



Republic of South Africa

REFUGEE APPEAL BOARD

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AppealBoard Ref no: XXXXXX
Reg.Ref no: XXXXXXXXX

Refugee Reception Office
CAPETOWN

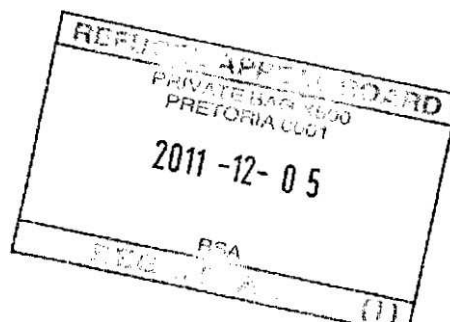
APPEAL AGAINST DECISION OF THE REFUGEE STATUS DETERMINATION OFFICER:
XXXXXXXXXX (TANZANIA) XXXXXXXXXX

Please hand over the attached letter to the applicant. The applicant's appeal has been dismissed by the Refugee Appeal Board.

Please note that your office must inform this office of the date the appellant received his rejection letter for record purposes and update the Refugee System and MCS system with the final extension if applicable and date of departure.

Yours faithfully

REGISTRAR: REFUGEE APPEAL BOARD





DEPARTMENT: HOME AFFAIRS
REPUBLIC OF SOUTH AFRICA

270 Maggs Street, Waterlooplein, Private Bag X114, Pretoria, 0001
Parliamentary Office, 120 Plein Street, Private Bag X9048, Cape Town, 8000

REG:REF: XXXXXXXXX
AppealREF: XXXXXXXXX

XXXXXXXXXX

Dear Sir/Madam

APPEAL AGAINST THE DECISION OF THE REFUGEE STATUS DETERMINATION OFFICER:
YOURSELF

Please be informed that the Refugee Appeal Board considered your appeal and determined that it be dismissed.

Accordingly, the decision rejecting your application for refugee status is upheld. The decision of the Refugee Appeal Board is attached.

As an illegal foreigner cannot reside in the country on a temporary basis indefinitely your case will be dealt with in terms of the provisions of the Immigration Act, No 13 of 2002, after receipt of this letter.

Yours faithfully

p.p. REFUGEE AFFAIRS

UMNYANGO WEZASEKHAYA

Republic of South Africa
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FILE NO. XXXXXXXXXX

APPEAL NO. XXXXXXXXXX

XXXXXXXXXX

(TANZANIA)

XXXXXXXXXX

XXXXXXXXXX

AT CAPETOWN

Before:

Counsel:

Date of Hearing:

Date of Decision :



XXXXXXXXXX

XXXXXXXXXX - UCT

9 December 2008

2011 -12- 05

DECISION

[1] This an appeal against the decision of the Refugee Status Determination Officer (RSDO) declining to grant refugee status to the appellant, a national of Tanzania.

INTRODUCTION

[2] The appellant is an unmarried male born on XXXXXXXXXX, Tanzania and is from the Sukuma ethnic group.

[3] He entered South Africa clandestinely via Mocambique during 2002. After his arrival in the Republic the appellant duly lodged an application for refugee status and was seen by a Refugee Reception Officer on 31 August 2006 to complete the BI-1590 application form. The application was declined by letter dated 14 September 2006.

APPELLANT'S CLAIM:

[4] The appellant was born at Mbeya in Tanzania. After the appellant's birth his family moved to Dares Salaam where he attended primary school. He attended high school at XXXXXXXXXXXX (boarding school) and completed high school in XXXXXXXXXXXX. The appellant has XXXXXXXXXXXX brother and XXXXXXXXXXXX sisters who all reside at Dar es Salaam. XXXXXXXXXXXX. His father resides at Dares Salaam and XXXXXXXXXXXX.

[5] After leaving high school the appellant performed volunteer work XXXXXXXXXXXX and was paid expenses for transport and food. He did fund raising for school children and also served coffee. The appellant did the work in Dares Salaam and Arusha. He did the volunteer work for about two years and then stopped because of financial reasons.

[6] According to the appellant he realised he was homosexual or gay since he was 20 years old. While at boarding school at XXXXXXXXXXXX the appellant had relations of a sexual nature with other boys. The appellant's mother discovered that the appellant was gay and told his father who reacted with anger and told the entire family. The appellant's brother informed the community of the appellant's sexual orientation who verbally threatened him and threatened to throw him in the XXXXXXXXXXXX. People who knew that the appellant was gay made his life very unpleasant.

[7] According to the appellant being gay is not allowed in his tribe and in the Muslim religion. The Tanzanian government does not allow male homosexuality. The appellant was never arrested by the police for being gay because he was not openly gay.

[8] The appellant was not happy staying at home with his family and moved to Mtwara where he worked on a farm for a few months. Then he decided to come to South Africa and arrived in 2001, because of his sexual orientation. If he returns to Tanzania he will not be safe.

THE LAW

[9] The law relating to refugees is set out in the Refugees Act, No. 130 of 1998, with the relevant provisions contained in section 3(a) and 3(b) of the Act which can be summarized as follows :

1. A person qualifies for refugee status if –
 - 1.1 he or she has a well-founded fear of being persecuted by reason of race, tribe, religion, nationality, political opinion or membership of a particular social group; or
 - 1.2 he or she was compelled to leave his or her habitual place of residence in order to seek refuge elsewhere owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either part or the whole of his or her country of nationality.
 - 1.3 he or she is a dependant of a person contemplated in 1.1 or 1.2 above.
2. A person may not be removed from the Republic to any country where he or she may be subjected to persecution or where his or her life, physical safety or freedom would be threatened for a reason set out above.

BURDEN AND STANDARD OF PROOF

[10] It is an accepted principle that an appellant must carry the burden to prove his or her case. This is contained in the maxim "*Semper necessitates probandi incumbit illi qui agit*" and is confirmed in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status at p.47, par. 96 : "*It is a general principle that the burden of proof lies on the person submitting a claim.*"

[11] The standard of proof is reasonable risk and must be considered in light of all the circumstances and is a forward-looking test. In this regard please see Appeal No. 2304/06 (S.A. Refugee Appeal Board)

FINDING

[12] In reaching its decision the Board has thoroughly assessed the appellant's claim and has had due regard to the objective background information on the appellant's country of origin.

[13] Before the Board can consider the principal issues in this matter it is first necessary to make an assessment of the appellant's credibility. The appellant testified in a frank and open manner with the aid of his Counsel and is found to be consistent in his claim. He is accepted as credible.

[14] Counsel for the appellant has prepared excellent Heads of Argument for which she is thanked. Not only has she made all the necessary submissions but all are backed up by reports which has made the Board's task so much easier.

[15] The Board accepts that the appellant is a homosexual person. The question to be answered is whether his homo-sexualism causes him to be persecuted in his country of ongm. As a point of departure the Board refers to the Tanzanian Penal Code (2002). Under the heading Unnatural Offences. Part 1. Ch. XV, 154 it states " Any person who : (a) has carnal knowledge of another person 'against the order of nature' (b) permits a male person to have carnal knowledge of him, against the order of nature. Punishment : Imprisonment 20 years – life." Under the heading Judicial Discretion it is stated that " A judge CAN NOT make a sentence outside of the guidelines in the criminal code for sexual offences. A Court must sentence any person convicted of a sexual offence to imprisonment for the prescribed period under the statute." Before anything like the above-mentioned sentence can be imposed the accused must, of course, first be convicted of the offence. To be gay or homosexual in itself is not punishable – only where it can be proved that carnal knowledge took place the penal code comes into play. Whether a conviction and sentence is equal to persecution must be determined by the application thereof by the Courts. According to the DOS report on Human Rights Practices – 2006 no one was punished under the law during the year. In practice the law is rarely enforced because of the difficulty of obtaining proof.

[16] The DOS report aforementioned also states that homosexuals faced societal discrimination, especially at the community level. Again the question is whether the discrimination encroaches on basic human rights.

[17] Persecution is defined as the sustained or systemic violation of basic human rights demonstrative of the failure of state protection. The criteria to establish persecution is harassment, harassment which is so constant and unrelenting that the victim thereof sees no other way out but to flee to another country for refuge.

[18] *In casu* the appellant suffered social discrimination in that members of the community said unpleasant things to him. He was harassed by his brother who put water on his bed so he could not sleep in a wet bed. The Board is not convinced that these acts of harassment are equal to persecution. There is also no evidence that the harassment was constant and unrelenting.

[19] Counsel, in her Heads of Argument has submitted "that the appellant originates from a country which criminalizes homosexuality and as such mere membership of this group involved prosecution. It was not simply prosecution based on a petty criminal offence but prosecution based on a fundamental right that involves the dignity of a human being. Thus it is submitted that the prosecution in this case was persecution where the appellant could not live openly and when he did he was ostracized by his family and the community." The Board, with respect, begs to differ with Counsel in this regard. Even though the Tanzanian Penal Code criminalizes homosexual acts such as carnal knowledge of another male person, mere membership of the homosexual fraternity does not lead to prosecution which in turn can be seen as persecution.

[20] The Board is not convinced that the mere fact that the appellant is a homosexual person and has suffered social discrimination means that he has been persecuted. He has not been harassed to the extent that it can be seen as persecution. The fact that there is a Penal Code which criminalizes sodomy does not mean that a homosexual person is being persecuted.

[21] The appellant's case would have been vastly different had he been harassed with continual arrests and prosecutions under the Penal Code in relation to his sexual orientation but this is not the case. In the appellant's own words: "The police have never arrested me for being gay because I am not openly gay."

[22] Objectively on the facts as found the Board finds that there is no reasonable risk of the appellant being persecuted if he is returned to his country of nationality. The appellant has failed to discharge the burden of proof which rested on him and as a result the appeal does not succeed.

CONCLUSION

[23] For the reasons mentioned above, the Board finds the appellant is not a refugee within the meaning of section 3 of the Refugees Act, 1998, and the decision by the Refugee Status Determination Officer rejecting the appellant's claim for refugee status is confirmed. Refugee status is declined. The appeal is dismissed.


~~MEMBER~~ : REFUGEE APPEAL BOARD

Signature :

Date :