

CANADA / JUDGMENT

TB9-35367

COURT

Refugee Appeal Division

DECIDED

22 October 2020

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RAD File / Dossier de la SAR : TB9-35367 TB9-35368 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 22, 2020 Date de la décision Panel E. Bobkin Tribunal Counsel for the persons who are the subject of the appeal Bruce Perreault 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] These are my reasons for dismissing the appeal of XXXX XXXX XXXX (Principal Appellant) and XXXX XXXX XXXX (Associate Appellant), citizens of Nigeria. I substitute a decision that the Appellants are Convention refugees based upon the imputed sexual orientation of the Principal Appellant.
- [2] The Principal Appellant alleges that she is bisexual. She alleges that she came to Canada in 2017 because she has two adult daughters in school here. She alleges that, while she was here, her same-sex partner was discovered having sex with another woman and arrested. She alleges that this individual exposed the Appellant's own sexual orientation and that this was widely reported in the news. She alleges that she then decided to claim protection.
- [3] The Refugee Protection Division (RPD) rejected the Appellants' claim for a lack of credibility. The RPD found there were omissions, inconsistencies, subjective fear issues and a lack of appropriate corroborating documents. The RPD found the Principal Appellant had not established that she is bisexual, on a balance of probabilities.
- [4] The Appellant argues the RPD erred by being microscopic and failing to follow the SOGIE Guideline.¹ The Principal Appellant states that she is not submitting new evidence on appeal but has, in fact, done so.
- [5] I find the determinative issue is the perceived or imputed sexual orientation of the Principal Appellant. The RPD failed to assess the fact that the newspaper article naming the Principal Appellant as bisexual is publicly available on the internet and whether this would expose the Appellants to a risk of persecution. I find it would. I am not finding the Principal Appellant has established her sexual orientation, on a balance of probabilities. I am also not evaluating the new evidence, as it has no bearing on this appeal. I generally agree with the

RPD that there are serious credibility concerns with the Principal Appellant's testimony, but, nevertheless, a sur place claim is established. DECISION

- [6] The appeal is allowed. I substitute my own decision that the Appellants are Convention refugees.

ANALYSIS

- [7] My role is to look at all the evidence and decide if the RPD made the correct decision.² In this instance, I find that the RPD did not.
- [8] The RPD identified several credibility issues with the Appellants' evidence which led to the conclusion that the Principal Appellant had not established that she is bisexual, on a balance of probabilities. The Principal Appellant has challenged these findings. However, in my view, these issues are not determinative of the appeal. What is determinative is that the RPD failed to consider the impact of the news article describing the Principal Appellant as a sexual minority or the risk to the Appellants based upon this. While this is not raised by the Appellants specifically, it is my duty to consider all issues arising on an independent review of the record, and I have done so here.
- [9] The Principal Appellant presented a newspaper article published in the Nigerian paper, Leadership, naming her as a partner of a bisexual woman caught having sex with another woman.³ The Appellant also presented evidence that this article is available online.⁴ I confirmed, via Google, that the article is available online and that it is the fourth item listed when the Principal Appellant's name is searched in Google.
- [10] The question to be asked for a sur place claim is whether the circumstances are "likely to come to the attention" of the authorities in Nigeria and whether this gives rise to a serious possibility of persecution.⁵ The Federal Court has also recognized sur place claims where the agent of persecution is not the state but a third party.⁶ In this way, the Principal Appellant need not establish the likelihood of the state learning about the article but, instead, that she faces a serious possibility of persecution as a result of third parties likely learning about this article.
- [11] I find, on a balance of probabilities, that the Principal Appellant's imputed sexuality is likely to come to the attention of third parties in the community given that the article is publicly accessible through an online search of her name. I further find, on a balance of probabilities, that the Leadership article establishes the Principal Appellant's sur place claim and that she faces a serious possibility of persecution in Nigeria. The treatment of sexual minorities, including perceived or imputed sexual minorities, amounts to persecution.
- [12] The objective evidence in the National Documentation Package (NDP) indicates that, while prosecutions under the Same Sex Marriage (Prohibition) Act are rare, the law has become "a tool used by police and members of the public to legitimize human rights violations."⁷ A mere allegation or accusation of same-sex activity is often sufficient for arrest and

detention.⁸ Persons who are not imputed to be sexual minorities face persecution in Nigeria from the state as well as members of the community, ranging from extortion and mob violence to death.⁹ This risk is also real for those whose alleged sexuality has been disclosed through media reports.¹⁰ The 2017 European Asylum Support Office report describes the circumstances of a similarly situated person in Nigeria, whose alleged sexuality was disclosed online which led to a fear of community harm and persecution.¹¹ Based upon this, I find the Principal Appellant faces a serious possibility of persecution based upon her imputed sexual orientation.

- [13] As for the Associate Appellant, I find that, in this instance, she faces a serious possibility of persecution based upon her membership in the particular social group of minor children of imputed sexual minorities. I would not necessarily find this in every case, but, given the widespread availability of the article about the Principal Appellant, I find the Associate Appellant faces a serious possibility of persecution. There is evidence on record that family members of individuals who are identified as sexual minorities face stigma, ostracization, embarrassment, insult and assault.¹² Additionally, in some circumstances where the sexual minority is wanted, their family members could be arrested in order to get the wanted family member to appear.¹³ Given the availability of the article about the Principal Appellant, I find that the Associate Appellant would face more than a mere possibility of this treatment, which, given that it includes assault, amounts to persecution.
- [14] Regarding state protection, I find that it would be objectively unreasonable for the Principal Appellant to seek the protection of the Nigerian state. Nigerian authorities are known to target imputed sexual minorities. It would be objectively unreasonable to expect the Principal Appellant to seek the protection of the state where doing so would require her to disclose that she has been identified online to be a sexual minority, opening up the possibility of persecution by the state itself. For the same reason, I find that it would be unreasonable for the Associate Appellant to approach the state. I further note her young age, 11, which also indicates it would be unreasonable for her to approach the state on her own. I therefore find the Appellants do not have access to adequate state protection in Nigeria.
- [15] I further find that the Appellants face more than a mere possibility of persecution throughout Nigeria. The newspaper article is publicly accessible throughout Nigeria through an online search of the Principal Appellant's name, as discussed above. The treatment of sexual minorities is the same across Nigeria. Therefore, I find that the Appellants face more than a mere possibility of persecution throughout Nigeria and that there is no viable internal flight alternative.

CONCLUSION

- [16] The appeal is allowed. I substitute my own decision that the Appellants are Convention refugees. (signed) Erin Bobkin E. Bobkin October 22, 2020 Date 1 Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression: issued by the Chairperson, pursuant to paragraph 159(1)(h) of the IRPA,

effective date: May 1, 2017. <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx> 2 M.C.I. v. Huruglica, Bujar (F.C.A., no. A-470-14), Gauthier, Webb, Near, March 29, 2016, 2016 FCA 93; Rozas Del Solar, Paola v. M.C.I. (F.C., no. IMM-2645-17), Diner, November 14, 2018, 2018 FC 1145. 3 Exhibit RPD-1, RPD Record, at p. 172. 4 Exhibit RPD-1, RPD Record, at p. 377. 5 Win, Ko Ko v. M.C.I. (F.C., no. IMM-1248-08), Shore, March 28, 2008, 2008 FC 398, at paras. 2, 30; Girmaeyesus, Yokob Ciyem v. M.C.I. (F.C., no. IMM-2739-09), Kelen, January 20, 2010, 2010 FC 53, at para. 28; Martinez Caicedo, Adriana v. M.C.I. (F.C., no. IMM-5544-10), Rennie, June 24, 2011, 2011 FC 749, at paras. 32-33. 6 Balog, Laszlo v. M.C.I. (F.C., no. IMM-1806-13), Mosley, May 9, 2014, 2014 FC 449, at para. 18; Demirtas, Alev v. M.C.I. (F.C., no. IMM-1781-10), O'Keefe, May 19, 2011, 2011 FC 584, at para. 27. 7 NDP for Nigeria (July 31, 2020), Item 2.1, United States Department of State, "Nigeria: Country Reports on Human Rights Practices for 2019", March 11, 2020. 8 NDP for Nigeria (July 31, 2020), Item 2.1 (ibid.); Item 6.11, Immigration and Refugee Board of Canada (IRB), "The Situation of Sexual and Gender Minorities in Nigeria (2014-2018)", February 2019; and Item 1.3, European Union, European Asylum Support Office, "EASO COI Meeting Report: Nigeria", August 2017. 9 NDP for Nigeria (July 31, 2020), Item 6.12, United Kingdom Home Office, "Country Policy and Information Note, Nigeria: Sexual orientation and gender identity or expression", Version 2.0, April 2019. 10 NDP for Nigeria (July 31, 2020), Item 6.11 (supra footnote 8), at pp. 30-31. 11 NDP for Nigeria (July 31, 2020), Item 1.3 (supra footnote 8). 12 NDP for Nigeria (July 31, 2020), Item 6.11 (supra footnote 8). 13 NDP for Nigeria (July 31, 2020), Item 10.1, IRB, Response to Information Request (RIR) NGA106375.E, "Whether the police in Nigeria detain family members of wanted persons, including sexual and gender minorities; the manner in which these persons are treated; legal recourse available to them (2016-November 2019)", November 20, 2019.

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