

CANADA / JUDGMENT

TB9-16011

COURT

Refugee Appeal Division

DECIDED

5 October 2020

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RAD File / Dossier de la SAR : TB9-16011 TB9-16012 Private Proceeding / Huis clos Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX XXXX XXXXXXXX XXXX XXXX Personnes en cause Appeal considered / heard at Toronto, ON Appel instruit / entendu à Date of decision October 5, 2020 Date de la décision Panel G. Cohen Tribunal Counsel for the persons who are the subject of the appeal Stella I. Anaele 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] XXXX XXXX XXXX (the "Principal Appellant") and her male child, XXXX XXXX XXXX (the "Minor Claimant" and together the "Appellants") are citizens of Nigeria. The Principal Appellant acted as the designated representative for the Minor Claimant.
- [2] The Appellants claim to fear persecution and/or a risk of harm in Nigeria with respect to individuals seeking to undertake widowhood rituals and related threats to their lives. The Appellants appeal a decision of the Refugee Protection Division (the "RPD") rejecting their claims for refugee protection. The Appellants argue that the RPD erred in its assessment of the evidence and their related risk of persecution and/or harm.
- [3] The Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (the "Gender Guidelines") and the Guidelines with regard to Child Refugee Claimants (the "Child Guidelines" and collectively the "Guidelines") have been considered in this appeal to the Refugee Appeal Division (the "RAD").¹
- [4] The Guidelines assist in assessing key evidentiary elements to determine the extent women or children making a refugee claim may successfully rely on any Convention ground, and what circumstances constitute persecution. The Guidelines were used to help assess the circumstances of this claim and to understand and apply the added sensitivities necessary to properly assess the evidence. DECISION
- [5] The appeal is allowed and the matter is referred to the RPD for redetermination by a differently constituted panel, pursuant to subsection 111(1)(c) of the Immigration and Refugee Protection Act (the "IRPA")², given that I cannot make a decision without hearing evidence that was presented to the RPD.

- [6] While I do not accept the Appellants' core arguments, I have concerns with elements of these refugee claims that were not canvassed at the RPD and/or addressed in its decision. This prevents me from raising requisite issues or holding a fulsome hearing on appeal absent an RPD record or related findings to support this.

BACKGROUND

- [7] The RPD heard the Appellants' refugee claims on March 22, 2019 and rejected them in a written decision dated May 7, 2019. The RPD found that the Appellants are neither Convention refugees nor persons in need of protections and in doing so raised credibility concerns with their evidence.
- [8] The Appellants allege that they are at risk of harm in Nigeria by family members of the Principal Appellant's late husband and the minor claimant's father. This alleged risk relates to demands for participation in widowhood rituals, ceremonies, and observances by the family members, including a demand that the Principal Appellant marry an elder male relative of her late husband, as well as related threats to their lives.³ The Role of the RAD
- [9] Jurisprudence provides that the RAD is required to undertake an independent assessment of the evidence and reach its own determination, including as to whether the RPD made the correct decision.⁴
- [10] Deference is owed to the RPD only where it held a meaningful advantage in assessing evidence. In the present case, given the lack of evidentiary advantage, I see no reason to show deference to any of the RPD's findings. As such, I have applied a correctness standard and arrived at independent findings and conclusions based upon my assessment of the evidence before me.⁵ New Evidence and Oral Hearing Request
- [11] Ultimately, I have rejected the Appellants' new evidence and denied their request for a new hearing at the RAD. Nonetheless, this matter will be referred back to the RPD for redetermination.
- [12] Subsection 110(4) of IRPA states that, on appeal, the person who is the subject of the appeal may only present evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the claim's rejection. 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.⁶
- [13] The Appellants are seeking admission of the following alleged documentary evidence:
- a. Letter from law firm (the "Letter");
 - b. Updated Psychological Assessment (the "Updated Assessment"); and
 - c. Deed of Agreement and Deed of Transfer (collectively the "Deed Documents").⁷

- [14] Overall, based on the factors explained above from subsection 110(4) of IRPA and the analysis below, I have rejected admission of the Letter. The alleged Letter from the law firm in the United States mentions a consultation with the Principal Appellant on XXXX XXXX, 2018. While the Letter is dated XXXX XXXX, 2019, the consultation allegedly occurred long before the RPD hearing in Toronto (March 2019). Therefore, the subject matter of the Letter arose before the rejection of Appellants' refugee claim, and the Appellants had more than one year to acquire such a letter.
- [15] Furthermore, given that the Appellants are providing the Letter in an effort to explain why they failed to seek refugee protection in the United States, this involves important issues that need to be addressed in any refugee claim, i.e. failure to seek refugee protection in a Convention country en route to Canada; failure to seek refugee protection at the first available opportunity; and/or delay in seeking refugee protection. As such, the Appellants could reasonably have expected to need to present such a letter at the time their refugee claims were rejected, particularly given that they have been represented by counsel throughout the process in Canada.
- [16] Additionally, given that the Principal Appellant's aunt allegedly resides in XXXX XXXX, the Principal Appellant provided the name of the lawyer she met with in testimony (which notably is different from the author of the letter), and the Principal Appellant alleges to be a XXXX, I find that the Letter was reasonably available at the time of the rejection of the Appellants' refugee claim, and the Appellants could have and/or ought to have contacted the law firm and sought a letter during the one-year period mentioned above.
- [17] Moreover, the Federal Court reiterated in Eshetie that, "A RAD appeal is not a second chance to submit evidence to answer weaknesses identified by the RPD." Instead, Appellants must "put his or her best foot forward to the RPD" and not present evidence that could have and should have been presented in their refugee claims.⁸ Moreover, in Abdullahi, the Federal Court provided that: "...responding to an inadequacy identified by the RPD in a party's case cannot be a legitimate foundation for the party to claim that had she known about the deficiency she could have presented better evidence that was always in existence...This would make the RPD process a monumental waste of time, which is surely not Parliament's intention in providing appeal rights.⁹
- [18] Ultimately, I have rejected admission of the Letter. Nonetheless, the Letter does not explain why the Principal Appellant was advised to seek asylum elsewhere "because of current administration" or what that means, it misspells the United States, and cannot be considered new.
- [19] Furthermore, based on the factors and jurisprudence explained above, I have ultimately rejected admission of the Updated Assessment. As noted, it is inappropriate to submit evidence to answer weaknesses identified at the RPD. In this case, the Appellants acknowledge that the update was done specifically to address RPD concerns regarding content that was not included in the original assessment. Moreover, I find that this evidence

did not arise after the rejection of the Appellants' refugee claim (even if the amendment was made afterward), it was reasonably available at that time, and the Appellants could reasonably have been expected to present a complete assessment at that time as well. Nonetheless, this evidence is not new and is rejected.

- [20] Additionally, I have rejected admission of the Deed Documents. These documents also did not arise after the rejection of the Appellants' refugee claim, were reasonably available at that time, and could reasonably have been expected to be presented at that time as well. Again, as the Federal Court has noted, this appeal is not a second chance for the Appellants to submit evidence that could have and should have been presented in their refugee claims or to answer weaknesses identified by the RPD, under the guise of it being 'new', which it is not. The Appellants must put their best feet forward at the RPD and then do the same at the RAD.¹⁰ As such, I have rejected admission of the Deed Documents.
- [21] With respect to the Appellants' request for an oral hearing in light of the new evidence and in accordance with section 110(6) of IRPA, this cannot be granted.¹¹ I carefully considered the three criteria for new evidence that could enable holding an oral hearing, i.e. if it raises a serious issue with respect to credibility; is central to the decision; and if accepted, would justify allowing or rejecting the refugee protection claim. However, even if accepted, the new evidence in and of itself would not justify allowing or rejecting the Appellants' refugee claims.
- [22] Moreover, given my concerns with the Appellants' evidence, including the new evidence they have presented, and given the related insufficiency of the RPD record, even if I accepted the Appellants' new evidence, which I am not, granting an oral hearing at the RAD will not enable a fulsome examination of all outstanding issues and concerns. In other words, pursuant to the relevant sections of IRPA and jurisprudence, the RPD record provides an insufficient basis upon which to hold a fulsome hearing.¹² As such, the Appellants' request for an oral hearing at the RAD is denied.

ANALYSIS

Determinative Issues - Credibility and Well-Founded Fear

- [23] Overall, this appeal examines whether the RPD erred in determining that the Appellants' risk of persecution and/or harm has not been established, such that the Appellants are neither Convention refugees nor persons in need of protection.
- [24] The determinative issues in this case at the RPD were the Appellants' credibility and whether they face a serious possibility of persecution and/or a risk of death. As such, in conducting an independent assessment of the evidence before me, I have examined the analysis conducted by the RPD, which ultimately raised credibility concerns and found that the Appellants are neither Convention refugees nor persons in need of protection.

- [25] According to the Appellants' formulation of the issues, they argue that the RPD: (1) erred by failing to apply the correct section 96 test for determining whether the Appellants have a well-founded fear of persecution; (2) erred in its assessment of the Appellants' credibility; and (3) had a reasonable apprehension of bias.¹³
- [26] Based upon my assessment of the evidence, I do not accept the Appellants' core arguments and have significant concerns with elements of these refugee claims that were not canvassed at the RPD and/or addressed in its decision. These include, among other things, concerns with internal flight alternative, with the Appellants' delay in leaving Nigeria, and with their unlawful exit from the United States and entry to Canada, having failed to seek refugee protection in a Convention country en route to Canada (i.e. the United States).
- [27] That said, following a full assessment of all of the Appellants' evidence, together with and including the RPD hearing transcript, I found that there is some confusion arising from the hearing as reflected in the RPD decision, and there are conclusions drawn by the RPD that I find incorrect. In particular, this relates to confusing evidence regarding the timing of the Appellants' departure from Nigeria; when the Principal Appellant stopped working; and what transpired at an alleged hiding spot; as well as their omission of an alleged hiding place on their Schedule A form. Given that this matter is being referred back to the RPD for redetermination, I will not analyze this in great detail here, however, a few points of clarification provided below might be helpful. Relevant Legal Tests and Standards of Review
- [28] The Appellants argue that the RPD erred by applying the incorrect legal test for determining whether they have a well-founded fear of persecution. In doing so, the Appellants reference Arduengo¹⁴, which notes that claimants must establish their case on a balance of probabilities; and they quote the RPD decision, which accepted "on balance" that the Appellants are from Ilorin, Kwara State. These two references are not conflicting and fail to establish that the RPD applied an incorrect test - instead suggesting the opposite.
- [29] This same analysis is applicable to the Appellants' arguments in paragraphs 23-26 of their Memorandum referencing the RPD decision, in finding that "on balance" the Appellants did not leave their place of residence to seek temporary safety in Lagos.¹⁵ In other words, the phrases 'on a balance of probabilities' and 'on balance' reflect the same principle or legal test of determining whether a fact is 'more likely than not' to be true.
- [30] Additionally, the Appellants argue that the RPD erred in stating that they had not established their removal from Ilorin to Lagos based on 'sufficient reliable evidence'¹⁶. In doing so, the Appellants argue that the RPD did not identify the intended standard and created its own 'higher' and 'incorrect' evidentiary requirement.¹⁷ However, it is correct that the Appellants' obligation of establishing their case at the RPD requires sufficient reliable evidence that must be established on a balance of probabilities, and without this their claims may be rejected.

- [31] Moreover, the Appellants quote the RPD in finding that the evidence failed to establish on a balance of probabilities that they had gone into temporary hiding in Lagos or any place and similarly argue that the RPD elevated the standard of proof to "a more stringent test than that imposed by the statute" and erred in its conclusion.¹⁸ This line of argument suggests that the Appellants misunderstand the difference between: (a) the evidentiary standard to prove a fact, i.e. on a balance of probabilities; and (b) ultimately establishing whether the Appellants face a 'serious possibility of persecution' in Nigeria. Two related but distinct standards or tests.
- [32] Additionally, the Appellants have cited case law regarding the reasonableness standard of review for credibility or subjective fear findings made by the RPD.¹⁹ However, as noted above, deference is only owed to the RPD where it held a meaningful advantage in assessing evidence, not present in the current case. As such, I have applied a correctness standard and conducted an independent assessment of the evidence. For added clarification, the leading case to consider in this regard is *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 with further guidance from *Rozas Del Solar, Paola v. Canada (Citizenship and Immigration)*, 2018 FC 1145.²⁰
- [33] Additionally, the Appellants argue that the RPD demonstrated "stereotyping" or "prejudices against refugee claimants" by stating an expectation of their actions, in light of their alleged fears.²¹ However, there is an abundance of Canadian jurisprudence, particularly from the Federal Court, discussing expected behaviours of refugee claimants allegedly fearful of and/or fleeing from harm, including that they would seek refugee protection at the first available opportunity.²² Summary of Findings
- [34] Ultimately, I have rejected the Appellants' new evidence and denied their request for a new hearing at the RAD. Furthermore, given that: (1) I do not accept the Appellants' core arguments; (2) I have concerns with elements of these refugee claims that were not canvassed at the RPD and/or addressed in its decision; (3) there is some confusion arising from the hearing as reflected in the RPD decision; (4) there are conclusions drawn by the RPD that I find incorrect; and (5) I cannot make a decision without hearing evidence that was presented to the RPD absent an RPD record or related findings to support this - this matter will be referred back to the RPD for redetermination.

CONCLUSION

- [35] The appeal is allowed and the matter is referred to the RPD for redetermination by a differently constituted panel, pursuant to section 111(1)(c) of IRPA. (Signed) G. Cohen G. Cohen October 5, 2020 Date 1 Immigration Refugee Board (IRB), Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act, Effective date, November 13, 1996; and IRB, Guidelines on Child Refugee Claimants: Guidelines issued by the Chairperson pursuant to Section 65(3) of the Immigration Act, Effective date, September 30, 1996. 2 Immigration and Refugee Protection Act (IRPA), S.C. 2001, c. 27, as amended. 3 Exhibit

RPD-1, RPD Record, RPD Reasons, at p.4, lines 21-24; and Exhibit RPD-1, RPD Record, Exhibit 2, p. 22, para. 4. 4 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93; Rozas del Solar v. Canada (Citizenship and Immigration), 2018 FC 1145. 5 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93 ; see also Rozas Del Solar, Paola v. Canada (Citizenship and Immigration), 2018 FC 1145. 6 Canada (Citizenship and Immigration v. Singh, 2016 FCA 96; Canada (Citizenship and Immigration) v. Raza FC 385. 7 Exhibit P-2, Appellants' Record, at pp. 18-39. 8 Eshetie v. Canada (Citizen and Immigration), 2019 FC 1036. Nonetheless, out of an abundance of fairness I have addressed arguments raised in the Appellants' written statement/affidavit. 9 Abdullahi v. Canada (Citizenship and Immigration), 2016 FC 260 at para. 15. 10 Eshetie v. Canada (Citizen and Immigration), 2019 FC 1036. 11 IRPA, ss. 110(4)-(6). 12 Ching v. Canada (Citizenship and Immigration), 2015 FC 725 at paras. 65-74; R. v. Mian, 2014 SCC 54 at paras. 30-52. 13 Exhibit P-2, Appellants' Record, p.38. 14 Exhibit P-2, Appellants' Record at p. 41, paras. 15-17. 15 Exhibit P-2, Appellants' Record at p. 42, paras. 23-26; Exhibit RPD-1, RPD Record, RPD Decision at p.6, lines 11-12. 16 Exhibit RPD-1, RPD Record, RPD Decision at p. 5, line 26. 17 Exhibit P-2, Appellants' Record at p. 41, paras. 18-22. 18 Exhibit P-2, Appellants' Record at p. 42, paras. 27-31; Exhibit RPD-1, RPD Record, RPD Decision at p. 6, lines 1-3. 19 Exhibit P-2, Appellants' Record at p. 43, paras. 32-36. 20 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93 ; see also Rozas Del Solar, Paola v. Canada (Citizenship and Immigration), 2018 FC 1145. 21 Exhibit P-2, Appellants' Record at p. 46, paras. 54-58. 22 Ghasemian v. M.C.I. 2003 FC 1266; Ortiz Garzon v. Canada (Citizenship and Immigration), 2011 FC 299 at para. 30 [Ortiz Garzon]; Mohamed, Hibo Farah v. M.C.I. (F.C.T.D., no. IMM-2248-96), Rothstein, April 9, 1997; see also Remedios v. Canada (Minister of Citizenship and Immigration), 2003 F.C.T. 437 [Remedios]; Rana v. Canada (Citizenship and Immigration), 2012 FC 453 at paras. 28-29 [Rana]; Kaddoura v. Canada (Citizenship and Immigration), 2016 FC 1101 at para. 3 [Kaddoura]; Garcia v. Canada (Minister of Citizenship and Immigration), 2012 FC 412 at paras. 19-20; Jeune v Canada (Minister of Citizenship and Immigration), 2009 FC 835 at para. 15; Velez v Canada (Minister of Citizenship and Immigration), 2010 FC 923, [2011] FCJ no 1138 at para 28.

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15 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 14, 2020) Disponible en français

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Prepared on 27 October 2026 · Esheria