

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75250

AT AUCKLAND

Before: B Burson (Member)

Counsel for the Appellant: D Ryken

Appearing for the NZIS: No Appearance

Date of Hearing: 8 December 2004

Date of Decision: 28 January 2005

DECISION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellant, a national of Nigeria.

INTRODUCTION

[2] The appellant is a single man aged in his mid-thirties. He arrived in New Zealand on 8 October 2001 and lodged his claim for refugee status on 11 September 2003. He was interviewed by the RSB on 17 December 2003 which by decision dated 28 May 2004 declined his application. He duly appealed to the Authority.

[3] The central issue to be determined in this appeal is whether the appellant's status as a gay man in Nigeria gives rise to a well-founded fear of persecution if returned on this basis. Before turning to consider this issue the Authority will set

out a summary of the appellant's evidence.

THE APPELLANT'S CASE

[4] The appellant was born into a large family. When aged approximately eight, his elderly father became ill and ceased working. The resulting lack in income saw the appellant being sent to live with his sister and her family in another state. There, the appellant remained living until the early 1990s by which time he had completed his first year of high school.

[5] The appellant was aware from an early age that there was something different about him as compared to the other boys at his primary school. He noticed that he preferred playing with girls and engaging in activities usually seen as the province of the girls. He was teased by other students at the school who called him names meaning "a boy who behaved like a girl". The appellant tried to partake in more traditional male pastimes such as football, but found that this made things worse; the way he kicked a ball was seen to be "girlish" and he became the object of more ridicule.

[6] An older female cousin also lived with his sister throughout this time. Although his sister had both a son and two daughters, the son was very young and therefore the appellant only associated with his three female cousins during his time living with his sister. He can recall being asked to put on one a dress by one of his female cousins. The appellant did and found that he liked it. The appellant also put on lipstick and makeup and found that he liked this too. He therefore did this on a number of occasions with her but was also careful to take off the dress and makeup before his sister, her husband or their children returned home.

[7] After returned to his family home in the early 1990s he largely stayed at home, helping his mother tend to his sick father and attending church. This routine was interrupted when in 1992 a cousin invited him to stay with him in Lagos for a short while. Whilst in Lagos the appellant met a boy called CC who was living with his cousin. CC and the appellant became friends and over time their relationship developed into one of a sexual nature. This relationship was kept hidden from the appellant's cousin. It ended when the appellant returned to his parent's home some two months later at the end of his holiday.

[8] When the appellant returned home from his holiday he returned to his usual life attending church and helping his mother. However he also began visiting his sister who was attending boarding school in a nearby town. The journey to this town required the appellant to change transport at a particular bus terminal. There he met a man called FF. Over time, they commenced a sexual relationship. The appellant told his mother that he was staying with a classmate. Thereafter, using this excuse, the appellant would see FF approximately two times a month whenever he passed through to see his sister. The relationship ended when the appellant went to Lagos to live permanently in 1993.

[9] He went to Lagos at this time on the invitation of his brother who had arranged for him to stay at a distant relative's house. At this house the appellant shared a room with GG. Over time GG and the appellant's relationship developed into a sexual one. Although the appellant had effectively learnt that GG was gay shortly after his arrival, he made no attempt to commence a relationship with GG until after he had moved out of the relative's house in mid-1995. This was because he did not want to create trouble with his relative for either himself or GG, with whom they were then both living and on whom they both depended.

[10] In mid-1995 the appellant took over his brother's business and had begun renting a house with a friend, II. II was also gay but told the appellant not to speak to anybody about it. The appellant began inviting GG to spend the night every now and then with him but under no circumstances would GG do so if his family were visiting. They did not live openly together in a relationship. They did not want anyone to be suspicious about the true nature of their relationship. Although II knew about it, being gay himself, he kept it secret.

[11] In approximately 1998 the appellant was introduced by II to a friend of his who had returned from London with his boyfriend. When the appellant met them he was amazed to witness the degree in which they were open about their sexuality and were not bothered to display openly their love and affection for each other. This affected the appellant deeply as he contrasted this situation to his own where he had to hide his true feelings from his family, his church and the population in general.

[12] The appellant had been born into a Christian family and was heavily involved in his church which had a sizable congregation. The appellant hid the

fact that he was gay from the church which was very homophobic. In 1998, the Anglican church of Nigeria spoke strongly against homosexuality at the Lambeth conference and he recalls that around this time his minister preaching openly against homosexuality. He called it a grave sin and said that any gays in the congregation should repent or they would go to hell. This affected the appellant and although he strongly disagreed it did not cause him to leave the Christian church. This was his faith. It did however, make him think more about leaving Nigeria.

[13] The appellant's opportunity came in approximately 2000. He met a businessman who said that for a sum of money he could arrange for the appellant to travel to Malaysia and earn money and study. The appellant spoke to his brothers who, while initially sceptical, never-the-less agreed to help and provided some funds. The appellant sold some of the business and borrowed other funds from his friends. He was told by the businessman that in Malaysia he would also be able to obtain a visa to travel to a western country.

[14] The appellant left Nigeria in late 2000 with the businessman. Upon arrival in Malaysia the businessman disappeared and the appellant never saw him again. He realised that he had been the victim of a scam. He therefore enrolled in a course and applied for a student visa through the school. This school closed and went out of business and the appellant was unable to get his fees reimbursed.

[15] At about this time the appellant met an agent who promised him he could obtain a Zimbabwean passport for him. The appellant obtained a false Zimbabwean passport through the agent. This was in mid-2001. At about this time the appellant met XX, a New Zealand national, over the internet on a gay chat-line. The appellant and XX began a course of correspondence over the internet which culminated in the appellant coming to New Zealand. The appellant arrived in late 2001. The appellant has lived with XX since his arrival in New Zealand. They are in a genuine and stable *de facto* relationship.

[16] The appellant fears that if he goes back to Nigeria he will not be able to live openly as a gay man. Homosexuality is not tolerated in Nigeria. He and the other gay men that he knew were unable to admit openly that this was their sexual orientation. Indeed, the whole process of beginning a relationship was fraught with difficulty and characterised by a degree of subterfuge as each of the

prospective partners skirted around the issue of whether they were gay. Once established it had to be hidden.

[17] If the appellant's family and church found out about his sexuality, they would ostracise him. He was concerned that as he was now at an age when he would be expected by his family to marry, he will come under ever increasing pressure from his family to take a wife.

[18] The appellant fears that although he has not yet been a victim of a homophobic attack, this is something which he is at risk of. The appellant said, if he were to be attacked because he was identified as being gay, he would not tell the police this was the reason for his attack. He would tell the police that he had been robbed because he would fear that although he would be the victim, he himself would be charged by the police as homosexuality is illegal in Nigeria.

[19] His fears in this regard have been amplified by the recent death of GG who died after the appellant arrived in New Zealand. He was telephoned by a friend who advised him that GG had died in mysterious circumstances with either poisoning or suicide being the suspected cause of death. According to the appellant, the rumour circulating in GG's village it that this happened because he had been caught with a man.

[20] While in New Zealand the appellant has been in some contact with his family. They still do not know he is in a gay relationship.

THE EVIDENCE OF XX

[21] The Authority also heard from XX. XX confirmed that he met the appellant while the appellant was in Malaysia and learnt of the appellant's various troubles there. XX confirmed that the appellant has been residing with him in a genuine gay relationship. He described the appellant as stoical and undemonstrative. He said that the appellant had become more open as he spent longer in New Zealand but never-the-less remained very reticent to show publicly his true feelings.

OTHER DOCUMENTS RECEIVED

[22] The Authority received further submissions from counsel dated 23 December 2004 together with an internet report of a successful claim for asylum by a gay Nigerian man in the United States of America. A copy of the decision has not been submitted. The Authority also received from the appellant a letter from his friend IK and a death certificate relating to GG. The Authority also received statements from TT, the flatmate of the appellant and XX and the sister of XX. Both confirmed their knowledge of the relationship between XX and the appellant.

THE ISSUES

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

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

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

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

CREDIBILITY

[25] The appellant is accepted as a credible witness. The Authority accepts the appellant is a gay man from Nigeria who is in a genuine de facto gay relationship with a New Zealand citizen.

A WELL FOUNDED FEAR OF BEING PERSECUTED

Country Information

[26] At the outset the Authority records that the discussion that follows is limited to the position that obtains in those parts of the country that are not subjected to Sharia law. The reason is that the appellant lived in Lagos for a number of years prior to his departure. Lagos is situated in the southern part of the country that is not subjected to Sharia law. It is here that the question of well foundedness of his fears will be assessed. As the Authority finds his fears as to Lagos are not well founded, the risk to him in the northern areas that are subject to Sharia law is irrelevant.

The Legal Position in Nigeria

[27] Whilst homosexuality is not criminalised *per se* under the Nigerian Criminal Code, homosexual acts are a criminal offence. Chapter 21 of the Code provides for severe penalties for sex acts performed between persons of the male gender and is entitled “Unnatural Offences” giving some measure of the degree of the formal legal system characterises the seriousness of these matters. It relevantly provides:

“214. Any person who

- (1) has carnal knowledge of a person against the order of nature; or
- (2) has carnal knowledge of an animal; or
- (3) permits a male person to have carnal knowledge of him or her against the order of nature; shall be guilty of a felony and shall be punished with 14 years’ imprisonment.

215. Every person who attempts commit one of the offences described in the proceeding section shall be guilty of a felony and shall be punished with seven years’ imprisonment.

217. Any male person, who, whether in public or private domain, commits any act of gross indecency with another male person, or suborns another male to commit an act of gross indecency with him, or attempts to instruct any other male person to suborn any such act, be it with himself or with a third male person, whether publicly or privately, shall be guilty of a felony and shall be punished with three years’ imprisonment.”

[28] As noted by the Canadian Immigration Refugee Board Research Directorate report *Nigeria: Situation of homosexuals and their treatment under Sharia law (2002-July 2004)* (14 July 2004) (the CIRB report), the term “unnatural offences”, places same sex practises between male persons on a level of sexual intercourse with animals. The report notes that this could lead to the application of much more severe penalties under s.214 instead of s.217 in the event of a conviction for homosexuality practised between males.

[29] The CIRB report notes however, that while severe penalties for dealing with homosexual acts between men are provided for in the Criminal Code, it is unaware of any cases in which the Act’s punitive measures were carried out or individuals having been convicted for committing homosexuality acts.

Social Attitudes Towards Homosexuality

[30] The combined efforts of counsel and the Authority reveal a surprising paucity of information about the wider social situation of gay men in Nigeria. The information that is available however, suggests that Nigerian society has a long standing intolerance of homosexuality. The CIRB report (ibid at 3), states that in Nigerian society homosexuality especially amongst men is considered as abnormal and meets with resentment and repudiation.

[31] C.D. Aken’Ova, the Executive Director of International Centre for Reproductive Health and Sexual Rights, Nigeria, writes in *Preliminary Survey of Homosexuality in Nigeria* (7 March 2000) at page 2;

“The environment is very homophobic or at least appears to be. There is an outward expression of homophobia in a dominant culture, although among the general population there is greater tolerance and understanding that the practises exist. It is difficult for gays and lesbians to come out and admit to others they are in a gay or lesbian or bisexual. They are therefore forced into heterosexual relationships. They marry to give semblance of belong to the widely accepted sexual orientation – heterosexuality – while they continue to meet their same sex partners secretly.”

[32] The Authority has found one item of anecdotal evidence to suggest that being identified as gay or lesbian is viewed very negatively and may affect employment opportunities in the public sector. Thus “Police Recruitment Dogged By Lesbianism” *African News Service* (1 January 2000) notes that following an upsurge of reports of lesbianism amongst lady police recruits, sources at the college authoritatively told the reporter that:

“...stringent punitive measures had to be taken to stem the tide of the ugly trend...although the culprits arrested as at this time of this report were alleged to be undergoing severe punishment at the Quarter Guard of the College, a police sergeant told PM News that ‘there is no option than to give them summary dismissal for constituting a public disgrace to the force’ “.

[33] The report “In Africa, homophobia goes beyond church” *United Press International* (25 February 2004) notes that the Nigerian Anglican church has taken a high profile stance against the ordination of a gay bishop in America. The report refers to the longstanding intolerance of homosexuality in Africa. The report quotes the director of an NGO working to combat HIV/AIDS in Lagos who states that although homosexuality is on the increase in Nigeria and it is read about in the papers generally people do not want to talk about it. The report goes on to state:

”There is little outward evidence of a gay community in Nigeria not even in the crowded city streets or in public schools where memories linger of a killing in 2002 of a gay university student in a northern state.”

Homophobic Attacks

[34] As to this issue, the article “10,000 homosexuals exist in Nigeria” *African News Service* (9 September 2003)

http://web2.infotrac.galegroup.com/itw/infomark/263/92/58846770w2/purl=rc1_ITOE, quotes an official from Alliance Rights (an NGO dealing with gay issues which investigates the prevalence of HIV and AIDS amongst Nigerian men) as stating that the criminalisation of homosexuality and violence visited on men having sex with men as contributing factors to high risk activity. Yet no detail of the violence is given. The NGO’s study was however conducted in cities stated to have high gay populations which included Lagos.

[35] The report “Gays of Nation Unite!” *African News Service* (22 April 2002) –

http://web2.infotrac.galegroup.com/itw/infomark/263/92/58846770w2/purl=rc1_ITOE has some detail but again it is scanty. The report is of an interview by a Dutch radio station of the president of Alliance Rights, a then new gay group in Nigeria. The president of the Alliance Rights stated that although homosexuality has always existed in Africa, there is a climate of intolerance. He noted that while the laws were rarely applied, they did contribute to a climate of intolerance towards homosexuals in Nigeria; a situation that had deteriorated in the north of the country because of the introduction of *Sharia* law. The president himself came from a village approximately 40 kilometres away from Lagos. He states that gay bashing and verbal abuse are not common. Recently, a mob burned down a bar

frequented by gays on the Lagos beachfront but other bars had since emerged. He stated that generally however, gays and lesbians in Nigeria meet at parties and friends' houses. He noted that young people who discover they are attracted to the same sex tend to hide the fact from their families and friends because they are often ostracised or even thrown out of the family home.

[36] Apart from these two references, counsel has not produced and the Authority knows of no other country information dealing with the issue of violence against gay men in Lagos or non Sharia states.

CONCLUSION ON COUNTRY INFORMATION

[37] The practice of same sex acts by consenting male adults in private is criminalised although criminal charges are seldom if ever brought. Never-the-less there does exist within Nigerian society, a climate of intolerance towards non heterosexual relationships. This climate causes gay persons generally to hide their sexual orientation from family and friends. Socialisation between adult gay men is mostly a private affair as a result.

[38] This does lead, on occasion, to instances of homophobic attacks although there is no evidence this is widespread. There is at least one report of an attack on a bar frequented by gays and being identified as a gay can hinder employment prospects in the police force.

A Well Founded Fear of being Persecuted

[39] The position in refugee law as regards the rights of gay men and women was recently considered in the Authority's decision in *Refugee Appeal No 74665/03* (7 July 2004). While that case concerned an Iranian national, the Authority reviewed the position relating to gay and lesbian rights under international law and at para [103] drew the following conclusions:

1. The prohibition by law of consensual homosexual acts between adults in private offends core human rights: the right to privacy and the right to equal treatment before the law – *Toonen v Australia* (Comm No 448/1992, UN Doc CCPR/C/50/D/488/1992 , 4 April 1992);

2. The prohibition of consensual homosexual acts, if accompanied by penal sanctions of a severity which are in fact in force, may well found a refugee claim;
3. It cannot be said that the criminalisation of consensual acts on its own is sufficient to establish a situation of being persecuted.

[40] It is plain that the Nigerian law discriminates against homosexuals. They are not afforded the equal protection of the law, contrary to Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR). The criminalisation of consensual homosexual acts in private under the Nigerian Criminal Code breaches Article 17 ICCPR.

[41] As noted in *Refugee Appeal No 74665/03*, the mere fact of criminalisation does not however amount to persecution. This is rightly conceded by counsel. In any event there is no evidence to show that these provisions of the Nigerian criminal Code are applied or enforced. The risk of the appellant being prosecuted is negligible. It falls well below the real chance threshold.

[42] As to the risk of the appellant being physically attacked the Authority finds that this too falls below the real chance threshold. There is simply no evidence to establish that the incidence of homophobic attacks is such as to raise the risk of this to above even the relatively low level required in refugee claims.

[43] The Authority accepts that given that homosexual practice remains criminalised, there may be a degree of under reporting of attacks to the police. Nevertheless it is clear that at least one gay rights NGO does exist, the president of which has stated that such attacks are not common. Had there been widespread homophobic attacks, the Authority would have expected that an interview on a Western European radio station to provide an appropriate forum to articulate this fact. That he did not is instructive. In the circumstances the Authority declines to draw the inference suggested by counsel in para 21 of the final written submission that the mistreatment of homosexual men is so widespread in Nigeria, so as to cross the real chance threshold, albeit a phenomena underreported in human rights literature.

[44] The Authority is mindful of the appellant's belief that GG's death may be linked to the discovery of his sexual orientation. However, this appears a matter of some speculation and even if true, there is no evidence that it has compromised the appellant's own position or is indicative of a wider state of affairs so as to support of finding of a real chance of serious harm befalling this appellant.

[45] As noted in *Refugee Appeal No 74665/03* at para [97], the Human Rights Committee in *Toonan* unanimously found that the criminalisation of private consensual homosexual acts between adult males breached the Art 17 ICCPR right to privacy. In this context at least, the right to "privacy" under Art 17 ICCPR has been treated by the Committee as a concept more akin to the Art 8 European Convention of Human Rights (ECHR) concept of "private life" as opposed to a concept relating solely to the gathering, retention and divulging of information by state agencies.

[46] Understanding the Art 17 right to privacy in this way, the Authority observes that Harris Boyle and Warbrick *Law of The European Convention on Human Rights* (Butterworths, 1995) at p 307 state that central to this notion of privacy is the issue of personal identity:

"a. Personal identity

The fundamental interest within the sphere of private life is the capacity of the individual to determine his identity: to decide and then to be what he wants to be. Within the individual's power are matters like his choice of name, his mode of dress and sexual identity. There is not merely a right to a closet identity; he must be free to choose how he is regarded by the state and how to present himself to others"

See also in this context Nicholas Blake QC and Raza Hussein *Immigration, Asylum in Human Rights* (Blackstones 2003) at p 174, para 4.25.

[47] This right has also been treated as including a right to forge meaningful relationships. In *Niemietz v Germany*, (1992) 60 EHRR 97, the European Court of Human rights held at para 29 that :

"...it would be too restrictive to limit the notion, of private life to an inner circle in which an individual may live his personal life as he chooses and to exclude from entirely the outside world not encompass within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings".

[48] Accepting in this context, the notion of privacy under Art 17 ICCPR as analogous to the private life provisions under the ECHR, the Authority finds that

the appellant's right to privacy under Art 17 would be breached if returned. His ability to freely choose and present his sexual identity and forge meaningful relationships is, from the country information available, restricted. As noted by the Authority in *Refugee Appeal No 74665/03* at para [127], these activities are at the core of the right. While it is possible to have a gay relationship in Nigeria as the appellant's own history shows, this tends to be hidden so as to avoid possible societal discrimination and familial ostracism.

[49] The Authority finds that were the appellant to seek to exercise his core right under Art 17 ICCPR and have his sexual orientation generally known he would be shunned by his family (with the possible exception of one brother) and ostracised by his church. While plainly unjustifiable these consequences flowing from the breach of his human right do not rise to the level of persecution.

[50] It must be recalled that not every breach of a human right will amount to persecution see – *Refugee Appeal No 2039/93 Re MN* (12 February 1996) at p 14; *Refugee Appeal No 71404/99* (29 October 1999) at para [65]–[67]. They are interrelated, but different, legal concepts. Persecution is defined by the presence of two distinct factors: serious harm + the failure of state protection - see *R –v- Immigration Appeal Tribunal, ex parte Shah and Islam* [1999] 2 AC 629, 653 per Lord Hoffman; adopted in *Refugee Appeal No 71427/99* [2000] 545, 569. Thus, absent evidence at the real chance level of consequential serious harm, evidence of a prospective breach of a human right will not amount to persecution.

[51] What emerges from the country information produced by counsel or available to the Authority, is that life for the appellant as an openly gay men in Lagos, while far from ideal, would nevertheless possible without a real chance of serious harm befalling him. There are no prosecutions of gay men. There is little evidence of homophobic attacks.

[52] This is of course not to say that a claim of persecution can only be founded on evidence of the existence and application of discriminatory legislative provisions or physical attacks; at an extreme level, societal discrimination can amount to persecution. However, there do appear to be some gay bars in Lagos. Some cities have large gay populations. He does appear to have been able to forge meaningful relationships with other men such as GG. The appellant did not suggest that he would suffer substantial employment, housing or other

discrimination which might result in such levels of destitution so as to amount to serious harm for the purposes of the Refugee Convention; nor has the Authority seen any country information which would suggest this is a risk. There is simply no evidence before the Authority to establish that any discrimination that he might face gives rise to a real chance of serious harm being visited upon the appellant.

[53] That said, the Authority records that having seen and heard from him, it does not seek to deny the genuineness of the appellant's desire to live in a society that is more tolerant of gay relationships. However, the Authority is clear, that on the evidence before it, while there would be a breach of his human rights under Art 17 ICCPR if returned, the consequences flowing from this breach do not individually or cumulatively reach the threshold of persecution.

[54] For these reasons the Authority answers the first principal question in the negative. The need to address the second does not therefore arise.

CONCLUSION

[55] The appellant is not a refugee within the meaning of Art 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

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B Burson
Member