

Immigration and Refugee Board of  
Canada

Refugee Protection Division



Commission de l'immigration et du statut  
de réfugié du Canada

Section de la protection des réfugiés

RPD File # / No. dossier SPR : CA5-00557

Private Proceeding  
Huis clos

<b>Claimant(s)</b>		<b>Demandeur(s) d'asile</b>
<b>Date(s) of Hearing</b>	<b>December 21, 2005</b>	<b>Date(s) d'audience</b>
<b>Place of Hearing</b>	<b>Edmonton, Alberta</b>	<b>Lieu de l'audience</b>
<b>Date of Decision</b>	<b>January 13, 2005</b>	<b>Date de la décision</b>
<b>Panel</b>	<b>Marnie Armstrong</b>	<b>Tribunal</b>
<b>Claimant's Counsel</b>	<b>Wendy Bouwman Oake</b>	<b>Conseil du demandeur d'asile</b>
<b>Refugee Protection Officer</b>	<b>Mumtaz Rana</b>	<b>Agent de la protection des réfugiés</b>
<b>Designated Representative</b>	<b>NIL</b>	<b>Représentant désigné</b>
<b>Minister's Counsel</b>	<b>Nancy McIver</b>	<b>Conseil du ministre</b>

You can obtain the translation of these reasons for decision in the other official language by writing to the Editing and Translation Services Directorate of the IRB at the following address: 344 Slater Street, 14th Floor, Ottawa, Ontario K1A 0K1, by e-mail to [translation@irb.gc.ca](mailto:translation@irb.gc.ca) or by facsimile at (613) 947-3213.

La Direction des services de révision et de traduction de la CISR peut vous procurer les présents motifs de décision dans l'autre langue officielle. Vous n'avez qu'à en faire la demande par écrit à l'adresse suivante : 344, rue Slater, 14<sup>e</sup> étage, Ottawa (Ontario) K1A 0K1, par courriel à [traduction@cisr.gc.ca](mailto:traduction@cisr.gc.ca) ou par télécopie au (613) 947-3213.

s.19(1)

000327

The claimant, \_\_\_\_\_ is a citizen of Nigeria and claims protection pursuant to sections 96 and 97(1) of the Immigration and Refugee Protection Act.

### ALLEGATIONS

The claimant alleged a well-founded fear of persecution at the hands of the Nigerian government and certain Nigerian citizens by reason of his sexual orientation. He alleges that he is a bisexual male.

The claimant allegedly fears the family of his friend and one-time lover (\_\_\_\_). \_\_\_\_\_'s father was a wealthy and influential \_\_\_\_\_ in Benin City. In \_\_\_\_\_ 1998, the claimant and \_\_\_\_\_ were discovered together and seriously beaten for about three hours. The two young men were then taken by car to an area outside of Benin City where the claimant believes they were to be killed. The claimant escaped, obtained money from his sister and fled to Lagos. He does not know what happened to \_\_\_\_\_.

The claimant alleged that the claimant "\_\_\_\_\_" accompanied by police found him in at his relatives home. He escaped and with the help of his employer and friend was smuggled out of Nigeria to Austria. The claimant claimed asylum in Austria. His claim was denied.

The claimant also made a claim for asylum in Germany but left the country before he learned about the decision.

The claimant fears returning to Nigeria, as he believes the chief is still interested in harming him. As well, he alleges that a fraudulent warrant has been issued for his arrest. He also alleges that as a bisexual male he would not be able to live openly in Nigeria and that there would be no protection for him.

The Minister's Representative intervened pursuant to Rule 25 of the Refugee Protection Division Rules seeking exclusion under Article 1F(b).

The panel would first deal with the issue of exclusion.

### DETERMINATION ON EXCLUSION

The panel determines that the Minister has not satisfied his burden of establishing article 1F(b) applies.

s.19(1)

**ANALYSIS**

The panel is willing to accept that the claimant is a national of Nigeria.

The claimant confirmed that he was involved in criminal activities, arrested and convicted while in Austria. He testified that he had served the required sentences and had no outstanding warrants or charges at this time. The claimant made some errors in his Personal Information Form (PIF) regarding his convictions and the dates in custody. However, through his testimony it was confirmed that the claimant was convicted and fined in 1998 for theft; in 1999 he was convicted of possession of cocaine and illegitimate use of documents and served six weeks and fifteen months probation; in 2001 he was convicted of possession of heroin and was sentenced to three years; while in prison he was involved in an assault and his three year sentence was extended for three months. He confirmed that he completed his sentence on 2004. He testified that he did not have any outstanding charges or arrest warrants against him in Germany and that the information received by the CIC is erroneous.

In *Brzezinski*<sup>1</sup>, the Court considered the concept of habitual involvement in crimes. A misdemeanor probably lacks the requisite seriousness to be considered under Article 1F(b). Article 1F(b) is not applicable to refugee claimants who have been convicted of a crime committed outside Canada and who have served their sentence prior to coming to Canada.

The Minister submitted that the panel must consider the claimant's criminal background and the fact that he has an outstanding assault charge in Canada. The panel finds that the charges against the claimant in Canada are not relevant to the issue of exclusion. The Minister also submitted that the charges of theft and narcotics are serious charges and would result in significant penalties under Canadian law. The panel does find that the evidence before it indeed establishes that the claimant has a criminal background and significant recidivism. However, the panel also accepts that the claimant has served his sentences for his crimes in Austria.

The notes taken at an interview<sup>2</sup> with a Canadian Immigration official state that when asked if he had any criminal charges outstanding in Canada, the claimant stated that the police in Germany had a warrant out for him for "buggery." The officer noted that the claimant must have "misheard" his question. When asked if he had any other charges outstanding anywhere in the world the claimant stated that he had a criminal record in Austria and had served time. About two weeks later the claimant was interviewed<sup>3</sup> by another immigration officer. This officer's notes indicate that he asked the claimant with what he had been charged in Germany.

s.19(1)

The officer states that he asked the claimant to state "simply" because his pronunciation of words was "very hard to understand." The officer states that he had the claimant "clarify that he was, in fact, charged with burglary for having broken and entered into a dwelling for the purpose of stealing."

The panel recognizes that the test, serious reasons for considering, is not a particularly high one. The interpretation of "serious reasons for considering" has established the standard of proof at less than the balance of probabilities.<sup>4</sup> The panel considered the statements of the immigration officials regarding the claimant's "mishearing" and the difficulty in understanding the claimant's pronunciation and the complete lack of any details or corroborative evidence regarding any outstanding charges or warrants or convictions against the claimant in Germany. The panel finds that the evidence is not sufficiently clear or reliable to lead to a finding that there are serious reasons for considering that the claimant has outstanding charges against him in Germany or that those alleged charges would meet the requisite seriousness to be considered under Article 1F(b).

Having considered all of the evidence, and with reluctance, the panel determines that the Minister has not satisfied his burden of establishing serious reasons for considering that the claimant should be excluded under Article 1F(b).

Given the above determination the panel went on to consider the inclusion aspect of this claim.

#### **DETERMINATION ON EXCLUSION**

The panel determines that the claimant has not satisfied his burden of establishing a serious possibility of persecution on a Convention ground or that it is more likely than not that he would be subjected to a danger of torture or face a risk to life or a risk to cruel and unusual treatment or punishment upon return to Nigeria. The claimant is not a credible witness.

#### **ANALYSIS**

The claimant fears returning to Nigeria because he alleges a well-founded fear of persecution by reason of his sexual orientation. He alleges he is a bisexual man who had a long-term relationship with [redacted] from about 1993 to 1997. Because they were discovered he was

s.19(1)

seriously beaten and almost killed by [redacted]'s father. He also alleges that there is a warrant issued for his arrest.

Rule 7, of the Refugee Protection Division (RPD), which is authorized by subsection 100(4) of the Immigration and Refugee Protection Act (IRPA), clearly requires claimants to provide "acceptable documents establishing identity and other elements of the claim." The claimant submitted no reliable documentation to corroborate his allegations that he is a bisexual man or that there is a warrant for his arrest in Nigeria at this time. The claimant testified that he contacted many people to send documents to him but that they have not. He added, "The phones are not so good." The panel notes that the claimant has had benefit of counsel since May 2005 and has made a refugee claim in Austria and has allegedly made an asylum claim in Germany. The panel finds that the claimant would have had the knowledge of the importance of reliable and trustworthy documentation and finds that he did not exercise reasonable diligence in obtaining documents to corroborate these central elements of his claim.

The claimant testified that he was charged in Nigeria in 1997 but does not know the details of the charges or the warrant. He testified that he learned about the warrant in 2001 when police came to his parents' house after he applied for a passport. The panel notes that this warrant was not mentioned in the claimant's interviews<sup>5</sup> with immigration officials or in his Personal Information Form (PIF). He did not mention any charges or warrants in Nigeria in the *Background Information Form*<sup>6</sup> when initiating his claim. The panel finds this information regarding a warrant for his arrest is central to his claim as the warrant was allegedly a result of his problems with the [redacted]'s father, and is a significant omission. He testified that it was issued by the Federal Police, which is certainly relevant to the issues of state protection and internal flight alternative. This omission brings into question the credibility of the allegation that a warrant has been issued. The claimant testified that he has also known about this warrant since 2001. He speculated that the warrant was "probably issued on something else." When asked if he attempted to get a copy of the warrant through his parents he explained that they would have to go to the police station and that the police would find out about their efforts which could cause them problems. The panel notes that the claimant testified that his father has sent him his school certificates, his recent passport and a recent driver's license and could well have obtained the information required or at least submitted a statement explaining why he could not. The panel does not accept the claimant's explanation as reasonable or credible.

s.19(1)

The panel accepted a late disclosure<sup>7</sup> at the hearing as it was alleged to be a letter from the claimant's sister, which specifically addressed his problems in Nigeria. The letter was typed, unsigned and there was no envelope to confirm when and from where the letter was posted. The claimant explained that he threw the envelope away. The panel does not accept the claimant's explanation as he has had benefit of experienced counsel since at least May 27, 2005 and would undoubtedly know the value of certain documents. Not being able to confirm the source and date of the letter further undermines its credibility. As well, the information in the letter is not consistent with some of the claimant's evidence or testimony. For example, the claimant's narrative indicates that he "hitched a ride on a transport truck bound for Lagos" and the letter states that the claimant's sister took him to a bus, which he took to Lagos. More importantly, there was no mention of the claimant's relationship with [redacted] or that there was a warrant issued by police. The panel considered the untimely disclosure of the letter, its problematic format and the inconsistencies and finds that it is not a credible, reliable document and gives it no weight. In the alternative, the panel considered the relationship of the author to the claimant and her strong vested interest in the outcome of this claim and the lack of corroborative evidence regarding the claimant's sexual orientation or arrest warrant. The letter is of little corroborative use to the panel in establishing that the claimant is bisexual or that he is the subject of an arrest warrant in Nigeria at this time.

The claimant married in Canada on [redacted], 2005. He testified that he told his wife about his past and his experiences with [redacted]. The panel refers to letter<sup>8</sup> from the claimant's wife. Although the panel is unsure as to just why this letter was written, it notes that it is a lengthy letter discussing the depth and success of their relationship. It makes no reference to the claimant's past problems in Nigeria and has no corroborative value regarding the claimant's sexual orientation or problems resulting from that alleged orientation.

The claimant alleged he is a bisexual and that he was involved in a same-sex relationship in Nigeria from about 1993 until the time he left the country in 1997. He has had no further contact with [redacted] and has no knowledge of his situation at this time. He testified that during the same time he had a girlfriend. He also testified that that he has had no bisexual or homosexual relationships since leaving Nigeria. He confirmed that he never had another relationship with a man. The panel finds the actions of the claimant since September 1997 in no way suggest that he is a bisexual male. He testified that if he likes what he sees he goes after it.

The panel finds the claimant's statement is in no way sufficient to establish that he is a bisexual male.

The panel considered the evidence and finds there is not sufficient credible and trustworthy evidence to establish that the claimant is a bisexual male or that there are outstanding charges or arrest warrants in Nigeria at this time.

The panel would also address the issue of subjective fear, which also further addresses the claimant's credibility.

The panel also finds that the claimant does not have a subjective fear of returning to Nigeria. It refers to a Refugee Protection Division decision and its analysis of "subjective fear."<sup>9</sup>

The term "subjective fear" performs a useful function inasmuch as it reminds us of another term "objective fear". The two terms "subjective fear" and "objective fear" are a perpetual reminder in refugee law that while the fear of persecution exists in the mind of the claimant, a valid basis must exist for the claim to succeed. The definition of a Convention refugee, thus, has a subjective component and an objective component. Both need to be satisfied before a person is determined to be a Convention Refugee. A fear, to be well-founded, must exist in the first place. How can one establish that a fear has a valid basis if the fear itself does not exist? Lacking that fear means lacking the necessary subjective basis for the claim. Emphasizing the importance of the subjective element, Madam Justice Tremblay-Lamer has held in *Kamana*<sup>10</sup> that the lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, since both elements of the refugee definition - subjective and objective - must be met.

A claimant's behaviour, more than his words, can be a reliable indicator (on a balance of probability) of the presence or absence of fear.

The panel finds that the claimant's behaviour in Austria and Germany is not consistent with a person who left his country fearing for his life and seeking international protection. He has testified that he fears returning to a country whose social attitudes and state authorities he dislikes and fears. The claimant managed to reach Austria in 1997. He indicated in his narrative that he "attempted to claim asylum." A letter<sup>11</sup> from an immigration official states that the claimant informed her that he requested protection in Austria. In his PIF he identifies himself as a refugee when he was living in Austria and in Germany. The claimant was well

aware that he had temporary status in Austria as he awaited the outcome of his claim for asylum and would also have been aware of the conditions to which potential residents and citizens would be subjected. There was no evidence of the claimant suffering from any mental or psychological problems. He appeared to be in full command of his senses. If the claimant were truly fearful of returning to Nigeria he would have respected and abided by the laws of the country in which he claimed asylum. The considerable evidence of his illegal activities while in Austria indicates to the panel that the claimant was not serious about his desire to find a safe and free country in which to live. The panel also finds on a balance of probabilities that he did not have a subjective fear, which in this case would include, awareness and appreciation of the consequences of his behaviour.

The claimant also made a claim for asylum in Germany, a signatory to the *Convention Relating to the Status of Refugees*. Failure to await the outcome of a claim to Convention refugee status in countries where the claimant resided or sojourned, or through which the claimant traveled before coming to Canada could be seen as negating the claimant's fear, but only if reasonable explanations are not provided by the claimant. The notes<sup>12</sup> taken by an immigration official during an interview indicate that the claimant decided to leave before the outcome of his claim and came to Canada because he did not have a job and was only receiving social benefits. He testified that he decided to come to Canada because he did not want to stay in countries that would put him in jail. The claimant was able to live on social assistance in Germany. The claimant chose to leave Germany for Austria before leaving for Canada "to pick up some property he left behind"<sup>13</sup> and according to the claimant's information he was arrested on the border between Germany and Austria upon his return and charged with possession of heroin that resulted in further significant jail time. The panel does not accept these explanations as reasonable. Indeed, the panel again finds that the actions of the claimant clearly exhibit a lack of subjective fear of returning to the country in which he alleges persecution.

This lack of subjective basis is fatal to this claim, in terms of the statement of Madame Justice Tremblay-Lamer, above. The lack of subjective fear further undermines the claimant's credibility and the credibility of the allegations, which form the basis of this claim.

As to whether the claimant, not being a Convention refugee, is a person in need of protection, as spelled out in Section 97 of IRPA, the same arguments apply. The claimant failed to establish sufficient credible and trustworthy evidence that he is a bisexual or that there are



outstanding charges against him in Nigeria at this time. As well, a person in need of protection has to establish both a subjective as well as an objective basis to his fear of serious harm, whether that harm is torture, risk to life or cruel and unusual treatment or punishment. The subjective basis is clearly absent in this claim, for the reasons mentioned above.

Having concluded that the claimant is not a bisexual male, that there is no outstanding warrant for his arrest in Nigeria at this time and that the claimant lacks subjective fear, the panel determines that the claimant has not satisfied his burden of establishing a serious possibility of persecution on a Convention ground or that it is more likely than not that he would be subjected to a danger of torture or face a risk to life or a risk to cruel and unusual treatment or punishment upon return to Nigeria. These findings apply to all three grounds of protection.

Judges of the Trial Division have expressly held that *Sheikh* is the applicable approach to the words "no credible basis." The panel considered all of the evidence and at this juncture would cite *Sheikh*:<sup>14</sup>

"even without disbelieving every word [a claimant] has uttered, ... a panel may reasonably find him so lacking in credibility that it concludes there is no credible evidence relevant to his claim ... In other words, a general finding of a lack of credibility on the part of the [claimant] may conceivably extend to all relevant evidence emanating from his claim."

The panel is of the opinion that there was no credible and trustworthy evidence on which it could have made a favourable decision.

Accordingly, the panel determines that the claimant, s.19(1)  
 is not a Convention refugee, under section 96 of IRPA or a person in need of  
 protection within the meaning of section 97(1)(a) or (b) of IRPA. Pursuant to subsection 107(1)  
 of the Immigration and Refugee Protection Act, the panel is of the opinion there is no credible or  
 trustworthy evidence on which it could have made a favourable decision and finds there is no  
 credible basis for this claim.

"Marnie Armstrong"  
 Marnie Armstrong

DATED: January 13, 2005

<sup>1</sup> *Brzezinski, Jan v. M.C.I.* (F.C.T.D., no. IMM-1333-97), Lutfy, July 9, 1998.

<sup>2</sup> Exhibit # M-2, Pages 11 to 13.

<sup>3</sup> Exhibit # M-2, Pages 11 to 13.

<sup>4</sup> *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.).

<sup>5</sup> Exhibit # M-2, Pages 11 to 13.

<sup>6</sup> Exhibit # M-1, Pages 8.

<sup>7</sup> Exhibit # C-4.

<sup>8</sup> Exhibit # M-3, Pages 14-15.

<sup>9</sup> RPD TA0-16602, October 3, 2002.

<sup>10</sup> *Kamana, Jimmy v. MCI (FCTD, IMM-5998-98)*, Tremblay Lamer, September 24, 1999.

<sup>11</sup> Exhibit # M-1.

<sup>12</sup> Exhibit # M-2, Page 13.

<sup>13</sup> Exhibit # M-2, Page 13.

<sup>14</sup> *Sheikh, Abdulhakim Ali v. M.E.I.* (F.C.A., no. A-521-89), MacGuigan, Iacobucci, Desjardins, July 4, 1990. Reported: *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (C.A.); 11 Imm. L.R. (2d) 81 (F.C.A.)