) into consideration in assessing the corroborative evidence presented by the Appellants. The Appellants do not make any submissions about the claims of the male and minor Appellants.
- [13] Following my independent review, I find that the RPD erred in its assessment of the Principal Appellant's credibility and, on a balance of probabilities, that the Principal Appellant established her sexual identity. I agree with the RPD that neither the male Appellant nor the minor Appellant demonstrated their claims for protection as family of a lesbian wife/mother. Credibility of Principal Appellant
- [14] A recent Federal Court decision⁴ has laid out the relevant principles in analyzing credibility in the context of refugee claims: * Refugee applicants are presumed to tell the truth, but this is a presumption rebuttable by the applicant's lack of credibility, e.g. where the evidence is inconsistent with sworn testimony or where the applicant's explanation for the inconsistencies is not satisfactory; * Even though they may be insufficient when taken individually or in isolation, the accumulation of contradictions, inconsistencies and omissions regarding crucial elements of a refugee claim can support a negative conclusion about an applicant's credibility; * A negative credibility finding cannot be based on minor contradictions that are secondary or peripheral to the refugee protection claim; * A lack of credibility concerning central elements of a refugee protection claim can extend and trickle down to other elements of the claim and be generalized to all of the documentary evidence presented to corroborate a version of the facts; * Credibility findings should not be made based strictly on the absence of corroborative evidence. Where corroborative evidence should reasonably be available to establish an essential element of a claim and there is no reasonable explanation for its absence, a decision-maker can draw a negative inference of credibility based on the claimant's lack of effort to obtain such corroborative evidence; and * Conclusions can be drawn concerning an applicant's credibility based on implausibilities, common sense and rationality.
- [15] I find that the RPD's credibility analysis did not follow the principles laid out by the Federal Court. It erred in its assessment of the Principal Appellant's credibility as it did not identify contradictions, inconsistencies or omissions in the evidence presented to rebut the presumption that the Principal Appellant was telling the truth about her sexual orientation.⁵

- [16] The RPD also erred in its application of the SOGIE Guideline. I agree with the Appellants that the RPD did not make any reference to section 7.2 of the SOGIE Guideline in its assessment and dismissal of the corroborative evidence presented. I also note that section 6.1 of the SOGIE Guideline warns about relying on stereotypes and inappropriate assumptions in SOGIE cases "as they derogate from the essential human dignity of an individual."⁶ I find that the RPD decision reflected a number of stereotypes and preconceptions unsubstantiated by objective evidence relating to the manner in which individuals discuss their relationships and to open marriages.
- [17] In the absence of inconsistencies, contradictions and omissions in the evidence and testimony of the Principal Appellant, I find, on a balance of probabilities, that she has established her sexual identity as a lesbian.
- [18] The objective evidence presents Nigeria "as one of the most homophobic countries in the world, not only due to the severity and comprehensiveness of its legislation that criminalises same-sex relations, but also for the discriminatory and violent treatment given to LGBTI people in the form of arbitrary arrests, blackmail, physical and psychological abuse by the police..."⁷ Under these circumstance the state of Nigeria cannot be expected to provide an internal flight alternative or protection for the Principal Appellant. Claims of the male and minor Appellants
- [19] While membership in a family can constitute membership in a social group for the purposes of refugee protection, persecution against one family member does not automatically entitle all the other family members to be considered refugees. "Where membership in a family group is the basis for the claim, a personal nexus must be established between the claimant and the alleged persecution on Convention grounds."⁸
- [20] To succeed under section 96, the male and minor Appellants must demonstrate a well-founded fear of persecution, establish their case on the balance of probabilities, and meet the legal test of "reasonable chance" or "more than a mere possibility."⁹
- [21] To succeed under section 97(1) (b), the minor and male Appellants must establish that the risk is more likely than not and provide evidence that establishes, on a balance of probabilities, the factual basis of the claim.
- [22] Following my review of the evidence, I find that the male and minor Appellants have not demonstrated more than a mere possibility of persecution and have not established, on a balance of probabilities, that they are being threatened by, or risk harm from, the male Appellant's family, society or the Nigerian authorities due to their relationship with their lesbian wife/mother.

CONCLUSION

[23] The appeal is allowed in part. Pursuant to section 111(1) (b) of the Immigration and Refugee Protection Act, the RAD sets aside the determination of the RPD and substitutes its own determination that the Principal Appellant is a Convention refugee. The appeals of the male Appellant and minor Appellant are dismissed. (signed) "Susan Brown" Susan Brown January 22, 2020 Date 1 RPD-1, RPD Record, Exhibit 2, pages 10-52. 2 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93. 3 Immigration and Refugee Board (IRB), Chairperson's Guideline 9: Proceedings before the Immigration and Refugee Board of Canada involving Sexual Orientation and Gender Identity Expression, effective May 1, 2017 (SOGIE Guideline). 4 Lawani v. Canada (Citizenship and Immigration), 2018 FC 924 (CanLII), paras. 21-26. 5 Maldonado v. Canada (Minister of Employment and Immigration), [1980] 2 FC 302 (CA). 6 SOGIE Guideline, section 6.1. 7 RPD-1, RPD Record, Exhibit 3, National Documentation Package, Nigeria, 20 August 2019, tab 6.2: Nigeria. State-Sponsored Homophobia 2019. International Lesbian, Gay, Bisexual, Trans and Intersex Association. Lucas Ramón Mendos. March 2019, page 3. 8 Ndegwa v. Canada (Minister of Citizenship and Immigration), 2006 FC 847 (CanLII) [2006] FCJ No 1071 at paragraph 9. 9 El Achkar v. Canada (Citizenship and Immigration), 2013 FC 472 (CanLII) at paragraph 25.

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

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