

CANADA / JUDGMENT

TB9-28137

COURT

Refugee Appeal Division

DECIDED

29 January 2020

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RAD File / Dossier de la SAR : TB9-28137

TB9-28138 / TB9-28139 / TB9-28140

TB9-28141

Private Proceeding / Huis clos

Reasons and decision ? Motifs et décision

Persons who are the subject of the appeal

XXXX XXXX XXXX XXXX

(a.k.a XXXX XXXX XXXX XXXX)

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(a.k.a. XXXX XXXX XXXX)

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(a.k.a. XXXX XXXX XXXX XXXX)

Personnes en cause

Appeal considered / heard at

Toronto, ON

Appel instruit / entendu à

Date of decision

January 29, 2020

Date de la décision

Panel

S. Thompson

Tribunal

Counsel for the persons who are the subject of the appeal

Orr Kolesnik

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

INTRODUCTION

[1] XXXX XXXX XXXX (the principal Appellant) and her children XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX (the minor Appellants) are all citizens of Nigeria. The minor Appellant XXXX XXXX XXXX is also a citizen of the United States of America (USA). All the Appellants are appealing a decision of the Refugee Protection Division (RPD) dated September 20, 2019, rejecting their claims for refugee protection.

BACKGROUND AND OVERVIEW OF APPEAL

The Appellants' claim, the RPD's decision, and the Appellants' arguments before the Refugee Appeal Division (RAD)

[2] Before the RPD the Appellants alleged a fear persecution in Nigeria due to demands by the XXXX family that the minor female Appellants undergo female genital mutilation (FGM). When the principal Appellant refused to allow her eldest daughter to participate in a ritual, the Head Chief (HC) called and threatened the principal Appellant. On XXXX XXXX XXXX 2015, the head of the family advised that the eldest girl would undergo the ritual on XXXX XXXX XXXX 2017. The family again did not attend.

- [3] The HC again made threatening calls, and the principal Appellant's brother-in-law advised them of kidnapping plans. On XXXX XXXX XXXX 2018, the principal Appellant and her son were kidnapped at gunpoint. They were threatened, and the principal Appellant was beaten and raped. They managed to escape and travelled to Akure, where the principal Appellant was admitted to hospital. Her husband reported the kidnapping to police, but they did not follow up due to fear of the HC's influence. The Appellants left Nigeria on XXXX XXXX XXXX 2018 and arrived in Canada the same day. The principal Appellant's husband remains in Nigeria.
- [4] The RPD dismissed the Appellants' claim on the ground of credibility. It also found the minor Appellant XXXX was neither a Convention refugee nor a person in need of protection as did not face a risk of persecution in the USA, his other country of nationality.
- [5] Before the RAD the Appellants submit that the RPD made the following errors in its decision:
1. That the RPD's assessment of the minor Appellant XXXX claim is in violation of international human rights instruments and ignores the principle of best interests of the child;
 2. That the RPD violated the Appellants' right to natural justice and procedural fairness by failing to consider the impact of abuse on the principal Appellant's testimony; and
 3. That the RPD erred in its credibility assessment: that its findings regarding omissions from the principal Appellant's evidence were selective and biased; that the RPD erred in misconstruing, misapprehending, or selectively assessing evidence; and that the RPD erred in its assessment of the Appellants' travel to the US in XXXX 2016 and their failure to claim asylum in the USA on that occasion.
- [6] The Appellants have asked the RAD to admit certain documents into the record before it as new evidence in accordance with s. 110(4) of the Immigration and Refugee Protection Act (IRPA). They are also requesting an oral hearing in accordance with subsection 110(6) of IRPA.

DETERMINATION

- [7] 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 section 111(1)(a) of the Immigration and Refugee Protection Act (IRPA).

THE ROLE OF THE RAD

- [8] The role of the RAD is to review RPD decisions by applying the correctness standard of review after conducting its own analysis of the record with a view to determining whether, as the appellant submits, the RPD erred.¹ The RAD will only show deference to RPD findings based on the assessment of the credibility or weight to be granted to the oral evidence given before it, in situations where it enjoys a particular advantage. If the RAD finds that the RPD had a particular advantage, the reasons will indicate as much.

ADMISSIBILITY OF NEW EVIDENCE ON APPEAL

- [9] The Appellants have asked the RAD to admit certain documents into the RAD record as new evidence in accordance with subsection 110(4) of the IRPA.

Legal test for admitting evidence under s. 110(4) of IRPA

- [10] Pursuant to subsection 110(4) of the IRPA, new evidence will only be admitted where that evidence: 1) arose after the rejection of the claim by the RPD; 2) was not reasonably available; or 3) the appellant could not reasonably have been expected in the circumstances to have presented the evidence, at the time of the rejection. The RAD has no discretion to admit new evidence unless it falls under one of these three statutory categories.
- [11] If the new evidence meets the above statutory requirements, the RAD must then go on to assess whether the evidence is credible, relevant, and new in deciding whether to admit it.

The legal test applied to the evidence

- [12] I will address the admissibility of the documents in turn.

Photographs of incident that occurred on XXXX XXXX XXXX 2019 (pp. 26-27 of the Appellants' Record)

- [13] The first two photographs on page 26 and the single photograph on page 27 all appear to depict XXXX XXXX. All the photos show reddish stains on and tears in XXXX XXXX XXXX shirt as he sits or lies on the ground wearing a TILCOR shirt. The single photograph on page 27 depicts XXXX XXXX XXXX leaning on his left arm, with a red stain on the right side of his forehead, but without visible cuts or bruises.
- [14] The third photograph on page 26, which appears to depict XXXX XXXX, shows him wearing a neck brace with bandages on his left inner elbow and the right side of his forehead, seated on a stretcher.

- [15] Although the Appellants assert that these photographs pertain to an assault on XXXX XXXX XXXX and his driver XXXX XXXX XXXX that post-dates the RPD's determination of their claim, the fact they do not bear digital date, time or geolocation stamps, makes it difficult for me to know where and when they were taken. All three photographs of the principal Appellant's spouse, in particular, appear staged.
- [16] There are no landmarks are depicted in the photos that link them to the other documents submitted as part of the Appellants' IRPA s. 110(4) new evidence application, and the photos themselves appear staged. As such, I find they do not meet the basic threshold of credibility required for me to admit them into evidence in this appeal.
- [17] All of the remaining documents post-date the RPD's refusal of the Appellants' claim on XXXX XXXX XXXX 2019. As such, none of the documents was reasonably available at the time of the RPD's rejection of the claim at first instance.

Sworn Affidavit of XXXX XXXX XXXX, dated XXXX XXXX XXXX 2019 (page 32 of the

Appellants' Record) and XXXX XXXX XXXX General Hospital Discharge Report for XXXX XXXX, dated XXXX XXXX, 2019

- [18] The affiant of the XXXX XXXX states that he is related to XXXX XXXX family and affirms that the family practices FGM. It also states that the affiant's daughter XXXX underwent FGM on XXXX XXXX XXXX 2019 and was subsequently treated in hospital when she took ill after FGM was performed.²
- [19] The accompanying hospital discharge note corroborates the XXXX Affidavit's statement that XXXX XXXX was discharged from hospital ten days after being "admitted and manage[d] as [a] case of complicated Ureterovaginal fistula which was repaired by surgical operation".³
- [20] The Appellants submit that these documents "confirms [sic] that the age limit for FGM within the [principal Appellant's] family is not until the age of 15" and "corroborate[s] [...] the Principal Appellant's testimony" in the RPD hearing concerning the age limit for FGM given in the threatening letter she allegedly received in XXXX 2019.⁴
- [21] In my independent assessment both documents meet the basic threshold of credibility and are relevant to my assessment of the credibility of the minor female Appellants' alleged risk of being forced to undergo FGM in Nigeria. I therefore admit these documents into evidence in this appeal.

Medical Reports from XXXX Medical Centre for XXXX XXXX XXXX, and XXXX XXXX XXXX, both dated XXXX XXXX XXXX 2019 (page 25 of the Appellants' Record);

- [22] The medical report for XXXX XXXX states he was admitted to the hospital on XXXX XXXX XXXX 2019 and threatened for "cuts, bruises and body pains" said to be the "result of an assault to him and his driver by hoodlums during a journey", before being discharged the following day.⁵

[23] The medical report for XXXX XXXX states that he, too was treated on XXXX XXXX XXXX 2019 for "bruises and a superficial laceration to [his] left anterior forearm" received "when he and his employer were assaulted by hoodlums during a journey." Unlike XXXX XXXX report, XXXX XXXX report contains no reference number and no discharge date.⁶

[24] Both documents meet the basic threshold of credibility and are relevant to my assessment of the Appellants' forward-looking risk in Nigeria. I therefore admit them into evidence in this appeal.

Sworn Affidavit of XXXX XXXX XXXX, dated XXXX XXXX XXXX 2019 with photocopy of XXXX XXXX XXXX TILCOR company card; Sworn Affidavit of XXXX XXXX XXXX XXXX dated XXXX XXXX XXXX 2019 & Letter from the Federal High Court of Nigeria dated XXXX XXXX XXXX 2019

[25] The affiant XXXX XXXX states that he and XXXX XXXX were attacked on XXXX XXXX XXXX 2019 by hoodlums linked to XXXX XXXX XXXX "family head XXXX XXXX XXXX" causing bruises and necessitating a hospital visit for both men.⁷

[26] The affidavit of XXXX XXXX is more detailed. It too states that he and XXXX XXXX were attacked on XXXX XXXX XXXX 2019 "by hoodlum thugs working for XXXX XXXX XXXX" and were subsequently treated in hospital before the affiant XXXX XXXX XXXX was released the following day.⁸

[27] The XXXX XXXX is accompanied by a letter from the Federal High Court which explains the original Remita Retrieval Reference (RRR) 2803-4429-1511 is invalid and which explains the provenance of the receipt bearing an updated payment reference number for the XXXX affidavit. Attached is a valid receipt showing the XXXX Affidavit was paid for in the Federal High Court in Ondo State on December 16, 2019.⁹

[28] In my independent assessment these documents meet the basic threshold of credibility and are relevant to my assessment of the credibility of the Appellants' forward-looking risk of persecution in Nigeria. I therefore admit these documents into evidence in this appeal.

XXXX XXXX with the published article "XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX, dated XXXX 2019 (pp. 30-31 of the Appellants' Record)

[29] The XXXX states that "XXXX XXXX XXXX XXXX [...] has been in a running battle with members of his own extended family whose tradition demands that daughters born into the family line be circumcised. His failure to ensure that his wife [...] complies with that tradition has constantly made his life and that of his family a living hell." The XXXX states further that XXXX XXXX XXXX and his driver were attacked on XXXX XXXX XXXX 2019 by "thugs sent by members of his extended family [...] to force him to comply with their long standing family tradition", causing injuries that were treated in hospital.

[30] In my independent assessment this document meets the basic threshold of credibility and is relevant to my assessment of the credibility of the Appellants' forward-looking risk of persecution in Nigeria. I therefore admit this document into evidence in this appeal.

Police Report dated XXXX XXXX XXXX 2019

- [31] I have considered this document in light of a XXXX 2019 Response to Information Request (RIR) in the current compilation of the National Documentation Package (NDP) for Nigeria concerning documents issued by police in Nigeria during criminal investigations.¹⁰ The features of the Nigeria Police investigation report¹¹ submitted by the Appellants correspond to those described in the RIR.
- [32] In my independent assessment this document meets the basic threshold of credibility and is relevant to my assessment of the credibility of the Appellants' forward-looking risk of persecution in Nigeria. I therefore admit the document into evidence in this appeal.

REQUEST FOR AN ORAL HEARING UNDER S. 110(6) OF IRPA**Legal test for an oral hearing under s. 110(6) of IRPA**

- [33] When read together, subsections 110(3), (4), and (6) of the IRPA establish that the RAD must not hold a hearing in an appeal such as this unless there is new evidence, in which case the RAD may hold a hearing if that new evidence raises a serious issue with respect to the credibility of the appellant, is central to the RPD decision, and that, if accepted, would justify allowing or rejecting the refugee protection claim.¹²

Decision on appellants' request for an oral hearing

- [34] As none of the documents raises a serious issue with the Appellants' credibility, I decline to hold an oral hearing of this matter.

ANALYSIS

- [35] My determination is based on my independent assessment of the evidence before me. This includes the records prepared by the RPD and the Appellants, an audio recording of the Appellants' RPD hearing on September 4, 2019, and documents contained in the current compilation of the National Documentation Package (NDP) for Nigeria and the USA.

The claim of minor Appellant XXXX XXXX XXXX

- [36] The minor Appellant XXXX XXXX XXXX is a citizen of the USA.¹³ Before the RPD the principal Appellant alleged that she feared that if XXXX returned to the USA he "would have to live without his parents."¹⁴
- [37] The RPD accepted that it would be a "hardship" for XXXX to have to lived without his immediate family in the USA, but noted that the hardship did not rise to the level of "persecution or a need for protection". The RPD observed further that "[n]either the [Appellants] nor their counsel presented any evidence, outside of hardship, that [XXXX] faced any risk in the [USA]" and dismissed his claim against that country.¹⁵

- [38] On appeal the Appellants submit the RPD erred in assessing the minor Appellant XXXX claim against the USA "as [it] did not take into consideration the best interest of the child."¹⁶ They submit the RPD's finding violates international law, specifically article 9(1) the United Nations (UN) Convention on the Rights of the Child, and the principle of "integrity of the refugee family".¹⁷
- [39] I reject the Appellants' submission. The question of whether XXXX returns to the USA, with or without his parents and siblings, is a decision for his parents to make and is a matter of private interest that does not implicate the RPD's jurisdiction.
- [40] The RPD was not under an obligation to consider the principle of the "best interest of the child" in determining whether he had a claim against the USA. It properly assessed the risk the principal Appellant alleged XXXX would face, and noted that no evidence was disclosed to support a claim against the USA on the child's behalf. I find the RPD did not err in dismissing XXXX claim against the USA.

The Appellants' failure to claim in the USA

- [41] The Appellants submit the RPD erred in law in finding that they "did not make efforts to remain permanently in the [USA]"¹⁸, as refugee claimants are not required to seek asylum in the first country they reach in their flight. They submit that the date for the FGM rites was only set after the Appellants returned to Nigeria from the USA in XXXX 2017, and that it was only in early XXXX 2017 that their pastor counselled them to refuse to subject any of their daughters to FGM.¹⁹
- [42] The RPD found the Appellants' failure to claim asylum in the USA undermined the credibility of their subjective fear of FGM-related persecution.²⁰ It noted that by the time the Appellants returned to Nigeria from the USA in XXXX XXXX XXXX 2016 "they had already been approached by the extended family to have the minor girl claimants undergo FGM" and knew the date of XXXX XXXX XXXX 2017 had been set for the FGM rites.²¹ It rejected the principal Appellant's explanation that there was no threat to her daughters' lives at that time as they were "given another date to produce their daughter"²², as the principal Appellant had previously expressed the fear that her daughter would die if subjected to FGM.²³
- [43] I have listened to the relevant portion of the audio recording of the RPD hearing. The principal Appellant testified that she did not try to remain in the USA with her children during their 2016 trip because they did not have any issue threatening their lives or "bothering [them] in Nigeria as at that time".²⁴
- [44] When the RPD panel asked her why she said that there was no threat at that time if she had already been approached by the family for her daughters to undergo FGM, the principal Appellant responded that she had at that time been told to present her daughters for FGM in XXXX 2017 and that "everything went down and no one was talking".²⁵

- [45] The principal Appellant went on to testify, however, that she first learned that she was expected to subject her daughters to FGM after she married and her spouse told her about the tradition.²⁶ The principal Appellant's Basis of Claim (BOC) narrative is clear that as early as XXXX 2015 she and her spouse knew of a friend, XXXX XXXX XXXX, whose daughter had died after being subjected to FGM, and that as a result they both feared that their daughter might die if she underwent the procedure.²⁷
- [46] I therefore reject the Appellants' submission that the XXXX 2017 discussion with their pastor was the "trigger" for their fear of persecution and find that the RPD did not err in drawing a negative inference concerning the credibility of the Appellants' subjective fear of FGM-related persecution.

The Appellants' evidence about the age limit for FGM

- [47] The RPD drew a negative credibility inference from what it found to be the principal Appellant's inconsistent evidence about when all girls in her family must undergo FGM. It noted that while her BOC narrative stated the age limit was 15 years, a copy of a threatening letter she disclosed to the panel stated that her daughters had to undergo FGM by the age of 18 years.²⁸ It rejected her explanation that "the age limit must have changed as she did not present her eldest daughter by age 15, noting that her "testimony concerning the age limit changed only after the contradiction was put to her."²⁹
- [48] The Appellants submit the RPD erred by placing a "higher burden on the Principal Appellant" concerning the age limit for FGM, as it failed to consider the principal Appellant "was not the person who made the rules within her husband's extended family members" about the age at which female children should be subjected to excision.

- [49] According to the principal Appellant's BOC narrative,

It is the tradition and custom of XXXX family that any female child [who] is born in to the family must pass through female genital mutilation and ritual when she clocks fifteen years. When its Twelve years, that child has to pass the first huddle of ritual cleansing by initiation and preparation for the major one at Fifteen.³⁰

- [50] The principal Appellant testified as follows in the hearing:

RPD MEMBER:

By what age must the girls in your husband's family undergo female genital mutilation?

PRINCIPAL APPELLANT:

The official age is 15 but there are [sic] preparation towards it.

RPD MEMBER:

Sorry, I didn't hear the last bit. "But the preparation was ..."

PRINCIPAL APPELLANT:

Before it.

RPD MEMBER:

When does the preparation occur?

PRINCIPAL APPELLANT:

They ... she's supposed to attend the market and propitiation at age 12. That-- that one we now did the one that we, that, that thing, we did the one that would lead to the traditional cutting when she's 15 - when she [inaudible] 15.

RPD MEMBER:

So is it always by age 15?

PRINCIPAL APPELLANT:

Yes.

RPD MEMBER:

If the girls in the family have to undergo this ritual cutting by age 15, why is it that the letter that was posted on the gate for your husband states that the age is before 18, and not 15?

PRINCIPAL APPELLANT:

Because we have an, um, they were not able to lay hands on her, um... Since we have not been able to present her before 15, I, I, uh, I think they will now be postponing it until they are able to lay hold on her. But the actual age that we [are] supposed to bring her is 15. So-- but because of the issues that we've been going for [inaudible] and they don't know the whereabouts of where we are so, that might be 31

[51] Having independently assessed the evidence I reject the Appellants' submission on this point, as it disputes how the RPD chose to weigh the principal Appellant's response to its question. The RPD was entitled to weigh the totality of the evidence before it - specifically, to weigh the principal Appellant's testimony in light of the ultimatum letter dated XXXX XXXX, 2019³² which does not give the age of 15 as the age by which girls must undergo FGM, contrary to the repeated references to age 15 in the principal Appellant's BOC narrative and her emphasis on the age of 15 in her testimony.

[52] I have also considered the Appellants' further submission that the new evidence - the XXXX Affidavit of XXXX XXXX XXXX 2019 and the XXXX XXXX XXXX General Hospital discharge record - confirms that the age limit was not 15 years, as the discharge record indicates the patient treated for injuries inflicted during an FGM rite was aged XXXX years old.³³

- [53] In my independent assessment the XXXX Affidavit confirms only that the affiant's daughter underwent FGM at age XXXX, which might have been exceptional. The details of XXXX injuries, while tragic, do not establish that the RPD erred in its assessment and weighing of the evidence before it at the time of its determination.
- [54] I find that the XXXX Affidavit and the hospital discharge are of little assistance in confirming that 15 was the upper age limit for FGM rites to be performed in the principal Appellant's spouse's family, and I therefore give both documents no weight for that purpose.

The RPD's assessment of the kidnapping incident

- [55] The Appellants submit that the RPD erred in assessing the credibility of the principal Appellant's evidence about the alleged kidnapping incident of XXXX XXXX XXXX 2018. The RPD found: that the principal Appellant's testimony omitted key threats made during the alleged kidnapping that were detailed in her BOC narrative³⁴; that she provided inconsistent evidence about the number of men that entered the store to kidnap her and her son³⁵; and that the evidence about the release of the principal Appellant and her son from kidnapping, and how much time passed after her alleged escape from her kidnapping before she and her son went to hospital was inconsistent.³⁶
- [56] The Appellants submit the RPD's finding that the principal Appellant "omitted the threats noted in her narrative was based on [a] selective and biased approach" that neglected to probe the principal Appellant's allegation that she was sexually assaulted while in captivity.³⁷ They submit the RPD should have tried to "establish if the Principal Appellant was a victim of abuse" which "might [have] affected her capacity to talk", thereby "breach[ing] humanitarian law as well as the natural justice."³⁸
- [57] They submit further that the RPD ignored the principal Appellant's explanation for inconsistencies in her testimony about the number of men who kidnapped her³⁹ and failed to assess the principal Appellant's testimony and explanation in light of the totality of the evidence⁴⁰; and also that the RPD panel failed to take into account the considerable distance between Port Harcourt, where the principal Appellant was allegedly kidnapped, and Akure, where she was treated in hospital after the kidnapping, and that it should have considered the XXXX XXXX XXXX 2018 police report and two affidavits from XXXX XXXX XXXX and XXXX XXXX XXXX.⁴¹

The Appellants' release from kidnapping and post-kidnapping hospital treatment

- [58] When the RPD asked the principal Appellant how long she was held for, the principal Appellant testified she was held for four days. The RPD asked the principal Appellant to confirm this and she did, stating that she escaped her captors on the fourth day. ⁴² She later confirmed that she escaped her kidnappers on the fourth day and that she went to the hospital the day after she escaped. She specified that she escaped from her captors, travelled, and arrived in Akure where the hospital was located the day after her escape.⁴³

- [59] The principal Appellant also testified that she went to the hospital in Akure on the second day, after she escaped her captors. She testified that the distance from where she escaped to Akure was about a day's journey, so she reached Akure on the XXXX XXXX XXXX. She testified further that she remained in hospital for four or five days.⁴⁴ The principal Appellant also testified that the hospital knew she had been abducted, because she told them, and that maybe they saw the shock.⁴⁵
- [60] The RPD asked the principal Appellant why she had testified she went to hospital the day after she escaped, when her medical report⁴⁶ said that she presented herself two hours after she was rescued. The principal Appellant explained that the doctor who treated her might have assumed that she was rescued after she arrived at Akure - that is, upon her arrival at Akure.⁴⁷
- [61] I share the RPD's concerns about the credibility of the principal Appellant's account of her post-abduction hospital treatment. Her explanation addresses the RPD's question by speculating about whether the doctor who wrote the medical report understood her account of her kidnapping.
- [62] Having reviewed the RPD hearing audio recording, however, I note that the RPD did not ask the principal Appellant to specify precisely how or what she told the doctors who treated her in Akure about the alleged abduction, where it took place, where she was held and in particular "[t]he manner of her release".⁴⁸
- [63] In my opinion it would have been open to the RPD to find the principal Appellant not credible if she had testified that she gave all these details to the doctor who treated her on XXXX XXXX XXXX 2018. Absent such testimony, it was not open to the RPD to expect such details to "be accurately recounted"⁴⁹ in the hospital letter in particular, notwithstanding the principal Appellant's testimony that she told the hospital she had been kidnapped. For this reason, I find the RPD erred in drawing a negative credibility inference from the failure of the medical letter to include details of how the principal Appellant and her son were released from their kidnappers.
- [64] Although the RPD erred in making this finding, however, I find for the following reasons that its other adverse credibility findings concerning the alleged kidnapping should stand.

Threats made during alleged kidnapping

- [65] In her BOC narrative the principal Appellant wrote the following about the threats allegedly made by her kidnappers:

They accused me that I am a witch [...] that I should confess otherwise they will kill me and kill my Son the way they killed others here and buried them in the mud. That I should also call my husband to bring down my daughter to their location in the bush so that they can be able to perform the ritual for her and that my husband should not alert the police or else they will kill me first before engaging the police.⁵⁰

- [66] During the hearing the RPD panel asked the principal Appellant what she was told by her kidnappers. The latter testified that she was told that she was being heady and disobedient to her husband's tradition, that she was a witch and that the repercussions of her actions were bringing death into the family. The RPD asked what else the kidnappers told her. The principal Appellant repeated that she was told she was a witch, that she was being disobedient to her husband's traditions, that she refused to produce her daughter, and that they would kill her the way they killed people in the hideout if she refused to produce her daughter.⁵¹
- [67] The RPD panel then remarked verbally that the principal Appellant had "left something out" in responding to the RPD's question about what the kidnappers had told her. The RPD revisited the principal Appellant's BOC narrative which recounted the threats allegedly made by the kidnappers: "that they will kill your son, that [the principal Appellant] should call [her] husband and ask [him] to bring [her] daughter to the location in the bush [...] so that they can perform the ritual on her" and that her spouse should not alert the police or the kidnappers would kill her.⁵²
- [68] When asked by the RPD why her testimony omitted those details, the principal Appellant testified that she had just summarized what the RPD had asked her, and that she hadn't realized the RPD wanted her to go into details.⁵³
- [69] Having independently assessed the evidence I find that the RPD did not err in drawing a negative credibility inference from this omission, as it was entitled to weigh the principal Appellant's explanation for the omission. In my opinion her explanation was inadequate to explain the omissions, given the specificity of the threats and the fact that she chose to highlight them in her BOC narrative. The omissions of the threat to perform FGM on the principal Appellant's eldest daughter is particularly inexplicable, since the principal Appellant asserted that this alleged risk prompted them to flee Nigeria and seek refugee protection.
- [70] The Appellants' submissions fail to directly address the fact that the principal Appellant's testimony omitted details that were relevant and important enough be mentioned in her BOC narrative. Instead, the Appellants have tried to undermine this finding of the RPD based on its failure to question the principal Appellant about her allegation that she was raped by her kidnappers. The Appellants' submission that the RPD's approach was "selective and biased" is a red herring, and I reject it.

Number of kidnappers

- [71] In her BOC narrative the principal Appellant wrote:

The most damaging experience that actually made us to run from Nigeria happened on the XXXX XXXX 2018, I took my small boy from daycare and I came back to the shop and attended to customers, When I was alone in the store I saw two guys come in, they approached me and told me go into their car outside. I was with my son who was on my lap and I was arguing with them. Then they pulled out guns and told me again, I was so afraid and I was holding my son because he was crying. I had no choice but to go in the car.

- [72] I have listened to the audio recording of the relevant portion of the hearing. The principal Appellant testified to the RPD that she was kidnapped from her shop in Nigeria with her son XXXX, and that her salesgirl witnessed the abduction from afar. She testified further that she was abducted by two men. When the RPD panel asked her if at any point in time, between the principal Appellant getting into her shop and then into the car with the abductees there were any other men involved, she responded, "No."⁵⁴
- [73] The affidavit from XXXX XXXX, the salesgirl the principal Appellant employed in her shop on XXXX XXXX XXXX 2018, states that three men "stormed the store" and abducted the principal Appellant and her son.
- [74] When the RPD asked the principal Appellant to explain the inconsistency between the XXXX Affidavit and her testimony, the latter said the salesgirl might have added the driver of the car, and that because she witnessed the abduction from afar she might not have noticed how many men had come. The principal Appellant testified further that at that moment she was not sure the salesgirl was even aware of what was happening until she (the principal Appellant) left.⁵⁵
- [75] The Appellants' Nigeria Police report of XXXX XXXX XXXX 2018 states that on XXXX XXXX XXXX 2018 the principal Appellant and her son were kidnapped "by 3 men gangs with a white hilux van".⁵⁶ During the hearing the principal Appellant testified that her spouse reported the kidnapping to the police, and that her spouse knew everything that was going on.⁵⁷
- [76] When the RPD asked her why the police report said that she was kidnapped by three men instead of two, the principal Appellant responded that her spouse was not at the scene of the kidnapping, and he told the police what he had been told by the salesgirl XXXX XXXX.⁵⁸
- [77] In my independent assessment neither the principal Appellant's explanations nor the news articles about other kidnappings is adequate to explain the inconsistencies in her evidence concerning the number of people who kidnapped her and XXXX.
- [78] First, of the news articles⁵⁹ the Appellants disclosed to the RPD, only five pertain to kidnapping⁶⁰ -- the others are not relevant to her situation and warrant little weight of the purpose of assessing the credibility of her allegation that she was abducted. For this reason, the RPD did not err in failing to discuss these articles.

- [79] I find, however, that the RPD's failure to mention the one article that mentions the principal Appellant's kidnapping was an error, as the mention of the Appellants means the article is relevant to the allegation. Notwithstanding this error, I have independently examined this news article and I note that it states she and her son were abducted by three kidnappers. This is inconsistent with the principal Appellant's BOC narrative and her oral testimony.
- [80] Moreover, the article states that the abductors were "hired killers engaged by someone to take [the principal Appellant's] life" and that the kidnappers "planned to sell the mother and son to ritual killers".⁶¹ This is inconsistent with the motive for kidnapping detailed in the principal Appellant's BOC narrative: that she was "responsible for the death[s] of the five family members" and that if she did not confess the kidnappers would "kill [her] and kill [her] Son", and also that they would kill her if her spouse did not "bring down [their] daughter to their location [...] so that they can be able to perform the ritual for her".⁶²
- [81] In my independent assessment the inconsistencies in the Appellants' account of the number of kidnappers, combined with inconsistencies in the motive for the kidnapping between the principal Appellant's BOC narrative and the news article that discusses the alleged kidnapping, further undermine the credibility of the principal Appellant's allegation that she and her son XXXX were abducted at all, let alone for the purpose of compelling her to subject her daughters to FGM.
- [82] Given my independent assessment of these inconsistencies along with the omission of key threats made by the kidnappers from the principal Appellant's testimony, I find on a balance of probabilities that the alleged kidnapping never took place.
- [83] Therefore, in my independent assessment, there is no merit to the Appellants' submission that the RPD failed to explain "why the supporting documents were not in compliance with the Principal Appellant's testimony and her BOC narrative".⁶³
- [84] A straightforward reading of paragraphs 14 through 32 inclusive of the RPD's reasons shows the RPD identified "inconsistencies" between the principal Appellant's testimony and documents that undermined her credibility, leading to its finding at paragraph 33, while paragraphs 34 through 38 of the RPD's reasons⁶⁴ explain its weighing of the Appellants' other supporting documents.
- [85] I have independently assessed the other supporting documents and none of them supports a finding that the RPD relied selectively on the Appellants' evidence in rejecting their allegations that the minor female Appellants face a risk of FGM in Nigeria.
- [86] While I agree with the Appellants that the affidavit of XXXX XXXX⁶⁵ establishes generally that women in the family of the principal Appellant's spouse have been subjected to FGM, I agree with the RPD that the affidavit alone fails to establish that the agents of persecution have threatened to subject the Appellants to FGM.

- [87] Although the affidavit of XXXX XXXX66 states that his daughter died after undergoing FGM in 2015, there is no indication that the affiant or his daughter have any connection to the Appellants, and for that reason it is of no relevance in assessing the credibility of their alleged risk.
- [88] Similarly, the death certificates of XXXX XXXXandXXXX XXXX XXXX XXXX XXXX67 establish that these individuals died on the dates in question, but there is nothing that explains how their deaths are in any way connected to the risks alleged by the Appellants.

The new evidence and the Appellants' forward-looking risk of persecution

- [89] The Appellants submit that their new evidence "confirm[s] the fear of persecution [the] suffered at the hands of the [principal Appellant's] husband's extended family members," whom they allege attacked the principal Appellant's spouse and his driver on XXXX XXXX XXXX 2019 for failing to disclose the whereabouts of his wife and children.⁶⁸
- [90] Although the affidavits of XXXX XXXXandXXXX XXXX XXXX69 and the police report of XXXX XXXX XXXX 2019⁷⁰ agree on the date and time of the alleged attack, the documents are speculative at best about the links between the attackers and the Appellants' alleged agent of persecution XXXX XXXX. These omissions, inconsistencies and vagueness concerning the links between the attackers and the alleged agent of persecution that undermine their reliability for the purpose of establishing a forward-looking risk of persecution.
- [91] The XXXX Affidavit states that the attackers were "some hoodlums" who "were identified as thug [sic] to my boss family head XXXX XXXX XXXX"⁷¹ without specifying how they were so identified. The XXXX Affidavit states that the attackers were "some hoodlum thugs working for XXXX XXXX XXXX" without explaining how the affiant was able to identify the attackers as being linked to his family head.
- [92] As well, the XXXX Affidavit says that one attacker "was constantly repeating that [his] boss" the principal Appellant's spouse "is stubborn and that he is playing with his life, that failure to produce his wife and children" but does not say why XXXX XXXX XXXX wife and children were being sought. This omission is in contrast to the XXXX Affidavit, which states that the attack was the "result of [his] refusal to present [his] daughter for the family ritual cutting festival (Obintun festival)."⁷²
- [93] Because of the omissions, inconsistencies and vagueness mentioned, I give these affidavits no weight in establishing that the attacks were linked to the risk of persecution alleged by the Appellants before the RPD and in the present appeal.
- [94] For its part, the Nigeria Police investigation report dated XXXX XXXX XXXX 2019 is not strong evidence to support a finding that the attack on the principal Appellant's spouse and his driver on XXXX XXXX XXXX 2019 was carried out by the agent of persecution for the reasons stated in the XXXX and XXXX Affidavits.

- [95] Although the report states that anonymous witnesses identified the attackers as "thugs harbored by XXXX XXXX XXXX"⁷³ it also states that when police "invited XXXX XXXX XXXX [...] to know the rationale behind his action but [sic] he denied of sending thugs to attack the complainant."⁷⁴ While the investigation report finds that XXXX XXXX XXXX thugs were the attackers, it states only that XXXX XXXX "complained that the complainant [is] always going contrary to his opinion as family head."⁷⁵
- [96] Given the risk of persecution alleged by the Appellants, one would expect the police investigation report to mention that the principal Appellant's spouse was targeted because of his refusal to subject his daughters to FGM. In my assessment, the failure of the Nigeria Police investigation report to make the explicit finding that the attack was perpetrated for the reasons stated in the XXXX and XXXX Affidavits undermines its utility for the purpose of establishing that the attack was carried out for the reasons stated in those affidavits.
- [97] As the report is useful only in establishing that XXXX XXXX XXXX and his driver were attacked on XXXX XXXX XXXX 2019, but fails to establish that the attack was linked to the risk of persecution at the heart of the Appellants' claim, I give the Nigeria Police investigation report of XXXX XXXX, 2019 no weight for the purpose of supporting the Appellants' allegation that XXXX XXXX XXXX was targeted as an extension and furtherance of the targeting and threats that they faced in Nigeria for refusing to subject the minor female Appellants to FGM.
- [98] I also accept that the XXXX Medical Centre reports⁷⁶ establish that XXXX XXXX XXXX and XXXX XXXX XXXX were attacked on XXXX XXXX, but I find that they too are of no weight in establishing the motive for the attack and whether it was tied to the risk of persecution alleged by the Appellants and the agent of persecution whom they identified, as they refer only to the medical treatment XXXX XXXX XXXX and his driver received.
- [99] I have also assessed the article in the XXXX 2019 XXXX of XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX".⁷⁷ The XXXX refers to XXXX XXXX XXXX "having received a threat letter at his residence [a] few weeks ago in which his extended family considered as a turbo and disrespect his outright disobedience to the customs of the land."⁷⁸ The XXXX Affidavit does not mention any such threat letter. I would expect it to do since the XXXX states XXXX XXXX XXXX received the threat letter only a few weeks before the attack of XXXX XXXX XXXX 2019.
- [100] The only other reference in the evidence to a threat letter that pre-dates the XXXX 2019 attack on XXXX XXXX XXXX is in the Nigeria Police investigation report of XXXX XXXX XXXX 2019⁷⁹, which refers to a threatening letter having been left at XXXX XXXX XXXX residence in Akure on XXXX XXXX XXXX 2019. The letter in question appears to be the one dated XXXX XXXX XXXX 2018⁸⁰ which directs the principal Appellant's spouse to "produce [his] two daughters" for "the ritual initiation cutting".⁸¹

- [101] This threat letter pre-dates the XXXX 2019 attack on XXXX XXXX XXXX by three months, three weeks and four days - considerably more than the "few weeks" mentioned in the XXXX XXXX XXXX. It is possible the XXXX is referring to a different threat letter, but no such letter was part of the documents included in the Appellants' IRPA s. 110(4) new evidence application.
- [102] In my independent assessment, the XXXX XXXX reference to the XXXX 2019 letter as predating the XXXX 2019 attack by only a "few weeks" further undermines the XXXX reliability, especially considering that the victim of that attack, XXXX XXXX XXXX, was the source of the information in the XXXX.
- [103] I note as well that the XXXX XXXX XXXX identifies the principal Appellant's spouse XXXX XXXX XXXX as the source for its content. Despite this, the XXXX does not identify the alleged agent of persecution, XXXX XXXX XXXX, as the person behind the attack, referring only to "thugs sent by members of his extended family"⁸² as the attackers.
- [104] As XXXX XXXX XXXX is the XXXX primary source, and given in particular that XXXX XXXX XXXX is named in the XXXX Affidavit, I would expect the XXXX to identify the Appellants' alleged agent of persecution, since the XXXX asserts that "life has now been made unbearable for [XXXX XXXX XXXX] following his failure to release his daughters for circumcision".⁸³
- [105] For all of the foregoing reasons I give the XXXX XXXX XXXX no weight in establishing that the XXXX XXXX XXXX 2019 attack was linked to the alleged risk of persecution at the heart of the Appellants' claim.
- [106] In my independent assessment, the Appellants have failed to establish that the RPD erred in refusing their claim for refugee protection. For this reason, the RPD's determination must stand.

CONCLUSION

- [107] 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 section 111(1) (a) of the Immigration and Refugee Protection Act (IRPA).

(signed)

"S. Thompson"

S. Thompson

January 29, 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.
- 2 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 15. See also Appellants' Record, p. 32.
- 3 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 16. See also Appellants' Record, p. 33.
- 4 Exhibit P-2. Appellants' Record, Appellant's Memorandum, p. 4.
- 5 Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 7. See also Appellants' Record, p. 22.
- 6 Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 8. See also Appellants' Record, p. 25.
- 7 Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 8. See also Appellants' Record, p. 23.
- 8 Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 3. See also Appellants' Record, p. 21.
- 9 Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 5.
- 10 National Documentation Package, Nigeria, 29 November 2019, item 10.3: Documents issued by police during criminal investigations or in response to a complaint; procedures for an individual to obtain a copy of a police report within the country as well as from abroad; appearance of police reports, including whether ... Immigration and Refugee Board of Canada. 7 November 2019. NGA106379.E.
- 11 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, pp. 13-14. See also Appellants' Record, pp. 28-29.
- 12 See *Malambu v Canada (Citizenship and Immigration)*, 2015 FC 763 at paras. 28-36 and 59.
- 13 Exhibit RPD-1, RPD Record, Exhibit 7, pp. 350, Exhibit 1, 153-156.
- 14 Exhibit RPD-1, RPD Record, RPD Reasons for Decision, p. 5 at para. 9.
- 15 Exhibit RPD-1, RPD Record, RPD Reasons for Decision, p. 5 at para. 10.
- 16 Exhibit P-2, Appellants' Record, Appellants' Memorandum, p. 7.
- 17 Exhibit P-2, Appellants' Record, Appellants' Memorandum, p. 8.
- 18 Exhibit P-2, Appellants' Record, Appellant's Memorandum, p. 17.
- 19 Exhibit P-2, Appellants' Record, Appellant's Memorandum, p. 18.

- 20 Exhibit RPD-1, RPD Record, RPD Reasons for Decision, p. 11 at para. 31.
- 21 Exhibit RPD-1, RPD Record, RPD Reasons for Decision, p. 11 at para. 29.
- 22 Exhibit RPD-1, RPD Record, RPD Reasons for Decision, p. 11 at para. 30.
- 23 Exhibit RPD-1, RPD Record, RPD Reasons for Decision, p. 11 at para. 31.
- 24 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 00:22:45 to 00:24:53.
- 25 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 00:26:20 to 00:26:56.
- 26 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 00:30:56 to 00:31:09.
- 27 Exhibit RPD-1, RPD Record, Exhibit 2.1, pp. 28-29 at lines 63-68, 77-85.
- 28 Exhibit RPD-1, RPD Record, RPD Reasons for Decision, pp. 9-10 at paras. 24-25.
- 29 Exhibit RPD-1, RPD Record, RPD Reasons for Decision, p. 10 at paras. 26-27.
- 30 Exhibit RPD-1, RPD Record, Exhibit 2.1, p. 25 at lines 17-21.
- 31 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 00:31:36 to 00:34:32 (emphasis added).
- 32 Exhibit RPD-1, RPD Record, Exhibit 7, p. 375.
- 33 Exhibit P-2, Appellants' Record, Appellants' Memorandum, p. 16.
- 34 Exhibit RPD-1, RPD Record, RPD Reasons for Decision, pp. 6-7 at para. 14-16.
- 35 Exhibit RPD-1, RPD Record, RPD Reasons for Decision, pp. 7-8 at para. 17-19.
- 36 Exhibit RPD-1, RPD Record, RPD Reasons for Decision, pp. 8-9 at para. 20-23.
- 37 Exhibit P-2, Appellants' Record, Appellants' Memorandum, p. 10.
- 38 Exhibit P-2, Appellants' Record, Appellants' Memorandum, p. 11.
- 39 Exhibit P-2, Appellants' Record, Appellants' Memorandum, p. 12.
- 40 Exhibit P-2, Appellants' Record, Appellants' Memorandum, p. 13.
- 41 Exhibit P-2, Appellants' Record, Appellants' Memorandum, p. 14-15.
- 42 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 00:54:38 to 00:55:11.
- 43 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 01:02:45 to 01:03:16.

- 44 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 01:00:28 to 01:01:47.
- 45 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 01:02:04 to 01:02:33.
- 46 Exhibit RPD-1, RPD Record, Exhibit 7, p. 368.
- 47 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 01:03:38 to 01:04:09.
- 48 Exhibit RPD-1, RPD Record, RPD Reasons for Decision, p. 9 at para. 22.
- 49 Exhibit RPD-1, RPD Record, RPD Reasons for Decision, p. 9 at para. 22.
- 50 Exhibit RPD-1, RPD Record, Exhibit 2.1, p. 31 at lines 135-146 (emphasis added).
- 51 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 00:55:50 to 00:57:34.
- 52 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 00:58:10 to 00:58:45.
- 53 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 00:58:46 to 00:59:02.
- 54 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 00:45:46 to 00:48:32.
- 55 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 00:52:09 to 00:52:47.
- 56 Exhibit RPD-1, RPD Record, Exhibit 7, p. 371
- 57 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 01:05:44 to 01:06:46.
- 58 Audio recording of hearing in RPD file number TB8-22747 on September 4, 2019 at timestamps 01:08:14 to 01:08:39.
- 59 Exhibit RPD-1, RPD Record, Exhibit 7, pp. 428-445.
- 60 Exhibit RPD-1, RPD Record, Exhibit 7, pp. 428-430, 434-437, 439-444.
- 61 Exhibit RPD-1, RPD Record, Exhibit 7, p. 428.
- 62 Exhibit RPD-1, RPD Record, Exhibit 2.1, p. 31 at lines 136-137, 140-141, 142-144.
- 63 Exhibit P-2, Appellants' Record, Appellants' Memorandum, p. 19.
- 64 RPD Record, RPD Reasons for Decision, pp. 12-13.

- 65 Exhibit RPD-1, RPD Record, Exhibit 7, p. 377.
- 66 Exhibit RPD-1, RPD Record, Exhibit 7, p. 396.
- 67 Exhibit RPD-1, RPD Record, Exhibit 7, pp. 397-398.
- 68 Exhibit P-2, Appellants' Record, Appellants' Memorandum, pp. 3-4.
- 69 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, pp. 4, 8.
- 70 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, pp. 13-14.
- 71 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 8.
- 72 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 4 at para. 7. See also Appellants' Record, p. 21 at para. 7.
- 73 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, pp. 13-14.
- 74 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 13 ("INVESTIGATION").
- 75 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 14 at para. 5 ("FINDINGS").
- 76 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, pp. 7, 12. See also Appellants' Record, pp. 22, 25.
- 77 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 24.
- 78 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 24.
- 79 Exhibit RPD-1, RPD Record, Exhibit 7, pp. 373-374.
- 80 Exhibit RPD-1, RPD Record, Exhibit 7, p. 375.
- 81 Exhibit RPD-1, RPD Record, Exhibit 7, p. 375.
- 82 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 24.
- 83 Exhibit P-3, Appellant's submission of documents in support of IRPA s. 110(4) new evidence application dated December 30, 2019, p. 24.

RAD File / Dossier de la SAR : TB9-28137

TB9-28138 / TB9-28139 / TB9-28140

TB9-28141

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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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