Republic of South Africa

REFUGEE APPEAL BOARD

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APELLANT:XXXXXXXXXXXXXXX)

HEARING HELD AT PRETORIA

FILE NUMBER XXXXXXXXXX

APPEAL NUMBER:XXXXXXXXX

Counsel for Appellant : XXXXXXXX

Date of hearing : **13 May 2002**

DECISION

This is an appeal against the decision of a Refugee Status Determination Officer of the Department of Home Affairs declining the grant of refugee status to the appellant, a citizen of Nigeria.

INTRODUCTION

The appellant is a XX year-old single male. He arrived in South Africa clandestinely by road via Swaziland on or about XXXXXXX 1998. The appellant lodged an application for refugee status and was interviewed by a Refugee Reception Officer on XXXXXXX 2001. The application was declined and the appellant was informed by letter on XXXXXX 2002. On XXXX 2002 a telefax letter was received from the Wits Law Clinic indicating that they were appearing for the appellant and that he was lodging an appeal against the decision by the Department of Home Affairs.

APPELLANT'S CLAIM

The appellant's claim can be summarised as follows:

He, as well as his parents and siblings, are members of the Aka Igbo tribe in Nigeria. The family is originally from the Rivers State, Nigeria.

The appellant's father worked for the Nigerian Navy and was a member of the UPN party. His mother was a trader. The appellant has four sisters and two brothers of whom one is married to a British national and now resides in the United Kingdom.

According to the appellant he attended the Ojo School and graduated in 1986 whereafter he participated in a civil aviation training course in Zaria. He became a member of the UPN party in 1996 and was an active member in the sense that he organised meetings and rallies. His duties were to distribute pamphlets and take part in rallies and demonstrations. He also supervised the ballot boxes during elections. He participated in demonstrations to protest the killing of Ken Saro-Wiwa because he came from the same region.

During 1998 the appellant was arrested and handcuffed by police in Lagos on account of his alleged sexual orientation. Under Nigerian law homosexual conduct is prohibited. He was taken to the Ojuelegba Police Station where he was detained. After paying the police a bribe he was released from custody. While living in Nigeria the appellant was occasionally harassed by the police when he was doing business at the market or while passing the police station.

A different version of his detention was mentioned in his appeal oral hearing where he alleged that he was arrested in March 1997 on suspicion of homosexuality. He was released after a day on charges of loitering. He also mentioned in his oral hearing that in September 1997 he was arrested in a police raid in an "underground" gay meeting venue in Lagos. During his weeklong detention the appellant was subjected to beatings and abuse at the hands of both the police and his fellow prisoners. Upon a lawyer's intervention the charge was reduced from engaging in homosexual conduct to loitering.

He was therefore advised to leave Nigeria. He learned through research that South Africa has the most progressive policies towards gays and lesbians.

The appellant came to South Africa on XXXXXXXXXXX 1998. His journey from Nigeria through Zaire and Angola to the Republic lasted two months.

According to the appellant he was unaware that sexual orientation was a ground for being considered for asylum, hence his first application for refugee status only made mention of his fear of returning to Nigeria based on his political activities. He later learned from his attorneys of record, during 2000, that he could make a claim for refugee status based on his sexual orientation because of his membership of a particular social group.

The appellant has heard from his homosexual friends that the Nigerian police persecute homosexual persons and that homosexual conduct is still illegal in Nigeria. The appellant has been dating with one, Terrence Mashaba, a South African citizen, for over a year and is involved in a long term monogamous relationship with him. According to the appellant he would never have been able to have had such an open homosexual relationship in Nigeria because he would have been imprisoned.

The reason why the appellant left Nigeria was because of his sexual orientation. Homosexualism (sic) is illegal in Nigeria and he could not practice it freely.

Before being arrested during 1998 he never suffered any form of discrimination based on sexual orientation.

He therefore fears that, were he to return to Nigeria his safety would be placed at risk on account of his political opinion and his homosexual activities.

Counsel for the Appellant submitted objective information as well as photographs of the Appellant depicting scars on his head as well as his back which were allegedly caused as a result of the torture inflicted on the Appellant because of his homosexuality.

THE LAW

The law relating to refugees is set out in the Refugees Act, 1998. The relevant provisions are summarized hereafter.

1. A person qualifies as a refugee if –

   (a) he or she has a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, or

   (b) 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 a part of the whole of his or her country of origin or nationality.

2. A person may not be removed from South Africa 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 in 1 above.

BURDEN AND STANDARD OF PROOF

The burden of proof is on the Appellant to show that he is entitled to refugee status.

The standard of proof is that of "real risk" and must be considered in light of all the circumstances**.[R V Secretary of State for the Home Department ex parte Sivakumaran(1998) AC958]**. In applying this test the Board takes note that there is no single definition of persecution and that all the relevant circumstances must be brought into account.

The Board has to assess whether the claim to asylum is well founded on the evidence as a whole, going to past, present, future and the prospective risk of persecution. The Board has to also assess the degree of risk facing the Appellant now at the date of making this assessment . **[UK Immigration Appeal Tribunal cases of Sandralingan and Ravichandran [1996], Imm AR 97; Koyazia Kaja (11038).]**

FINDING

In reaching its decision the Board has thoroughly assessed the Appellant's claim and considered all documentary and oral evidence. The Board has also had due regard to both the subjective and the objective elements of the claim. The claim is therefore considered in the light of all the relevant circumstances which also includes a credibility assessment.

> In order to assess the appellant's case, a credibility finding must first be made. The heart of the refugee determination process is the careful consideration of the claimant's own evidence. That such evidence must be adjudged to be plausible, frank, consistent and above all credible which is deemed to be sufficient to establish the objective foundation of a claim to refugee status. The Board is also mindful that claimant's credibility should not be impugned simply because of vagueness or inconsistencies in recounting peripheral details.

> The primary reason for the Appellant's departure was because of being persecuted for his sexual orientation. The Board found it strange that he failed to mention this fear at his initial hearing. He alleged that he was not aware that being persecuted on the basis of sexual orientation was a ground for seeking asylum. He also mentioned that through research he had learned that South Africa had "most progressive policies towards gays

and lesbian in Africa" . Surely his "research" would have indicated that persecution because of homosexuality would be a ground for seeking asylum in South Africa. The Board also found certain inconsistencies relating to the dates of his alleged arrests.

The Board finds that although there are certain credibility concerns, these are not regarded as material and central to the claim and that the Appellant is given the benefit of the doubt.

Notwithstanding the aforementioned the Board now refers to the essence of his claim.

In this claim there are a number of aspects which need to be determined before a final decision can be reached.

The Appellant in his submissions alleged that he fears persecution if he were to return to Nigeria on the basis of his political opinion and his belonging to a particular social group(homosexuals). The Board will therefore analyse his claim to asylum under two separate categories. viz Political Opinion and Homosexuality.

POLITICAL OPINION

The appellant claims to have been an active member of the UPN party. He fears that because of his political opinion he will encounter persecution at the hands of the government. He organized meetings and rallies. He also supervised ballot boxes during elections and even participated in demonstrations protesting the killing of Ken Saro Wiwa.

Despite extensive research the Board was unable to find details pertaining to the political profile of the UPN. However the Board noted from country reports that there are many smaller political parties in Nigeria.

From the objective information submitted by the Appellant's Counsel as well as independent research conducted by the Board, no evidence could be found of any state sponsored persecution against members of the UPN.

His work in the UPN involved organizing meetings and rallies and supervising ballot boxes during elections.

In the case of **Mongoua UK Immigration Appellate Tribunal** 15433 it was held that " organizing meetings, informing people and preparing posters is a very low level of involvement and as such a person could not be regarded as an activist"

The appellant's activities within the UPN was at a low level. There was no evidence to indicate that his political profile was such that he was regarded as a threat to the government and would be targeted by the authorities. The appellant made no claim that he was ever targeted or that he suffered harm amounting to persecution for reasons of his political opinion. The Board does not consider, given the appellant's absence from Nigeria and the passage of time, that his political profile is such that he would be of interest to the authorities today.

The appellant also made mention of the fact that he took part in demonstrations to protest the killing of Ken Saro Wiwa because he came from the same region.

The country information reveals that in late May 1994 a large number of people were arrested after a meeting was held on 21 May 1994 in Gioko which was attended by a number of Saro Wiwa's opponents. The meeting was attacked by a large mob and four chiefs were killed. Saro Wiwa and Ledum itu were amongst those arrested. Fifteen members of the Ogoni ethnic minority were brought to trial before a Special Tribunal. On 31 October 1995 Saro Wiwa and eight others were sentenced to death in spite of international protests. .**[Immigration and Nationality Directorate of the United Kingdom 1 April 2000 Country Assessment – Nigeria].**

According to the UK Country Information and Policy Unit, April 2002 Nigeria Country Assessment Mosop and NYCOP activists were subjected to harassment and persecution by the Nigerian authorities during the Abacha regime. After Abubakar became head of state in June 1998 the situation in Ogoniland improved. In early September 1998, 20 Ogoni political prisoners who had been in detention since 1994 for the murder of four Ogoni chiefs (the same charges as the late Ken Saro Wiwa) were released after a high court judge in Port Harcourt dropped all the charges. Their release was unconditional. The above-stated report further revealed that " since the election of Obasanjo the situation of the Ogoni people has improved. The Obasanjo government seems to be committed towards the principles of democracy and good governance. At the moment government sponsored development projects and projects initiated by Shell are organized in Ogoniland. **[Immigration and Nationality Directorate of the United Kingdom 1 April 2000-Country Assessment – Nigeria].**

The Board noted that there is a change in circumstances in Nigeria.

According to Hathaway(The Law of Refugee Status, p200),there are three criteria to be satisfied where there has been a change of circumstances. These are:

(a) The change must be of a substantial political significance, in the sense that the power structure under which persecution was deemed a real possibility no longer exist.

(b) There must be reason to believe that the substantial political change is truly effective.

(c) The change of circumstances must be shown to be durable.

According to objective information :General Abubakar who replaced General Abacha as head of state on 8 June 1998 took several steps to improve the poor human rights record in Nigeria. Abubakar committed his administration to uphold the rule of law and strengthen the judiciary in order to enable it to dispense justice and protect the rights of individuals without interference from the government. Nigeria is now a democratic federal republic, where the government. Local, Parliamentary and Presidential elections have been held, and the handover to the elected civilian President Olusegun Obasanjo took place on 29 May 1999 without incident.Decree 63 of 26 May 1999 repealed many of the decrees that impinged on human rights including Decree 2.The 1999 constitution enshrined basic political rights including the right to a fair trial. President Obasanjo has prepared a code of conduct signed by his ministers and

advisors reminding them of the need for probity and accountability in public life.

President Obasanjo has committed his government to a review of human rights abuse under previous military governments. He has also taken action against those who have been accused of human rights abuses committed during the Abacha regime.On 5 June President Obasanjo created a panel to investigate human rights abuses between January 1994 and 28 May 1999, and to identify the people responsible.

There have been no reports of harassment of human rights organisations under President Obasanjo, or infringements of peaceful protest or union activity.**[Immigration and Nationality Directorate of the United Kingdom 1 April 2000 Country Assessment – Nigeria].**

Elections were held recently in Nigeria Mr Obasanjo was elected President for a second term in April 2003, winning more than 60% of the vote in Nigeria's first civilian-run presidential poll for 20 years.[BBC NEWS- Nigeria- Country Profile, Monday, 7 July, 2003]

The Board after scrutinising objective country profile material has found that political changes have taken place and that such changes are durable.

Therefore considering the appellant's political profile and the fact that significant political changes have taken place, the appellant would therefore not necessarily attract the unwanted attention of the authorities. Consequently the Board does not accept that the appellant would be of any interest to the authorities as a result of his political opinion if he were to return.

HOMOSEXUALITY

As regards his fear of being persecuted because he belongs to a particular social group of homosexuals that faces persecution in Nigeria, the Board finds that on the evidence before it that the appellant is a homosexual person. Consequently it needs to be seen, firstly, whether such a person falls within the category of "membership of a particular social group" as mentioned in section 3(a) of the Refugees Act, 1998.

In the matter of **ACOSTA, USA Board of Immigration Appeals, March 1, 1985** the following was stated : ***" Applying the doctrine of ejusdem generis we interpret the phrase 'persecution on account of membership of a particular social group' to mean persecution that is directed towards an individual who is a member of a group of persons all of whom share a common immutable characteristic. The shared characteristic might be an innate one such as sex. …..The particular kind of group***

characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or conscience."

In **Islam v. Secretary of State for the Home Department and R. v. Immigration Appeal Tribunal & Another ex parte Shah [1999] Imm AR 283; [1999] 1 Accra 629** , a House of Lords decision, Lords Steyn and Millet expressly held that homosexuals would form a 'particular social group'. Lord Steyn stated the following : " ***In Re G.J. [1998] 1 NLR 387 the New Zealand Refugee Status Authority faced this question. Drawing on the case law and practice in Germany, The Netherlands, Sweden, Denmark, Canada, Australia and the U.S.A.' the Refugee Status Authority concluded in an impressive judgment that depending on the evidence homosexuals are capable of constituting a particular social group within the meaning of article 1A(2): see pap. 412-422. This view is consistent with the language and purpose of article 1A(2). Subject to the qualification that depends on the state of the evidence in regard to the position of homosexuals in a particular country I would in principle accept the reasoning in Re G.J. as correct."***

Based on the above ***dicta*** in the various cases the Board finds that the appellant falls within the 'membership of a particular social group' as set out in section 3(a) of the Refugees Act, 1998.

The second aspect which the Board must determine is whether homosexual conduct is illegal in Nigeria and if so what the consequences are of a criminal prosecution and whether such harassment or penalties amount to persecution.

The appellant gave evidence to the effect that homosexual relationships are (still) illegal under Nigerian law. According to the **U.K. Immigration and Direcorate, Country Assessment, Nigeria, October 2002,** par. 6.85 **: *"Nigerian law prohibits male homosexual conduct, and homosexuals can be subject to prosecution. The penalty for convicted homosexual behaviour varies from 3 months to 14 years imprisonment or a fine and/or corporal punishment."***

Although the Board has been unable to obtain a copy of the Nigerian statute dealing with the prohibition of male homosexual behaviour the Board has had insight in **Helman and Hammelberg : World Survey**, p.311, where the following appears under **Nigeria - Official Attitudes and the Law** : **" *Homosexual acts between men are illegal, and homosexual act between women are not mentioned. According to***

Article 214 of the Penal Code every person who has 'carnal knowledge of another person against the order of nature,' or who permits a male person to have ' carnal knowledge of him (or her) against the order of nature,' is guilty of a felony and liable to imprisonment for fourteen years. Section 217 of the Penal Code criminalizes attempts at, and actual acts of, 'gross indecency', with a maximum penalty of three years imprisonment." In order to be convicted the State thus has to prove that actual 'carnal knowledge' took place.

The next aspect the Board must have a look at is the prevalence of prosecutions in Nigeria insofar as male homosexual persons is concerned and the severity of the sentences meted out to convicted persons. The Board must also look at the current situation in Nigeria and whether the treatment that the Appellant will face on his return will amount to persecution in terms of a forward looking assessment of risk.

Evidence relating to sentencing is needed by the Board in order to determine whether, in practise, the draconian laws in Nigeria relating to homosexuality are actually enforced and whether people violating the relevant statutes are penalised. Harsh and hostile laws without any record of practical enforcement does not amount to persecution. As efforts made by the Board in obtaining the required information relating to sentencing of homosexuals yielded no results , the Board therefore directed a request

to the representative of the Appellant to provide such information relating to disproportionate sentencing. The burden of proof rests on the Appellant to produce the evidence. The Appellant conceded that the Burden of Proof is on the Appellant but alleged that the Burden of Production should be shared between the Appeal Board and the Appellant. Representative of the Appellant responded by saying: " The Wits Law Clinic does not have funds budgeted for such a request and our client is unable to provide the US$100.00 for such a request either…We have been instructed by Mr Udogu to seek judicial review in a court of law of any adverse decision regarding his appeal…". The Board found it strange and indeed inconsistent that on the one hand the Appellant pleads poverty when requested to obtain additional information, which is his responsibility, and on the other hand emphatically states that he is prepared to embark on the costly exercise of having the matter judicially reviewed. It needs to be mentioned that even though the burden of proof rested on the Appellant, the Board had made an effort to obtain such information but as mentioned above no evidence was found of disproportionate sentencing.

According to objective information, **International Gay and Lesbian Human Rights** , **Commission** in their publication, **Country Packets Supporting Documentation for Asylum Claims,** the following excerpts are meaningful :

1. "In Nigeria, the Gentlemen's Alliance, a group of gay men, held the country's first gay conference in 1991, despite the presence of a law that makes 'carnal knowledge against the order of nature' punishable by up to fourteen years' imprisonment."
2. "…….in Lagos and most other areas in Nigeria, it is not uncommon to see men sitting on the lap or in the bosom of each other in the market stalls, social functions or just relaxing in front of their apartments. It does not always denote sexual desire, just a way of feeling close to people or accepting just as people."

3. "In practice, however, these provisions (that make homosexual acts punishable) – like those concerning bigamy – are rarely enforced. There are no witch hunts to try to identify or even to take issue with homosexuals. That would occur only if a homosexual were deliberately to flaunt his homosexuality in front of everybody. This apparently relaxed social attitude gives homosexuals sufficient confidence to enable them to redirect their energies towards other issues."

According to **Africa News Service**, May 24, 1999 " *Some People Go the Extra-Mile to Seek Sexual Satisfaction*"By Kelechi Obasi, Lagos, The laws of the Federation of Nigeria and Lagos, Chapter 42 of the criminal code, section 214, states that any person who "has carnal knowledge of any person against the order of nature" or "permits a male person to have carnal knowledge of him or her

against the order of nature is guilty of a felony and is liable to imprisonment for fourteen years." However, the spectre of a spell in jail is not haunting members of a steadily growing clan of homosexuals in Nigeria's commercial nerve centres. A once strange gay culture seems to be thriving in Lagos, Kano, Port-Harcourt and many cosmopolitan cities in the country. A recent study of Kano and Kirikiri, Lagos maximum security prisons showed that out of every 200 men, 30 confessed to having had sexual relations and about 20 in the latter.

According to another report: Nation's Homosexuals,The News (Lagos), OPINION,**April 22,2002 .**

"Homosexuals who used to hide their faces, have of late, become more brazen in their acts. Their influence pervades the public and private sectors in Nigeria"

In Lagos, the sodomites on the Island have meeting points at some exclusive restaurants in Victoria Island, while those on the mainland have a meeting place at Kampala Hotel, Oke Koto, Agege. The decrepit one storey building looks ordinary in daytime, but at dawn, it is a special place for the homosexuals and transvestites. The building facing the road adjacent to the popular Danjuma Cinema has no signboard to indicate that it is a hotel. But as from 10:00 p.m in the evening, everything changes; exotic cars are always seen in front of the brothel. Some of the gays would put on lipsticks like women while some of them try to walk like ladies.

Most of the patrons of the brothel are said to be the rich and powerful in the society: army officers and top government officials. Access to the club is exclusive to the members of the gay club.

Homosexuality also abounds in Abuja, Kaduna, Kano and other cities in the country.Gay business in Kano is notorious as female prostitution in Italy or the Red Light District of Hamburg in Germany. The business is said not to be limited to any class. Low class gay brothels can be found along Abedi, Freetown, and Sani streets,all inside Sabon Gari.

Among the gays are transvestites who usually dress and make up like female prostitutes at night. The high-class gays, incorporating Nigerians and some of their Lebanese friends do their own at guesthouses where they keep their lovers. Such guesthouses are along Sultan Road, Nassarawa, G.R.A, Kundila Estate and Maiduguri Road. They are also found at Hausawa quarters and Sabongari. Among the top gays in Kano is the Galadima Kano, Alhaji Tijanni Ashim. Although, he has several wives, at the same time he has sexual peccadillo for his gender. Ibrahim Dan Kabo, who died last week, was also reputed for being a bi-sexual.Indeed, one of his hotels at the GRA in Kano has for some years been a rendezvous of gays and bi-sexuals.

Some top journalists in the town have also been found among them. There is also Ibrahim Ismail, the former husband of women affairs minister, Aisha Ismail. He was said to be close to a former inspector-general of police. Insiders said that the fact of his homosexuality was one of the major reasons for his separation from his wife.

ILGA Africa Newsletter ,Alliance Rights Nigeria. ,Ilga Africa. Nov 20 (www.q.co.za)

Alliance Rights Nigeria is a gay welfarist association and was formally launched on the 2nd of July, 1999 in Lagos, Nigeria. Since inception last year, ARN have been engaged in organising seminars and lectures in various high schools within the Lagos metropolitan area which is their present base of operations. Their lectures focus mainly on AIDS, STD's and Safer-Sex. They also encourage LGBT pride as a means of achieving freedom within their society.

At present, Alliance Rights Nigeria have 467 registered members, though there are thousands of Sagba's (the word SAGBA refers to Homosexuals in Nigeria) in Nigeria, that are indifferent in becoming members.

Homosexuality, however, goes beyond the escapades of mischievous schoolboys or the perversion of politicians and boardroom players. In Nigeria, it rules the realm of politics.

In an article in ***The News*** (Lagos, Nigeria), April 22, 2002 it was mentioned that according to the president of Alliance Rights Nigeria, a gay organisation, homosexuality has always existed in Africa. "In some cultures in the northern part of Nigeria", says Erilou—who like most other Alliance Rights' members use a pseudonym—"there are people called dan daudu which is a typical Hausa term.

According to : "**NIGERIA COUNTRY ASSESSMENT APRIL 2002 COUNTRY INFORMATION & POLICY UNIT IMMIGRATION & NATIONALITY DIRECTORATE HOME OFFICE, UNITED KINGDOM**" **[5.71]**

Homosexual males in Nigeria are likely to face discrimination and occasional violence if they are overt about their sexual orientation, but not on an organised or systematic scale. Society is not openly hostile but homosexuals can be subjected to ridicule. <u>There are some areas in Nigeria where it is possible to live openly as a homosexual - such as in a large city like Lagos</u>. There have been instances of homosexuals being subjected to violence, but they usually keep to themselves and are usually left alone. [109]source: DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS: Australia Government, DFAT Report 0116 of 19.01.99.

The credibility of the abovementioned report has been questioned by counsel for the Appellant by referring to Judge Zelinka of the Australian Refugee Review Tribunal observations that "there were a number of inconsistencies" between the abovementioned report and other independent evidence on Nigeria. The Board after research was unable to trace any records of the alleged observations of Judge Zelinka. A request was therefore forwarded to the Appellants counsel to provide records of Judge Zelinka's observations. No response was received and no explanation was tendered for not responding. The Board thereafter contacted the Australian Refugee Appeal Tribunal regarding Judge Zelinka's observations. The honourable Judge noted that she dealt with 11 similar cases and has never

referred adversely to any DFAT information. In only one case which she did in early 1998 when she was newly appointed at the Tribunal did she allow for refugee status to be granted. It was a case of very serious abuse during the Abacha era[now ended]. In the other 10 similar cases asylum was not granted.

The Board made enquiries from the **Nigerian Information Service Centre (Southern Africa Zone)** regarding the number of prosecutions which have taken place under the Penal Code relating to homosexual orientation. The Board was informed that " there is no known case of any Nigerian, within Nigeria in her history, who has been prosecuted as a result of his sexual orientation." This would gainsay the appellant's submission that "The lack of reported cases concerning litigation over homosexual conduct only evidences the depth of societal prejudice against gay men."

It appears from all available information that prosecutions for homosexual behaviour in Nigeria are possibly and presumably discussed but never seen in criminal courts. The main reason for this is one relating to the law of evidence. The fact that a person is a homosexual is not ***per se*** a criminal offence. The criminal offence consists of a homosexual person or persons engaging in an act of ***coitus per anus*** or as stated, **carnal knowledge** of another male or female person. Due to the fact that this act

is always committed in private, it is virtually impossible for the police to gather the necessary evidence needed to convict a person.

The result is that homosexual persons are possibly harassed by police officials but nothing more than that. **Hathaway, The Law of Refugee Status, p.104 : "** ***Persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection."*** The harassment complained of by the appellant does not measure up to a sustained or systemic violation of his basic human rights and the Board finds that this is not persecution. According to the appellant's evidence he was arrested twice because of his homosexuality but was never harassed prior to 1998. As stated above this cannot be seen to be a sustained and systemic violation of the appellant's basic human rights. He was neither detained indefinitely nor was refused the right to legal representation. In fact he was not even convicted for the offence allegedly charged for.

The Board will now deal with some of the submissions made in the appellant's heads of argument, the first one being that the central issue in this case concerns the characterization of prosecution of Nigerian penal laws that impose criminal sanctions on **all aspects of intimacy between gay men**. In this context the Board finds it necessary to deal with two issues. Firstly whether there exists an independent judiciary in Nigeria and

secondly whether there is actual enforcement of the penal provisions relating to homosexuality.

In relation to the first issue whether there exists an independent judiciary in Nigeria the Board found that according to objective information : "**NIGERIA COUNTRY ASSESSMENT APRIL 2003 COUNTRY INFORMATION & POLICY UNIT IMMIGRATION & NATIONALITY DIRECTORATE HOME OFFICE, UNITED KINGDOM**"-

The 1999 Constitution enshrined basic political rights including the right to a fair trial. President Obasanjo has committed his government to a review of human rights abuse under previous military governments. Under the Constitution, the court system is composed of federal and state trial courts, state appeals courts, the Federal Court of Appeal, and the Federal Supreme Court**.** Criminal justice procedures call for trial within three months of arraignment for most categories of crimes. Trials in the regular court system are public and generally respect constitutionally protected individual rights in criminal cases, including a presumption of innocence, and the right to be present, to confront witnesses, to present evidence, and to be represented by legal counsel

As regards the second issue whether there is actual enforcement of the penal provisions relating to homosexuality the Board agrees with the submission that while the extreme severity of punishments which can possibly be handed down in terms of the relevant penal code may in certain circumstances constitute persecution, it cannot agree that this applies to "**all aspects of intimacy between gay men**." Article 214 of

the penal code is explicit in that it spells out that "carnal knowledge .. against the order of nature" is a felony and punishable with fourteen years imprisonment. Section 217 of the penal code deals with "gross indecency". Nowhere in the penal code is it stated that "all aspects of intimacy between gay men" is criminally punishable. If homosexual persons were arrested for the very fact that they were homosexual beings that would alter the entire picture but that is not the case here. This is borne out by the excerpts mentioned *supra* from the **Country Packets Supporting Documentation for Asylum Seekers.**

The Board cannot go along with the submission made and finds that only in certain cases will prosecution constitute persecution in regard to section 3(a) of the Refugees Act, 1998.

The second submission contained in the appellant's heads of argument is that the past persecution suffered by the appellant on account of his sexuality made him a target for subsequent police harassment and monitoring. The Appellant provided photos depicting scars which were allegedly caused as a result of beatings he received due to his sexual orientation.

Hathaway, The Law of Refugee Status, p.88 puts it this way : " The issue is not the fact of the past persecution, but rather whether that which happened in the past may happen in the future".

According to the **U.K. Immigration Appeal Tribunal case Direk [1992] Imm AR 330.** Past persecution alone does not necessarily establish a well-founded fear of persecution. It was necessary to look to the likelihood of persecution in the future.

According to the **U.K. Immigration Appeal Tribunal cases,** it was said: "The risk of random attack is not persecution."**[Montiero-Figueras].** In **(12785) Veluff (12988)** it was said that: "A general round-up of suspects is not persecution." **Kemal Onay [1992] Imm AR 320** A series of minor incidents would not necessarily amount to persecution. Isolated attacks by non-government agents did not constitute persecution.

In the **U.K. Immigration Appeal Tribunal case Kagema [1997] Imm AR 137-** Kenya – Appellant was a Kikuyu from the Rift Valley. He and his family were attacked by members of the Kalenjin tribe. It was found that persecution is to be given its ordinary English meaning to be looked at in the round taking into account all relevant circumstances. We need to look to the future to ascertain whether the applicant had a well-founded fear of persecution and what had happened in the past could be persuasive as to what would happen but could not be decisive.

The Board finds that it is necessary to view all circumstances surrounding the appellants fears and not only look at isolated instances. Not only should past

persecution be considered but also the prospective risk of persecution should the appellant return.

The Appellant referred to " the right to sexual intimacy, irrespective of one's sexual preference, is a fundamental human right under the South African legal system and International Covenants on Human Rights.

The Board noted that every individual had the right to privacy and sexual preference. However such rights are not absolute. In the interest of society there are always checks and balances. For example although an individual has the Right to Freedom of Expression, this right is not absolute as hate speech is therefore excluded and not accommodated for. Rights should not be looked at in a vacuum but according to prevailing legal and societal values. Perceptions in different countries are changing and it is inappropriate to lay down definitions. The Refugees Act 130, of 1998 is a humanitarian measure of enormous value. It is a living instrument whose meaning is flexible.

What might not be regarded as persecution at one time may come to be so regarded at another. Inevitably views change with time, and views will differ between States and within States. It is clearly desirable that the international community moves with a degree of consensus in relation to what it regards as persecution, for otherwise burdens will be imposed upon those States who are most liberal in their interpretations and whose social conditions are most attractive. If

intolerable burdens are imposed there is a risk that such States will resile from their observance of the International Conventions standards, which would be a disaster.

The constitutional court in the case of **National Coalition for Gay and Lesbian Equality v Minister of Justice, Case CCT 11/98**[hereinafter referred to as the NCGLE case] ruled that the Common law offence of Sodomy and its inclusion in certain statutory schedules were not reasonable or justifiable limitations on the rights of gay men to equality, dignity and privacy. The offences were accordingly found to be unconstitutional and invalid.

This case clearly establishes that there is now a consensus that everyone has a right of respect for his private life. A person's private life includes his sexual life, which thus deserves respect. Of course a person has a right to engage in sexual activity. His right in this field is primarily not to be interfered with by the State in relation to what he does in private at home, and to an effort by the State to protect him from interference by others. That is the core right. There are permissible grounds for State interference with some persons' sexual life - eg those who most easily express their sexual desires in sexual activity with small children below the age of consent or having sex openly in a public area. The position has now been reached in the NCGLE case that criminalisation of homosexual activity between consenting adults in

private is not regarded as acceptable. If a person wishes to engage in such activity and lives in a State which enforces a criminal law prohibiting such activity by actively arresting, detaining and sentencing a homosexual , he may be able to bring himself within the definition of a refugee. That is one end of the continuum.

The other end of the continuum is the person who lives in a State in which such activity is not subjected to any degree of social disapprobation and he is free to engage in it as he is to breathe. In most States, however, the position is somewhere between those two extremes. Those who wish to engage in homosexual activity are subjected to various pressures to discourage them from doing so. Some pressures may come from the State - eg State subsidised advertising or teaching to discourage them from their lifestyle. Other pressures may come from other members of the Community, without those members being subjected to effective sanctions by the State to discourage them. Some pressures are there all the time. Others are merely spasmodic. An occasional interference with the exercise of a human right is not necessarily persecution. The problem which increasingly faces decision-takers is when to ascribe the word persecution" to those pressures on the continuum. In this context Mr Shaw, who appeared for the Secretary of State, alluded to the references in Shah & Islam to the concept of serious harm and the comment of Staughton LJ inSandralingum & Ravichandran v Secretary of State for the Home Department [1996] Imm AR 97 at page

114, where the Lord Justice stated:

Persecution must at least be persistent and serious ill-treatment without just cause ..."

In the UK case of **Rezmives (14388)** of a Romanian homosexual, the court found that the crime was punishable by imprisonment. However it was held that the Convention did not conceive to provide international protection for groups of homosexuals who consider that they are discriminated against if they make public the fact that they are homosexual. In Romania, homosexuals only become liable for prosecution if they "come out" or cease to behave discreetly - a far cry from offending basic human rights.

Madgwick J in **MMM v Minister for Immigration and Multicultural Affairs [1998] 90 FCR 324** rejected a submission that the circumstance that homosexual acts are prohibited by law with criminal sanctions necessarily amounted to persecution of homosexuals. It may well be that his Honour's conclusion was influenced by the fact that the Bangladeshi law, which he was then considering, did not prescribe the death penalty for homosexuality: the maximum penalty was transportation for life or imprisonment for up to ten years. Nevertheless, conscious of the fact that prosecution for homosexual conduct was not actively pursued by the authorities, his Honour said at 331-332:

"If serious official harm is offered or threatened to homosexuals, because they

wish privately to give expression to their sexuality, there is, in my view, no legal reason why, in particular circumstances, this might not amount to persecution.

However, in this case, all that was shown was the existence of the law and no evidence of its enforcement. Nor was there any demonstration that in the moderately near future there was a real chance that the law might be pressed into service."

Burchett J in F v Minister for Immigration and Multicultural Affairs [1999] FCA 947 at [4] was satisfied that "the severe Islamic law in respect of homosexuality was not zealously enforced in practice". At a later stage in his reasons, he concluded, based on the particular facts of that case, that"there is only a remote chance any persecution would, in practice, face the applicant, if he is a.homosexual, in Iran" [13]. What is more, the mere possession of some homosexual feelings might not necessarily be enough. So much will be dependent on the particular circumstances of the individual applicant. A person who has been publicly denounced as a practicing homosexual is not to be compared with a person, such as the present appellant, whose homosexuality is private and unknown to all but his partners and who finds no difficulty in keeping his sexual preferences a secret. As Burchett J noted at [14]: "It cannot reasonably be maintained that, simply because a country's law restricts sexual activity between consenting adults, those who do not wish to obey it are ipso facto persecuted, whether it is enforced by the authorities or not."
It is inappropriate to submit that the ability to publicly proclaim one's sexual

preference is an essential right, the denial of which would or could amount to persecution. Significantly, Burchett J pointed out that ***"all persons in Iran, whatever their sexual orientation, have to be discrete in sexual matters".***

In **WABR v Minister for Immigration & Multicultural Affairs [2002] FCAFC 124W 517 of 2001-FEDERAL COURT OF AUSTRALIA** The Tribunal accepted that homosexuality is specifically outlawed in Iran by the Islamic Penal Code and that penalties for homosexual activity range from death to flogging to imprisonment. That indicated to the Tribunal that, in theory, homosexuality in Iran can be treated in a way that may amount to persecution. However, the Tribunal did not accept that these findings meant that every homosexual person in Iran has a well-founded fear of persecution. In particular the tribunal member said: "I do not accept that the mere fact that homosexual conduct is illegal in Iran means that the[appellant] would have a well-founded fear of persecution because he is a homosexual. The illegality of homosexual conduct in Iran is a relevant factor to consider but I am still obliged to consider whether there is a real chance that the [appellant] would face persecution for a Convention reason if he returned to Iran."

In the Australian Case of **Satinder Pal Singh v Minister for Immigration and Multicultural Affairs (2000) 178 ALR 742,**("Singh") the **Federal Court of Australia** found that the Tribunal had accepted that the applicant's homosexuality meant that he would be a member of a particular social group within the meaning of Article 1A(2) of the Convention. It also accepted, although

with considerable doubt, that the applicant in the case before it was, in fact, a homosexual. It accepted his claims that attitudes towards homosexuals were harsh in the Punjab and that he had been assaulted by his lover's father, by some villagers and by the police to whom he and his lover had been reported. The Tribunal concluded that the appellant faced a real chance of persecution in his home area by reason of his homosexuality; he was well-known in the locality for his homosexual activities. However, after considering whether the appellant faced a real chance of persecution by reason of his homosexuality in the whole of India (and finding that he did not) the Tribunal came to the view that it would not be unreasonable to expect the applicant to relocate to another part of India. In coming to that conclusion, the Tribunal referred to independent country information concerning the question of homosexuality in India. It noted that s377 of the Indian Penal Code created a criminal offence of sodomy, punishable by imprisonment for life, even though the offence may be committed by consenting adults. However, despite that law of general application throughout India, the Tribunal noted that the evidence did not indicate that it was generally enforced. The learned primary judge quoted with approval the following passage from the Tribunal's reasons:

"The clear weight of available evidence is that, notwithstanding the existence of draconian provisions under the Indian Penal Code and widespread disapproval of homosexual behaviour, any chance of homosexuals actually facing persecution in the larger cities of India, such as New Delhi or Bombay, is remote and increasingly so; and the Tribunal finds accordingly."

In Singh, which fundamentally upheld the principle of relocation, the decision of his Honour was not determined by the harshness of the penalty for which provision was made in the Penal code; it was determined by the evidence which pointed, as a matter of fact, to the finding that the authorities did not generally pursue consenting adult homosexuals who conducted their affairs in private and with discretion; there had to be some real prospect of significant, actual detriment or disadvantage.

After carefully considering contemporary case law in various international jurisdictions as well as relying upon a substantial amount of country information, the Board finds that there is no evidence to justifiably conclude that a homosexual person in Nigeria and more particularly in Lagos is at risk of attracting the adverse attention of the authorities merely because he is homosexual. His core right would not be affected.

Contrary to the Appellant's allegations the Board finds that the evidence indicated that the Nigerian authorities do not actively seek out homosexuals and that the risk of prosecution for homosexuality is minimal, as long as the homosexual activities are carried out discreetly. The Board also finds that the evidence suggested that homosexual activity, as long as it was not overt and public, was tolerated and not uncommon in Nigeria. Furthermore the Board noted that the appellant had not claimed that the need to be discreet had caused him any significant detriment or disadvantage.

In the case of **WABR v Minister for Immigration & Multicultural Affairs [2002]FCAFC 124W 517** of 2001-FEDERAL COURT OF AUSTRALIA the learned Judge in rejecting the claim for asylum said :

"Overall, whilst I accept that the applicant is homosexual, I reject his claim that the authorities are interested in him and that he fears arrest and persecution if he returns to Iran… In the circumstances, I am not satisfied that the Iranian authorities had any adverse interest in the applicant at the time he left Iran, or that they have any adverse interest in him currently."

The Board finds that the Appellant should apply a certain degree of discretion which required that the Appellant avoid overt and public, or publicly provocative, homosexual activity and having to accept those limitations did not amount to persecution.

The Board also balanced the risk of the penalty being enforced against the severity of the penalty to determine whether the applicant had a well founded fear of persecution.

According to the appellant's evidence he was arrested twice by police but released on both occasions. He was also occasionally harassed by police and non – state agents. The Board is not convinced that this has made him a target for police harassment and monitoring but rather fostered a subjective fear within the appellant of being prosecuted for his

homosexuality. The Board finds, however, that objectively, on the facts as found, the appellant's fear is not well-founded.

The Board furthermore finds that the Appellant can return to Lagos or relocate to any other town in Nigeria where homosexuals are allowed to continue these practices without any interference from the community or state.

The Board also finds that there is no real risk of persecution because of his political opinion and involvement in political activities.

Under the circumstances the Board finds that the Appellant can live without fear of a real risk of persecution in Nigeria.

The Board therefore finds that the appellant has not discharged the burden of proof.

CONCLUSION

The appeal is dismissed and the decision by the Refugee Status Determination Officer rejecting the claim for refugee status is confirmed.