



LEGAL
RESOURCES
CENTRE

RESEARCH REPORT:

LGBTQIA REFUGEE RIGHTS IN SOUTH AFRICA





CAPE TOWN OFFICE

Block D, Ground Floor, Aintree Office Park,
cnr Doncaster & Loch Roads,
Kenilworth, Cape Town, 7708

Tel: +27 21 879 2398
Fax: +27 21 423 0935

info@lrc.org.za

LGBTQIA REFUGEE RIGHTS IN SOUTH AFRICA:

Contributors: Sherylle Dass, Devon Turner (Attorney), Nuhaa Hendricks (Candidate Attorney), Cyerra Haywood (Legal Intern), Julia Kahn (Legal Intern) & Maria LoCicero (Legal Intern)

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LIST OF ACRONYMS

DHA	Department of Home Affairs
RAA	Refugee Appeal Authority
RRO	Refugee Reception Office
RSDO	Refugee Status Determination Officer
SCRA	Standing Committee for Refugee Affairs
SOGIESC	Sexual orientation, gender identity, gender expression and sex characteristics.
UNHCR	United Nations High Commissioner for Refugees

TERMINOLOGY

Asylum seeker:	Persons seeking recognition as a refugee in the Republic
LGBTQIA:	Collectively, lesbian, gay, bisexual, transgender, queer, intersex and asexual people are referred to as LGBTQIA+.
Non-Refoulment:	This principle is recorded in section 2 of the Refugees Act which provides that: “no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or (b) his or her life, physical safety or freedom would be threatened on

account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.”

Refugee: persons who are outside their country of origin for reasons of feared persecution, conflict, generalized violence, or other circumstances that have seriously disturbed public order and, as a result, require international protection.

1. INTRODUCTION

South Africa has some of the most progressive LGBTQIA+ laws in the world. It is one of the few countries in the world with an explicit constitutional guarantee of equality for people of differing sexual orientations, and the only African country with that guarantee.¹ South Africa’s progressive LGBTQIA+ protections stand in stark contrast with the rest of the African continent. As of 2022, 33 out of Africa’s 54 countries still criminalise same-sex relations, maintaining the remnants of restrictive colonial-era laws.² For example, homosexuality is banned under Zimbabwe’s constitution, and LGBTQIA+ people have no protections from discrimination and violence.

Despite South Africa’s progressive legal environment, there is a striking difference between the promises of the law and peoples’ lived reality.³ In the 2016 study *Hate*

¹ Hakizimana, “LGBT Asylum Claims: The Case of South Africa,” University of the Witwatersrand, 2018. <https://wiredspace.wits.ac.za/server/api/core/bitstreams/087e76f6-c8dd-4763-9844-e82daa7a7073/content>

“Does the constitution explicitly guarantee equality or non-discrimination across sexual orientation and gender identity? The World Policy Center, January 2022.

<https://www.worldpolicycenter.org/policies/does-the-constitution-explicitly-guarantee-equality-or-non-discrimination-across-sexual-orientation-and-gender-identity>; “LGBT rights and protections are scarce in constitutions around the world, UCLA study finds,” UCLA Newsroom, June 2016.

<https://newsroom.ucla.edu/releases/lgbt-rights-and-protections-are-scarce-in-constitutions-around-the-world-ucla-study-finds>.

² “How Britain’s colonial legacy still affects LGBT politics around the world,” The Conversation, March 2018, <https://theconversation.com/how-britains-colonial-legacy-still-affects-lgbt-politics-around-the-world-95799>; Reid, “Progress and Setbacks on LGBT Rights in Africa”

<https://www.hrw.org/news/2022/06/22/progress-and-setbacks-lgbt-rights-africa-overview-last-year>

³ De Greef, “The Unfulfilled Promise of LGBTQ Rights in South Africa,” *The Atlantic*, July 2019

<https://www.theatlantic.com/international/archive/2019/07/southafrica-lgbtq-rights/593050/>

Crimes Against LGBT People In South Africa, researchers found that in South Africa, 55 percent of people surveyed expressed fear of discrimination due to their sexual orientation and 40 percent knew of someone who had been murdered due to their sexual orientation. The survey also found that in a two-year period, 39 percent of people had been verbally insulted, 20 percent of people had been threatened with physical violence, 17 percent had been “chased or followed,” and 9 percent had experienced physical violence and property damage.⁴ Between February and October 2021, at least 20 LGBTQIA+ individuals were killed across South Africa for their sexual orientation and gender identity, spurring Human Rights Watch to draft an open letter to the Deputy Minister for Justice and Constitutional Development.⁵

LGBTQIA+ refugees in South Africa often face even greater threats to their health and safety, as rising levels of xenophobia compound the potential dangers. According to professors Jean Pierre Misago and Loren Landau, “violence mobilization against non-citizens and other ‘outsiders’ is an increasingly prominent feature of South Africa’s political landscape.”⁶ Large-scale violence first erupted in 2008 but continues to this day. The paradigmatic example being the story of Elvis Nyathi, a Zimbabwean national who was dragged from his home on the outskirts of Johannesburg and was beaten, stoned, and set on fire in the street as recently as April 2022.⁷

South Africa began offering asylum to people being persecuted for their sexual orientation in 1998 with the passage of the Refugees Act.⁸ However, the system has been criticized for its inefficiency and failure to protect victims.⁹ Additionally, not many

⁴ “Hate Crimes Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in South Africa, 2016” <https://out.org.za/wp-content/uploads/2020/10/Hate-Crimes-Against-LGBT-People-in-South-Africa-21-November-2016-Web.pdf>

⁵ “Letter to South African Authorities Regarding LGBTI Murders and Assaults,” Human Rights Watch, January 2022. <https://www.hrw.org/news/2022/01/19/letter-south-african-authorities-regarding-lgbti-murders-and-assaults>

⁶ Misago, Landau: “Running Them Out of Time: Xenophobia, Violence, and Co-Authored Spatiotemporal Exclusion in South Africa.” <https://www.tandfonline.com/doi/full/10.1080/14650045.2022.2078707>

⁷ Id. See also, Baerak and Dugger, “South Africans Take Out Rage on Immigrants” May 2008. <https://www.nytimes.com/2008/05/20/world/africa/20safrica.html>

⁸ LGBTI+ Asylum Seekers in South Africa: A Review of Refugee Status Denials Involving Sexual Orientation, The Legal Resources Centre, <https://lrc.org.za/wp-content/uploads/LGBTI-ASYLUM-REPORT-RFS.pdf>, page 12

⁹ For example, the Refugees Act provides that a status determination be finalized within 180 days following an asylum application. In reality, many asylum seekers can wait years before their applications are finalized; Okisai, “Sexual Orientation and Gender Identity Asylum Claims and Refugee Protection Under South African Law” 2015. https://repository.up.ac.za/bitstream/handle/2263/46231/Okisai_Sexual_2015.pdf;sequence=1#:~:text=

applications for asylum are accepted. According to a 2017 White Paper on International Migration for South Africa, South Africa had an average of 62,000 asylum applications per year, and over 90 percent of the claims for asylum were rejected.¹⁰ Analysis of refugee status denials involving LGBTQIA+ applicants reveal egregious misapplications of domestic and international law in addition to rampant homophobia, transphobia, and corruption within the Department of Home Affairs, the governmental body responsible for managing immigration and asylum.¹¹

These problems make it harder for LGBTQIA+ asylum seekers to attain recognised legal status, find jobs, and access necessary social services. This in turn increases their likelihood of poverty, homelessness, and exploitation. Given the distinct vulnerabilities of LGBTQIA+ refugees in South Africa, the Legal Resources Centre is endeavoring to establish what the current levels of protection for LGBTQIA+ refugees are, identify shortfalls within South Africa's legal framework, and provide recommendations for ameliorating the problems that emerge. This report specifically seeks to outline, situate, and analyse relevant case law to support those objectives.

2. SOUTH AFRICA'S CURRENT FRAMEWORK AND WHETHER IT ESTABLISHES AN ENABLING ENVIRONMENT FOR LGBTQIA+ REFUGEE PROTECTION

South Africa is the only African country that formally extends refugee protection to lesbian, gay, bisexual, transgender, and intersex individuals. Even though South Africa is viewed as a more progressive country, especially when it comes to extending legal protection to at risk individuals, the national government should be guided by International human rights norms when making decisions. When interpreting the Bill of Rights, courts are required to consider international law and the Constitution provides that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with

=The%20South%20African%20Constitution%20and,to%20be%20protected%20from%20persecution.
(36

¹⁰ White Paper on International Migration for South Africa, July 2017.

<https://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf>, page 27, 59

¹¹ “Major New Study on LGBTIQ+ migrants and asylum seekers, 2023.

<https://www.wits.ac.za/news/latest-news/opinion/2023/2023-03/major-new-study-on-lgbtq-migrants-and-asylum-seekers-.html>

international law.”¹² Thus, international law is not only relevant, but mandatory to consider in adjudications.

2.1. The Refugees Act establishes a legal basis for claiming protection.

In accordance with international law, South Africa has assumed certain obligations to receive and treat refugees in accordance with the standards and principles established in international law.¹³ Asylum seekers are those who seek recognition as a refugee in South Africa.¹⁴ An individual qualifies for refugee status if they can establish a well-founded fear of persecution based on a protected ground, and if they are unwilling or unable to avail themselves to the protection of the country that they have fled.¹⁵ A well-founded fear must be subjective and objective – an applicant must have a fear of being persecuted and a well-founded (factual) basis for that fear.¹⁶ Persecution, as described by international law and South African case law, is serious harm combined with the failure of state protection.¹⁷ Serious harm can include threats to life, liberty, and freedom, but also significant human rights abuses.¹⁸ The International Criminal Court (ICC) defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”¹⁹

South Africa cannot refuse entry, expel, extradite, or return individuals to a country where they could be persecuted on account of a protected ground.²⁰ This is referred to as the principle of non-refoulement.²¹

The Refugees Act sets out the asylum process in South Africa. It begins with an asylum seeker declaring their intention at any port of entry within the country. From this point, asylum seekers interact with Refugee Reception Officers (RROs) who initially interview them, and then Refugee Status Determination Officers (RSDOs) who

¹² Section 233 The Constitution of the Republic of South Africa, 1996.

¹³ The Refugees Act 130 of 1998.

¹⁴ The Refugees Act 130 of 1998.

¹⁵ The Refugees Act 130 of 1998.

¹⁶ The Refugees Act 130 of 1998.

¹⁷ O.N v Chairperson of the Standing Committee for Refugee Affairs and Others (15376/16) [2017] ZAWCHC 57 (16 May 2017)

¹⁸ O.N v Chairperson of the Standing Committee for Refugee Affairs and Others (15376/16) [2017] ZAWCHC 57 (16 May 2017)

¹⁹ Art. 7.2. g of ICC Statute.

²⁰ The Refugees Act 130 of 1998.

²¹ The Refugees Act 130 of 1998.

ultimately decide whether an asylum application is approved or denied.²² The RSDOs are charged with gathering evidence to test the veracity of a claim.²³ This evidence is a combination of subjective evidence, such as an applicant's credible testimony,²⁴ and objective evidence, such as country of origin conditions. The question that RSDOs must answer is, "what might happen if they were to return to their country of nationality?"²⁵ If their applications are approved, asylum seekers are then granted refugee status and after ten years are entitled to apply for certification with the Standing Committee for Refugee Affairs, who after certifying that a refugee will remain a refugee indefinitely, will allow a refugee to then apply for permanent residency.²⁶

Applications that are rejected as manifestly unfounded, abusive, or fraudulent, are automatically reviewed by the Standing Committee for Refugee Affairs, who can either confirm the rejection or send the decision back to the RSDO to reconsider.²⁷ Applications that are rejected because the claimant failed to discharge their burden of proof that they have a refugee claim can be appealed to the Refugee Appeals Authority. In both instances of rejection, if their claim has been finally rejected by the Standing Committee or the Refugee Appeals Authority, a refugee claimant can review that decision in the High Court.

2.2. The Refugees Amendment Act (RAA) and the Refugees Act Regulations (RAR) has made it more difficult for individuals to successfully seek asylum in South Africa.

In January 2020, with the promulgation of the Refugees Act Regulations, the Refugees Amendment Act came into effect. The Refugees Act Regulations explains how the provisions of the Refugees Amendment Act are to be applied and implemented. Under the 2019 Regulations, an asylum claim can be tested against *any* information, evidence, research, or documents at the RSDO's disposal, as opposed to the

²² UNHCR, Asylum & Refugee Status Determination. <https://help.unhcr.org/southafrica/get-help/asylum/>

²³ UNHCR, Asylum & Refugee Status Determination. <https://help.unhcr.org/southafrica/get-help/asylum/>

²⁴ UNHCR, Asylum & Refugee Status Determination. <https://help.unhcr.org/southafrica/get-help/asylum/>

²⁵ UNHCR, Asylum & Refugee Status Determination. <https://help.unhcr.org/southafrica/get-help/asylum/>

²⁶ DHA. Refugee Status & Asylum. <https://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum>

²⁷ DHA. Refugee Status & Asylum. <https://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum>

reputable sources that could be considered under the 2000 Regulations.²⁸ With the amendments to the Refugees Act came a substantial and detrimental alteration of South Africa's refugee protection landscape.²⁹

Specifically of concern for SOGIESC asylum applicants is a new clause in the Refugee Amendments Act that automatically disqualifies “a fugitive from justice in another country” from refugee status.³⁰ The South African Human Rights Commission has found that “several LGBTI asylum seekers/refugees have fled their home countries due to the fact that their sexual orientation was regarded as a punishable offence.”³¹ In such cases, their refugee status might be inextricably linked to their status as a “fugitive from justice” and it would run foul of the principle of non-refoulement to send them back to a country where punitive measures would amount to persecution on a protected ground. Where the law in itself is inherently persecutory and does not conform with accepted human rights standards, as in laws prohibiting and criminalizing same-sex relationships, a claimant fleeing their country of origin for contravening such laws is still deserving of refugee protection and should not be excluded. Rejecting a LGBTQIA+ asylum claimant on the grounds that they committed such a criminal offence would be contrary to both domestic and international law.

2.3. The Equality Clause in the Constitution seeks to protect all individuals from Discrimination.

South Africa was the first country in the world to prohibit discrimination on the grounds of sexual orientation. Section Nine of the Constitution states, “Everyone is equal before the law and has the right to equal protection and benefit of the law.”³² The Equality Clause provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more listed grounds, such as gender, sex, and sexual orientation.³³ The enactment of several key pieces of legislation has given legal effect to constitutional mandates.

²⁸ LRC. LGBTI+ Asylum Seekers in South Africa: A Review of Refugee Status Denials Involving Sexual Orientation & Gender Identity. 2021.

²⁹ LRC. LGBTI+ Asylum Seekers in South Africa: A Review of Refugee Status Denials Involving Sexual Orientation & Gender Identity. 2021.

³⁰ LRC. LGBTI+ Asylum Seekers in South Africa: A Review of Refugee Status Denials Involving Sexual Orientation & Gender Identity. 2021.

³¹ LRC. LGBTI+ Asylum Seekers in South Africa: A Review of Refugee Status Denials Involving Sexual Orientation & Gender Identity. 2021.

³² Section 9 of the Constitution.

³³ Section 9 of the Constitution.

2.4. The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) gives effect to Section 9 of the Constitution.

Section 9 of the Constitution mandates the state to enact legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality. To satisfy this requirement, Parliament enacted PEPUDA to provide for the advancement of disadvantaged individuals, communities, and social groups. The Act aims to prevent unfair discrimination and protect human dignity, equality, and freedom - ideals that are laid out in sections 9 and 10 of the Constitution.³⁴ The distinction between discrimination and unfair discrimination is important because under the Constitution, the applicant must establish the discrimination and thereafter the onus shifts to the respondent to prove that this discrimination was fair. When discrimination occurs on a listed ground, such as sex, gender, or sexual orientation, it is presumed to be unfair and thus unconstitutional.³⁵

PEPUDA generally states that, “Neither the state nor any person may unfairly discriminate against any person.”³⁶ The Act also specifically prohibits unfair discrimination on the grounds of gender.³⁷ Under the Act, discrimination refers to “any act or omission, including a policy, law, rule, practice, condition, or situation which directly or indirectly imposes burdens, obligations, or disadvantage on; or withholds benefits, opportunities, or advantages from any person on one or more of the prohibited grounds.”³⁸ Prohibited grounds not only include gender, sex, and sexual orientation, but also any other ground where discrimination causes systemic disadvantages, undermines human dignity, or adversely affects the equal enjoyment of a person’s rights and freedoms.³⁹ As important as it is to have the prohibited grounds explicitly listed, it is even more important that the Act allows for a broader, catch-all approach that provides additional grounds for relief.⁴⁰

To determine whether unfair discrimination has taken place, judicial officers are instructed to consider the likely impacts of the discrimination, whether the discrimination might impair human dignity, whether the complainant is a member of a group that suffers from patterns of disadvantage, whether the discrimination is

³⁴ The Constitution.

³⁵ Section 9 of the Constitution.

³⁶ Prevention of Equality and Prevention of Unfair Discrimination Act 4 of 2000. (PEPUDA)

³⁷ PEPUDA.

³⁸ PEPUDA.

³⁹ PEPUDA.

⁴⁰ PEPUDA.

systemic in nature, and whether the respondent has taken steps to address the disadvantage.⁴¹ As in the Constitution, the Act also instructs anyone interpreting the Act to consider international law and comparable foreign law.⁴²

2.5. The Promotion of Administrative Justice Act (PAJA) gives effect to Section 33 of the Constitution.

Section 33 of the Constitution provides that everyone has a right to administrative action that is lawful, reasonable, and procedurally fair.⁴³ With every right comes a duty for the national legislature to enact laws to give effect to them.⁴⁴ PAJA is important in terms of refugee rights because the determination of refugee applications are administrative decisions.⁴⁵ Under this Act, administrative action that materially or adversely affects the rights or legitimate expectations of any person must be procedurally fair, and what is procedurally fair is a context specific enquiry.⁴⁶ PAJA requires that all administrative decisions be communicated in writing that clearly lays out the reasoning for each decision.⁴⁷

Additionally, PAJA enables applicants to have administrative actions judicially reviewed.⁴⁸ In order to participate in judicial review, applicants must be given adequate notice of their right to appeal, and to obtain legal advice or representation.⁴⁶ In the context of asylum applications and refugee status determinations, RSDOs are legally obligated to explain how they reached their status decision so that applicants can effectively appeal.⁴⁹ Administrative actions must align with the law and must not be arbitrary or capricious.⁵⁰

2.6. Challenges faced Despite the existence of a strong Legal Framework

Despite the advancement of legal protections and recognition for LGBTQI+ individuals, colonial and apartheid conceptions of gender and sexuality have deeply

⁴¹ PEPUDA.

⁴² PEPUDA.

⁴³ Section 33 of the Constitution.

⁴⁴ Promotion of Administrative Justice Act 3 of 2000 (PAJA).

⁴⁵ PAJA.

⁴⁶ PAJA.

⁴⁷ PAJA.

⁴⁸ PAJA.

⁴⁹ PAJA.

⁵⁰ PAJA.

impacted the experiences of the LGBTQI+ community within South Africa today.⁵¹ During apartheid, LGBTQI+ individuals were seen as ‘unnatural,’ ‘deviant,’ and ‘unequal.’⁵² With the cementation of these perceptions in apartheid policies that criminalized LGBTQI+ individuals, it is no wonder that simply enacting legislation that now protects these individuals and promotes equality is not enough.⁵³ A deep bias still entrenches the individuals in charge of ruling on asylum applications, and new amendments to the Refugees Act has changed what evidence they can consider when reviewing these applications. The rights that have been afforded to these individuals are vital, as legal recognition legitimizes them and their place in society, but without measures that can effect change on a social level, they are relatively useless.⁵⁴ A report produced by the LRC shows that the Department of Home Affairs still engages in discriminatory practices, and that RSDOs are still making decisions on asylum applications without being fully aware of the law.⁵⁵ Even with policy directives aimed at the respect, protection, and promotion of the rights of the LGBTQI+ community, discrimination still prevails.⁵⁶

3. SOUTH AFRICAN CASE LAW

This section outlines the South African Asylum Process that LGBTQIA+ refugees must navigate and presents relevant internal case law. Discussion of international and foreign case law will follow.

3.1 The South African Asylum Process and Relevant Case Law

In South Africa, refugees and asylum seekers are managed under the Refugees Act and not the Immigration Act.⁵⁷ Asylum seekers are entitled to apply for asylum at any time they wish and have certain legal rights, including non-refoulement until the proper procedure has been completed.⁵⁸ As explained in *Ruta v Minister of Home Affairs*, even “illegal foreigners” (categorized under the Immigration Act) who do not enter South Africa at a designated port of entry and are liable for criminal penalties and

⁵¹ Westman, S.C. Colonialism and Sexual Orientation and Gender Identity: South Africa 2023.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ The Refugees Act, https://www.gov.za/sites/default/files/gcis_document/201409/a130-980.pdf. =

⁵⁸ *Ruta v Minister of Home Affairs* [2018] ZACC 52

deportation, may still apply for asylum and must have their case heard before they can be deported.⁵⁹ Asylum seekers must be treated as presumptive refugees until the merits of their claim have been analyzed⁶⁰

There are several steps in the claims process for refugees and asylum seekers. First, a person fleeing a threat to their lives will arrive at a border or port of entry. They will be given a non-renewable section 23 transit permit which is valid for five days. Within that period, the individual will be designated as an asylum seeker and will need to report to the Refugee Reception Office to be interviewed by an officer for the Department of Home Affairs (DHA).

This is increasingly difficult as many Refugee Reception Offices are sometimes unable to take new cases due to backlogs.⁶¹ The first process in claiming asylum in South Africa involves an initial formal application for a section 22 asylum seeker permit. Upon formal application, an asylum seeker is granted a renewable section 22 permit. . This permit protects asylum seekers from deportation and entitles them to lawfully seek employment, access education, and access health care facilities.⁶² Renewing this permit is a method of staying in the country while awaiting consideration of official refugee recognition by the Department of Home Affairs. Under *Saidi and Others v Minister of Home Affairs and Others*, Refugee Reception Officers have the power to extend the section 22 permit and are obliged to extend the permit of an asylum seeker while their case is under judicial review.⁶³ Once refugee status is granted, the individual can stay in South Africa until they cease to be a refugee.

A refugee ceases to qualify for Refugee status under the Refugees Act if:

- i) They avail themselves of the protection of their country of origin or nationality;
- ii) They voluntary and formally re-acquire their nationality having lost it;

⁵⁹ Id.

⁶⁰ *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs and Others* [2023] ZACC 45.

⁶¹ Bhagat, "LGBT Asylum Claims: Examining the limits of citizenship in Post-1994 Cape Town, South Africa. 2015. file:///Users/mllocic/Downloads/fdb908a1-6666-4bca-acca-bc129dfb9b9b.pdf

⁶² *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9; South African Department of Home Affairs, "Refugee Status and Asylum," <https://www.dha.gov.za/index.php/refugee-status> asylum#:~:text=The%20section%2022%20permit%20which,status%20determination%20is%20in%20progress.

⁶³ *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9.

- iii) They become a permanent resident or citizen of South Africa or another country;
- iv) They voluntarily re-establish or visit their country of origin or the country they fled from;
- v) They can no longer refuse to avail themselves of the protection of their country or nationality because the circumstances that caused them to flee no longer exists;
- vi) They commit a serious crime in South Africa that is punishable by imprisonment without the option of a fine;
- vii) They commit an offence related to the fraudulent possession, acquisition or presentation of a South African Identity card, passport, travel document, temporary resident visa or permanent resident permit; or
- viii) The Minister of Home Affairs orders cessation or revokes refugee status for an individual refugee or category of refugees.

A refugee who has remained in South Africa for a continuous period of 10 years and has been certified by the Standing Committee that they will remain a refugee indefinitely can apply for permanent resident status.⁶⁴

The asylum process is not easy to navigate, and applicant's petitions are often rejected as "unfounded" or "manifestly unfounded." Unfounded claims are applications which are made on the grounds contemplated in section 3 of the Refugees Act, but which are without merit.⁶⁵ Manifestly unfounded claims are claims which are not based on any of the grounds on which a person may apply for refugee status according to the Refugees Act.⁶⁶ If denied, the applicant can appeal to the Refugee Appeal Board. If they are denied for having a "manifestly unfounded claim" the case is automatically sent for review by the Standing Committee for Refugee Affairs.⁶⁷ According to a report published by the United Nations High Commissioner of Refugees in 2014, South Africa had the highest rejection rate of refugees in the world, denying over 90% of their total applicants.⁶⁸ It is important to note that this number may be bolstered by xenophobic attitudes of some South Africans officials. There is a documented misconception

⁶⁴ Hakizimana, "LGBT Asylum Claims: The Case of South Africa," University of the Witwatersrand, 2018.

⁶⁵ LGBTI+ Asylum Seekers in South Africa: A Review of Refugee Status Denials Involving Sexual Orientation, The Legal Resources Centre

⁶⁶ Okisai, "Sexual Orientation and Gender Identity Asylum Claims and Refugee Protection Under South African Law" 2015.

⁶⁷ Id.

⁶⁸ Hakizimana, "LGBT Asylum Claims: The Case of South Africa," University of the Witwatersrand, 2018.

among officers at the Department of Home Affairs that people applying for asylum are seeking to migrate to South Africa for economic opportunities, not because they fear persecution.⁶⁹

Under *Van Garderen N.O. v Refugee Appeal Board and Others*, the High Court held that a lower standard of proof is required for asylum adjudications as compared to civil proceedings.⁷⁰ Applicants do not need to provide irrefutable proof that their lives are in danger. The Court also held that Refugee Status Determination Officers must consider applicants' testimonies alongside other reliable, objective evidence when deciding whether to grant an applicant's petition. Moreover, Refugee Status Determination Officers have a duty to gather additional evidence to help them assess the validity of a claim.⁷¹

Two years after *Van Garderen*, the High Court decided *Tantoush v Refugee Appeal Board and Others* and found that asylum applicants only needed to show a "reasonable possibility of persecution" to qualify for protection. It reiterated the fact that both applicants and Refugee Status Determination Officers must share the responsibility of presenting and evaluating the relevant facts.

Despite these two cases lessening the burden on asylum seekers in proving their claims, studies have suggested that the current process has still resulted in unlawful denial of access to the asylum system.⁷² One study by the African Centre for Migration and Society found that Refugee Status Determination Officers routinely failed to thoroughly investigate conditions in an applicant's country of origin and misapplied fundamental aspects of the Refugees Act.⁷³ The study concluded that "South Africa's asylum system exists to refuse access to the country and makes no attempt to realize the goal of refugee protection."⁷⁴ Problems of corruption often occur, including allegations that "in the absence of a bribe, the outcome of an application depended mainly on the mood of the interviewer and which country the applicant was from."⁷⁵

⁶⁹ Id.

⁷⁰ LGBTI+ Asylum Seekers in South Africa: A Review of Refugee Status Denials Involving Sexual Orientation, The Legal Resources Centre.

⁷¹ Id.

⁷² Okisai, "Sexual Orientation and Gender Identity Asylum Claims and Refugee Protection Under South African Law" 2015.

⁷³ Siegfried, "South Africa's flawed asylum system," The New Humanitarian, 2013.

<https://www.thenewhumanitarian.org/analysis/2013/04/30/south-africa-s-flawed-asylum-system>

⁷⁴ Id.

⁷⁵ Id.

There are accounts of asylees having their asylum documents ripped up in front of them when they refuse to pay.⁷⁶ These unlawful denials have led to a growing backlog of appeals to the Refugee Appeal Board, which in turn promotes inefficiency. According to the Auditor General, the current backlog would take about 68 years to clear – excluding any new applications for asylum.⁷⁷ Many asylum seekers must often wait years for an appeal hearing.⁷⁸

3.2. Specific Vulnerabilities for LGBTQIA+ Refugees and Relevant Case Law

In addition to the standard problems of corruption, overzealous denials, and inefficiency faced by all asylum seekers in South Africa, LGBTQIA+ refugees and asylum seekers can face further discrimination and systemic challenges regarding the outcome of their applications. In 2021, the Legal Resources Centre issued a report documenting 67 LGBTQIA+ asylum applicants who had been rejected due to discriminatory practices by the Department of Home Affairs.⁷⁹ Three specific vulnerabilities for LGBTQIA+ refugees are (1) undignified treatment by government officials, (2) interviewer bias, and (3) non-disclosure regarding their need for asylum.

3.2.1 Mistreatment at the Department of Home Affairs

Despite South Africa's progressive LGBTQIA+ rights enshrined in law; homophobic sentiments abound in South Africa. A 2016 survey conducted by the Other Foundation found that 72% of South Africans thought that same-sex activity was morally wrong.⁸⁰ There is a webpage operated by the Department of Justice and Constitutional Development that answers frequently asked questions about LGBTQIA+ people. Some frequently asked questions include: "Are LGBTI persons un-African?", "Are LGBTI people mentally sick / have to be cured?", and "Are homosexual people

⁷⁶ "A Double Challenge: LGBTI Refugees and Asylum Seekers in South Africa," October 2018. <https://za.boell.org/en/2018/10/11/double-challenge-lgbti-refugees-and-asylum-seekers-south-africa>

⁷⁷ *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs and Others* [2023] ZACC 45.

⁷⁸ Siegfried, "South Africa's flawed asylum system," The New Humanitarian, 2013.

⁷⁹ Igual, "Equality Court refuses to rule on LGBTIQ+ asylum discrimination," November 2023. <https://www.mambaonline.com/2023/11/23/equality-court-refuses-to-rule-on-lgbtiq-asylum-discrimination/>; LGBTI+ Asylum Seekers in South Africa: A Review of Refugee Status Denials Involving Sexual Orientation, The Legal Resources Centre.

⁸⁰ Hakizimana, "LGBT Asylum Claims: The Case of South Africa," University of the Witwatersrand, 2018.

perverts, watch pornography, and sexually abuse children?”⁸¹ Evaluators of asylum applications are not immune to these widespread biases and beliefs.

There are numerous personal stories of LGBTQIA+ asylum seekers facing verbal abuse at the hands of government officials. Researcher Kizitos Okisai collected several stories like this for his mini dissertation at the University of Pretoria. Several interviewees revealed incidences of harassment: officials laughing at them and ridiculing them for their sexual orientation or gender identity; calling them “moffie,” a derogatory term; requiring them to queue in lines not accordant with their gender identity; not interfering if they were attacked; and generally causing LGBTQIA+ asylees to feel as though they are “less human.”⁸²

3.2.2 Bias Amongst Interviewers

The mistreatment faced by LGBTQIA+ asylum seekers is predicated on the biases of DHA officers and other officials. However, in addition to overt acts of bigotry, biases of government officials can threaten the outcome of an LGBTQIA+ asylum case in more systematic ways.

The Department of Home Affairs requires asylum applicants to provide clear evidence of their persecution. Even with the *Van Garderen* rule that personal testimonies must be considered by officials, a request for empirical evidence of persecution based on sexuality is often unrealistic. Many asylees come from countries where same-sex conduct is criminalized, which means they would not be able to go to the police about their persecution and therefore would have no official documentation.⁸³

Further, DHA officials will have different preconceived notions of what it means to be LGBTQIA+, but expressions of gender identity and sexuality are not homogenous. Often, there is disbelief among officers that an asylee is an LGBTQIA+ member if their appearance and actions do not conform to commonly held stereotypes.⁸⁴ A 2018 study of 50 LGBTQIA+ refugees and asylum seekers revealed that 86% of respondents

⁸¹ The Department of Justice and Constitutional Development, Resources, <https://www.justice.gov.za/vg/lgbti-faq.html>

⁸² Okisai, “Sexual Orientation and Gender Identity Asylum Claims and Refugee Protection Under South African Law” 2015.

⁸³ Hakizimana, “LGBT Asylum Claims: The Case of South Africa,” University of the Witwatersrand, 2018.

⁸⁴ Id.

claimed they had been asked to “prove” their sexual orientation at refugee centers. This can be the basis on which asylum applications are refused.⁸⁵

Even though bias and misapplications of law have been shown to be commonplace among Refugee Reception Officers and the Department of Home Affairs, the judicial branch has been slow to respond. In an effort to respect the separation of powers, courts are hesitant to use the power of substitution afforded to them in Section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act (PAJA) to substitute or correct an administrative action regarding a denial of asylum based on prejudice.⁸⁶

In *Mayemba v Chairperson of Standing Committee for Refugee Affairs and Others*, an asylum seeker from the Democratic Republic of Congo (DRC) sought refuge in South Africa. His application was rejected as “manifestly unfounded,” but it was later revealed that the Refugee Reception Office had not acted competently in completing his application. They did not provide him with an adequate interpreter (Mr. Mayemba did not speak English), he received no explanation regarding the asylum process, and various information recorded on his form was manifestly incorrect (including his birthplace, ethnic group, and marital status).⁸⁷ While this is not prima facie evidence of bias and could just be the result of an overburdened system, the many mistakes indicate a serious disregard for Mr. Mayemba’s story and ultimately, his safety.

The High Court judge refused to exercise the court’s power of substitution, stating that Mr. Mayemba’s matter was not an “exceptional case.” He decided that the appropriate action was to allow Mr. Mayemba to resubmit a new asylum application which was to be reviewed by a different Refugee Status Determination Officer.⁸⁸ While it would be unrealistically inefficient and costly to require judicial review and substitution of administrative decisions (not to mention in violation of the separation of powers), given the reports of biases and legal errors endured by asylum seekers, it is distinctly possible that a new officer assigned to Mr. Mayemba’s case would make the same mistakes as the prior one.

⁸⁵ De Barros, “Abusive Home Affairs biggest challenge facing LGBTI asylum seekers,” May 2019. <https://www.mambaonline.com/2019/05/31/abusive-home-affairs-biggest-challenge-faced-by-lgbti-asylum-seekers/>

⁸⁶ Under PAJA, this power is only to be used in “exceptional circumstances.” Kohn, “The Test for ‘Exceptional Circumstances,’” <https://journals.co.za/doi/pdf/10.10520/EJC-a30f2aa0b>

⁸⁷ *Mayemba v Chairperson of Standing Committee for Refugee Affairs and Others* [2015] ZAWCHC 86

⁸⁸ *Id.*

3.2.3. Non-Disclosure of Reasons for Seeking Asylum

LGBTQIA+ asylees may not desire to disclose their sexual orientation or gender identity for fear of discrimination or abuse. They may feel scared and confused by the asylum process and withhold relevant information. This was the case in *Makumba v Minister of Home Affairs and Others*. Esnat Makumba was a lesbian Malawian who concealed her sexual orientation due to past persecution in Malawi. When she arrived in South Africa she was unaware that she could claim refugee status based on sexual orientation, was unsure whether it was acceptable to be openly lesbian in South Africa, and did not know how officials at the Refugee Reception Office would react to her disclosure.⁸⁹ Additionally, she was being aided by her Malawian friend and was scared that the friend would no longer help her if she disclosed her sexual orientation. Therefore, instead of revealing her true motivations for fleeing Malawi, Makumba stated she came to South Africa for economic reasons, and as such her application was deemed manifestly unfounded and denied.

In Ms. Makumba's case, the High Court decided that although she had been dishonest regarding her reasons for fleeing Malawi, the important consideration was whether she would face persecution in Malawi regarding the new facts disclosed.⁹⁰ The court determined that she had essentially changed the basis for relief sought and ordered that her denial be set aside, she be re-interviewed, and her application for asylum reconsidered.

3.3. In Practice, South Africa's Legal Protections Do Not Meet the Needs of LGBTQIA+ Asylum Seekers

Because of the barriers in place for LGBTQIA+ asylum seekers, many of them refuse to proceed with the legal process and instead opt to live as illegal immigrants. This status denies them access to medical services, employment, and housing, and means they risk being deported to the countries they have fled.⁹¹

While there have been some judicial victories in protecting the rights of asylum seekers as a whole, namely the recent case finding certain subsections of the Refugees Act

⁸⁹ *Makumba v Minister of Home Affairs and Others* [2014] ZAWCHC 183

⁹⁰ *Id.* at 8

⁹¹ *Id.* See also, "A Double Challenge: LGBTI Refugees and Asylum Seekers in South Africa," October 2018. <https://za.boell.org/en/2018/10/11/double-challenge-lgbti-refugees-and-asylum-seekers-south-africa>

were constitutionally invalid, courts appear to hear and decide cases on individual bases.⁹² Additionally, LGBTQIA+ asylum seekers do not always bring cases even when they have been treated unfairly due to lack of information, ability, and resources.

4. ASSESSING INTERNATIONAL LEGAL FRAMEWORKS IN COMPARISON TO SOUTH AFRICAN LEGAL FRAMEWORKS

Due to the Constitution's requirements under sections 39 and 233 that South African law remain consistent with international law, it is important to consider international frameworks regarding LGBT+ refugee status. This requirement is echoed by Refugees Act section 1A, which states all provisions must be interpreted and applied consistently with international law. As such, local courts must favor interpretations of law that accords with international human rights standards, including the United Nations ("UN") and African Commission on Human and Peoples' Rights ("ACHPR").

The UN's Universal Declaration of Human Rights ("UDHR") of 1948 provides for the right to seek and enjoy asylum in other countries. Further, the 1951 UN's Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees further enriches the right to seek asylum. The African Union's ("AU") predecessor, the Organization of African Unity ("OAU"), adopted the 1969 Convention Governing Specific Aspects of Refugee Problems in Africa, which has been ratified by South Africa along with the other international treaties.

These treaties do not explicitly define 'persecution', nor do they offer specific criteria with regard to the term 'refugee.' However, this vagueness is intentional; as worded, the international guidelines can be adapted to fit the specifics of the country, jurisdiction, or social context in which it is applied. Thus, South Africa's Refugees Act gives meaning to the international treaties as applied here.

Many countries still criminalize certain sexual orientations, and general provisions are used to prosecute and discriminate, on various grounds, against the LGBT+

⁹² *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs and Others* [2023] ZACC 45.

community. In certain parts of the world, LGBT+ individuals are at risk of persecution or serious harm from non-state actors, and the state may be unable or unwilling to provide the community with effective protection against persecution or serious harm. LGBT+ applicants are generally granted international protection under the qualification of being a “member of a particular social group” in accordance with sections 2(A) and 3(A) of the Refugees Act in South Africa as well as similar statutes offering protection internationally.

UNHCR’s Guidelines on International Protection No. 9: Claims To Refugee Status Based On Sexual Orientation and/or Gender Identity Within The Context Of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (‘UNHCR Guidelines’), the UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (‘SOGI Guidance Note’) and the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (‘Yogyakarta Principles’) provide guidance for how countries can meet legal obligations when working with LGBT+ asylum seekers. The ACHPR has also adopted resolution 275, which recognizes the right of all people to be protected from SOGI-based violence and human rights violations.

Yogyakarta principle 33 confirms the right of LGBT+ persons to live free from “criminalisation and sanction on the basis of sexual orientation, gender identity, gender expression or sex characteristics.” This is further supported by principle 30, which asserts the right of state protection for sexual and gender minorities. Principle 23 entrenches the right to seek protection from SOGI-based persecution and reaffirms the principle of non-refoulement.

The UNHCR Guidelines confirm that SOGIESC-based persecution can be perpetrated by both state and non-state actors. State-based persecution often takes the form of discriminatory laws targeting LGBT+ persons, e.g., legislation that criminalizes sodomy or ‘relations against the order of nature.’ An inability or unwillingness to protect LGBTI persons from harm is another example of state-sanctioned persecution, which might take the form of impunity for non-state actors who commit SOGI-based violence, such as intimidating, exploiting, attacking, or killing those presumed to be LGBTI.

A credibility assessment plays a key role in determining whether to grant international protection to LGBT+ applicants. The assessment may be done based on documentary evidence, which is available in the file or, in the absence of documents, on the core

material facts of the application and the applicant's statements. Some courts have ruled that disclosing sexual orientation only after the initial application may have a negative impact on the applicant's credibility. Conversely, other courts have ruled that a credibility decision cannot be based solely on the fact that an applicant did not share their sexual orientation immediately, and there may be valid reasons why an applicant may be reluctant to reveal their sexual orientation.

The UNHCR Guidelines (paragraph 47) and the SOGI Guidance Note (paragraph 32) consider gender and sexuality to be immutable aspects of a person's being. As such, persons should be free to express these parts of their identity without fear. International guidelines also provide practical advice for those adjudicating SOGI-based asylum cases; the UNHCR Guidelines caution RSDOs against relying on stereotypes or visible markers when assessing the credibility of a claim (paragraph 49). An RSDO should not base their determination on an applicant's appearance, mannerisms or style of dress; the credibility of a claim should be judged according to the information provided in the applicant's testimony and balanced with reliable objective evidence.

Evidence and credibility may be difficult to gather for applications from LGBT+ persons because they involve a characteristic fundamental to the identity of the person, "inner' or 'hidden' thoughts, outlooks and states of being."¹ The assessment of credibility of LGBT+ applicants may be done based on documentary evidence available in the file or, in the absence of documents, based on the core material facts of the application.²

Country of origin information (COI) also plays a significant role in the assessment of LGBT+ asylum applications, with European Union Agency for Asylum country of origin reports being used as evidence in first and second instance procedures. Therefore, it is important to have updated, comprehensive, and reliable COI. European and national courts have made several rulings on deportation, removal, and the return of LGBTIQ applicants while considering the possibility of persecution, ill treatment and refoulement.

International law accepts that non-state actors, such as relatives, neighbors, or colleagues, can persecute LGBT+ persons. This may occur directly, such as physical abuse or forced marriages, or through indirect actions, such as reporting LGBT+ persons to state authorities. Research shows that SOGI-based persecution is most likely to occur within social settings, e.g., within families or religious communities, making it difficult for potential asylum applicants to document and prove persecution.³ Accordingly, the UNHCR Guidelines advise RSDOs to consider family and social

disapproval in the context of the overall claim (paragraph 23). As such, an RSDO should not interpret a lack of SOGI-based arrests or prosecutions in a person's country of origin as evidence of safety and, instead, should consider the threat of serious harm that may accompany familial and/or societal disapproval, even if said violence has not yet occurred.

Further, the repeal of punitive laws does not automatically mean that an LGBT+ asylum seeker can safely return to, or relocate within, their country of origin. Paragraph 37 of the UNHCR Guidelines cautions that the "existence of certain elements, such as anti-discrimination laws or presence of LGBT+ organisations and events, do not necessarily undermine the well-foundedness of the applicant's fear." More, paragraph 49 states that an applicant does not need to be publicly known as an LGBT+ person in order for them to have a well-founded fear of persecution. And, conversely, the guidelines state an LGBT+ person should never be required to conceal their identity in order to avoid harm (paragraph 12).

Only in very specific circumstances can a state recommend that a person resettle in a different part of their home country instead of seeking asylum, known as a relocation alternative. According to the UNHCR Guidelines, it is reasonable for an RSDO to suggest relocation within a country of origin *only* if state protection is available in a genuine and meaningful way (paragraphs 51–56). For internal relocation to be considered viable, an RSDO must be able to identify a specific area where the threat of persecution is demonstrably absent meaning the applicant would have access to a minimum level of political, civil and socioeconomic rights if they moved to the proposed location (paragraph 56).

The adjudicator – in South Africa, an RSDO – must establish the reasonableness of the alternative by determining whether the claimant can live without undue hardship. Considerations when evaluating a location include safety levels, respect for human rights, agents of persecution, risk of exposure to harm and possibility for economic survival. Additional factors need to be considered with SOGI-based asylum claims, such as the likelihood of a person being outed, tracked down by relatives, or arrested, detained and/or prosecuted. Critically, punitive laws can make even a supposedly 'safe' location dangerous, e.g., an urban area with a known LGBT+ community.⁴ The burden of proof when identifying a relocation alternative rest solely with the RSDO (paragraph 55). The applicant involved must be provided with sufficient opportunity to respond to such a consideration.

International law is clear that a relocation alternative must not be used by a state to evade the provision of care and protection and is clear on the question of internal flight. According to the UNHCR's Guidelines On International Protection: 'Internal Flight or Relocation Alternative' within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, persecuted individuals do not have an obligation to exhaust all options within their country of origin before seeking protection elsewhere (paragraph 4). An applicant's failure to move to a different part of their country of origin does not automatically invalidate their claim. Thus, asylum does not need to be a last resort.⁵

5. INTERNATIONAL CASE LAW

According to the United Nations Refugee Agency there are 35.3 million refugees and 5.4 million asylum seekers worldwide.⁹³ The exact number of them who identify as LGBTQIA+ are unknown, and there is a distinct lack of quantitative data on the number of people seeking asylum for persecution based on their sexuality or gender identity.⁹⁴ Currently, 65 countries criminalize private, consensual, same-sex sexual activity, and the UN High Commissioner for Refugees estimates that only 37 countries have granted asylum due to a well-founded fear of persecution based on sexual orientation or gender identity.⁹⁵

There is no binding international legislation relating to protection from persecution based on sexuality or gender identity, however the UN and other organizations have provided guidance on how countries can meet legal obligations that relate to LGBTQIA+ asylum seekers under the 1951 Convention on the Status of Refugees and the 1967 Protocol Related to the Status of Refugees.⁹⁶ Additionally, South Africa has ratified the UN's Convention against Torture and Other Cruel Inhuman or Degrading

⁹³ The UN Refugee Agency, <https://www.unhcr.org/refugees>

⁹⁴ Shaw and Verghese, "LGBTQI+ Refugees and Asylum Seekers: A Review of Research and Data Needs," June 2022, UCLA, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQI-Refugee-Review-Jul-2022.pdf>.

⁹⁵ The Human Dignity Trust, Map of Countries that Criminalize LGBT People, <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/>; United Nations "Free and Equal" Fact Sheet, 2014. https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT/FactSheets/UNFE_Fact_Sheet_Refugee_Asymylum_EN.pdf

⁹⁶ LGBTQI+ Asylum Seekers in South Africa: A Review of Refugee Status Denials Involving Sexual Orientation, The Legal Resources Centre.

Treatment or Punishment (CAT) and the UN's International Covenant on Civil and Political Rights (CCPR). Several LGBTQIA+ refugee and asylum cases have been brought globally for being in violation of articles of those two treaties.⁹⁷

Article Three of the CAT states that “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁹⁸ A violation of this was argued in 2013 in *J.K. v Canada* CAT/C/56/D/562/2013. In *J.K.*, the complainant was a gay Ugandan man who had fled to Canada following years of persecution. In 2007, he participated in a public gay rights demonstration near Kampala. Riot police arrested him, handcuffed him, beat him, and brought him to an interrogation room where they tortured him for three days for information on how the demonstration had been planned and for “promoting bad morals in Ugandan society.” He continued to receive threats, and in 2008 took a job in Iraq to escape Uganda. When his contract ended in 2010, he was forced to return home. When he returned to Uganda, Parliament was debating an anti-homosexuality bill which “would give the Government the legal right to imprison and torture gays.”⁹⁹ He fled to Canada on October 14th, 2010, and filed an application for refugee status four months later. The delay occurred because it took him four months to learn about and understand the process of asylum in Canada. His refugee application was denied in October 2012 because the Refugee Protection Division found that he was not a person in need of protection by Canada. His application for judicial review was similarly dismissed the next year.¹⁰⁰

J.K. argued that should Canada return him back to Uganda, he would certainly be tortured and killed and that this action would be in violation of Article 3 of the UN's Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. The Committee agreed, considering factors including the complainant's sexual orientation, his militancy in LGBTQIA+ organizations, and a criminal charge that had been levied against him in Uganda for his sexuality.¹⁰¹ On the facts, the

⁹⁷ Specifically, cases have been brought for being in violation of Article Three of the CAT and Article Seven of the CCPR. Both articles protect against torture. <https://juris.ohchr.org/SearchResult>

⁹⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading#:~:text=justification%20of%20torture.-,Article%203,of%20being%20subjected%20to%20torture.>

⁹⁹ *J.K. v Canada*, CAT/C/56/D/562/2013

¹⁰⁰ *Id.*

¹⁰¹ The charge was for failing to appear in court to answer a charge of “having carnal knowledge against nature.”

Committee (acting under Article 22(7) of the Convention) determined that the complainant's removal to Uganda by the State party would be a breach of Article Three of the Convention. Accordingly, Canada had an obligation to refrain from returning the complainant to Uganda or any other country where he would face a real risk of being returned to Uganda.¹⁰²

Article Seven of the International Covenant on Civil and Political Rights (CCPR) states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." LGBTQIA+ asylum seekers have similarly brought claims under Article Seven of the CCPR.¹⁰³

In *M.K.H. v Denmark* CCPR/C/117/D/2462/2014, the complainant was a failed Bangladeshi asylum seeker who faced deportation from Denmark.¹⁰⁴ From 2010-2011, M.K.H was in a same-sex relationship with a childhood friend. One night, they were caught together in a rice field and were subsequently brought to a village council where they were tortured.¹⁰⁵ Homosexuality is illegal in Bangladesh, and as such M.K.H. was expelled from his family and village and threatened with death if he returned.¹⁰⁶ M.K.H fled to different cities in Bangladesh before moving to India and finally, Europe. On February 3rd, 2021, he arrived in Denmark without valid travel documents and applied for asylum.¹⁰⁷ His claim was rejected for being not credible and that several aspects of his explanations were "unreliable." They also determined that "even if he were homosexual" the State could not conclude that "he would be at risk of persecution upon his return to Bangladesh" as the law that criminalizes homosexual acts is often not applied in practice.¹⁰⁸ M.K.H appealed the decision, but his rejection was upheld as the Board similarly found his allegations to not be credible.¹⁰⁹ Since the decision could not be appealed to the Danish Courts, M.K.H faced deportation and approached the UN Committee.

¹⁰² Id. This approach is not always successful as seen in *H.S v Denmark* in which a lesbian woman from Uganda made the same claims as in *J.K.* and was denied an order against removal.

¹⁰³ International Covenant on Civil and Political Rights, 1966, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

¹⁰⁴ *M.K.H. v Denmark* CCPR/C/117/D/2462/2014

¹⁰⁵ Id. Methods of torture included hanging from a tree, having hot water poured on them, and being beaten on the soles of their feet.

¹⁰⁶ His partner returned later to visit his sister and was subsequently tortured and killed.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Id.

The Committee determined that since the Immigration Service and the Review Board had found M.K.H.'s homosexuality "suspicious," they erroneously disregarded his allegations of torture, exile, death threats, and the fact that no protection could be expected from Bangladeshi authorities.¹¹⁰ In doing so, they failed to consider his version of the events in Bangladesh and arbitrarily dismissed his claims. Under those circumstances, the Committee found that M.K.H.'s deportation back to Bangladesh would be a violation of Article Seven of the Covenant.

While the facts of both cases discussed here are relatively extreme, it is important to note that there have been successful cases brought by LGBTQIA+ asylum seekers under Article Three of the CAT and Article Seven of the CCPR. Additionally, *M.K.H.* provides insight into standards of credibility. Because South Africa has ratified these two treaties, if cases were brought under them, South African courts may find the UN's jurisprudence influential.

6. FOREIGN CASE LAW

Foreign case law is not binding on South African courts; however, it may prove persuasive as section 39(1)(c) of the Constitution allows South African courts to consider foreign case law when deciding domestic matters.¹¹¹ For that reason, in this section, I will outline important case law from foreign courts regarding the issues discussed above. I will not discuss every case found, for a more robust list of cases, please see the bibliography.

In *Karouni v Gonzales* (2005) 399 F 3d 1163, the US Court of Appeals upheld an appeal by a Lebanese applicant who claimed he would face persecution were he to return to Lebanon because of his sexuality. They determined that sexual identity was a fundamental characteristic integral to human freedom.¹¹² This provides a basic rationale for sexuality being a protected status.

In *HJ (Iran) and HT (Cameroon v Secretary for the Home Department* [2010] UKSC 31, the Supreme Court of the United Kingdom ruled that asking an LGBTQIA+

¹¹⁰ *Id.*

¹¹¹ *The South African Constitution, Section 39(1)(c).*

¹¹² *Karouni v Gonzales* (2005) 399 F 3d 1163

individual to conceal their identities to avoid persecution and harm was incompatible with rights afforded by the 1951 Refugee Convention.¹¹³ It also confirmed the American *Karouni* ruling in stating that sexuality was an intrinsic part of a person's identity and that they should be free to express it, and yet a person did not need to be openly gay in their home country to apply for asylum.¹¹⁴ Additionally, the case laid out a potential test to be adopted by fact-finding tribunals when determining the merits of an LGBTQIA+ asylum application.¹¹⁵ These findings have wide-reaching implications regarding the rights of LGBTQIA+ refugees and the basis on which claims should be adjudicated.

7. OVERVIEW

1. Problems in South Africa Remain Consistent Globally

Many of the issues faced by LGBTQIA+ refugees and asylum seekers in South Africa are strikingly ubiquitous across global asylum regimes. Namely, asylees having trouble navigating the immigration system, biases of government officers, and issues of credibility regarding claims and concealment of identity.

2. Navigating the System

Many asylum seekers live illegally and delay their applications because they are unaware of how the asylum system operates and what rights they have. Often, there are language barriers that make the process even more difficult.

3. Bias

Bias is a problem among officials globally. Lack of knowledge, social acceptance, and reliance on stereotypes hinders the asylum process and presents challenges for LGBTQIA+ asylum seekers.

4. Credibility and Concealment

As is the case in South Africa, to be recognized as a refugee under international frameworks, applicants must convince decision-makers that their sexual orientation or gender identity is genuine, that they face persecution because of it, and because they

¹¹³ *HJ (Iran) and HT (Cameroon v Secretary for the Home Department* [2010] UKSC 31

¹¹⁴ *Id.*

¹¹⁵ *Id.*

lack protection in their country.¹¹⁶ This can be difficult to prove, as applicants may not conform to stereotypes and may not be able to get empirical evidence of their persecution. In the *M.K.H.* case, the applicant did not have much evidence besides his own testimony. Later, he presented the board with a newspaper article alleging his mother's suicide due to his homosexuality as evidence and was still denied asylum based on his credibility.¹¹⁷

8. RECOMENDATIONS

8.1. Addressing Problems on a Global Scale

To effectively combat the issues faced by refugees and asylum seekers, it is essential to establish and implement global training standards for immigration officials. These standards should focus on sensitivity, inclusivity, and a deep understanding of the unique challenges faced by LGBTQIA+ refugees. Such training is not merely beneficial but crucial for ensuring that all individuals are treated with dignity and respect, regardless of their sexual orientation or gender identity. This could include sensitivity training and inclusivity practices.

8.2 Navigating the System

The government must implement comprehensive programs and initiatives that clearly explain the application process for refugees and asylum seekers. Relying solely on human rights organizations to run these programs is insufficient. Additionally, it is imperative that translators and interpreters are readily available at every Refugee Reception Office. This will ensure that refugees can communicate effectively in their native languages and within the context of their cultural backgrounds, facilitating better understanding and support. The government and human rights organizations need to work hand in hand in eliminating the barriers that exist for refugees and asylum seekers.

8.3. Bias

¹¹⁶ Jordan and Morrissey, "On what Grounds: LGBT Asylum Claims in Canada," <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/sogi/jordan-morrissey.pdf>

¹¹⁷ *M.K.H. v Denmark* CCPR/C/117/D/2462/2014

DHA officials must receive thorough and specialized training to handle refugee matters with the utmost compassion and understanding. The journey of many refugees and asylum seekers is fraught with traumatic experiences, often involving persecution, violence, and severe hardship. When these individuals seek refuge, it is critical that DHA officials receive them with humility, dignity, and respect.

Training should include sensitivity to the psychological and emotional scars that refugees carry, ensuring that officials are equipped to provide support in a manner that is empathetic and non-judgmental. Furthermore, addressing the issue of bias and discrimination within the DHA is crucial. Refugees, particularly those from the LGBTIA community, frequently face additional layers of prejudice and hostility. Specialized training should aim to eradicate these biases, fostering an environment where all refugees, regardless of their sexual orientation or gender identity, are treated with fairness and respect.

Implementing such training programs will not only improve the overall experience of refugees and asylum seekers but also ensure that the DHA upholds the highest standards of human rights and equality. This comprehensive approach will contribute to a more inclusive and supportive system for all individuals seeking asylum and refuge.

8.4. Credibility and Concealment

To address the challenges of credibility and concealment in asylum claims, especially for LGBTQIA+ applicants, a multifaceted approach is required. This involves enhancing training for decision-makers to include comprehensive education on the unique challenges faced by LGBTQIA+ refugees, incorporating a trauma-informed approach, and broadening the types of evidence accepted to include personal testimonies, affidavits, and reports from LGBTQIA+ organizations. Additionally, decision-makers should utilize detailed Country of Origin Information (COI) reports and focus on individualized assessments rather than stereotypes. Psychological evaluations should be incorporated to attest to the credibility of the applicant's experiences. Furthermore, it is crucial to provide safe and confidential environments for testimonies, ensuring applicants can share their stories without fear of retribution or exposure. By implementing these strategies, the asylum process can become more just and supportive for LGBTQIA+ refugees.

9. CONCLUSION

While there is not a copious number of cases from South African jurisprudence focusing on LGBTQIA+ asylum seekers, the cases I found coupled with the data gathered from the numerous studies, dissertations, and articles paints a bleak picture of the state of the asylum process in South Africa. South Africa faces many of the same problems as the international community regarding asylum for LGBTQIA+ people, but it is clear the practical application of South Africa's lofty ideals leaves much to be desired.

There are many factors to be considered by Refugee Reception Officers when determining the merit of an LGBTQIA+ asylum seeker's case. In addition to current information on the socio-political situation in the applicant's country of origin, some factors that must be considered by the state are: the criminalization of LGBTQIA+ status in the applicant's home country, whether the state must provide state protection against non-state persecution, whether the applicant could have sought internal protection, whether the applicant concealed their sexual orientation or gender identity, whether their identity and persecution are credible, and whether they made a late disclosure of sexual orientation or gender identity.¹¹⁸ This can be a lot for the state to manage, especially when officers may be biased, not properly trained, and overworked. This, along with corruption, creates even more vulnerabilities for LGBTQIA+ asylum seekers and refugees.

Most of the data that has been gathered regarding the experiences of LGBTQIA+ asylum seekers in South Africa have been qualitative and not quantitative. This allows governmental bodies to treat serious miscarriages of justice as isolated incidents not indicative of larger systemic problems.¹¹⁹ However, it is clear from studies and case law that LGBTQIA+ refugees and asylum seekers are not given sufficient protection on a global scale.

¹¹⁸ Aurre, "LGBTQ issues of the right to asylum and the refugee status, Charles University, 2019. <https://dspace.cuni.cz/bitstream/handle/20.500.11956/109288/120343100.pdf?sequence=1>

¹¹⁹ "Major New Study on LGBTIQ+ migrants and asylum seekers, 2023. <https://www.wits.ac.za/news/latest-news/opinion/2023/2023-03/major-new-study-on-lgbtq-migrants-and-asylum-seekers-.html>

REFERENCE LIST

a. South African Cases

- i. *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs and Others* [2023] ZACC 45.

1. Finding that subsections 22(12) and 22(13) of the Refugees Act of 1998 was constitutionally invalid retrospective to 1 January 2020, the date the subsections came into effect.
- ii. *Ruta v Minister of Home Affairs* [2018] ZACC 52
 1. Finding that *Kumah* must be overruled, and that until the right to seek asylum is afforded and a proper determination procedure is engaged and completed, the Constitution requires that the principle of non-refoulement as articulated in Section Two of the Refugees Act must prevail. The “Shield of non-refoulement” may be lifted only after a proper determination has been completed. Then the Immigration Act may apply.
- iii. *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9
 1. Finding that Refugee Reception Officers have the power to extend the section 22 permit and that the principle of non-refoulement dictates that, until judicial review proceedings have been finalized, there must be a permit in place.
- iv. *Van Garderen N.O. v Refugee Appeal Board and Others*
 1. Finding that lower standard of proof is required for asylum adjudications as compared to civil proceedings. Applicants do not need to provide irrefutable proof that their lives are in danger. Additionally, Status Determination Officers must consider applicants’ testimonies alongside other reliable, objective evidence when deciding whether to grant an applicant’s petition. Moreover, Refugee Status Determination Officers have a duty to gather additional evidence to help them assess the validity of a claim.
- v. *Tantoush v Refugee Appeal Board and Others* [2007] ZAGPHC 191
 1. Finding that asylum applicants only needed to show a “reasonable possibility of persecution” to qualify for protection. It also reiterated the fact that both applicants and Refugee Status Determination Officers must share the responsibility of presenting and evaluating the relevant facts.

vi. *Makumba v Minister of Home Affairs and Others* [2014] ZAWCHC 183

1. Finding that although an asylum seeker had been dishonest regarding her reasoning for fleeing her home country, she was not barred from bringing up the true reason later in the process. Her dishonesty could be used as a data point for assessing the credibility of her claim. She was to be re-interviewed considering the new claim.

vii. *Mafadi and Another v The Minister of Home Affairs and Another* [2021] ZAGPJHC 141

1. Finding that the applicants (a gay couple from Uganda) had not waived their right to apply for asylum and were being deprived of their liberty by being incarcerated at the Lindela Detention Center. The court ordered them to be released, however, they could still be ordered to report to a Refugee Reception Office to apply for asylum.

viii. *Mayemba v Chairperson of Standing Committee for Refugee Affairs and Others* [2015] ZAWCHC 86

1. Finding that there were procedural defects in the asylum process on the part of the government and that Mr. Mayemba's application was not a fair and accurate representation of his case. As such, he must be afforded the opportunity to present a new application.

ix. *Abdi v Minister of Home Affairs* [2011] ZASCA

1. Finding that the appellants who had recognized refugee and asylum seeker status did not lose that status by leaving for another country without informing authorities. Additionally, refusing a refugee entry to the country and exposing them to the risk of persecution is against the fundamental values of the Constitution. Finally, the government's officials failed to understand the purpose of the Act that it was their duty to apply, causing unnecessary litigation.

x. *Arse v Minister of Home Affairs* [2010] ZASCA 9

1. Finding that the Refugees Act and Immigration Act must be read in tandem and that the detention of a refugee under section 34(1) of the Immigration Act was unlawful and impermissible where a refugee had applied for asylum in

terms of the Refugees Act. The refugee was protected from arrest, detention, and deportation.

xi. *Bula & others v Minister of Home Affairs & Others* [2011] ZASCA 209

1. Finding that it is Refugee Status Determination Officers, not judges, who determine the merits of an application for asylum and a Refugee Reception Officer is obliged to accept an application for asylum and, if required, must assist an applicant to complete the necessary forms.

xii. *Ersumo v Minister of Home Affairs* [2012] ZASCA 31

1. Finding that an asylum seeker can rely on the Refugees Act at any stage and a delay in indicating a wish to apply for asylum is not a ground for preventing an asylum application.

b. International Cases

xiii. *Toonen v Australia*

1. Finding that “criminalization of same-sex sexual activity is a violation of human rights. LGBTI+ persons are entitled to privacy, meaning that states should not interfere with sexual encounters between consenting adults. Undermining an LGBTI+ person’s right to privacy, either through discriminatory laws or community/state actions, constitutes an act of persecution.”¹²⁰

xiv. *J.K. v Canada*, CAT/C/56/D/562/2013

1. Finding that given the applicant’s specific circumstances, returning him to Uganda would amount to a violation of Article Three of the CAT.

xv. *H.S. v Denmark*, CAT/C/71/D/792/2016

1. Finding that given the applicant’s specific circumstances, returning her to Uganda would not amount to a violation of Article Three of the CAT.

xvi. *X. v Sweden*, CCPR/C/103/D/1833/2008

1. Finding that the state had violated its obligation under Articles Six and Seven of the CCPR and had to provide the

¹²⁰ LGBTI+ Asylum Seekers in South Africa: A Review of Refugee Status Denials Involving Sexual Orientation, The Legal Resources Centre.

author with an effective remedy which would include taking measures to facilitate his return to Sweden.

xvii. *M.K.H. v Denmark*, CCPR/C/117/D/2462/2014

1. Finding that the applicant's deportation back to Bangladesh would be in violation of Article Seven of the CCPR.

xviii. *K.S.Y. v Netherlands* CAT/C/30/D/190/2001

1. Finding that the applicant did not substantiate his claim that he would be subjected to torture upon return to Iran and therefore concluded that his removal would not constitute a breach of Article Three of the CAT.

xix. *M.I. v Sweden* CCPR/C/108/D/2149/2012

1. Finding that under the complainant's specific circumstances, removal to Bangladesh would result in a violation of her rights under Article Seven of the CCPR.

xx. *W.K. v Canada* CCPR/C/122/D/2292/2013

1. Finding that although the state party did not believe the applicant's claim that he was in fact homosexual, the applicant did not show that they were arbitrary or manifestly erroneous. The applicant failed to demonstrate he would be at a real risk if he was returned to Egypt and therefore removal would not violate his rights under Article Seven of the CCPR.

xxi. *H.R.E.S. v Switzerland*

1. Finding that the information submitted by the complainant was insufficient to establish his claim that he would face a foreseeable, real, personal, and present risk of torture if he were removed to Iran. Thus, his removal would not constitute a violation of Article Three of the CAT.

c. Foreign Cases

xxii. *Karouni v Gonzales* (2005) 399 F 3d 1163

1. Finding that asylum applicants cannot be asked to conceal their sexual orientation and that there is no "appreciable difference between... being persecuted for being a homosexual and being persecuted for engaging in homosexual acts."

xxiii. *L.C. (Albania) v Secretary of State for the Home Department v UN High Commissioner for Refugees*

1. Finding that being forced to conceal one's sexual orientation to avoid persecution is prima facie evidence of having a well-founded fear of persecution.
- xxiv.** *HJ (Iran) and HT (Cameroon v Secretary for the Home Department* [2010] UKSC 31
1. Finding that sexuality is an intrinsic part of identity and applicants should not be forced to conceal their sexuality. Moreover, applicants cannot be expected to return to their country of origin if they must conceal their identity to remain safe.
- xxv.** *McKenzie v Canada*, 2019 FC 555
1. Finding that the Immigration and Refugee Board and Refugee Appeal Division failed to show an appreciation of the complainant's life story, personal profile, and circumstances when considering his asylum application and their decision was therefore unreasonable
- xxvi.** *McIntyre v Canada*, 2016 FC 1351
1. Finding that an attorney who did not provide any country condition reports about the risks faced by gay men in Jamaica amounted to negligent representation and resulted in a breach of procedural fairness.
- xxvii.** *Ravichandran v Canada*, 2015 FC 665
1. Finding that consistency is a hallmark of credibility, and it is not unreasonable to draw a negative inference to credibility from unwarranted similarities between a refugee claimant's narrative and the narrative of other unrelated claimants. However, officers must "use their common sense to determine whether...there is a valid reason for the similarity." If a valid reason exists, it is unreasonable to find that similarity casts doubt on an applicant's credibility.
- xxviii.** *X (Re)*, 2017 CanLII 61319 (CA IRB)
1. Finding that in this case, the Refugee Protection Division erred in not extending a "presumption of truth" regarding LGBTQIA+ asylum seekers. Further, the decision of the Refugee Protection division was set aside and substituted with the determination that the appellants were Convention refugees.

xxix. [List of Cases and Findings from Europe by the European Union Agency for Asylum](#)

The Constitution of the Republic of South Africa, 1996

[Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications](#) – Sabinet African Journals, Ruvi Ziegler 2020

Refugees Act No. 130 of 1998 ([Refugees Act](#))

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees ('the UNHCR Handbook') Geneva, January 1992

O.N v Chairperson of the Standing Committee for Refugee Affairs and Others (15376/16) [2017] [ZAWCHC 57](#) (16 May 2017)

International Criminal Court Statutes

Refugees Act of 1998 Refugee Regulations of 2019 ([Refugees Act Regulations](#))

[LGBTI+ Asylum Seekers in South Africa: A Review of Refugee Status Denials Involving Sexual Orientation & Gender Identity](#), Legal Resources Center

The Promotion of Equality and Prevention of Unfair Discrimination Act ([PEPUDA](#))

[Discrimination and Violence on the Basis of Sexual Orientation, Gender Identity, and Expression \(SOGIE\) in South Africa](#) – South African Human Rights Commission

The Promotion of Administrative Justice Act 3 of 2000 ([PAJA](#))

[Colonialism and Sexual Orientation and Gender Identity: South Africa](#) – OHCHR, Dr. Claire Stephanie Westman 2023

[Terms of Reference for National Task Team on Gender and Sexual Orientation-Based Violence Perpetrated Against LGBTI Persons](#) – Department of Justice and Constitutional Development in South Africa

[Gay refugees denied asylum by Home Affairs Bigotry](#) – Ground Up, April 2021



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