Neutral Citation Number: [2009] IEHC 281

THE HIGH COURT

2009 176 JR

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000, SECTION 5 OF THE REFUGEE ACT, 1996 (AS AMENDED), AND IN THE MATTER OF THE IMMIGRATION ACT, 1999 (AS AMENDED)

BETWEEN:

C. I. A.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

AND

THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Ms. Justice Mary Irvine delivered the 30th day of June, 2009

This is an application for leave to seek judicial review, in which the applicant seeks, *inter alia*, an order of *certiorari* of the decision of the Refugee Appeals Tribunal (the "RAT") not to grant the applicant refugee status notified to the applicant by letter dated 14th October, 2008, and, by extension, the decision of the Minister for Justice, Equality and Law Reform to issue a proposal to deport the applicant notified to the applicant by letter dated 14th November, 2008. The applicant seeks an extension of the time limit for the making of this application, pursuant to section 5(2)(a) of the Illegal Immigrants (Trafficking) Act, 2000.

The grounds upon which relief is sought can be summarised as follows:-

1. In concluding that the applicant did not have an objectively well-founded fear of persecution, the Tribunal member failed to have any or adequate regard to the fact that the applicant had already been subjected to police brutality when he was detained for two months and beaten in police custody, and, by reason thereof, was entitled to the benefit of a presumption that he would be subject to persecution upon his return to Nigeria.

2. The Tribunal member failed to have any or adequate regard to the fact that the applicant, as a homosexual man in Nigeria and a member of a particular social group, could be subject to acts of persecution, within the meaning of Regulation 9 of the European Communities (Eligibility for Protection) Regulations 2006, without necessarily being liable to execution.

3. The Tribunal member failed to have any or adequate regard to reputable country of origin information submitted to the said respondent at the time of the decision, which demonstrates that 18 men had been arrested for alleged sodomy,

which is punishable under Sharia law by death by stoning, and were awaiting trial.

4. The Tribunal member failed to have any or adequate regard to reputable country of origin information available to the said respondent at the time of the decision, which demonstrates that Nigerians are liable to arbitrary arrest and detention, as well as police brutality and lengthy prison sentences by reason of engaging in homosexual activity.

5. The Tribunal member acted *ultra vires* the Refugee Act, 1996 (as amended), as interpreted in accordance with Article 4(3) of Council Directive 2004/83/EC in failing to take account of all relevant facts as they relate to the country of origin at the time of taking his decision on the applicant's asylum application, including all the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm.

Background facts
The applicant is a Nigerian national who sought asylum in Ireland in or about 10th of June 2008. On 11th June 2008, the applicant completed a questionnaire in which the following facts, amongst others, are revealed:-

1. The applicant was born on 16th of July 1986 and is a citizen of Nigeria.

2. For the last eighteen years, the applicant has resided in Benin city with his father. His mother is deceased and the whereabouts of his sister are unknown.

3. The applicant attended school from 1990 to 2000 at the Baptist Group of Schools, obtaining his primary and secondary school certificates.

4. Between January 2006 and February 2007, the applicant worked with a charity helping the under-privileged, known as the African Children Care Democratic Party.

5. The applicant claims that he was accused of stealing money from this charity. He was arrested and detained in police custody for 2 months during which time he was beaten by the police. Later he came to understand that this was because the police knew that he was gay.

6. The applicant claims that he fled to Lagos to hide himself but was followed by the police. The applicant fears that he will be killed if he returns to Nigeria.

7. The applicant claims that he was brought to Ireland by an agent, to whom he paid a fee.

Following the completion of this questionnaire, an interview was held on 24th June, 2008. During the interview the applicant was asked a large number of questions as is normal, and while it is not necessary for me to detail everything that was said, I will summarise the relevant information which was given during this interview.

The applicant stated that he was detained in the police station for 2 months. He was released following the assistance of his uncle, who is a lawyer. Following his release, the police came to his house on 2nd June, 2008. There were 3 policemen and 3 fearful cultist men. They drove the applicant to a building site where the 3

policemen left. The applicant's boss was at the building site as well as six of his co-workers. His boss said that he knew the applicant had not stolen the money, that he used that to get the applicant out of his office because he knew that the applicant was gay. His boss advised him to leave the country immediately. The applicant stated in his interview that he is gay.

The applicant stated that he fled to Lagos to stay with a friend. He remained there for the whole month of June. On 27th June, three policemen came to Lagos and showed the applicant's photograph to his neighbour as they were seeking the applicant. The neighbour claimed that she did not know the Applicant and later told the applicant what had occurred. The applicant then stated that it was in fact on 27th May, not June, that the police came to Lagos. The applicant's friend, who worked at Lagos Airport, made arrangements with an agent to get the applicant out of the country. On 8th June, 2008 the applicant travelled with the agent to Ireland, transiting through Madrid, Spain.

The applicant was asked about the inconsistency of dates in his account. He then stated that he was released from police custody on 25th May, 2008; the police called to his home on 2nd June, 2008. He then stated that he was in fact released on 2nd May; the police came to his house on 12th May and he went to Lagos that same day.

The applicant was asked how his employer knew that he was gay. He responded that "I don't know how he got the information but he put it straight to me that he knew. He said he saw me, but I don't know if he saw me or not, but he said he did." The applicant was asked when he first discovered that he was gay. He stated "When I was 16 years old. A friend of mine came to stay with me, on vacation. He was making advances at me and he lured me into it." The applicant stated that he is not openly gay in Nigeria. He stated that it is a crime to be gay; if the police know that you are gay they will search for you everywhere. The applicant fears execution if he returns to Nigeria, and stated that he cannot relocate internally as the police will search for him everywhere.

In the Report pursuant to s. 13(1) of the Refugee Act, 1996 (as amended), and which is dated 26th June, 2008, the facts as outlined by the applicant in his application and interview are outlined. It is clear from this report and recommendation that he was considered not to have established a well-founded fear of persecution. The Commissioner was of the view that the applicant's account of events was not credible. He stated:-

"According to the applicant, his employer used the pretext of him, in collaboration with his assistant, stealing from the charity where they worked, to have him arrested rather than sack him for being, allegedly, gay. It is not credible.

According to the applicant, his employer told the police that he was gay on the day of his release from detention yet, according to the applicant, the same police who he claims to be searching for him everywhere, picked him up from his home approximately one week later and brought him to some building site to meet with his former employer instead of arresting him. It is not credible.

It is not credible that the police in Benin city would then act to look for the applicant in Lagos purely on the word of the man who had previously accused the applicant of stealing from the charity, withdrawing that allegation when confronted by the applicant's uncle, a lawyer, and then accusing the applicant of being gay."

The Commissioner noted that the applicant had not provided any documentation which would support any aspect of his claim of persecution. Having regard to the relevant country of origin information, homosexual acts are criminalised but this of itself does not amount to persecution.

The applicant lodged an appeal against the decision of the Refugee Appeals Commissioner to refuse his application for refugee status on 7th July, 2008. The decision of the Refugee Appeals Tribunal member is contained in a document of twelve pages approximately in which she outlines the applicant's background and summarizes the facts already outlined above and which are contained in the questionnaire and interview. The Tribunal member made the following findings in relation to the evidence of the applicant:-

"[The applicant] stated that he was re-arrested on the 12th May owing to the fact that his employer informed the police of his homosexuality on the day of his release and that his fear of persecution stems from this as he was picked up by the police about a week later and brought to a building site. The appellant was extremely vague and incoherent about what happened thereafter and why the police did not continue to detain him or otherwise interfere with him. There is a divergence between the dates provided by the appellant at the hearing and the dates provided to the Commissioner at his interview in relation to these events as well as a divergence within the interview itself.

The appellant states that he is a homosexual but that the reason he is was that "he was lured into it" by a friend of his…

When questioned by the presenting officer, the appellant explained that the discrepancies in relation to dates could be explained by the fact that there was a problem of comprehension between himself and the Commissioner's interviewer and that the discrepancy as to whether his detention lasted one or two months was due to the fact that, although he was detained for a month, it felt like two months to him.

The appellant re-iterated that the police were actively pursuing him in Nigeria for being gay, yet could proffer no explanation as to why they released him on the second occasion. Upon further probing by the presenting officer, the appellant stated to the Tribunal that he would not be safe anywhere in Nigeria as his name was mentioned on the national media as being a homosexual. When asked what specific media outlets and on what date(s), the appellant stated that he was aware that his name was mentioned as a wanted homosexual on the Nigerian Independent Television (ITV) and the Edo Broadcasting Station (EBS) on the 17th May, 2008 and, in the printed media, in the Daily Times on the same date.

The appellant, when further questioned by the presenting officer who put country of origin information to him which was to the effect that homosexuals were not executed by the State in Nigeria (information on file), was adamant that gays were regularly executed by court decree even in non-Sharia states. When asked how he knew this, the appellant stated that it was widely reported in the national media."

The Tribunal member made the following findings in relation to the credibility of the applicant and the existence of a well-founded fear of persecution:-

"Despite the appellant stating that he was aware of a number of executions carried out pursuant to court order of persons found guilty of homosexuality and that these cases were reported in the national media, the appellant proffered no

country of origin information to substantiate such a claim. The country of origin information proffered on behalf of the Commissioner was to the opposite effect. This is not a situation, therefore, where the Tribunal has to choose between two conflicting sets of country of origin information. Rather, the only independent information before the Tribunal is to the effect that no executions have been carried out in the State of Nigeria for the offence of homosexuality. This is not to say that Nigeria is not a deeply homophobic country, which, from an examination of the country of origin information, it seems to be. However, the appellant complained of only one specific type of persecution to the Tribunal: that he would be executed by the State because of his homosexuality and, from an examination of the country of origin information, there is no objective basis for concluding that the appellant's fear of the type of persecution which he complains of is well founded…

It is the case that prohibition by law of consensual homosexual acts in private offends a core human rights obligation. If such a law is accompanied by penal sanctions which are severe in form and are in fact enforced, it may well found a claim for refugee status. However, it cannot be said that the criminalisation of such acts on its own is sufficient to establish a situation of being persecuted. The appellant must establish that the risk of being persecuted is well-founded and that there is a real chance of being persecuted. There is a clear and cogent distinction between an infringement of an internationally recognised human right and persecution. While the fact that such a law would be viewed by more progressive societies as unsatisfactory and discriminatory, persecution is not the same thing as discrimination. The country of origin information on file states, inter alia, that "a Human Rights Watch study found "no evidence that anyone has ever been sentenced to death for sodomy with an adult. Instead, HRW learned that in practice, most of the sodomy cases which have come before the Sharia courts have not been about consensual, sexual activity between adults but rather allegations of adults sexually abusing children…reports of the federal government's enforcement of the section of Nigeria's criminal code that criminalises homosexuality and calls for a jail term of 14 years upon conviction, could not be found among the sources consulted." Accordingly, the Tribunal must conclude that the objective element of a well founded fear of persecution of the type which the appellant claims to have in this case is lacking…

When all of the above matters are taken into account on a cumulative basis, the Tribunal is forced to the conclusion that the appellant does not have a well founded fear of persecution for any of the reasons set out in the Act of 1996 or the Convention."

Extension of time
Pursuant to s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act, 2000 an application for leave to apply for judicial review under the order in respect of any of the matters referred to in sub-s. (1) shall:–

"(a) be made within the period of fourteen days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made."

It is clear that in the circumstances of this case an extension of time is required as these proceedings have been commenced some fifteen weeks outside the relevant period of fourteen days. The decision of the Tribunal challenged in this case was received by the applicant on the 16th October, 2008. The Notice of

Motion in these proceedings issued on the 18th February, 2009. The applicant attributes this delay to certain legal complexities in the case requiring that further advices be sought from a second counsel on 26th November, 2008. In addition to the legal complexities, the Christmas vacation intervened between 21st December, 2008 and 11th January, 2009. Consequently, counsel did not return the file until the 16th February, 2009.

Section 5(2)(a) imposes a strict statutory time limit for the bringing of judicial review proceedings, though there is of course discretion for the court to extend time where there is good and sufficient reason to do so. The rationale of section 5(2)(a) was explained by the Supreme Court in *In Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360, at 392-393 where Keane C.J. stated:-

"It may be inferred from the Bill and the surrounding circumstances that the early establishment of the certainty of the decisions in question is necessary in the interests of the proper management and treatment of persons seeking asylum or refugee status in this country. The early implementation of decisions duly and properly taken would facilitate the better and proper administration of the system governing seekers of asylum for both those who are ultimately successful and ultimately unsuccessful…

Accordingly the court is of the view that there are objective reasons concerning the public interest in the certainty of the validity of administrative decisions concerned on the one hand and the proper and effective management of applications for asylum or refugee status on the other. Such objective reasons may justify a stringent limitation of the period within which judicial review of such decisions may be sought, provided constitutional rights are respected…

The court is satisfied that the discretion of the High Court to extend the fourteen day period is sufficiently wide to enable persons who, having regard to all the circumstances of the case including language difficulties, communication difficulties, difficulties with regard to legal advice or otherwise, have shown reasonable diligence, to have sufficient access to the courts for the purpose of seeking judicial review in accordance with their constitutional rights."

This Court must have regard to the fact that the extension of time sought in the present case is in relation to a time limit fixed by statute at the will of the Oireachtas. This type of extension of time cannot be equated to an extension of time which is sought in respect of procedural time limits which are fixed by the rules of court. A more sympathetic view can be taken of a breach of such time limits. By virtue of the doctrine of the separation of powers, if the court were to customarily and on a continuous basis permit extensions of time beyond the statutory time limits provided the court would effectively be rewriting the legislation and replacing the will of the Oireachtas with that of the court which is simply not permissible.

In assessing whether there are good and sufficient reasons to extend time in the present case, I will have regard to the following factors: the period of delay, any prejudice to the respondent, the reasons given for the delay, whether the applicant had an intention to appeal within the stated time limit, whether the matters relied upon for the extension of time are on affidavit, and the strength of the applicant's case on the merits.

The period of delay
The decision of the Tribunal was sent to the applicant by letter dated 14th

October, 2008. Therefore one can reasonably assume that it was received by the applicant on or around 16th October, 2008, when the statutory time period began to run. The solicitor acting for the applicant is an experienced solicitor in refugee matters and would have been aware of the strict time limit. A consultation took place on 22nd October, 2008, and according to the affidavit filed by the applicant's legal adviser, the papers were sent to counsel on 28th October, 2008, just two days before the expiry of the time limit. The affidavit does not state when the opinion of the first counsel was received but it would appear that it was received before 19th November as a consultation took place on that date. A further week elapsed before the papers were sent to a second counsel on 26th November, 2008 by which time the statutory period had long since expired. A huge onus arises to explain any additional delay at this point but over two months elapsed before the second counsel's opinion reached the solicitor on 12th February, 2009. The only explanation proffered for this additional period of delay, four times the permitted statutory period which had already expired, is that the legal vacation intervened between 21st December, 2008 and 11th January, 2009. Thereafter, there was a further delay until proceedings finally issued on 17th February, 2009. This is an unacceptable period of delay, having regard to the fact that the applicant was represented by the same firm of solicitors for the entirety of the case.

Prejudice to the respondents
The applicants in their submission supporting an extension of time have relied upon an assertion that the court should view favourable the extension of time sought by reason of the fact that the first named respondent has not been prejudiced in relation to these judicial review proceedings by the delay concerned. This is a submission which does not find favour with the court having regard to the nature of the present proceedings. Judicial review proceedings are essentially a paper based exercise. Hence, it is difficult to see how any period of delay is ever likely to cause prejudice to the ability of the respondent to defend the proceedings. Clearly an equivalent argument in a witness case where an extension of time is sought would be a meritorious one in circumstances where during a period of delay, evidence may be lost or witnesses may become unavailable.

The court does believe, however, that what should be considered instead of cases of this nature is whether the delay has caused the respondents to carry out work, expend time and costs and/or make decisions which would otherwise not have been made had the application for judicial review been brought within the statutory time limit. In this case, the Minister had acted on foot of the Tribunals' decision to proceed to make a deportation order on 12th February, 2009. The existence of the strict statutory time limit is intended to allow the Minister to act with certainty as to the validity of administrative decisions such as the decisions of the Refugee Appeals Tribunal in the treatment of asylum seekers in this State. The delay by the applicant in initiating legal proceedings consequently caused prejudice to the second named respondent, the Minister, a matter which this Court has taken into account in reaching its conclusions.

Reasons for the delay
The reason offered by the applicant and his legal advisers for the delay essentially relates to a change of counsel in order to obtain an opinion more favourable to the applicant. In relation to delay caused by legal advisers, Denham J. held in *S v. Minister for Justice, Equality and Law Reform and Others* [2002] 2 I.R. 163, at 167-168 that:-

"Legal advisers have a duty to act with expedition in these cases. In general, delay by legal advisers will not prima facie be a good and sufficient reason to extend time. Circumstances must exist to excuse such a delay and to enable the matter to be considered further."

In *Muresan v. Minister for Justice, Equality and Law Reform* [2004] 2 ILRM 364, at 373, Finlay Geoghegan J. stated:

"It is inevitable that different counsel will take a different view of the same case. It appears to me that if the courts were to permit an extension of the period provided for under section 5(2) of the Act of 2000 simply upon the grounds that a new counsel had come into a case and had taken a view that a differing and additional claim on new and distinct grounds should be made that this would defeat the legislative intent as expressed in section 5(2) of the Act of 2000. It may be that on certain facts the clear oversight or errors by lawyers acting for an applicant may amount to a good and sufficient reason for extending this period under section 5(2). There was no such clear error in this case."

In the present case, I am not satisfied that the reasons advanced by the applicant for the delay amount to good and sufficient reason within the meaning of section 5(2) of the Act of 2000.

Intention to appeal within the stated time limit
The affidavit of the applicant's solicitor attests that the applicant expressed his desire to challenge the decision of the Refugee Appeals Tribunal at the consultation on 22nd October 2008. This is a matter to which the court should have little regard in cases of this nature. Firstly, the applicant has not himself averred to this fact in his own affidavit. Secondly, his intention to appeal was clearly dependent on a favourable opinion by counsel, which he did not receive from his first counsel. Accordingly his stated desire to appeal the decision of the Refugee Appeals Tribunal is something to which the court must consequently have little regard. In total, the delay at issue was a significant period, from 30th October 2008 to 18th February 2009.

Matters relied upon for the extension of time must be on affidavit
In *C.S. v. Minister for Justice, Equality and Law Reform* [2005] 1 I.R. 343, a decision of the Supreme Court, McGuinness J. stated:

"This Court has previously stressed that in this type of case the applicant should personally set out on affidavit the circumstances which gave rise to any delay by the applicant himself or herself while the solicitor should set out any circumstances of delay which arose in the legal process itself."

In the present case, the affidavit of the solicitor setting out the reasons for the delay was only available in the course of the hearing, a somewhat casual in the light of the period of delay concerned.

The strength of the applicant's case
In *G.K. v. Minister for Justice* [2002] 1 ILRM 401, at 405, Hardiman J. in the Supreme Court stated in relation to extensions of time under s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act, 2000:-

"I believe that the use of the phrase "good and sufficient reason for extending the period" still more clearly permits the court to consider whether the substantive claim is arguable. If a claim is manifestly unarguable there can normally be no good or sufficient reason for permitting it to be brought, however slight the delay

requiring the exercise of the court's discretion, and however understandable it may be in the particular circumstances. The statute does not say that the time may be extended if there were "good and sufficient reason for the failure to make the application within the period of 14 days." A provision in that form would indeed have focussed exclusively on the reason for the delay, and not on the underlying merits. The phrase actually used, "good and sufficient reason for extending the period", does not appear to me to limit the factors to be considered in any way and thus, in principle, to include the merits of the case.

On the hearing of an application such as this it is of course impossible to address the merits in the detail of which they would be addressed at a full hearing, if that takes place. But it is not an excessive burden to require the demonstration of an arguable case. In addition, of course, the question of the extent of the delay beyond the fourteen day period and the reasons if any for it must be addressed."

In *Bugovski v. Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* [2005] IEHC 78, Gilligan J. stated:

"In the particular circumstances of this case it is quite clear that the applicant does not have a very strong or indeed almost unanswerable case on the merits of the substantive action and there is no question that an obvious or substantial injustice would be done to him if he was deprived of the opportunity to litigate his claim."

Though that case concerned a longer period of delay, thirteen months, I am satisfied that the principle stated therein is sound and I propose to apply it in the present case. Even though I am not satisfied that an extension of time should be granted, I will address the substantive merits of the applicant's claim to determine if he would meet the threshold of an arguable case if I were to extend time.

Credibility of the applicant
In *Kramarenko v. Refugee Appeals Tribunal* [2004] 2 ILRM 550, Finlay Geoghegan J. stated the following in relation to credibility:-

"The credibility of an applicant is often crucial to the determination as to whether or not an applicant is entitled to a declaration of refugee status. Credibility potentially comes into play in two aspects of the assessment of the claim. It is well established that the determination as to whether a person is a refugee within the meaning of section 2 of the Act of 1996 and the similar definition in the 1951 Geneva Convention, relating to the status of refugees contains both a subjective and an objective element. The subjective element requires the applicant to establish that he or she has a fear of persecution for a convention reason if returned to his/her own country. An assessment as to whether the applicant has such a fear will normally involve an assessment of credibility.

The objective element involves the assessment as to whether the subjective fear is well-founded, or, as sometimes put, objectively justifiable. Often, and as appears to have been the position in this case, the objective element requires an assessment of objective facts relied upon by the applicant to establish that the fear is well-founded."

It is clear in the instant case that the subjective credibility of the applicant was not central to the Tribunal's decision to refuse him refugee status. Though the Tribunal member stated that the applicant's account of events was in some respects "extremely vague and incoherent", the Tribunal member accepted the

evidence of the applicant that he was homosexual, that he was arrested and beaten while in police custody, that the police picked him following his release and brought him to a building site where he met with his former employer, that he left the country on the advice of his former employer and friends and that he travelled to Ireland with the assistance of an agent to whom he paid a fee. This account of events and the credibility of the applicant were not challenged by the Tribunal member. Rather, he considered whether the fears expressed by the applicant of persecution if returned to Nigeria were well-founded having regard to available country of origin information.

Did the Tribunal member apply the correct legal test?
It was submitted by counsel for the applicant that the Tribunal member focussed exclusively on whether the applicant faced a real risk of execution if returned to Nigeria and did not have regard to whether the applicant faced a real risk of serious harm as defined in Regulation 2(1) of the European Communities (Eligibility for Protection) Regulations, 2006. I do not accept this contention. The applicant himself insisted on continually referring to his fear of execution if returned to Nigeria. He stated in his questionnaire that "I fear that I will be eliminated at once the minute I go back to my country." In his interview, he stated "if I am taken back home I will be executed. I am here to save my life." It was therefore incumbent on the Tribunal member to address the fear of execution put forward by the applicant and he did this specifically on a number of occasions in the course of his decision. However, this does not mean that he did not address the real risk of serious harm to the applicant if returned to Nigeria. He must apply and did apply the definition contained in the Regulations. This is evident from the outset of the Tribunal member's analysis of the appellant's claim, where he states:-

"If it is accepted that the appellant would be subject to serious harm, the Tribunal accepts that same would qualify as persecution for a Convention reason under the terms of the Refugee Act 1996 and the Convention. However, one must assess the well-foundedness of the appellant's claim in light of all the background information before the Tribunal, particularly the circumstances and facts peculiar to this appellant."

The Tribunal member accepted that homosexual conduct was criminalised under state law. The question that arose was whether that law was pursued by severe penal sanctions to the extent that persecution occurs. The Tribunal member assessed this fear of persecution as defined in the Regulations against the country of origin documentation and found that the applicant's fear was not well-founded. Taking the applicant's claim at its height, homosexual conduct was a criminal offence but there was no evidence of execution and little evidence of prosecution. Having regard to the country of origin information, the Tribunal member stated:-

"The country of origin information on file states, inter alia, that "a Human Rights Watch study found "no evidence that anyone has ever been sentenced to death for sodomy with an adult. Instead, HRW learned that in practice, most of the sodomy cases which have come before the Sharia courts have not been about consensual, sexual activity between adults but rather allegations of adults sexually abusing children…reports of the federal government's enforcement of the section of Nigeria's criminal code that criminalises homosexuality and calls for a jail term of 14 years upon conviction, could not be found among the sources consulted." Accordingly, the Tribunal must conclude that the objective element of a well founded fear of persecution of the type which the appellant claims to have in this case is lacking."

The country of origin documentation clearly suggested that there was no real risk to homosexuals whose homosexual activities were kept private. Nearly all of the cases referred to in the country of origin information were in non-Christian states in the north of Nigeria where an offence under Sharia law occurred and was brought before a Sharia court. The BBC report relied upon by the applicant, "Gay Nigerians face Sharia death" also referred to the Sharia region and Sharia law. Therefore, the Tribunal member acted within jurisdiction in determining that no real risk of serious harm arose for the applicant by reason of the laws prohibiting homosexual conduct in Nigeria.

Presumption of future harm
Counsel for the applicant submitted that a presumption of future harm arose for the applicant on the basis that he had previously been arrested and assaulted by the police. This presumption is founded on Regulation 5(2) of the European Communities (Eligibility for Protection) Regulations 2006, which states:-

"The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or serious harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection."

I am of the view that no such presumption arises on the facts of the present case. By the applicant's own evidence, he was initially arrested and detained by the police on the assertions of his employer that he had stolen money. The assault by the police on the applicant therefore occurred before the police were aware that the applicant was gay. Thereafter, the applicant claims that he was picked up by the police and brought to a building site to meet with his former employer. No assault took place on this occasion. There was no evidence that this occurred because the police knew that the applicant was gay or could be deemed to be evidence of persecution based on the fact that the applicant was gay.

Burden of proof
In relation to the burden of proof in asylum applications, paragraphs 195 and 196 of the UNHCR Handbook state:-

"The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.

It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, and applicant may not be able to support his statement by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application."

Counsel for the applicant submits that the existence of a criminal code prohibiting homosexual conduct in Nigeria raises the presumption that it will be applied. He submits that the relevant country of origin information must then be looked at by the decision-maker and asserts that the Tribunal member failed to adequately assess country of origin information demonstrating persistent discrimination and persecution of homosexuals in Nigeria. In my view, the whole thrust of the country of origin information indicates that there are grave societal difficulties for gays in Nigeria. This was acknowledged by the Tribunal member when he stated in his decision that:

"This [the fact that no executions have been carried out in Nigeria for the offence of homosexuality] is not to say that Nigeria is not a deeply homophobic country."

However, although even private homosexual activity is criminalised in Nigeria, there was practically no evidence before the Tribunal member to show that any prosecutions were taken. While there may have been a few isolated cases, it was open to the decision-maker to take the view that these few cases, in a country as vast and populous as Nigeria, were insufficient to establish a real risk that the applicant would be persecuted if returned to Nigeria. Such examples concerned Sharia states in the north of Nigeria where Sharia law is applied by Sharia courts. It was open to the Tribunal member to reach the almost unassailable conclusion that no real difficulties arose for the applicant if his homosexual practices remained private. The burden of proof rested on the applicant to establish a well-founded fear of persecution and this threshold was not met in the instant case.

Conclusion

I am satisfied that the applicant has not shown good and sufficient reasons allowing the court to exercise its discretion to extend time under section 5(2)(a) of the Act of 2000. Even if I were minded to grant the extension of time, it is clear that the applicant has not met the threshold for the grant of leave, namely the demonstration of an arguable case. In all the circumstances, I must dismiss the claim of the Applicant and refuse the extension of time sought.