

REFUGEE STATUS APPEALS
AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76152

AT AUCKLAND

Before: M A Roche (Member)

Counsel for the Appellant: D Ryken

Appearing for the Department of Labour: No Appearance

Date of Hearing: 10 December 2007

Date of Decision: 8 January 2008

DECISION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a national of Nigeria.

INTRODUCTION

[2] The appellant is a single man aged in his early 30s. He arrived in New Zealand on 27 May 2007 and lodged a claim for refugee status upon arrival. He was interviewed by the RSB on 18 June, 24 July and 24 August 2007. His claim for refugee status was declined in a decision dated 31 October 2007 against which he appeals to this Authority.

[3] At the airport and in his subsequent written statement, the appellant claimed to fear being persecuted in Nigeria because of what can loosely be described as "tribal" issues. After his initial RSB interview on 18 June 2007, the appellant's former counsel sent a letter to the RSB informing them that the appellant had disclosed to her that he was homosexual and that this was another reason why he

feared being persecuted in Nigeria. Accordingly, his RSB interview was reconvened and the appellant was interviewed about his sexual orientation and his experiences as a gay man in Nigeria.

[4] On 3 December 2007, one week prior to the scheduled appeal hearing, the appellant's current counsel sent a letter to the Secretariat advising that the "tribal" aspect of the appellant's case had been fabricated and would not be pursued at the hearing. A supplementary statement by the appellant explaining why he fabricated that part of his case was subsequently filed.

[5] The central issue to be determined in this appeal is whether the appellant's status as a gay man in Nigeria gives rise to a well-founded fear of being persecuted if he returns there.

THE APPELLANT'S CASE

[6] What follows is a summary of the appellant's evidence. It will be assessed later in the decision.

[7] The appellant is the eldest son of a large middle class family in Lagos. His father is deceased but his mother and all his siblings remain living there.

[8] The appellant was educated at a boarding school. When he was around 12 or 13 years old he realised that he was attracted to boys rather than girls. Around this time he entered into his first sexual relationship with a classmate, AA, which continued until he and AA graduated from high school. This relationship was conducted in secrecy and was concealed by the appellant and AA from their schoolmates and the school staff.

[9] After they completed high school, AA returned to his home town which was distant from Lagos and entered university. He and the appellant kept in touch and met occasionally when AA came to Lagos but did not remain in a relationship with each other.

[10] The appellant entered a catering and hotel management course in Lagos. While studying in the course he began to engage in casual sexual relationships with other men. He did not discuss his sexual orientation with anyone and in particular he concealed it from his family with whom he lived.

[11] After completing his course the appellant worked as a teacher in a private school. While working as a teacher the appellant met and commenced a relationship with his wife. He was not attracted to women but had begun to find it awkward to always be single at family and social gatherings and had begun to fear that people would guess his sexuality. He started the relationship with his wife to avoid his sexual orientation coming to light. However, his relationship with his wife was extremely difficult, primarily because he was not attracted to her and did not enjoy having sexual relations with her.

[12] In April 1998 the appellant and his wife had their first child, a daughter. Around this time the wife began pressuring him to marry her.

[13] In early 2000 the appellant terminated his employment as a teacher and began working as a waiter in a restaurant based in a large hotel in Lagos. While working at the hotel the appellant entered into a relationship with an Englishman who worked in a business based in the hotel and who had a hotel room. The appellant and the Englishman concealed their relationship from others. On one occasion the appellant was approached by a security guard who had observed that he had spent an inordinate amount of time in the Englishman's room and asked him what was going on. Although the appellant told him that he had been discussing a work-related matter with the Englishman, the security officer reported the matter to the appellant's supervisor. The appellant was interviewed by his supervisor but was able to persuade him that he had been in the room discussing the restaurant menus.

[14] After approximately six months, the Englishman returned to England. The appellant did not have any further relationships of an ongoing nature with other gay men in Lagos but continued to engage in casual sexual relationships.

[15] In March 2004, the appellant succumbed to pressure being placed on him by his wife and by his mother and married his wife. Several months after the wedding, the appellant's second child, a son, was born.

[16] Around this time one of the appellant's co-workers was caught by police performing a sexual act with one of the supervisors from the hotel on a beach in Lagos. The supervisor was a foreign national and was able to leave Nigeria immediately. BB was detained in a police station where he was beaten before being forced to write a statement saying that he was not a homosexual and that he would never have anything to do with homosexuals. Although the appellant had

heard stories about gay men being attacked by the police and by vigilante groups, this was the first time someone close to him had been mistreated because of their sexuality. He became very nervous that his sexuality would be found out and was scared that the way he walked, talked or the way he looked at men might lead to him being exposed as a gay man and suffering similar treatment to BB. At the same time the appellant's relationship with his wife was becoming increasingly unhappy.

[17] In August 2005 the appellant left Nigeria and went to Johannesburg, South Africa. In Johannesburg he stayed with the cousin of a friend from Nigeria and found work as a waiter. He had left Nigeria because of the pressure he felt from concealing his sexual orientation and from his wife. However in Johannesburg he still felt it necessary to conceal his sexual orientation because of the large number of Nigerians there. He engaged in casual sexual encounters with men but did not tell his workmates or his flatmate that he was gay.

[18] The appellant is a Christian and attended church in Nigeria and in Johannesburg. At his church in Johannesburg he met a South African man, CC, and formed a relationship with him. CC was married and he and the appellant kept their relationship secret from other people, meeting in hotel rooms and at the home of one of CC's friends.

[19] The appellant had managed to obtain a work permit in South Africa and to renew this from time to time. However, he was concerned that he would not be able to remain in South Africa indefinitely and would eventually be returned to Nigeria. Accordingly he decided to leave South Africa.

[20] With financial assistance from CC, the appellant obtained a photo-substituted South African passport and a ticket to New Zealand. He was unaware that his sexual orientation could form the basis of a refugee claim and so upon arrival in New Zealand made the false "tribal" claim.

[21] The appellant has attended church regularly since arriving in New Zealand. However, he no longer attends church study groups since members of the group tried to "cure" his sexuality through prayer.

[22] He has engaged in casual sexual relationships with men in New Zealand and has also met a New Zealander, DD, with whom he wishes to pursue a serious relationship.

[23] The appellant does not wish to return to Nigeria because he cannot live openly as a gay man there. He does not wish to spend his life having casual sexual relationships and sneaking in and out of rooms. He wishes to live openly in a normal partnership without fear and without being discriminated against.

The witness DD

[24] The man with whom the appellant is currently in a relationship, DD, appeared before the Authority and gave evidence.

[25] Witness DD resides in Auckland. He is the customer services manager for a company. He met the appellant in October 2007 through another gay friend and is involved in a sexual and romantic relationship with him. He told the Authority that the appellant had told him about his friend in Nigeria being beaten by the police after being arrested for homosexuality and that the appellant had been very frightened because of this. DD also told the Authority that the appellant had told him about his relationship with CC in South Africa and about how difficult it was to live as a gay man in Nigeria.

Documents filed

[26] Prior to the hearing counsel for the appellant filed an updated witness statement, a statement from DD, opening submissions and a bundle of documents including country information and Nigerian identity documents for the appellant.

THE ISSUES

[27] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[28] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

Credibility

[29] Prior to determining the framed issues it is necessary to make an assessment of the appellant's credibility. The Authority found the appellant to be a credible witness. It is accepted that he is a gay man from Lagos and that the account that he gave to the Authority is true. DD also impressed the Authority as a credible witness. It is accepted that the appellant and DD are currently involved in a relationship.

Does the appellant have a well-founded fear of being persecuted in Nigeria?

Previous decisions of the Authority

[30] Before examining the appellant's particular circumstances, it is helpful to consider previous decisions of the Authority concerning the legal issues that arise from the claim that homosexuals face "being persecuted" in their countries of origin.

[31] There are two previous decisions of particular relevance. These are *Refugee Appeal No 74665* (7 July 2004) and *Refugee Appeal No 75250* (28 January 2005).

[32] *Refugee Appeal No 74665* considered the predicament of a young gay Iranian male and concluded that he was entitled to refugee status. Like the appellant in the present case, the appellant in *Refugee Appeal No 74665* had experienced few difficulties resulting from his homosexuality (apart from his expulsion from high school) because of the furtive manner in which his relationships were conducted, the overriding imperative being to conceal his sexual orientation from other people. In his evidence, he described himself as deeply unhappy because of his inability to live a normal life which he defined as being able to form relationships with other men and to love and be loved.

[33] At [34] country information about conditions for gays in Iran was summarised as follows:

- (a) The Penal Code of Iran prescribes the severest of penalties for homosexuality (death). That penalty is not a historical footnote or relic on the Iranian statute books. It is a very real penalty which is imposed from time to time, as is the “lesser” penalty of being flogged.
- (b) There is strong theological and societal disapproval of homosexuality in Iran.
- (c) To avoid criminal penalties (including lashings and potentially, the death penalty), extrajudicial beatings, societal disapproval, public humiliation, discrimination and unequal treatment, homosexuals in Iran must be “discreet”. They are denied a meaningful “private” life. For most, sexual orientation must be carefully hidden under the camouflage of feigned heterosexuality.

[34] At [35] the Authority found that the above factors amounted to “being persecuted” as that term is understood in the Refugee Convention. At [103] the following conclusions were drawn concerning the human rights implications of penal sanctions and discrimination against homosexuals:

- (a) The prohibition by law of consensual homosexual acts between adults in private offends core human rights: the right to privacy and the right to equal treatment before the law – *Toonen v Australia* (Comm No 448/1992, UN Doc CCPR/C/50/D/488/1992, 4 April 1992);
- (b) The prohibition of consensual homosexual acts, if accompanied by penal sanctions of severity which are in fact in force, may well found a refugee claim;
- (c) It cannot be said that the criminalisation of consensual acts on its own is sufficient to establish a situation of being persecuted.

[35] *Refugee Appeal No 74665* discussed the extent to which a person may be expected to engage in self-denial or discretion on return to their country of origin to avoid harm that would arise from the exercise of a fundamental human right that is in jeopardy. At [114] the Authority stated:

“[114] Understanding the predicament of “being persecuted” as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection means that the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right in jeopardy and the resulting harm. If the right proposed to be exercised by the refugee claimant in the country of origin is at the core of the relevant entitlement and serious harm is threatened, it would be contrary to the language, context, object and purpose of the Refugee Convention to require the refugee claimant to forfeit or forego that right and to be denied refugee status on the basis that he or she could engage in self-denial or discretion on return to the country of origin; or, to borrow the words of Sachs J in *National Coalition for Gay and Lesbian Equality* at [130], to exist in a state of induced self-oppression...The issue cannot be evaded by dressing the problem in

the language of well-foundedness, that is, by asserting that the claim is not a well-founded one because the risk can or will be avoided.”

[36] The Authority concluded at [126] that in order to avoid severe criminal penalties, extrajudicial beatings, societal disapproval, public humiliation, discrimination and unequal treatment, homosexuals in Iran must conceal their sexual orientation and consequently are denied a meaningful “private” life. The appellant wished to escape the situation where he was denied a private life and was exposed to grave judicial and extrajudicial consequences should he exercise a fundamental human right. The return of the appellant to Iran would, for him, lead to the predicament of “being persecuted”.

[37] *Refugee Appeal No 74665* was considered in *Refugee Appeal No 75250* which, like the present case, considered a claim to refugee status from a gay man from Lagos, Nigeria.

[38] In *Refugee Appeal No 75250*, after reviewing the available country information the Authority concluded that the right to privacy guaranteed under Article 17 of the International Covenant on Civil and Political Rights (ICCPR) is breached in Nigeria by the provisions of the Criminal Code which make homosexual acts illegal but that the consequences that would flow should the appellant exercise his right to privacy (by freely choosing his sexual identity and forging meaningful relationships) do not rise to the level of being persecuted. The Authority noted that there was a lack of evidence demonstrating that the provisions in the Nigerian Criminal Code which prohibit homosexual acts were enforced and little evidence of homophobic attacks. It concluded that the consequences for someone presenting himself as an openly gay man in Lagos would be limited to shunning by his family and ostracism by his church

[39] In finding that the treatment of homosexuals in Lagos is perhaps more benign than might be suggested by the Criminal Code, the Authority at [43] noted the existence of “at least one gay rights NGO”, Alliance Rights, the president of which had stated in a radio interview in 2002 that criminal sanctions against gays in Nigeria were rarely enforced and that “gay bashing” was rare.

Current Country Information concerning the treatment of homosexuals in Nigeria

[40] There have been a number of developments in Nigeria since *Refugee Appeal No 75250* was published. In January 2006, a bill entitled the “Same Sex Marriage (Prohibition) Act” was introduced to the Nigerian National Assembly by

the Minister of Justice. The proposed bill bans homosexual relations and same sex marriage. It also makes organisations for promoting gay rights illegal. It has been the subject of a public hearing at the House of Representatives and has received a second reading. Although it has not yet been passed into law, the bill, which has widespread support in the National Assembly, is indicative of attitudes toward homosexuality in Nigeria.

[41] Updated country information considered by the Authority indicates that the homosexual community in southern Nigeria is underground to the point of invisibility. There appears to be but a handful of openly gay Nigerians. The author of an article concerning the bill noted that there was little opposition to the proposed legislation because “Nigeria’s gay community is too far underground and the subject is too taboo” and that the three gays she interviewed requested to be identified only by their first names “citing the risk of arrest, beatings or even death”. The same article also states that persons convicted of engaging in homosexual acts in Nigeria have been ‘publicly flogged, exhibited before the press naked, or beaten severely in prison’. It also reports that the gay rights NGO referred to in *Refugee Appeal No 75250*, Alliance Rights, has no membership list and its buildings are not in town centres or identified by signs: Katharine Houreld “New Law, Old Prejudices Threaten Nigeria’s Gay Community” *The Associated Press* (11 December 2006).

[42] Another article concerning the bill notes that Alliance Rights advertises no office address and has “gone underground in the face of stiff public disapproval of their attitude”. It goes on to state that getting members of Alliance Rights to grant press interviews is almost impossible and that “those giving rare interviews to the press use pseudonyms because they know the implications of coming out into the open with their views” Godwin Haruna “Laws Attitudes Drive Homosexuals Underground” *This Day (Nigeria)* (7 September 2006).

[43] An interview with the President of Alliance Rights in May 2004, Oludare Odumuye, quoted him as saying: “Recently, some of us have been arrested by the police, thrown into jail and raped in the cells. One out of 50 lawyers we have contacted has accepted to defend their interests. The others were too afraid to be associated with homosexuals, even if they were homosexuals themselves.” “Nigeria: Persecuted Gay Community Cautiously Seeks a Voice” *IRIN* (7 May 2004).

[44] In a similar vein, a quotation included in the United Kingdom Home Office Border and Immigration Agency Country of Origin information Report on Nigeria (13 November 2007) states at paragraph 21.11:

“The editor of a Nigerian newspaper stated “society does not tolerate homosexuals and no homosexual dares speak out openly that he is or she is a homosexual”. Homosexuals tend to live “underground” in Nigeria. As an illustration of fear among homosexuals, Yusuf explained that it was impossible for the Daily Trust to come across any spokesman for homosexuals in the large city of Lagos.”

[45] The United Kingdom Home Office Operational Guidance on Nigeria (26 November 2007) notes that there is a widespread belief in Nigeria that homosexuality is alien to African traditional culture and that it is the result of corrupting influences from Western colonisation and/or Arab cultural influence in the northern parts of the country. It states that the bulk of the North’s Muslims and the South’s Christians are united in their hostility towards homosexuality but it goes on to state that “gay men living in the larger cities of Nigeria may not have reason to fear persecution, as long as they do not present themselves as gay men in public”.

[46] A joint British-Danish report published in January 2005 noted reports of cases in the states of Kano and Lagos in which police officers humiliated alleged homosexuals. In these cases the police officers reportedly forced the subjects to engage in homosexual acts so that the photographs of the acts could be taken and presented as evidence in court: Danish Immigration Service *Report on Human Rights Issue in Nigeria: Joint British-Danish Fact-Finding Mission to Abuja and Lagos, Nigeria* (January 2005).

[47] An article published in the New York Times in December 2005 quoted unnamed gay activists in Nigeria as stating that gay men and lesbians in Nigeria regularly face arrest and harassment and that, in practice, gay men are often arrested and jailed until bribes are paid for their release. The article also reports that in October 2005, several members of a gay lobby group named Changing Attitudes Nigeria were arrested following their first meeting in Abuja (the Nigerian capital) and the leader, David Mac-Iyalla, was assaulted and jailed for several days without charge before being released. The group now meets only in close secrecy: Lydia Polgreen “Nigerian Anglicans Seeing Gay Challenge to Orthodoxy” *The New York Times* (18 December 2005).

[48] In January 2007, an article published in the Wall Street Journal quoted one of the few openly gay Nigerian activists, Adebisi Alimi, as stating that “society is

very, very brutal towards gay people” and that “their relationships founder because the men can’t build a life together”. This article also states that “gay bashers” are always a threat in Nigeria where gays cannot count on police protection: Mark Schoofs “In Nigeria a Bill to Punish Gays Divides a Family” *Wall Street Journal* (12 January 2007).

Assessment of the Appellant’s circumstances

[49] The country information concerning the inability of homosexuals in Lagos to live openly and to establish and maintain meaningful relationships accords with the appellant’s evidence. He feigned heterosexuality to the point of entering a marriage and fathering two children in order to conceal his sexual orientation from his family and community. He conducted furtive, casual relationships because of the risks he perceived in establishing or maintaining deeper relationships. He was deeply affected by the police treatment of his workmate and believed that should he be caught engaging in homosexual activity he would suffer similar consequences. The country information indicates that he was realistic in this assessment.

[50] The country information establishes that, with the exception of a handful of activists, homosexuals throughout Nigeria are fearful of being publicly identified, are unable to live openly, and that the consequences of exposure can be severe. It also establishes that the Nigerian police enforce the provisions of the Criminal Code which ban homosexual acts (albeit in a manner which may not lead to recorded prosecutions).

[51] In view of the country information and the appellant’s own evidence, we consider that, should he return to Lagos and attempt to exercise his right to privacy (by freely choosing his sexual identity and forging meaningful relationships), the consequences would go beyond those identified in *Refugee Appeal No 75250* (ostracism and shunning). We accept that the appellant would risk losing his employment and that there is a real chance he will experience violence at the hands of police or vigilante groups.

[52] There is a real chance that the appellant will be persecuted if returned to Nigeria. The answer to the first issue framed for consideration is “yes”.

Is there a Convention ground for the persecution?

[53] The Authority has held previously that homosexuals can qualify as members of a particular social group for the purposes of the Refugee Convention *Refugee Appeal No 1312 re GJ* (30 August 1995) at 57-58: [1998] INLR 387, 422-423 (as approved by Lord Steyn in *R v Immigration Appeal Tribunal: ex parte Shah* [1999] 2 AC 629 at 643d and 644d).

[54] The Authority finds that there is a Convention reason, namely membership of a particular social group, for the persecution feared by the appellant.

CONCLUSION

[55] For the reasons mentioned above, the Authority finds the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

"M A Roche"
MA Roche
Member