

CANADA / JUDGMENT

MB9-09762

COURT

Refugee Appeal Division

DECIDED

3 March 2020

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RAD File / Dossier de la SAR : MB9-09762 MB9-09763 / MB9-09764 / MB9-09765 MB9-09766 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 XXXX XXXXXXXXXXX XXXX XXXX Personnes en cause Appeal considered / heard at Ottawa, ON Appel instruit / entendu à Date of decision March 3, 2020 Date de la décision Panel Anna Wyse 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] XXXX XXXX XXXX (Principal Appellant), XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX, and XXXX XXXX XXXX (Associate Appellants), citizens of Nigeria, appealed a decision of the Refugee Protection Division (RPD), dated April 9, 2019. The RPD rejected their claims for refugee protection due to the availability of an Internal Flight Alternative (IFA).
- [2] The Appellants allege that the family of the Principal Appellant is threatening the female children with Female Genital Mutilation (FGM) and are threatening all of the children with facial scarring. The Appellants further allege that the RPD erred when finding that they have an IFA. The Appellants have not submitted any new evidence nor have they requested an oral hearing.
- [3] I find that the Appellants do not have a safe IFA. The Appeal is allowed. ROLE OF THE REFUGEE APPEAL DIVISION (RAD)
- [4] While reviewing the RPD decision, I am required to independently determine whether the RPD was correct in relation to each alleged error of law, fact or mixed fact and law. I may defer to the RPD's credibility assessment of the oral testimony if I find that the RPD had a meaningful advantage in the circumstances.¹ Reasons will be provided in my analysis if I find that the RPD had a meaningful advantage.

ANALYSIS

- [5] The RPD found that the Appellants gave sincere testimony, but noted that there were contradictions. These contradictions were not described, and the RPD did not make an overall finding on credibility. The RPD found that the Appellants did not establish that the Principal Appellant's family are still seeking the Appellants, or that they could find them wherever they might be in Nigeria.
- [6] The Appellants argue that they were not given advance notice that IFA is an issue and which cities were being considered as IFAs. The Appellants' further argue that a Jurisprudential Guide (JG) was inappropriately applied and that indigeneship was not considered.
- [7] I found errors in the RPD's decision when assessing whether the Appellants have a safe IFA. My reasons for this finding are below. The Appellants were given opportunities to make submissions regarding the proposed IFAs
- [8] I found no breaches of procedural fairness in this matter. The Appellants were informed of the proposed IFAs and were given an opportunity to make submissions regarding the proposed IFAs.
- [9] The Appellants argue that the RPD did not give sufficient advance notice that it would raise IFA as an issue, and further, did not give notice in advance of the hearing that the potential IFAs would be Benin City and Port Harcourt. The Appellants stated that this lack of advance notice caught the Appellants by surprise and prevented them from bringing evidence concerning these cities. The Appellants argue that because of the high threshold which much be met to find that an IFA is unreasonable, and because of the large number of cities with big populations in Nigeria, advance notice is required to allow the Appellants an opportunity to substantiate their claim that an IFA is not viable.
- [10] The Appellants and their Legal Counsel were informed that IFA is an issue at the beginning of the RPD hearing.² The RPD asked many questions about the viability of both cities to both of the adult Appellants. Legal Counsel was given an opportunity to make oral submissions at the end of the hearing and did not request additional time to provide further information on the IFAs. Furthermore, IFA is a potential issue at every refugee hearing.
- [11] I find that the Appellants were given ample opportunity to provide submissions on IFA. They were represented by Legal Counsel whose own submissions for this appeal indicate that IFA is not a new legal concept, and that the onus is on the Appellants to meet a high threshold. For these reasons, I find that the Appellants were given sufficient notice that IFA is an issue, and were given an opportunity to give submissions on the proposed IFAs. The RPD did not err by considering a JG.

- [12] The Chair Person of the Immigration and Refugee Board designated RAD Decision No. TB7-19851,3 which analyzes IFAs in major cities in south and central Nigeria for claimants fleeing non-state actors, as a JG on July 6, 2018 (hereinafter "JG IFA"). As the Appellants are fleeing family members, and as the proposed IFAs are in the south of Nigeria, I find that the RPD did not err by considering this guide.
- [13] The Appellants argue that this guide does not apply as the Appellants' circumstances are very different from the facts of the JG IFA. The Appellants further argue that JG IFA does not consider indigeneship, which is at the crux of IFA in Nigeria.
- [14] Immigration and Refugee Board members are not obligated, but are expected to apply the JG IFA where the facts underlying the decision are sufficiently close to those in the case being decided. While I find that the JG IFA has facts similar to the Appellants' case as the Appellants are fleeing a non-state actor, I do not find that applying the JG IFA altered the outcome of this case as the same elements must be considered whether or not the JG IFA is considered. Further, the RPD did consider indigeneship and concluded that ethnicity is less important in large urban centres. For these reasons, I find that the RPD did not err by considering the JG IFA. The Appellants do not have a safe IFA
- [15] The test for an IFA is two-pronged. Once the issue of IFA has been raised and the potential IFA has been identified, the onus of proof is on the claimant to establish:
- 1) On a balance of probabilities that there is a 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 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; and
 - 2) It is unreasonable or unduly harsh, in all of the circumstances, for the claimant to move to the suggested IFA location.⁴ First Prong: The Appellants have established they do not have a safe IFA The Appellants' have established that they can be found by the agent of persecution through social media
- [16] The Appellants argue that the concept of IFA is antiquated as Google and other websites are specialized in finding and locating people, and it is no longer just the rich and powerful that are able to find people in hiding.
- [17] During the hearing, the Principal Appellant testified that the XXXX where he XXXX XXXX XXXX has a Facebook page, but that he does not run that page.⁵ He further testified that his family found him in 2017 partially through his XXXX which has over XXXX XXXX.⁶
- [18] The RPD found that, as the Principal Appellant testified that he and the family members who are the agents of persecution are not on Facebook themselves, it is not credible that he could be found through Facebook by the agents of persecution.

- [19] There are no significant negative credibility findings in this case. Therefore, the presumption that sworn testimony is true has not been rebutted. Given that the Principal Appellant's family wish to perform FGM on his daughter, when these same rituals caused the death of his first child, I find that there is sufficient evidence to conclude that his family is motivated to find the Appellants and complete these rituals. Given that the Principal Appellant is XXXX XXXX, and therefore has an elevated profile that will be difficult to keep off social media, I find that there is sufficient evidence to conclude that there is a serious possibility that the Appellants could be found in Port Harcourt and in Benin City.
- [20] I find that the Appellants have established, on a balance of probabilities, that they do not have a safe IFA. As the first prong of the IFA test has failed, I will not proceed to the second prong of the test. The Appellants have established their claims
- [21] While there are laws prohibiting FGM, and plans of action to eliminate FGM, there have not been any identified prosecutions under these laws. Anti-FGM legislation is not widely understood by the public or by police, which hampers the ability of the legislation to deter the practice of FGM⁷. Consequences for refusing to take part could include ostracism, stigmatization, blackmailing and physical abuse. For these reasons, I find that the Appellants have established their claims that they are at risk in Nigeria.

CONCLUSION

- [22] The appeal is allowed. Pursuant to section 111(1)(b) of the Immigration and Refugee Protection Act (IRPA), the RAD sets aside the determination of the RPD and substitutes its own determination that the Appellants are Convention refugees. (signed) "Anna Wyse" Anna Wyse March 3, 2020 Date 1 Canada (Ministry of Citizenship and Immigration) v. Huruglica, 2016 FCA 93, paras. 70 and 103. 2 Audio recording of the hearing before the RPD, March 20, 2019, at 00:15:40. 3 X (Re), 2018 CanLII 52123 (CA IRB). 4 Rasaratnam v. M.E.I. [1992] 1 F.C. 706 (C.A.) (QL), paras 8-10; Thirunavukkarasu v. M.E.I., 1993 CanLII 3011 (F.C.A.). 5 Audio recording of the hearing before the RPD, March 20, 2019, at 02:08:50. 6 Audio recording of the hearing before the RPD, March 20, 2019, at 02:12:30 - 02:16:00. 7 RAD-1, National Documentation Package, Nigeria, 29 November 2019, tab 5.2: Nigeria: The Law and FGM. 28 Too Many. June 2018.

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RAD.25.02 (April 04, 2019) Disponible en français 2 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) Disponible en français

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