REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76414

AT AUCKLAND

Before:	A R Mackey (Chairman) D Henare (Member)
Counsel for the Appellant:	I Uca
Appearing for the Department of Labour:	No Appearance
Date of Hearing:	14 December 2009
Date of Decision:	27 January 2010

DECISION

---

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

[2] This is the appellant's second claim for recognition as a refugee in New Zealand.

INTRODUCTION

[3] The appellant is a single man in his late 20s. He arrived in New Zealand on 29 December 2008, using the passport of a South African friend, AA. After an interview with an immigration officer at Auckland airport on that date, he applied for recognition as a refugee under the name BB, a national of Y. A formal confirmation of claim for refugee status in New Zealand was lodged with the RSB on 5 January 2009 on the basis that he feared being returned to Y because, having been a follower of the X Party in Y, he would be at risk of being persecuted by the ruling regime.

[4] The appellant was detained at Mt Eden Prison, Auckland, pursuant to s128 of the Immigration Act 1987. He was transferred to the Authority Central Remand Prison and later to the Mangere Accommodation Centre (MAC). He was interviewed by the RSB on 12 February 2009 in relation to his first claim. A decision, refusing recognition, was made on 22 April 2009. His representative, on his behalf, lodged a notice of appeal to this Authority, received 29 April 2009. A hearing date was set down for 8 and 9 June 2009 and a summons was served on the appellant at MAC for him to attend.

[5] On 4 June 2009, the Authority received a letter from the appellant's counsel, stating that the appellant wished to withdraw his refugee appeal. Attached to that was an email from the appellant, authorising the Authority to "withdraw my case from the RSAA".

[6] On 15 June 2009, the appellant, through his counsel, lodged a second confirmation of claim for recognition as a refugee. On this second occasion, he claimed he was a national of Nigeria who predicted he would be persecuted by some vigilantes for reasons primarily related to his homosexuality.

[7] On 6 July 2009, the appellant made an application to retract the withdrawal of his appeal and have it restored. The Authority considered that application and the supporting submissions and documents provided by Ms Uca. In a letter dated 9 July 2009, the Authority refused the application, considering that the lodging of the withdrawal of the first appeal placed the matter at an end and the Authority was without jurisdiction. The Authority also noted that a second claim had been made with which the appellant now appeared to be progressing.

[8] The appellant had absconded from MAC in June 2009, but ultimately, after contact was made with his counsel, when he was advised he was suffering from a diabetic complication, the appellant surrendered himself and returned to MAC, undertaking to meet more restrictive conditions relating to his stay at MAC.

[9] The appellant was interviewed by the RSB on his second application on 17 August 2009. The RSB declined recognition on the subsequent claim on 30 September 2009, considering that it did not have jurisdiction to consider his subsequent claim. The RSB relied on a determination of this Authority in *Refugee Appeal No 74726* (19 December 2003). The appellant then appealed to this Authority on 1 October 2009. The Authority advised that it would hear evidence and submissions on both the issue of jurisdiction and the substantive claim itself

and then reserve its decision on both issues. This decision now incorporates the Authority's findings and conclusions on all issues.

Additional submissions post-hearing

[10] The Authority received further submissions from counsel on 20 January 2010. They relate to both jurisdiction and credibility issues. They have been considered and taken into account in this determination.

The appellant's medical condition

[11] As is noted later in the decision, the appellant underwent a medical test at the Refugees as Survivors (RAS) centre at MAC in May 2009 (the day before he absconded from MAC to travel to Wellington). That medical assessment revealed that the appellant was diabetic and in need of treatment. On returning to Auckland in June 2009, the appellant obtained the necessary treatment.

[12] Near the end of a full-day hearing before the Authority, at approximately 4.40pm, the appellant, in his final statement, advised that he had forgotten to take his insulin injection before coming to the Authority and he now felt tired. He advised that he was meant to have an injection twice a day.

[13] The Authority has taken into account the medical evidence provided in respect of the appellant. At the outset of the hearing, neither the Authority nor his counsel were aware that he had not had his diabetic injection that day. The Authority does not consider, in the circumstances, that the appellant's failure to have his diabetic treatment that day has impaired his ability to give cogent evidence in a fair manner. Throughout the day, the appellant gave clear and coherent responses to all questions and showed no signs of distress, or lack of understanding in his responses. He was offered the opportunity to take a break at any time throughout the hearing in the Chairman's opening address. No break was requested.

[14] While the Authority fully understands the stress and strain of a hearing and that the appellant may have been tired towards the end of the day, this was not a case where there was any evidence of medical impediment or illness on the part of the appellant in the giving of his evidence. We are therefore satisfied that an oversight in not taking his treatment in the morning before the hearing, has not undermined his ability to present his case and give full, rational and considered

responses to all questions.

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[15] The Authority's jurisdiction in connection with second claims is set out in s129O of the Immigration Act 1987 (the Act), which provides:

> "(1) A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that the circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision."

[16] The RSB itself derives its authority to consider a second claim from s129F(2) of the Act. That section provides that a refugee status officer must:

> "(a) Determine whether, since the most recent claim by the person, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim; and
> (b) Only if the officer is satisfied that circumstances have so changed, determine any matter specified in subsection (1)."

[17] If the RSB is satisfied that circumstances have so changed, then an officer is required to consider whether the appellant is a refugee within the meaning of the Convention. In this case, the RSB considered it was without jurisdiction. It was guided by the determination of this Authority in *Refugee Appeal No 74726* (19 December 2003) which stated at [8] and [9]:

> "[8] The RSB decided that there was a sufficient change in circumstances in the claimant's home country. It found that the fact that the appellant now claimed that he came from Nigeria, as opposed to his initial claim that he came from Sierra Leone, was a significant change in circumstances for the purposes of the statute.
>
> [9] The Authority does not agree with that finding. It is not sufficient for an appellant to simply rely upon a failure to properly disclose his true country of origin in order to later claim that there has been a change of circumstances sufficient to enable him to advance a second claim for refugee status. It amounts to no more than an admission of a past untruth, and does not address the circumstances in the appellant's country at all."

[18] The Authority is now charged with considering the appellant's second claim and is also required to address the issue of whether there has been a change in circumstances in the appellant's home country since the date his first claim was considered and determined on 22 April 2009. If the Authority finds it has jurisdiction under s129O(1), it is then required to considered whether the appellant

meets the requirements of the Refugee Convention in accordance with the issues which are set out later in this decision.

[19] The question of whether there is jurisdiction to entertain a second or subsequent claim was considered in *Refugee Appeal No 75139* (19 November 2004) where the relevant principles were set out at [54] – [57]:

> **[54]** In any appeal involving a subsequent claim under s 129O(1), the issues are not "at large". Rather, there are three distinct aspects to the appeal.
>
> **[55]** First, irrespective of the finding made by the refugee status officer at first instance, the claimant must satisfy the Authority that it has jurisdiction to hear the appeal. That is, the claimant must establish that, since the determination of the previous claim, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim. As to this:
>
> (a) The change of circumstances must occur ***in*** the claimant's home country. It is not open to the claimant to circumvent the jurisdictional bar by submitting that at the hearing of the previous claim the refugee status officer or the Authority misunderstood the facts.
>
> (b) A "reinterpretation" of a claimant's case is neither a change of circumstances, nor is it a change of circumstances ***in*** the claimant's home country.
>
> (c) The claimant cannot invite the Authority to sit as if it were an appellate authority in relation to the decision of the first panel and to rehear the matter. The Authority has no jurisdiction to rehear an appeal after a full hearing and decision.
>
> (d) A second appeal cannot be used as a pretext to revisit adverse credibility findings made in the course of the prior appeal.
>
> (e) Jurisdiction under ss 129J(1) and 129O(1) is determined by comparing the previous claim to refugee status against the subsequent claim. This requires the refugee status officer and the Authority to compare the claims as asserted by the refugee claimant, not the facts subsequently found by that officer or the Authority.
>
> (f) Proper recognition must be given to the statutory language which requires not only that the grounds be different, but that they be ***significantly different***.
>
> (g) The Authority does not possess what might be called a "miscarriage of justice" jurisdiction.
>
> **[56]** Second, in any appeal involving a subsequent claim, s 129P(9) expressly prohibits a claimant from challenging any finding of credibility or fact made by the Authority in relation to a previous claim. While the Authority has a discretion whether to rely on any such finding, that discretion only comes alive once the jurisdictional threshold for subsequent claims set by ss 129J(1) and 129O(1) has been successfully crossed.
>
> **[57]** Third, where jurisdiction to hear the appeal is established, the merits of the further claim to refugee status will be heard by the Authority. That hearing may be restricted by the findings of credibility or of fact made by the Authority in relation to the previous claim, or "at large", depending on the manner in which the discretion under s 129P(9) is exercised by the Authority."

[20] Against this background, it is now necessary to have regard to the first and second refugee claims of the appellant in order to determine whether the

jurisdictional threshold is met and, if necessary, to reach conclusions on the merits of the further claim.

[21] In this appeal, because of the preliminary necessity of establishing, on the facts as found, what is actually the appellant's "home country", the Authority has first considered the appellant's second claim in detail before turning to the issue of jurisdiction.

[22] A brief summary of the first and second claims follows and then the second claim is considered in full.

THE APPELLANT'S FIRST REFUGEE CLAIM

[23] The appellant's first claim was based on his being a national of Y who feared returning because he had been an active member of the X Party and both his father and brother had been killed because of their involvement in the X Party. He gave very detailed evidence of a life in Y until 2001 when he claimed he moved to South Africa. He provided evidence in support of that claim which included a Y birth certificate for himself, death certificates of an alleged father and brother, support letters stated to be from the X Party and a letter of support from a "fellow Y national". He also claimed that he was in a relationship with a Y national woman, "CC". An affidavit evidencing her relationship and engagement with the appellant was provided along with photographs (sent by email) of the appellant with CC in positions that presented them close friends or a "couple".

[24] The evidence he provided, including risks that he considered have arisen in Y after his "father's" death when he had fled to W, and then to South Africa. He explained further risks that he considered had arisen after the claimed killing of his "brother" by the police in January 2009.

[25] The RSB found that the appellant had not produced credible evidence and found that they had remaining concerns about his claim to be a citizen of Y. They considered there was a significant possibility of his being a citizen of South Africa but there were no credible facts against which to make an assessment and thus his application for recognition as a refugee was declined.

[26] As noted, the appellant appealed to this Authority but he then withdrew his appeal and lodged a second claim for recognition, on different grounds, with the

RSB and then shortly thereafter, applied to have his appeal reinstated which was refused by this Authority through lack of jurisdiction.

THE APPELLANT'S SECOND REFUGEE CLAIM (BRIEF SUMMARY)

[27] At the outset of the hearing of this matter, the Authority explained the limited jurisdiction of this subsequent appeal and noted the submissions made by Ms Uca on the issue of jurisdiction that were made when the appeal in this second claim was lodged with the Authority. The Authority invited further submissions from Ms Uca at the end of the hearing, which are noted below.

[28] The appellant, in his second claim, claims that he is a national of Nigeria and predicts that he will suffer serious maltreatment at the hands of the Bakassi Boys (a vigilante group in Nigeria). He claims this group have been asked by relatives of the appellant's former homosexual partner in Nigeria to take revenge action against him because of a claim made by the mother of the appellant's former partner to the Bakassi Boys that the appellant had forced his attentions onto her son.

[29] As noted below, the Authority has concluded that the appellant is, on the evidence, a national of Nigeria but little else. It is now appropriate to consider and assess the appellant's second claim in detail, as that assessment has led to our credibility conclusions on his evidence and necessary findings on his nationality.

THE APPELLANT'S SECOND CLAIM IN DETAIL

[30] The appellant adopted a statement in respect of this second claim, dated 15 June 2009 and also a supplementary statement dated 10 December 2009. Additional evidence in the form of emails, claimed to be from his brother and sister-in-law in Spain sent in December 2009 and a photograph, claimed to be of the appellant with his South African partner, AA, were also received. The appellant had provided a number of documents and photographs relating to his family from Nigeria to the RSB which the Authority has also taken into account.

[31] The appellant was born in Lagos, Nigeria on 17 April 1982. His father, who died in January 2008, and his mother had a family of eight children, two of whom

have died. The appellant belongs to the Ibo tribe and the family are Christians.

[32] The appellant's father died of complications related to diabetes. He was a career policeman predominantly in the S state in Nigeria but had worked in other parts of the country. He began as a constable and ended up as a deputy superintendent of police at the time of his retirement in 1997. The family had homes in the city of V in the T state and in their tribal home village of Umohiri, in the adjoining state of S. It is about a two hour drive from one home to the other.

[33] Two other recent deaths in the family have been his sister, DD, who died in February 2008 and a brother, EE, who died on 16 January 2009. Both these deaths, it is claimed, were also related to diabetes. His oldest sister, FF, is a high-ranking immigration officer who lives in V. His older brother, GG, lives in Barcelona, Spain and was formerly from V. He has lived in Spain for six or seven years and is a businessman. The appellant is unsure whether he has permanent residence in Spain. His next sister, HH, is a businesswoman who lives in the state of T. His brother, II, is now studying in Malaysia where he went in 2005. He is aged 36 and is studying history. Formerly he studied at the S State University. He is single. His next brother is JJ. He lives in the federal capital of Abuja where he works in a bank as a funds transfer officer. The appellant is the youngest in the family.

[34] All of the family are well-educated as their father was able to pay for their education. The appellant competed primary education at a police children's school and then attended a secondary school until 1999. From 2000 to 2001, he attended a computer training school in V and then obtained employment with ABC Company. This company operated internet access and servicing and ran what was effectively an internet café. The appellant's job was to send emails on behalf of others, to set up addresses for them and generally to teach them to use the computer. He held that occupation from 2001 until late 2005. ABC was owned by KK.

[35] The appellant was dismissed from ABC after being caught by KK's brother when involved in intimate sexual behaviour with LL, another employee of ABC. The appellant and LL had known each other for some time and formed a relationship. They kept it secret at work but one evening, at approximately 9pm when they thought there was no-one else at the office, they became intimate. However, KK's brother came back to the office and found them in a compromising position. The next day, KK called them into his office and asked what had

happened. They told him the story and apologised to him. They were told to go back to work. However, that evening they were given letters of termination, stating that their service was no longer required. The "real reasons" were not set out in the letter. After receiving the letter, the appellant left and never went back. He was paid up to the time of his dismissal. LL, whom the appellant had known since 2002/2003, was aged about 23/24. The appellant was slightly older. No-one else knew about their relationship as they kept it completely secret.

[36] After being formally dismissed, they left the office separately, LL going to a different suburb in V. They had no chance to communicate at the point of their dismissal. Later they did have communication through "Yahoo Messenger", however this did not take place until some four months later when they started to communicate through a "chat room". The appellant had started the communication soon after he went to the federal capital of Abuja. LL had remained in V. The appellant's initial communications were to inform LL that he was living in Abuja and that he understood the Bakassi Boys were looking for him. LL replied, stating that his mother had reported the appellant to the Bakassi Boys. LL's mother and KK knew each other and were stated to be from the same home town. She had asked KK why her son had been dismissed and was told the real reason. When LL was challenged by his mother on this, he said that the appellant had forced him to have a sexual relationship with him. In order to teach the appellant a lesson, she then reported the matter to the Bakassi Boys at the "office" of the Bakassi Boys in V. The appellant explained that in V city, the Bakassi Boys had an office from where they carried out their vigilante activities, "arrests" and maltreatment of people. The Bakassi Boys do not work with the police but are purely vigilante. He considered that they would act on the say-so of one person such as LL's mother. They used African witchcraft to check the truth of claims made to them. This would have been done to LL's mother. A knife would have been put on her head to see if she was telling the truth or not.

[37] The appellant stated that he found out that the Bakassi Boys were interested in him in January 2006. At this time, he had moved from V to the family village home in Z along with other members of the family who went to the village home for the festive season. His father did not go with the rest of the family in late December but came back and forth between V and Z from time to time. His father came to the village home in January for about one week and explained that the Bakassi Boys had called at the family home in V looking for the appellant. His father then called a family meeting at the village home and explained that the

Bakassi Boys were looking for the appellant and that, because of this situation, his father had arranged for the appellant to move to Abuja for safety reasons. The appellant was to be sent to the home of his brother JJ (a nine-hour drive away). The appellant then explained that the extent of his contact with LL had been on one occasion in April. During that internet exchange, he had found out the detail of why the Bakassi Boys were looking for him.

[38] At the family meeting, his father had just stated that the Bakassi Boys were looking for the appellant but did not give reasons. The appellant explained that personally he was the one who had provided the reasons why the Bakassi Boys were looking for him. He said that he had told his brother EE (since deceased) that the Bakassi Boys wanted to find him because of his relationship with LL and dismissal. Up until that time, no-one in the family knew that he had been dismissed and he had merely stated that he was tired of working. At the time when he had left V in late December, soon after his dismissal, he had no idea that the Bakassi Boys were looking for him. It was only after his father came and reported that they were looking for him and wanted to know the reasons for this that he then told his brother. He did not wish to keep his family in suspense.

[39] At this time he felt he should inform his family as they were the only ones who could save him from the Bakassi Boys. It was after disclosing the background that he was sent to Abuja.

[40] He then remained with his brother, JJ, in Abuja from the time shortly after his father's visit to the home village in the early part of 2006 until he flew to South Africa in mid-2007, a period of some 15 months. He did not work during that period.

[41] His brother was completing his traineeship with the bank. JJ was not a wealthy man but paid for the appellant's accommodation and his fares to South Africa and gave an additional US$800 that the appellant took with him to South Africa. The appellant considered that his brother, who was earning about US$400 per month or 60,000 Nigerian, could afford to pay for the fares and give the other support.

[42] During the time the appellant was in Abuja, he was trying to leave Nigeria and, prior to applying for a visa to visit South Africa, had made visa applications to Sweden and Finland, both of which were unsuccessful. He obtained approval for a visa to travel to South Africa in mid-2007 and two weeks later, on 7 June 2007,

departed for South Africa. During the 15 months he was in Abuja, the appellant had no problems but he stated he was in hiding, avoiding social gatherings. He had some contact with his parents and family but no contact with LL.

THE APPELLANT'S TIME IN SOUTH AFRICA

[43] After arriving in South Africa on a valid Nigerian passport, the appellant moved to a flat in Kempton Park. As he only had a visitor's visa and could not work, he went to some agents to try and get an extension of his visa. He was told about the agents through some Nigerian people he met in South Africa. The agent suggested that the appellant enter into a life partnership agreement with a South African woman and thereby obtain a two-year resident's permit. He paid the agent US$200 and everything was arranged for him, including finding the lady concerned. He had to buy a mobile telephone for her for entering into the arrangements. The life partnership agreement he entered into was drawn up by a lawyer and was accompanied by an affidavit from the woman concerned. The appellant considered he was in a desperate situation so undertook this, knowing it was fraudulent. He never saw her again but was able to obtain the extension of his visa.

[44] The appellant remained in the Johannesburg area and entered into a relationship with another man for a short time. He was sharing a flat with two Nigerians. Because he was having a relationship with another man, the Nigerian community in the Kempton Park area took exception to his lifestyle and called him to a meeting at a Nigerian community centre. He attended and was told that there was a complaint about his relationship with another man and that he was giving the Nigerian community a bad name with the South Africans. The community group therefore threatened to take action to cancel his resident's permit in South Africa and arrange for him to be sent back to Nigeria. He heard that the Nigerian community had contacts with the South African Department of Home Affairs and could expose that the life relationship agreement he had entered into was a fraudulent one.

[45] The appellant responded by stopping the same sex relationship he was involved in and moving out of the apartment. In August 2007, he was able to obtain a job in Rustenburg as an instrument technician and moved there to take up the job. Initially he worked as an assistant technician/helper but was soon able to work as a full-time technician. Accommodation was provided with the job. In

addition to filling some short-term contracts in Rustenburg, he spent six to eight weeks on a contract in Zambia.

[46] In October 2007, the appellant lodged an application to obtain a student visa to travel to New Zealand where he intended to study for a diploma in film and television studies. In the application form, he stated that he had a first class (upper division) MSc in computer engineering from the Federal University of Technology at R, S State, Nigeria and his sponsors/referees were his brother, JJ, and his sister (who worked in the Nigerian Immigration Service). The cost of the course was in the vicinity of US$20,000 and considerable information was provided from JJ of his financial backing and work experience with the Diamond Bank. JJ also undertook, in writing, to make available the sum of US$20,000. The visa application, however, was refused when JJ, who evidently had to borrow the money from the bank, refused to pay for the fees in advance of obtaining the visa. The appellant agreed that much of the documentation and information he had supplied in support of the visa application was fraudulent and that he had had nothing to do with the S State Film Board nor did he have an MSc degree.

[47] After receiving the refusal letter from the New Zealand High Commission, he was devastated. He realised that he could stay on in South Africa but thought he would get into more trouble and be sent back to Nigeria. To obtain permanent residence in South Africa, he would need to stay five or six years on valid permits. Because of his problems, he felt he could not wait that long. He therefore undertook some internet research and found that a South African citizen could come to New Zealand visa-free. At that time, he had not met AA.

[48] However, it was not long after that that he met AA in Rustenburg and formed a homosexual relationship with him. He then explained to AA that he would like to secure a South African passport to come to New Zealand. AA understood the situation and agreed to a scheme whereby the appellant would use AA's passport to come to New Zealand and then tell the South African authorities that he had lost his own passport and thereby obtain a new one. The appellant recognised this was a fraudulent scheme but considered it was worth doing as he wished to be in a safe place.

[49] The student visa application was declined on 6 February 2008 and communicated to him by email. After making the arrangement to borrow AA's passport, the appellant departed from South Africa on 27 December 2008 and arrived in New Zealand on 29 December 2008.

THE APPELLANT'S TIME IN NEW ZEALAND

[50] As noted, on arrival the appellant, after initially stating that he was South African and had come to New Zealand for a three week holiday after his fiancée had lost her baby, subsequently changed his story to state that he was a Y national who had come to New Zealand to seek asylum and he was not the person named in the South African passport. To do this he adopted the name of BB, on the assumption that it would not be picked up by the New Zealand authorities, with whom he had lodged his student visa application using his full name.

[51] He then gave a detailed and complex story, supported by documentation, that he was in the relationship with CC, his fiancée, who had just lost her baby, and that he was a Y citizen in fear of being persecuted if he was returned to Y. The idea of claiming that he was from Y initiated from discussions he had had with some Nigerians with whom he had stayed in Kempton Park. One of them had a Y national fiancée and discussed with him how Y nationals got refugee protection overseas. He thus decided to use the false nationality, including getting a false Y birth certificate. On arrival, he continued with the story that he had made up and was hoping that he would obtain sympathy based on that story.

[52] Once he had been placed in prison in Auckland, however, he became worried and confused. He did not want to change his story again, as he thought he may be sent back and so he continued to expand and provide more false or misleading material, including providing photographs of himself and CC looking reasonably intimate, as would be expected of an engaged couple. He stated, however, that the photographs were not of his girlfriend; it was just a lady he had met in South Africa. By this time, however, he agreed that it was difficult to separate fact from fiction in his story and this was causing him much grief. Therefore, he decided to withdraw all of his claim that he had presented as a Y national.

[53] While he had been in MAC, he was allowed to go out for four hours a day and on weekends to be absent for 12 hours. During this time, he played indoor soccer with Nigerian colleagues. He did not socialise significantly beyond this and did not enter into any homosexual relationship. His Nigerian colleagues suggested that he should leave the camp so that he would not be deported back to Africa. After absconding from the camp in May 2008, taking with him US$2,300, he went to Wellington where he thought he would not be located. However, soon after that, his medical tests were sent, by email, to him by his representative. His health

had been worrying him before that and so he had undertaken the medical tests at MAC the day before he absconded. After receiving his medical report, he became worried and tried to contact a general practitioner and hospitals in Wellington. Because he did not have any other papers, they were reluctant to assist him. At that time, he decided to tell the truth (that he was Nigerian not a Y national) to his lawyer and returned to Auckland and thereupon lodged his second claim.

[54] In order to establish that he was Nigerian, he arranged for family members to send statements to his lawyer for passing on to the RSB. The statements provided were from his brother, II, in Malaysia, and later from his brother GG and sister-in-law in Spain (which came to the Authority).

[55] The appellant stated that he could not attend the funerals of his relatives in Nigeria as he was afraid the Bakassi Boys would find him. At the funeral, there would be many people attending and so a message would be passed on to the Bakassi Boys who would never forget. This was confirmed and was stated in the email from the appellant's brother, GG's, wife who advised that she had been in Nigeria in July 2009 and travelled to V. Barely 48 hours after her arrival, some seven menacing men came to the compound in the village and demanded that everyone come out as they were looking for the appellant. As they did not find him, they left. However, they threatened that they would get the appellant and were willing to wait until he decided to return. Her email of 27 November 2009 stated that the trouble between the appellant and the Bakassi Boys is well-known in the home town of V and that she had no doubt in her mind that if they had seen the appellant, something terrible would have happened.

[56] The appellant said he obtained the emails when his representative requested proof of his problems in Nigeria and the trip home made by his sister-in-law. He realised it was difficult for him to be believed on many things and therefore he was appealing to the Authority and now telling the truth. He stated that his brother, GG, was already angry with him for the shame that he had brought on the family but was prepared to have his wife explain what had happened when she had returned to Nigeria.

SUBMISSIONS ON BEHALF OF THE APPELLANT

[57] All the submissions made by counsel before, during and after the hearing (20 January 2010) have been noted by the Authority.

Jurisdiction

[58] The jurisdictional arguments of counsel were twofold: firstly that this appellant's first refugee claim was not *finally determined* and alternatively, should the appeal currently before the Authority be considered to be a subsequent appeal the jurisdictional threshold is, nevertheless, met as the reasoning in *Refugee Appeal No 74726* is erroneous.

[59] The details of these submissions have been fully considered, although they become immaterial in the ultimate decision.

Credibility

[60] Ms Uca submitted that the concerns over his history of false statements and presentation of fraudulent documents were not unusual in a refugee situation. The appellant was in a desperate situation and thus to enter a country, such as New Zealand, from Nigeria or from South Africa could not have been achieved if the appellant had told the truth. In this situation, the false documents presented by him in support of his student visa should not be viewed as an example of dishonesty.

[61] The presentation of false documents and dubious sponsorship showed how serious the appellant was to escape from the risks to him in Nigeria. He came from a well to do family as was reflected in the occupations, not only of his father as a senior policeman, but also those of his brothers and one sister. Accordingly, he would not have lied unless he was at serious risk because of sexual orientation in Nigeria and that he had to escape.

[62] In respect of his claims to have had a wife/fiancée who had just lost a baby and the adoption of different names, she submitted that these were all indicative of the appellant's difficulties in disclosing his homosexuality. It was not unusual for persons in his situation to disguise their sexual orientation, particularly when it was illegal in countries such as Nigeria and where the gay population in South Africa was highly marginalised. In such situations, often false claims were initially presented as a basis for refugee status to cover what, in truth, was the reality of the claim put forward by a gay person.

[63] She submitted further that the appellant's behaviour in New Zealand was not that of a stable or rational person. He had made foolish statements and taken

foolish actions. These showed evidence of unpremeditated actions on his behalf that should not be counted against him. This was an appellant with diabetes which was only fully discovered after he left the Mangere camp. However, finding himself in such a desperate situation, he did take the brave and rational step to return to Auckland and face disclosure, which involved him being returned to prison.

[64] She also submitted that the evidence provided from his brothers showed that they did not approve of his behaviour but did not wish to see him harmed. The fear that the appellant held of maltreatment by the Bakassi Boys was supported by country information on their activities in eastern Nigeria and that even though his father had been an ex-district superintendent of police, he was not in a position to provide the protection to the appellant in V as he no longer had sufficient connections there.

THE ISSUES

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

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

[66] 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

[67] The Authority has undertaken a careful and considered assessment of the totality of the appellant's background, immigration history and the evidence presented in this and his previous claim. The Authority is also able to rely on the negative credibility findings made in his first claim.

[68] Considered in the round, the Authority finds this appellant is so lacking in credibility, through inconsistencies, implausibilities and mobility in his evidence, that it is simply not possible to reach sustainable conclusions on any part of his claim, apart from accepting that he is a national of Nigeria, aged approximately 30. The reasons for the rejection of the appellant's credibility follow.

Immigration background

[69] In his application to the New Zealand High Commission in South Africa, the appellant lied and gave false documentation. He claimed that he had a MSc (computer engineering) first class (upper division) degree, that he only had two brothers and one sister and that his father was the deputy superintendent of police working at central police office, V. All these statements are either false or serious misrepresentations. In addition, he claimed that he could be sponsored by his brother who would supply US$20,000 for course fees and support. Based on the brother's apparent earnings and background, this was a gross exaggeration of the brother, JJ's, ability to fund such an amount.

[70] In South Africa, the appellant entered into a life partnership agreement (which he now states was totally fraudulent) in order to support him obtaining the ability to work and reside legally in South Africa.

[71] While these lies and fraudulent documentation may be argued as the act of a desperate man wishing to escape a risk of being persecuted and using any means to do so, they also reflect, when considered with the rest of the appellant's evidence, that the appellant is a man who is quite prepared to be totally mobile in his evidence in order to overcome any hurdle or immigration problem that presents itself to him.

Previous claim as a Y national with a female partner who had just lost a child

[72] As is clear from the outline of the first claim set out above, the appellant, after arriving in New Zealand on a false South African passport, presented a long and detailed claim that he was at risk in Y because of past family support for the X

Party. He provided a false or, at best, corrupted name and then supported this claim by fraudulent documents, including death certificates, an affidavit from his partner, CC, several photographs of them together in reasonably intimate positions and a number of handwritten statements. While the appellant was, most of the time, in MAC, he had ample free time available to him to meet with his representatives to change his story and to obtain evidence of what he now claims is the true situation. Instead, he continued, over a five month period, a complex and integrated claim from which he did not resile until after it had been declined by the RSB and even then, he lodged an appeal which he later withdrew but then tried to resuscitate.

[73] The Authority relies on the negative credibility findings that were concluded on this first claim. Beyond that, this claim must be seen as a very strong case of a claimant whose evidence simply cannot be relied on at any time and who is prepared to present any story, complete with detailed support documentation, to further his claims.

The core claim based on the relationship with LL

[74] After an analysis of the evidence, the Authority finds the appellant's evidence in this regard, which is at the core of his claim, has been fabricated and is untrue.

[75] The appellant, from his evidence, never disclosed his relationship with LL to anyone, including his own family. Beyond that, he never disclosed his homosexuality to anyone in Nigeria. Evidence of the awareness of other family members of any propensity to homosexuality has only been disclosed when the appellant found that he needed support documentation for his second claim. The statement from his brother II, the Authority places no weight on. This document was presented in the form of a submission sent by email from the appellant's own email address to his counsel. When the appellant was questioned in relation to this, it became clear that the copy of the email (page 530 and 529 of the file) was indeed from the appellant himself and not from his brother II. The details of the appellant's history, in particular his relationship with AA and the use of his passport, are simply not pieces of information that were consistent with the level of disclosure to his relatives that the appellant stated he had undertaken. The Authority considers this is a self-serving, fabricated document prepared by the appellant himself.

[76] In respect of the emails from his brother in Spain and sister-in-law and that from AA in Rustenburg, the Authority considers these have also been fabricated to assist an otherwise meritless claim. When the totality of the appellant's unreliable and fabricated evidence is considered, these apparently self-serving documents cannot be given any weight by the Authority.

[77] The appellant's evidence of his contact with LL subsequent to their dismissal from ABC is inconsistent. Before the RSB, he claimed that he had been in contact with LL on a chat line and that this had happened twice a month online. This indicates multiple contacts with LL, perhaps over a two or three month period. Before the Authority, he was adamant that there had only been one contact between them. When challenged on this point by the Authority, he said there had been a miscommunication and that there could have been one or two contacts, but he was not in a good state of health. The Authority does not accept the explanations given. The appellant was adamant in his first statement to the Authority and only when confronted with his previous evidence found he had to adjust his story. Accordingly, his evidence of his later contact with LL and the claim that LL's mother had reported him to the Bakassi Boys and their reaction in chasing up the appellant after that, is utterly unreliable and is not accepted by the Authority. Beyond this, the Authority found the evidence of the appellant, relating to the way in which LL's mother reported this matter to the Bakassi Boys, was fanciful. Although the Authority is well aware of continuing rituals that may take place in Nigeria, for a woman to expose herself to being cut or seriously wounded in order to report a story, is considered to be highly implausible, even if she did wish to obtain revenge.

[78] The Authority also found the appellant was inconsistent in the dates of the family meeting and the time when he said his father came to the village home. In his initial story to the RSB, he claimed that this had taken place in March, whereas before the Authority, he maintained it was in January and was for a period of one week at a time when the family had moved to the home village as part of festive celebrations over the Christmas period. Again, when challenged with this, the appellant was extremely vague in his response. The Authority finds that this is yet another example of the appellant inventing the evidence as he progressed.

[79] The Authority considers the appellant has exaggerated any risks from the Bakassi Boys. He was able to move to Abuja for a period of more than 15 months where he was staying with his brother and moving about in public to undertake the

visa applications and all the necessary requirements related to that. If the Bakassi Boys had really wanted to contact him, it was simply a matter of checking him out with his various relatives. The Authority considers the whole story of risks from the Bakassi Boys and the association with LL to be a fabricated one.

Exaggeration of risks from the Nigerian community in South Africa

[80] The appellant claimed the "influence" of the Nigerian community in Kempton Park on the South African authorities constituted a real risk that he would be returned to Nigeria from South Africa. The Authority finds his evidence in this regard to be an exaggeration that is not supported by country information. The appellant, from his evidence, had the ability to move around at will in South Africa. His claims that members of the Nigerian community could somehow cause the South African Department of Home Affairs to have his permit to remain in South Africa terminated, based on the numbers of Nigerians and the huge workload of the Department of Home Affairs in South Africa, is speculative and not based on any form of sound evidence. His evidence on this point was vague and unconvincing. In the light of the appellant's propensity to exaggeration in other areas of his claim, the Authority considers that the appellant is expanding his story to give an appearance of heightened risk.

Relationship with AA

[81] The Authority found the appellant's evidence in relation to the appellant's relationship with AA and the arrangement for the "loan" of AA's passport to be unbelievable. The Authority considers that it is highly implausible that an apparently law-abiding South African, even in a close relationship with somebody such as the appellant, would hand over his own passport, and face a high risk of a serious criminal prosecution, after such a short period of time and without any apparent reward. Again, the Authority considers that the appellant's evidence in this regard is another example of his mobility in the provision of evidence to meet every impediment and immigration difficulty before him.

[82] While the appellant provided a photograph of him allegedly taken with AA, it is also to be recalled that the appellant had earlier provided photographs of himself with CC taken in poses that reflect a warm or intimate relationship.

[83] In its totality, the Authority considers the appellant's evidence in relation to AA simply cannot be relied upon and the Authority attaches no weight to it.

Homosexuality

[84] The Authority found the appellant's evidence in relation to his own homosexuality to be unreliable, when considered in the round. The Authority does not accept that the appellant has provided evidence to establish that he is homosexual. As noted above, he gave inconsistent and unreliable evidence about his alleged relationship with LL and also with AA. The inconsistencies, implausibilities and exaggerations relating to both relationships lead the Authority to conclude that his claim to be homosexual is an unreliable one to which the Authority can attach no weight.

CONCLUSIONS ON CREDIBILITY

[85] When all of the above conclusions on credibility are taken in their totality, the Authority finds that the evidence of this appellant is utterly unreliable to the extent that no weight can be given to any of it, apart from accepting that he is a national of Nigeria.

CONCLUSIONS ON WELL-FOUNDEDNESS

[86] As the Authority has concluded that the appellant is an utterly unreliable witness in virtually all aspects of his claim, he would return to Nigeria as a Nigerian man of approximately 30 years of age. The predicament and profile that he would present on arrival does not indicate a real chance of him being persecuted for any Convention reason. Accordingly, both of the issues raised above must be answered in the negative.

THE JURISDICTION QUESTION

[87] Having found that the evidence of the appellant is unreliable and that he is not a refugee, it is unnecessary to reach conclusions on the jurisdiction issue. The Authority has considered the submissions made by counsel in this regard. While conclusions on them are immaterial, on the basis of the above finding, the Authority does not consider those submissions in any way undermine the validity of the conclusions reached in *Refugee Appeal No 74726*. The Authority also considers the argument from counsel that the first refugee claim had not been "finally determined" lacks merit. The withdrawal of the first appeal, lodged by the appellant through counsel, clearly brought that first claim and appeal to an end. The decision of the Authority on the application to reinstate made that quite clear.

This situation is distinguishable from non-appearance cases and "withdrawals by inference" where the appellant may not have actually consented to the withdrawal although those representing him had reached such a conclusion by inference or faulty communication. This was not the case here. The appellant was fully aware of the situation and directed the withdrawal. This was not a non-appearance or withdrawal by inference situation. The informed withdrawal clearly put the first application at an end. The lodging of a valid second claim confirmed this. It is illogical to submit that a claimant can run two claims at the same time. That the second claim could be constituted as a "mere technicality" to preserve immigration status is a flawed argument the Authority rejects.

CONCLUSION

[88] For the reasons set out above, the Authority finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"A R Mackey"
A R Mackey
Chairman