

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

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APRIL 2021

Contents

Acknowledgements	02
Introduction to the organisations	03
Notes on terminology	05
Abbreviations	07
Introduction and overview	09
Legal context	11
The asylum process in South Africa	17
Lived experiences of LGBTI+ asylum seekers	21
Relevant asylum case law	23
Project summary	28
Analysis of RSDO letters for LGBTI+ applicants	34
Summary of findings	61
Key recommendations	64
Appendix A: Table summarising the findings	65
Appendix B: Consolidated responses to the Refugees Amendment Act and Regulations	66
Appendix C: Examples of persecutory laws	68
Appendix D: Glossary	73
Notes	76

Acknowledgements

We would like to thank the following people and organisations for their invaluable contributions to this project:

- The LGBTI+ asylum seekers who generously shared their experiences and/or legal documents with the research team. Many of these individuals were motivated by a desire to improve the asylum process for other LGBTI+ applicants. We recognise the courage it took to reflect on painful and often traumatic encounters with South Africa's border regime.
- The Scalabrini Centre of Cape Town and the University of Cape Town Refugee Rights Clinic for sharing data and crucial insights.
- Efemia Chela for her editorial expertise.
- Charlene May, Bongwiwe Gumede, Busisiwe Deyi and Patricia Schnell for their role in the preliminary crafting of this project.
- Dr Roni Amit, Sherylle Dass, Sally Gandar and Estian Smit for providing feedback on early drafts.
- Willson Tarusarira, Alex Goldfarb, Liliya Paraketsova, Cathy Peterson and Kelsey VanOverloop for providing research support.
- Fortaleza Agency (Pty) Ltd for their work designing the report.
- The University of Michigan's Rackham Public Scholarship Grant for funding the development, production and launch of the report.

Introduction to the Organisations

The Legal Resources Centre (LRC) was established in 1979. It is a South African-based human rights organisation with offices in Johannesburg, Durban, Makhanda and Cape Town. The organisation uses the law as an instrument of justice for vulnerable and marginalised persons, including those who are poor, homeless and landless. The LRC also works with individuals and communities who suffer discrimination due to race, class, gender, sexuality and/or disability, or because of social, economic and historical circumstances. The organisation provides legal advice and representation on issues relating to forced migration, with a specific focus on asylum protection and legislative reform affecting non-South African nationals. LRC participates in advocacy, public educational efforts and legal reform in this domain. The Cape Town clinic receives high volumes of walk-in clients seeking legal assistance, many of whom are asylum seekers and refugees.

www.lrc.org.za

Women's Legal Centre (WLC) is an African feminist law centre, established over 20 years ago, which seeks to advance women's rights to substantive equality by using the law. The WLC drives a feminist agenda that is aimed at dismantling the impact that discrimination has on women within their different classes, races, ethnicities, sexual orientations, gender identities and disabilities, among others. The work of the Centre aims to challenge the multiple intersecting forms of disadvantage that women face on a daily basis in order to develop feminist jurisprudence that recognises and advances women's rights. In order to achieve its objectives the Centre uses different methodologies including strategic and impact litigation, legal advocacy, research, education and training. The Centre does its work across five programmatic areas including the right to be free from violence, equality in relationships, and women's rights to land, housing property and tenure security, women's sexual and reproductive health rights and women's rights to work and fair working conditions.

www.wlce.co.za

The African Centre for Migration and Society (ACMS) is Africa's leading scholarly institution for research and teaching on human mobility. Established in 1993, the ACMS is an independent, interdisciplinary and internationally engaged centre focusing on the legal, social, political and discursive dimensions of human movement. The ACMS also houses the African LGBTQI+ Migration Research Network (ALMN), which aims to advance scholarship on all facets of LGBTQI+ migration. ALMN brings together scholars, researchers, practitioners, activists and service providers to spark critical conversations, promote knowledge exchange, support evidence-based policy responses, and initiate effective and ethical collaborations.

www.migration.org.za | www.almn.org.za

People Against Suffering, Oppression and Poverty (PASSOP) was founded in 2007 to provide paralegal assistance to refugees, asylum seekers and foreign nationals living in South Africa. PASSOP is staffed by non-South Africans who are committed to uplifting and empowering their communities through collaboration with civil society, activist networks, social movements, research institutions and global funders. The organisation works most closely with LGBTI cross-border migrants, refugees and asylum seekers, especially those seeking legal status in South Africa. In addition to offering paralegal services to this population, PASSOP organises psychosocial and financial support. The organisation is developing its collaborations across the African continent, in efforts to build support for those marginalised by nationality, sexuality and gender.

www.passop.co.za

Notes on terminology

This report uses the terms 'LGBTI+ refugees' or 'LGBTI+ asylum seekers' to refer to people who have applied for, or were eligible to apply for, refugee status in South Africa on the basis of persecution related to sexual orientation or gender identity (SOGI). The legal and identity categories used in this report are imperfect. With this in mind, we base our primary terminology – 'LGBTI+ asylum seekers' – on how applicants self-identified when engaging legal clinics. We also use the term 'SOGI asylum seekers' as this is commonly used in the international legal and research fields.

The individuals referenced here self-identified as lesbian, gay, bisexual, transgender or LGBTI when accessing legal support. To our knowledge, no applicants described themselves as intersex. While it may be true that no one in the sample is intersex, it is worth highlighting the reasons why a person may not disclose such information about themselves, such as embarrassment stemming from entrenched misconceptions, a lack of familiarity with Western terminology and/or categories (many intersex persons on the African continent are erroneously referred to as gay or transgender) or because they have not been provided with accurate medical information. There is also a general lack of recognition of intersex issues in South African legislation or refugee case law. For these reasons, we have decided to include intersex issues in the following discussion. We do so to avoid erasing the experiences of intersex asylum seekers and thus contributing to the invisibility of such applicants.

Our decision to use 'LGBTI+' was motivated by two factors. First, as highlighted above, some individuals specifically used this term in reference to themselves. Second, because other identity categories – lesbian, gay, bisexual, transgender and intersex – are in theory encompassed by this acronym. We include definitions of these terms in Appendix D.

We add a plus symbol (+) to the acronym in recognition that there may be more identities represented in this sample than we are aware of – identities that do not have English equivalents, that are yet to be named, or that people experience more saliently in certain locales or at certain periods of time. It is also possible that applicants included in this dataset identify differently today than how they did when approaching the Department of Home Affairs (DHA) or a legal clinic. Furthermore, the identity categories referred to in this report are embedded within Western ontological formations and therefore carry within them colonial and neo-colonial undertones. Words like 'transgender' can at best only partly encompass the experiences of gender-diverse persons who move between countries in the Global South.¹ For us, the plus symbol acknowledges fluid and shifting sexual/gender identities and expressions, beyond those captured by the named categories.

The LGBTI+ acronym often conflates the experiences and identities of those it purports to represent. Our intention is to hold together this group of asylum applicants for the sake of identifying legal flaws in SOGI-based adjudications. Our intention is not to conflate the experiences of members of this group. To that end, we aim to distinguish trends in asylum adjudication for different members across the sample.

Next, the LGBTI+ people whose documents are analysed here often refer to themselves as refugees – even though they are in legal offices precisely because the South African state has denied them that status. Most applicants represented in this sample are indeed refugees under international law. *The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR Handbook) states that a person is a refugee as soon as they fulfil the criteria outlined in the 1951 Convention and the 1967 Protocol (e.g. they fled persecution and moved across an international border). This often occurs prior to recipient countries' administrative processes. In South Africa, however, the Refugees Act classifies a person who has sought protection but not received formal recognition as an 'asylum seeker'. Like our clients and research participants, we use the terms 'LGBTI+ refugee' and 'LGBTI+ asylum seeker' interchangeably. In doing so, we allude to the failure of legal categories to reflect individuals' self-identifications and lived experiences.

Finally, refugees and asylum seekers are distinct from cross-border migrants. The latter term refers to people who have crossed a national boundary and not sought legal recognition, or who have sought legal recognition under the immigration system rather than the asylum system. Due to the South African asylum system's myriad shortcomings, many LGBTI+ people are pushed into the immigration system, even if their impetus for coming to South Africa stems in whole or in part from a well-founded fear of persecution. Naturally, many asylum seekers start families while waiting for their refugee applications to be adjudicated – a process that can take years, if not decades. This can force them to consider alternative documentation pathways within the immigration system. Immigration documentation options are understood to offer more permanent, flexible and humane solutions (such as permanent residence status) and are therefore preferable for most people, especially those with families. Given the scope and limitations of this research, we are unable to capture the legal experiences of all LGBTI+ people who seek legal recognition and/or a home in South Africa.

Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
Constitution	The Constitution of the Republic of South Africa (1996)
DHA	Department of Home Affairs
LGBTI+	Lesbian, gay, bisexual, transgender and intersex – inclusive of other identity formations, categories and labels
OAU Convention	Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa
PAJA	The Promotion of Administrative Justice Act 3 of 2000
PEPUDA	The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
RAA	Refugee Appeals Authority
RAB	Refugee Appeal Board (former name of RAA)
Refugees Act	Refugees Act No. 130 of 1998
Refugees Act Regulations	Refugees Act of 1998 Refugee Regulations of 2019
Refugees Amendment Act	Refugees Amendment Act No. 11 of 2017
RRO	Refugee Reception Office
RSDO	Refugee Status Determination Officer
SCRA	Standing Committee for Refugee Affairs
SOGI	Sexual orientation and gender identity

SOGI Guidance Note	<i>UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity</i>
TIRRO	Tshwane Interim Refugee Reception Office
UNHCR	United Nations High Commissioner for Refugees
UNHCR Guidelines	<i>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</i>
UNHCR Handbook	<i>United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status</i>
Yogyakarta Principles	<i>Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity</i>
1951 Convention	United Nations 1951 Convention on the Status of Refugees
1967 Protocol	United Nations 1967 Protocol Relating to the Status of Refugees

Introduction and overview

South African law provides for asylum on the basis of persecution related to sexual orientation and gender identity (SOGI). This report reviews 67 denial letters² written by Refugee Status Determination Officers (RSDOs) on behalf of 65 applicants who identify as lesbian, gay, bisexual, transgender and/or intersex (LGBTI+). The letters were issued by 32 RSDOs at 5 Refugee Reception Offices (RROs) – Cape Town, Musina, Port Elizabeth, Pretoria and Tshwane³ – between 2010 and 2020.

Our goal in reviewing these refugee status denial letters (RSDO letters) is to identify trends and potential shortcomings in the adjudication of SOGI-based refugee applications. While we accept that not all applicants can be granted refuge in South Africa, we are concerned by the high rate of denials for this population group, as evidenced in both anecdotal accounts (such as those given by clients at PASSOP and the LRC) and peer-reviewed research (see ‘Lived experiences of LGBTI+ asylum seekers’ section of this report). We contend that some of the individuals in this dataset were eligible for protection under international and domestic law.

This report is intended to serve as a resource for researchers, lawyers, service providers and civil society organisations, as well as for LGBTI+ persons seeking protection in South Africa. In sharing the findings of our review, we hope to spotlight some of the legal, administrative and bureaucratic barriers preventing LGBTI+ asylum applicants from being formally recognised. In addition to making available much-needed empirical data, we hope to provide contextual information that can assist in the preparation of appeal documentation (for example, relevant case law and international guidelines).

We do not assume a deep knowledge of the South African asylum system or of LGBTI+ rights and experiences on the African continent. Before sharing our findings, we present an overview of domestic and international law, as well as information about the process of applying for asylum. This information is designed to help those navigating the asylum system to understand their rights and responsibilities. We also include a glossary of relevant terms and concepts (Appendix D).

In reviewing the RSDO letters, we find evidence of DHA officials falling short of a number of legal obligations. The denials analysed here contravene elements of the Refugees Act 130 of 1998 (Refugees Act), the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). By failing to comply with these laws, RSDOs violate applicants' rights as outlined in the Constitution of the Republic of South Africa (the Constitution). We also identify serious misapplications of international law.

While it is relatively easy to identify legal, administrative and bureaucratic shortcomings within the dataset, it is less clear how or why these often egregious misapplications of law have occurred. Indeed, it is impossible to determine the exact motivations of the RSDOs from the letters alone. What we can say with confidence is that the RSDOs whose work is analysed in this report failed to observe key legal principles when adjudicating SOGI-based asylum claims. In sharing our analysis, we hope to support efforts to ensure LGBTI+ applicants are treated in a humane and dignified manner and, ultimately, that they receive fair adjudications. We do so in recognition of the immense challenges faced by RRO employees – for example, inadequate staffing, limited exposure to SOGI issues and language/cultural barriers – as well as attempts by the state to address corruption, xenophobia and structural inequality within DHA. However, these challenges do not excuse the South African state from meeting its domestic and international obligations.

It is our hope that the findings outlined here will accelerate efforts to address discrimination against LGBTI+ asylum seekers. Accordingly, we call on DHA to instigate a SOGI sensitisation programme for all employees, to provide substantive legal and research training for those who adjudicate asylum applications, to review its internal policies and procedures, to institute internal checks on status denials and to forge ongoing collaborations with civil society and other key stakeholders. These steps will ensure that RRO staff, including RSDOs, comply with domestic and international law when assisting LGBTI+ persons.

Legal context

South Africa is bound by international and domestic law to extend refugee protection to individuals with a well-founded fear of SOGI-based persecution. This section provides an overview of laws that secure this right.

South African law

The Constitution of the Republic of South Africa⁴

Section 9 of the Constitution – part of the Bill of Rights – secures equality for all persons within the borders of South Africa, regardless of nationality or documentation status.⁵ It prohibits discrimination based on (among other things) race, gender, sex, sexual orientation, ethnic or social origin, disability, religion, culture and language. The Constitution states unequivocally that this provision applies to state and non-state actors alike. This means that neither private individuals nor state entities may engage in unfair discrimination. In a landmark judgement from 1998, known as *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, the Constitutional Court interpreted the meaning of ‘sexual orientation’, ruling that it extends to people who are ‘bisexual or transsexual and also applies to the orientation of persons who might on a single occasion be erotically attracted to a member of their own sex.’⁶

Many other rights are guaranteed in the Constitution, including a number that apply directly to LGBTI+ asylum seekers (as well as other vulnerable populations). Sections 10 and 12 provide for human dignity, freedom and security of the person, while sections 26, 27 and 29 enshrine the rights to healthcare, food, water, social security, education and housing. Other key rights are outlined in sections 32 and 33, which secure an individual’s access to information and fair administrative action, respectively. As with all the protections in the Bill of Rights, these clauses apply to everyone within South Africa’s borders, not just citizens.

Finally, sections 39 and 233 of the Constitution state that courts, tribunals and forums must consider international law when interpreting the Bill of Rights. Foreign law may also be taken into consideration, but this is not a requirement.

The Refugees Act⁷

When read in conjunction with the Constitution, the Refugees Act establishes the legal basis for claiming protection on the basis of SOGI.⁸ To qualify for refugee status in South Africa, a person must have ‘a well-founded fear of being persecuted by reason of his or her race,

tribe, religion, nationality, political opinion or membership of a particular social group.’ They must also be outside of their country of origin and be ‘unable or unwilling to avail ... [themselves] to the protection of that country.’ The Refugees Act defines a ‘social group’ as ‘persons of particular *gender, sexual orientation, disability, class or caste*’ (emphasis added).

The Refugees Act requires South Africa to extend protection to individuals who have a well-founded fear of SOGI-based persecution. This applies to those who identify as LGBTI+ and to those who are perceived by others to be LGBTI+. Crucially, section 2 of the Refugees Act specifies that South Africa cannot repatriate individuals to countries where they may reasonably fear persecution. An example of this is sending an LGBTI+ person to a country that has homophobic and/or transphobic laws. This prohibition is known as the principle of non-refoulement.

On 1 January 2020, two important pieces of legislation came into effect: the Refugees Amendment Act 11 of 2017 and the Refugees Act Regulations of 2019. The amended Refugees Act provides the legislative framework for refugee protection in South Africa, whereas the Regulations explain how the provisions of the Act are to be applied and implemented. This means the Regulations are subsidiary to the Act – in other words, they cannot extend beyond what is provided for in the Act. Both the amended Act and the Regulations make it more difficult for a person to claim asylum in South Africa and harder for them to stay legally documented once here. Of particular concern is a new rule that prohibits people with criminal records from applying for asylum. This may unfairly exclude LGBTI+ persons from accessing protection, given that same-sex sexual activities are criminalised across most of the continent (see Appendix C). The amended Act also makes it harder for asylum seekers to work and study in South Africa. These are just two examples of how the new provisions may limit potential asylum seekers’ rights under international law. In Appendix B, we provide an overview of concerns raised by refugee advocacy organisations about these legal changes.

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)⁹

PEPUDA gives effect to section 9 of the Constitution, which prohibits state and non-state actors from discriminating against any person living in South Africa. Section 6 prohibits discrimination based on gender, sex and sexual orientation (among other grounds) and clarifies that the definition of sex includes intersex.

Section 14 provides a list of factors that must be considered when determining if a person has been treated unfairly. These include 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 systemic in nature and whether the respondent has taken steps to address the disadvantage.

Promotion of Administrative Justice Act (PAJA) ¹⁰

PAJA gives effect to section 33 of the Constitution, which provides for administrative action that is lawful, reasonable and procedurally fair. Determinations of refugee applications are administrative actions. This means that RSDOs must adhere to the minimum standards outlined in PAJA. In keeping with the provisions of section 6 of PAJA, adjudications should be made without bias, be informed only by relevant considerations and be logically connected to the information presented. Overall, status decisions must align with the law and must not be taken arbitrarily or capriciously.

Section 3 of PAJA requires all administrative decisions, including RSDO letters, to be communicated in writing, with a clear summary of the reasoning used to reach the decision. Applicants must be given adequate notice of any right to appeal and to obtain legal advice and representation. Should adequate reasoning not be provided, the applicant cannot effectively appeal. This is vitally important for refugee status denials: it is impossible for someone to appeal if they do not know the grounds on which their application was denied. Thus, RSDOs are legally obliged to explain how they reached their decision, based on the information available and in compliance with relevant legal provisions.

International law

As mentioned, sections 39 and 233 of the Constitution require South African law to be read in conjunction with international law. The same requirement is listed in section 1A of the amended Refugees Act, which states that all provisions must be interpreted and applied in a manner that is consistent with international law. This means that local courts must favour interpretations of law that accord with international human rights standards, as set by bodies like the United Nations and the African Commission on Human and Peoples' Rights (ACHPR).

Article 14 of the United Nations Universal Declaration of Human Rights (1948) provides for the right to seek and enjoy asylum in other countries. This right is further entrenched in two United Nations treaties: the Convention Relating to the Status of Refugees (1951) and the Protocol Relating to the Status of Refugees (1967). There is also a regional treaty known as the Convention Governing Specific Aspects of Refugee Problems in Africa (1969). This was adopted by the Organisation of African Unity (OAU) – the precursor to the African Union (AU) – and only applies to African states. South Africa has ratified all of these treaties. This means that it is bound to act in accordance with the provisions outlined in each agreement.

The 1951 Refugee Convention, the 1967 Protocol and the OAU Convention do not explicitly define 'persecution' and only offer vague criteria with regards to the term 'refugee'. This lack of

clarity is intentional: international law is meant to be adaptable to the socio-political realities of those who might need to access its protections.¹¹ In other words, international law acknowledges that persecution and protection can mean different things in different social contexts and must therefore be open to interpretation. It is up to local laws, such as South Africa's Refugees Act, to give shape and meaning to international treaties.

In South Africa, it is an RSDO's responsibility to determine whether an applicant's claim meets the threshold of a well-founded fear of persecution. In reaching a decision, the RSDO must take into account both subjective elements (the applicant's personal testimony) and objective elements (for example, scholarly research, independent reports, newspaper articles and reliable country-of-origin information). The final adjudication should be based on the eligibility criteria set out in international and regional protection instruments and those listed in national legislation.

International legal guidelines

There is no binding international legislation relating specifically to protection from SOGI-based persecution. Rather, international organisations provide guidance for how countries can meet legal obligations when working with LGBTI+ asylum seekers. These include the 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'). The ACHPR has also adopted resolution 275, which recognises the right of all people to be protected from SOGI-based violence and human rights violations.

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

The UNHCR Guidelines confirm that SOGI-based persecution can be perpetrated by both state and non-state actors. State-based persecution often takes the form of discriminatory laws targeting LGBTI+ persons (for example, legislation that criminalises 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. This 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+.

International law accepts that non-state actors, such as relatives, neighbours or colleagues, can persecute LGBTI+ persons. This may occur directly, such as physical abuse or forced marriages, or through indirect actions, such as reporting LGBTI+ persons to state authorities. Research shows that SOGI-based persecution is most likely to occur within social settings (for example, the family home or places of worship), making it difficult for potential asylum applicants to document and prove persecution.¹² For this reason, the UNHCR Guidelines advise RSDOs to consider family and social disapproval in the context of the overall claim (paragraph 23). This means that an RSDO should not interpret a lack of SOGI-based arrests or prosecutions in a person's country of origin as evidence of safety. Instead, they should consider the *threat* of serious harm that may accompany familial and/or societal disapproval, even if said violence has not yet occurred.

The repeal of punitive laws does not automatically mean that an LGBTI+ 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 LGBTI+ organisations and events, do not necessarily undermine the well-foundedness of the applicant's fear.' Furthermore, paragraph 49 states that an applicant does not need to be publicly known as an LGBTI+ person in order for them to have a well-founded fear of persecution (in other words, they do not need to be a high-profile figure in their community). The reverse also applies, in that an LGBTI+ person should never be required to conceal their identity in order to avoid harm (paragraph 12). 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. Therefore, a person 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. For example, the UNHCR Guidelines caution RSDOs against relying on stereotypes or visible markers when assessing the credibility of a claim (paragraph 49). This means that an RSDO should not base their determination on an applicant's appearance, mannerisms or style of dress – in other words, whether the person 'looks' or 'sounds' LGBTI+. Rather, the credibility of a claim should be judged according to the information provided in the applicant's testimony and balanced with reliable objective evidence.

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. This is 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. This means the applicant would have access to a minimum level of political, civil and socio-economic rights if they moved to the proposed location (paragraph 56). The adjudicator –

an RSDO in the case of South Africa – 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. This last point is critical: punitive laws can make even a supposedly ‘safe’ location dangerous (for example, an urban area with a known LGBTI+ community).¹³ The burden of proof when identifying a relocation alternative rests 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.

International law is also 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. In other words, asylum does not need to be a last resort.

The asylum process in South Africa

The Refugees Act provides that anyone wishing to seek asylum in South Africa must declare their intention at the port of entry, regardless of whether it is a land, air or sea border. Upon declaring their intention, the person will be issued with an asylum transit visa (as per section 23 of the Immigration Act 2002). They must then attend an RRO within five days so that their biometric data and personal information can be captured, along with any proof of identification and travel documents. Those who did not enter via a port of entry, or who were not provided with a transit visa, must undergo an interview with an Immigration Officer to ascertain whether valid reasons exist for this and to determine their eligibility to lodge an asylum claim.

After completing an Application for Asylum (officially referred to as the DHA-1590 form), the applicant will undergo an initial interview with a Refugee Reception Officer and be issued with an asylum seeker visa (officially known as a section 22 permit). This serves as confirmation of their claim and as a temporary identification document. Although asylum seeker visas are issued with an expiration date, they are normally renewable until a final determination is made. However, renewals can only be processed at the issuing RRO. South Africa currently has a policy of local integration, which means that asylum seekers can live freely in the community, pending the outcome of their application. Many applicants move within the country after applying for asylum and are required to travel between 900 and 1,900 kilometres whenever they renew their permit.¹⁴ Making such a journey every three to six months is expensive, time-consuming and often dangerous.

Applicants must undergo a second interview with an RSDO, though huge backlogs in processing claims mean that asylum seekers often wait years for an appointment. As part of the interview, the RSDO will request additional information and clarify details provided in the original application. The RSDO is then expected to gather evidence about the basis of the claim so that they can test its veracity. For a SOGI-based claim, the RSDO would be expected to find out about the socio-legal context in the applicant's country of origin – for example, if there are laws criminalising same-sex relations, if there have been documented hate crimes, or if there are religious and cultural practices that place LGBTI+ persons at risk. In reaching their decision, the RSDO is meant to determine if the weight of the subjective evidence (the details given in the interview) and the objective evidence (country-of-origin information) qualifies the applicant for refugee status. Worryingly, regulation 14(5)(b) of the 2019 Regulations states that a claim can be tested 'against *any* information, evidence, research or documents' (emphasis added) at the RSDO's disposal. This represents a significant erosion of previous standards of

practice – regulation 12(1)(c) of the 2000 Regulations stated that only ‘*reputable* sources’ (emphasis added) could be considered when assessing conditions in an applicant’s home country.

If refugee status is granted, the applicant will be furnished with a certificate of recognition that is valid for up to four years (though certificates are rarely granted for the full term). According to regulation 17(4) of the 2019 Regulations, the certificate can be renewed by returning to the issuing RRO at least 90 days prior to the date of expiration.

Under section 27(c) of the Refugees Act, a certified refugee is entitled to apply for permanent residence after 10 years of living in South Africa from the date on which refugee status was conferred (the right to apply for permanent residence is enshrined in section 27(d) and section 31(2)(b) of the Immigration Act 2002). Before lodging an application for permanent residence, a refugee must approach the Standing Committee for Refugee Affairs (SCRA) for certification that they will remain a refugee indefinitely, as explained in section 27(c) of the Refugees Act.

An RSDO can deny refugee status by determining an application to be ‘unfounded’ or ‘manifestly unfounded’. The latter category includes two subsets: ‘abusive’ and ‘fraudulent’. Please refer to the text box on the right for official definitions of these terms.

A denial of refugee status may be appealed. Section 24A(1) of the Refugees Act stipulates that manifestly unfounded, fraudulent and abusive claims are to be reviewed by SCRA. Those deemed to be unfounded can be appealed to the Refugee Appeals Authority (RAA) – formerly the Refugee Appeal Board (RAB) – as per Section 24B(1). However, SCRA is granted the power to monitor and supervise all decisions taken by RSDOs. This means SCRA can approve or disapprove any decision, or refer it back to the issuing RRO with recommendations for how it should be dealt with.

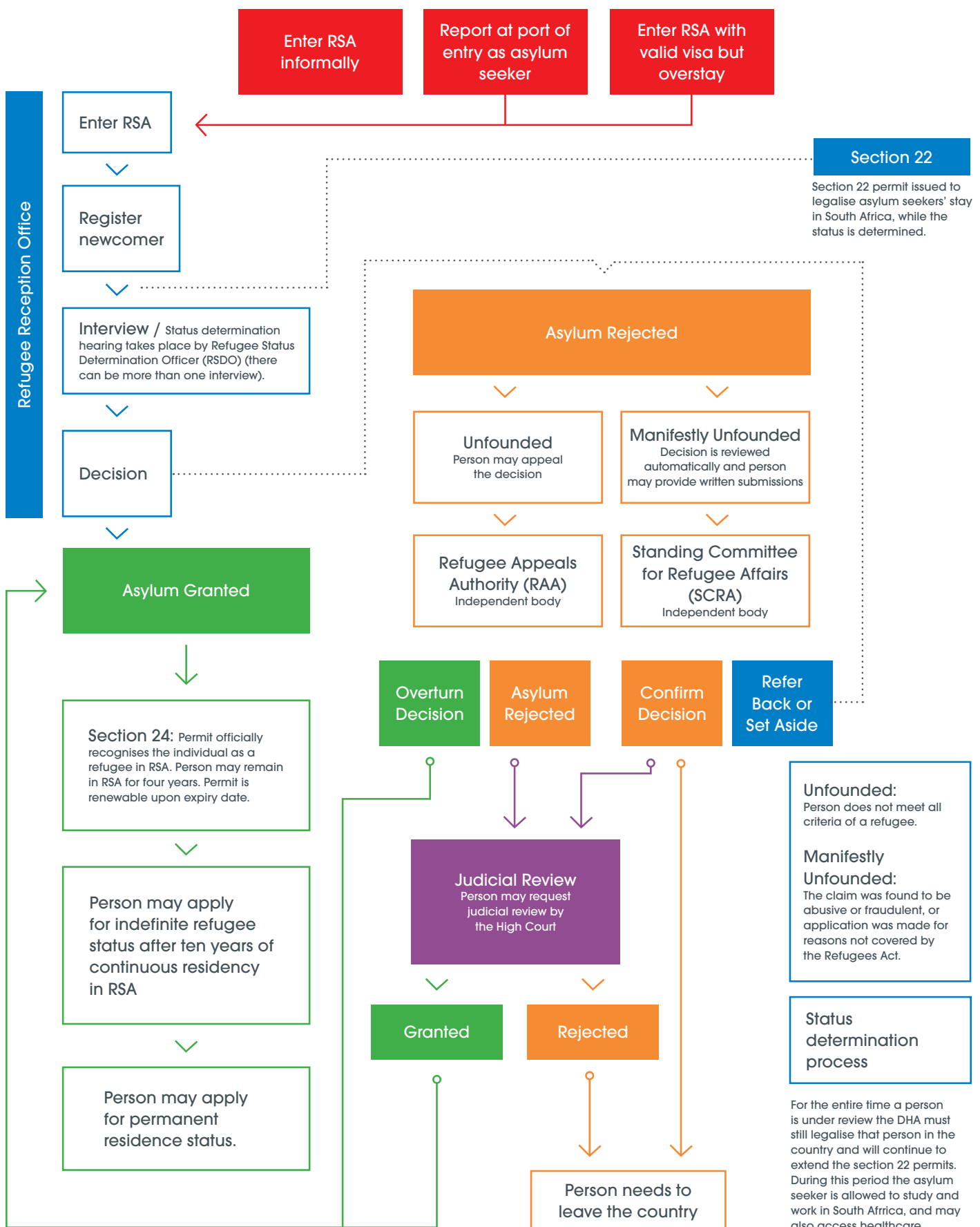
If a denial is upheld by SCRA or RAA, the applicant has the right to take the matter for judicial review. The High Court will be asked to rule on whether the administrative body involved correctly applied relevant laws and followed due process in terms of PAJA. The High Court has a number of options available to it. It can uphold the denial, require the application to be reheard by an RSDO, recommend the applicant be awarded refugee status (usually only done in exceptional circumstances) or grant anything further that the court deems appropriate, as long as it falls within the court’s powers.

According to the Refugees Act, asylum applicants must be made aware of the procedures outlined above, their legal rights and responsibilities, and the evidence being evaluated in their case. It also specifies that applicants must be provided with adequate written reasons if a claim is denied, in line with the applicant’s right to administrative justice. In practice, however, the state often fails to meet these obligations, undermining applicants’ ability to lodge an appeal.

The Refugees Act provides the following definitions for categories of denial:

- A 'manifestly unfounded' application is one that was 'made on grounds other than those in section 3' of the Act.
- An 'abusive' application is one that was made '(a) with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof; or (b) after the refusal of one or more prior applications without any substantial change having occurred in the applicant's personal circumstances or in the situation in his or her country of origin'.
- A 'fraudulent' application is one that was 'based without reasonable cause on facts, information, documents or representations which the applicant knows to be false and which facts, information, documents or representations are intended to materially affect the outcome of the application'
- An 'unfounded' application is one that was 'made on the grounds contemplated in section 3 (of the Act), but which is without merit.'

The decision-making process and different role players in determining an asylum seeker's status in South Africa



This is an adapted version of a chart featured in Auditor General of South Africa (2019) Follow-up Performance Audit of the Immigration Process for Illegal Immigrants at the Department of Home Affairs: 44

Lived experiences of LGBTI+ asylum seekers

Research has begun to chart the everyday challenges faced by LGBTI+ asylum seekers living in South Africa. Studies show that this population is highly susceptible to exploitation, harassment, social exclusion, and physical, sexual and emotional violence. Many LGBTI+ asylum seekers struggle to find safe housing, secure employment, or access social, health or justice services.¹⁵ This is widely attributed to the intersecting discrimination that LGBTI+ asylum seekers endure: like all foreign nationals, they are targets for xenophobic abuse and discrimination; as LGBTI+ persons, they are vulnerable to SOGI-based attacks.¹⁶ As one study puts it, LGBTI+ asylum seekers 'do not experience homophobia/transphobia in one place and xenophobia in another, but rather live both concurrently.'¹⁷ There is an added layer of risk for those who identify or present as women, given that they must also navigate patriarchal violence.¹⁸

Perhaps most important in the context of this study is the fact that LGBTI+ asylum seekers in South Africa experience discrimination from both community members and state authorities, such as healthcare workers, police officers and state bureaucrats.¹⁹ Mistreatment is most commonly documented in relation to DHA staff; LGBTI+ asylum seekers report bribery, apathy, disdain, ineptitude, mockery and intimidation when attempting to lodge asylum applications or renew existing permits.²⁰ Examples of discrimination range from being outed in front of other asylum seekers (often from the same country of origin), to having personal information divulged without consent, to being publicly ridiculed and shamed. In the following quote, a lesbian asylum seeker from Zimbabwe describes her first encounter with DHA officials:

The man looked at me with disbelief and didn't waste time judging me. I remember him saying, '*Habe nahku umhlola wami kanti na Zimbabwe!*' – 'I don't believe there are gays in Zimbabwe!' I was the joke of the centre. I felt so humiliated. Within a few seconds, the room was filled with other employees who were called to see the lesbian from Zimbabwe. One even asked me if I had ever been with a man before. If these people knew what I had gone through, I thought to myself, they wouldn't be making a joke of my sexuality.²¹

Being subjected to such treatment can cause immense psychological distress, especially for those already dealing with complex trauma. The stress associated with applying for SOGI-based protection leads some LGBTI+ persons to provide different reasons on their asylum applications, to look for other ways to formalise their immigration status, or to choose to remain undocumented.²² There is also considerable evidence suggesting that RSDOs are ill equipped to assess SOGI-based claims, resulting in serious misapplications of law.²³

A nascent body of research has drawn attention to the specific hurdles facing transgender and gender-diverse asylum seekers.²⁴ The system itself places these individuals at a disadvantage, given that it is predicated on a binary conceptualisation of gender. Before being admitted to an RRO, applicants are usually split into two queues: one for 'men' and the other for 'women'. Whatever decision a transgender applicant makes – that is, if they join the line of the gender they were assigned at birth or of the gender that reflects their inner sense of self – they are likely to be noticed and questioned, dramatically increasing their vulnerability to violence.²⁵ Furthermore, the system seemingly precludes asylum seekers from being categorised according to their lived gender, even when lodging a claim based on transphobic persecution. This means that transgender and gender-diverse applicants are provided with permits that do not reflect their everyday gender expression. This places them at an increased risk of violence, discrimination and exploitation, especially if police officers or other state officials request their paperwork for identification purposes.

Finally, research points to entrenched misconceptions among state authorities as a key driver of discrimination. Studies suggest that LGBTI+ asylum seekers are regularly addressed using derogatory language, reduced to popular stereotypes and subjected to invasive lines of questioning from DHA officials, police officers, healthcare workers and other service providers, as evidenced in the quote above.²⁶ There is also growing evidence of misunderstandings among RRO staff regarding the provisions of the Refugees Act and who counts as a member of a 'social group'.²⁷

In many ways, the findings presented in this report mirror the everyday struggles documented in earlier studies. Considered collectively, this body of research shows that LGBTI+ asylum seekers are susceptible to violence, harassment and bureaucratic mistreatment at all stages of the asylum process.

Relevant asylum case law

In this section we offer a snapshot of case law that may be relevant to appeal and review processes. Due to space constraints, we can only provide summaries of these lengthy judgements. We recommend reading the full judgements if you plan to cite them as part of an appeal or review. SOGI-based asylum is an expanding field of case law the world over. It is impossible to list all relevant judgements here. The list below will not necessarily suffice if you are seeking a thorough review of contemporary case law.

South African case law – refugee status adjudications

*Van Garderen N.O. v Refugee Appeal Board and others (2006)*²⁸

In a landmark ruling of the High Court, Justice Botha held that the burden of proof in civil proceedings – that is, expecting an applicant to prove something beyond reasonable doubt – is an inappropriate standard for the adjudication of refugee claims. Justice Botha explained that refugee determinations have ‘an inquisitorial element’ as the ‘burden is mitigated by a lower standard of proof and a liberal application of the benefit of doubt principle.’ In other words, RSDOs should consider what the majority of the evidence before them says, rather than expecting applicants to provide irrefutable proof. This means that a ‘reasonable possibility’ of persecution is sufficient for granting refugee status. Finally, Justice Botha found that RSDOs have a duty to gather additional evidence (for example, reliable news stories or research reports) that can help them assess the validity of a claim. This ruling means that RSDOs and asylum applicants are jointly responsible for sourcing evidence in relation to a claim.

- **Main finding and relevance:** A lower standard of proof is required in asylum adjudications, as compared to civil proceedings. RSDOs must consider applicants’ testimonies alongside reliable objective evidence when making a determination.

*Tantoush v Refugee Appeal Board and Others (2008)*²⁹

In paragraph 97 of this judgement, Justice Murphy in the High Court found that the RAB misunderstood the burden of proof required to demonstrate a well-founded fear of persecution. The RAB asserted that the applicant needed to demonstrate a real risk of persecution on a balance of probabilities. However, Justice Murphy ruled that a ‘reasonable possibility of persecution’ is sufficient in asylum cases. Drawing on *Van Garderen N.O. v Refugee Appeal Board*, Justice Murphy explained that the burden of proof standard set for civil proceedings is too high a requirement for asylum applications. Furthermore, an applicant should be given the benefit of the doubt. He noted Justice Botha’s finding that an RSDO has a duty to gather further evidence, as supported by the UNHCR Handbook:

[W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the 'benefit of the doubt.'

The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

- **Main finding and relevance:** Asylum applicants only need to show a 'reasonable possibility of persecution' to qualify for protection. Applicants and RSDOs share the responsibility of presenting and evaluating relevant facts related to the case.

South African case law – LGBTI+ asylum applications

*Makumba v Minister of Home Affairs and Others (2014)*³⁰

In this case, the High Court was asked to review a refugee claim that was deemed manifestly unfounded by both an RSDO and SCRA. In Makumba's original asylum interview, she claimed she had fled Malawi for economic reasons. At no point did she indicate that her sexual orientation was a motivating factor. However, in her founding affidavit for the judicial review, Makumba explained that she 'was unaware that she could claim refugee status on the basis that she had been persecuted in [Malawi] because of her sexual orientation'; that she was 'unsure whether it was acceptable to be openly lesbian in South Africa'; and that she 'was afraid of how the officials at the Refugee Reception Office would react [to this information]'. Makumba further noted that 'she was accompanied and assisted by a friend who was also from [her home country]' when submitting her application. She was concerned this friend would stop assisting her if she disclosed her sexual orientation, given the prevalence of homophobic attitudes among Malawians.

The court found that this was an example of a case where the state had an obligation to promote the applicant's right to non-discrimination, dignity and freedom from violence. Echoing the ruling in *Tantoush v Refugee Appeal Board and Others*, Justice Salie-Samuels found that withholding information in an interview setting – as Makumba did here by not

disclosing her real reason for leaving Malawi – is understandable in certain situations and does not preclude a person from telling the truth later. Moreover, the court found that omitting critical information does not necessarily negate the basis for claiming asylum. According to Justice Salie-Samuels, Makumba’s decision to withhold key elements of her story made sense given the circumstances in which she found herself and the information she had available to her. The court overturned SCRA’s denial of Makumba’s claim, thus allowing her another RSDO interview and a reconsideration of her application.

- **Main finding and relevance:** LGBTI+ persons may feel scared or confused during the asylum process. This can lead them to withhold information about their gender or sexuality. Not disclosing information is understandable in certain circumstances (for example, because of past experiences or a lack of familiarity with South African legal provisions). An LGBTI+ person’s decision to withhold information in an interview setting cannot be held against them in the appeal process.

International case law

*Toonen v Australia (1994)*³¹

As noted above, South African courts are bound to consider international law when interpreting and applying domestic legislation. An example of international case law that may be relevant to SOGI-based asylum claims is *Toonen v Australia*. Heard by the United Nations Human Rights Committee, this matter was ostensibly about anti-sodomy laws in Tasmania. The applicant argued that the criminalisation of consensual sex between adult males violated his rights to privacy and non-discrimination under articles 17 and 26, respectively, of the International Covenant on Civil and Political Rights. The committee ruled in the applicant’s favour, finding that criminalisation of consensual same-sex sexual practices was a violation of the right to privacy. As well as leading to legal reform in Tasmania, the case had implications for all signatories of the treaty. The ruling is widely regarded as a watershed moment, solidifying SOGI as protected grounds under international human rights mechanisms. It serves as the foundation for many SOGI-related legal cases, including asylum claims, in that it provides precedent for challenging laws that discriminate against LGBTI+ persons. As international law, this judgement means that South Africa – through its legislature and judiciary – is bound to regard anti-LGBTI+ laws and practices as gross human rights violations.

- **Main finding and relevance:** Criminalisation 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.

Foreign case law

Foreign case law refers to decisions made by courts in countries other than South Africa. Unlike international law, which creates norms and standards that apply to all member states of a human rights mechanism, foreign case law is not binding. However, foreign case law can help South African courts decide how best to address an issue. According to section 39(1)(c) of the Constitution, South African courts may consider foreign case law when ruling on domestic matters.

*HJ (Iran) and HT (Cameroon) v Secretary for the Home Department (2010)*³²

One of the most important cases related to SOGI-based asylum claims is *HJ (Iran) and HT (Cameroon) v Secretary for the Home Department*, in which the Supreme Court of the United Kingdom made a crucial ruling on the 'discretion principle'. The two claims being reviewed had been rejected on the basis that the applicants could avoid persecution if they concealed their sexual orientation in their countries of origin. The court was asked to rule on whether it was fair and reasonable to expect LGBTI+ people to hide their identities in order to avoid harm.

The three justices of the court found the discretion principle to be incompatible with the rights enshrined in the 1951 Refugee Convention. Lord Hope ruled that a person cannot be reasonably expected to tolerate such a requirement: 'to pretend that [a person's sexual orientation] does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny the members of this group their fundamental right to be what they are.' Similarly, Lord Rodger rejected the claim that sexual identity can be reduced to particular sex acts, arguing instead that it permeates all aspects of an individual's life. He asserted that people must be free to express their sexual orientation and that efforts to stop them from doing so constitute a human rights violation: 'gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution.'

- **Main finding and relevance:** Like *Toonen v Australia*, this ruling has far-reaching implications, particularly in reference to how SOGI-based asylum claims are adjudicated. First and foremost, it confirms that sexuality is an intrinsic part of human identity and that an individual should be free to express this aspect of their being. It also means that a person who was not out in their country of origin can still claim asylum. Furthermore, a person cannot be expected to return to their country of origin if it means concealing their identity in order to remain safe. Finally, it reaffirms the principle of non-refoulement by highlighting the very real physical and psychological harms that LGBTI+ asylum seekers face if they are returned to their countries of origin.

*LC (Albania) v Secretary of State for the Home Department v. UN High Commissioner for Refugees (2017)*³³

Another key case, also from the United Kingdom, is *LC (Albania) v Secretary of State for the Home Department v. UN High Commissioner for Refugees*. Here, the Court of Appeal ruled that 'social pressure' to conceal one's SOGI is sufficient to warrant a well-founded fear of persecution and that an individual should not be forced to return to their country of origin simply because they might not be easily identified as LGBTI+.

- **Main finding and relevance:** Provides further clarity on what constitutes a well-founded fear of persecution, as well as reaffirming that discretion should not be a precondition for being safe and noting that LGBTI+ applicants do not need to be high-profile figures to claim asylum.

Project summary

For this study, we analysed a sample of 67 RSDO letters from 65 individuals. Two individuals received a second RSDO letter following a successful appeal. We count these documents as distinct for the sake of analysis. This sample of RSDO letters is a subset of a larger collection of legal documents representing 88 people who applied for and were denied protection on the basis of SOGI-related persecution. Where available and appropriate, we supplement our analysis with information provided in asylum permits, appeal letters and High Court documents.³⁴ As far as we are aware, this is the largest sample of documents related to SOGI-based asylum claims in South Africa.

We collected RSDO letters from five legal and paralegal clinics that work with refugees and asylum seekers. Clinics authorised our analysis of redacted client files. We base this method for data collection on previous studies of RSDO letters.³⁵ Before including a letter in the sample, the clinics sought full and informed consent (either verbal or written) from the client. However, contact information for some individuals was out of date, meaning that permission for inclusion in the dataset was not possible in all cases. To ensure ethical compliance, we only quote from RSDO letters if we have direct consent from the individual involved.³⁶ We recognise that not all individuals whose redacted legal data is analysed here granted permission and have taken significant steps to ensure they can in no way be identified. We include them in the sample to show broader trends. We intend for this relatively sizable sample of anonymous SOGI-based refugee denials to serve members of the LGBTI+ community by streamlining the process of preparing appeal documents.

We use pseudonyms for most individuals and redact the names of loved ones and other identifying details. Two individuals – both of whom are involved in public advocacy and whose cases have been widely reported in the media – requested that their real names be used. These requests were granted after careful consideration of risks and benefits, in consultation with the individuals concerned. For everyone else, we use pseudonyms drawn from their region of origin. This approach balances the need to protect anonymity with respecting each person's cultural identity.

Finally, we reached out to clients for whom we had up-to-date contact information before publishing this report. Our intention with this second engagement was to involve these individuals in the research process as much as possible.

Sample overview

The individuals whose RSDO decisions are analysed here applied for asylum between 2010 and 2020. Most of the claims were lodged in Cape Town. We also include RSDO letters issued at the Pretoria, Musina, Tshwane and Port Elizabeth RROs. The data represents the work of at least 32 RSDOs (one letter is missing the RSDO's name). The majority of rejections were classified as unfounded (81 per cent), with only 15 per cent denied as manifestly unfounded and 4 per cent denied as fraudulent (see Table 1). None of the applications in this study were deemed abusive.

Office	# of decisions	# of RSDOs	Unfounded	Manifestly unfounded	Fraudulent
Cape Town	56	21	50	6	0
Pretoria	6	6	1	2	3
Musina	3	3	2	1	0
TIRRO	1	1	1	0	0
Port Elizabeth	1	1	0	1	0
Total	67	32	54	10	3

Based on the information recorded in the RSDO letters, 45 applicants (69 per cent) identified as male and 20 (31 per cent) identified as female. We note that pervasive misconceptions about transgender identities mean that applicants may have been misgendered in official documents.

All but three individuals in the sample identified as gay, lesbian, bisexual, transgender and/or LGBTI when engaging with legal/paralegal clinics. These three individuals applied for refugee protection due to SOGI-based persecution, but did not themselves identify as a sexual or gender minority. Rather, they applied as friends or relations of people presumed to be LGBTI+ and who were under threat of persecution by association.

The low number of RSDO letters issued in relation to SOGI-based claims does not necessarily indicate that only a small number of asylum seekers identify as LGBTI+. As research has shown, there is a huge backlog of cases being processed by DHA, leading to extraordinarily long wait

times for final adjudications.³⁷ We do not know the number of LGBTI+ applicants presently in the asylum system in South Africa. The information presented here reflects a sample of a larger population.

Most of the RSDO letters were issued between 2011 and 2014 (see Table 2). The year of issuance was missing from one letter in the dataset. The countries of origin represented in the sample, listed in descending order of applications, are Uganda, Zimbabwe, Cameroon, the Democratic Republic of the Congo (DRC), Malawi, Kenya, Tanzania, Jordan, Nigeria, Sudan and Zambia. We note that these demographics differ from those seen in the larger South African asylum system.³⁸ The proportion of applications from Uganda and Cameroon are likely higher in this dataset than they would be in a randomly selected sample of asylum applications. Ours is a small dataset and therefore it is impossible to determine statistical causality. However, it is not unreasonable to assume that these demographics result from the particularly punitive socio-legal circumstances facing LGBTI+ people in these countries of origin (see Appendix C). This is confirmed by PASSOP’s client work, which includes a significant number of LGBTI+ cases from Uganda, Zimbabwe, Cameroon and Malawi.

Country of origin	2010-12 decision	2013-14 decision	2015-16 decision	2017-18 decision	2019-20 decision	Total
Cameroon	4	5	1	1	-	11
DRC	2	2	-	1	-	5
Jordan	-	1	-	-	-	1
Kenya	-	1	-	-	1	2
Malawi	1	1	1	-	-	3
Nigeria	-	-	1	-	-	1
Sudan	-	1	-	-	-	1
Tanzania	2	-	-	-	-	2
Uganda	12	16	-	-	-	28
Zambia	-	-	-	1	-	1
Zimbabwe	7	1	2	1	1	12
Total	28	28	5	4	2	67

As much as possible, we refer to applicants' regions of origin rather than countries of origin. This is done to safeguard their anonymity. We recognise that refugee and LGBTI+ communities in South Africa are interconnected and that this can make it possible for people referenced in this report to be identified. There are a few instances where an applicant's country of origin is relevant to the legal and procedural shortcomings we seek to highlight. In these specific cases, we reference an applicant's country of origin but redact other information in order to minimise the risk of identification.

Objectives and data analysis

This study was motivated by an interest in how RSDOs apply laws during SOGI-based asylum adjudications. This stemmed from both the LRC's and PASSOP's client work with LGBTI+ asylum seekers. Our analysis was inspired by Roni Amit's research on a general sample of South African refugee status adjudications.³⁹ In reviewing our sample, we identified similar legal and procedural issues to those raised by Amit, as well as barriers specific to SOGI-based claims. We then reanalysed the sample to further surface population-specific trends.

During this iterative analysis process, we noted that RSDOs often included incorrect evidence linked to applicants' countries of origin. We next went through the data to identify the likely sources that RSDOs used and, where possible, have flagged these in the discussion below. In most cases, RSDOs did not cite the evidentiary sources on which they based their determinations. We did a Google search using quotes from the RSDO letters to locate possible source materials. This process not only revealed that evidentiary material was often lifted verbatim from sources, but also showed where RSDOs likely found country-of-origin information. This was important for evaluating the accuracy and reliability of the information RSDOs used to adjudicate SOGI-based asylum claims.

Limitations and concerns

Our sample comprises asylum seekers who were denied refugee status by an RSDO and subsequently sought legal representation at one of the clinics providing data for this project. The sample does not capture the experiences of LGBTI+ persons who could apply for asylum but chose not to (for instance, out of fear, lack of information or because they chose to explore other migration pathways); those who did not identify SOGI as the grounds for their claim; or those who sought legal assistance at other clinics. The sample also does not attend to SCRA's and RAA's evaluations of SOGI-based asylum claims. Finally, the sample does not include SOGI-based refugee applications that were successful. The findings presented here cannot be used to draw conclusions on rates of success. We are unable to state definitively which elements of a SOGI-based asylum claim might render a person more or less likely to receive refugee status in South Africa.

Our sample also contains a location bias in that it over-represents applicants based in Cape Town. This is the result of our sampling strategy. Although we attempted to collect data from across the country, we were most successful when reaching out to clinics near to the Cape Town LRC office, from which this study was managed.

The location bias likely informs the years represented in the dataset. In July 2012, the Cape Town RRO was closed to new asylum seekers and those who had registered in other provinces. Only asylum seekers who applied in Cape Town before July 2012 could receive status determinations at this location. The Cape Town RRO closure contextualises why we found more RSDO letters from the period 2011-14, as compared to 2015–20. It is also the case that South Africa received an overall higher volume of asylum applications during this earlier period.⁴⁰ We recognise that most of the RSDO letters analysed here were produced under the previous DHA administration and that since then efforts have been made to improve the provision of service to LGBTI+ asylum applicants.

While these spatial and temporal biases are certainly limitations, they do not invalidate the findings presented here. Asylum applications in South Africa often take years to be processed. It is likely that a number of the applicants referenced here are still waiting for an administrative appeal. The legal, procedural and bureaucratic shortcomings identified in this report remain relevant to people presently in the asylum system and thus deserve urgent attention.

Next, as mentioned above, DHA officials designated applicants as either male or female. This practice erases transgender, intersex and gender-diverse persons within the asylum system. Unfortunately, we were unable to determine the genders of many applicants whose RSDO letters are analysed. This makes it impossible for us to illuminate the unique legal barriers facing transgender, intersex and gender-diverse asylum seekers using the data alone. We are aware that much research and advocacy claiming to promote LGBTI+ asylum seekers' interests in South Africa privileges cisgender people. In an effort not to erase or misrepresent the experiences of transgender, intersex and gender-diverse asylum seekers, we highlight quality research conducted with this population.⁴¹

In discussing the RSDO letters, we refer to applicants using the pronouns assigned by DHA. We do so for the sake of clarity in a paragraph where we are describing a specific applicant's case. We recognise that this repeats the harm of erasing some applicants' identities and experiences, in a manner similar to DHA.

The sample skews towards those identified by DHA as male.⁴² There are a number of possible explanations for this. Firstly, most contemporary asylum seekers are young and male. It is possible that a similar principle holds true for LGBTI+ asylum seekers. The UNHCR estimates that barriers to economic self-sufficiency for women prevent many lesbian or bisexual women from migrating.⁴³ Secondly, we note that sexual practices most often associated with gay males tend to be more

aggressively policed. This is not to suggest that gay men are more targeted or vulnerable. Rather, we suggest that these laws can influence both a person's decision to migrate and the framing of their asylum claims in South Africa.

Finally, while we know RSDOs' names courtesy of the documents analysed, we do not have access to information regarding their genders. We do not assign the RSDOs a gender, but rather refer to them using third-person pronouns (they/them/theirs). We also do not name any RSDOs in this report. The issues identified in the following section are likely systemic and not the fault of any one individual.

Analysis of RSDO letters for LGBTI+ applicants

This section analyses RSDOs' enactment of law when adjudicating SOGI-based asylum claims. The findings suggest that RSDOs are failing to correctly apply relevant laws and, consequently, violating LGBTI+ asylum seekers' right to dignity, non-discrimination and administrative justice. There is evidence of RSDOs contravening both South African and international law, as well as failing to follow international guidance on adjudicating SOGI-based protection claims.

Principle of non-discrimination

The sample indicates that RSDOs' personal views and assumptions can influence the decision-making process.⁴⁴ We identify several instances of RSDOs drawing on stereotypes when adjudicating SOGI-based claims. We also note instances in which the vocabulary, syntax and grammar used in RSDO letters may be read as derogatory. Whether the RSDOs intended this is impossible to determine from the letters alone. Seemingly offensive language may be explained through inadequate SOGI sensitisation training, a lack of English proficiency and/or pressures from management to rush determinations. Regardless of the reasons for these practices, the pejorative language used in RSDO letters has negative impacts on the health and well-being of LGBTI+ asylum seekers. We also highlight insufficiencies in RSDOs' country-of-origin research, including citing inaccurate information about the socio-legal realities facing LGBTI+ applicants. This creates bias through an omission of evidence and thus unfairly disadvantages asylum applicants who are already deeply marginalised.

RSDOs' reliance on stereotypes when adjudicating SOGI-based claims can be seen across the dataset. Damba's (East Africa, male) claim was denied because the RSDO regarded his fathering of a child as evidence of dishonesty:

In his application the RSDO noted that he got [sic] a child in the [Republic of South Africa], and that the child was born in 2012. The RSDO is of the opinion that he was involved in a heterosexual relationship in the RSA.

This reasoning implies that LGBTI+ persons cannot have children. This popular misconception – based on the assumption that a 'real' gay man would be incapable of having sexual intercourse with a woman – is used by the RSDO to justify a denial of protection. Similar sentiments were expressed by the RSDO who adjudicated Tendai's (Southern Africa, male) claim. Here, the RSDO denied Tendai's refugee status in part because he had been in an opposite-sex relationship while in South Africa.

Doubts over the legitimacy of applicants' sexual orientation can also be found in Emmanuel's (West Africa, male) and Kaikara's (East Africa, male) determinations. In these cases, the RSDO doubted the applicants' self-identifications as gay men because they were not involved in SOGI activism. This is clear from Kaikara's RSDO letter:

[T]here no [sic] indications [sic] that you have joined any gay organisation where may be [sic] a meeting was conducted or planned then something that threatened your life happened from the side of the police or government of your country.

An applicant's parental status, history of opposite-sex relationships and/or involvement in political activities does not constitute definitive evidence of their sexual identity – as confirmed in international legal documents, such as the UNHCR Guidelines. Yet, RSDOs draw on these assumptions in order to discredit LGBTI+ asylum seekers' identity claims and deny their applications. Similar practices have been documented and critiqued in other jurisdictions.⁴⁵ Relying on stereotypes when adjudicating asylum applications contravenes both domestic and international legal norms.

In 22 of the letters analysed, RSDOs referred to applicants as 'a gay'. In everyday English parlance, this phrasing is used to convey hostile sentiments; the use of 'gay' as a noun rather than an adjective, especially when paired with the indefinite article, implies that the individual being referenced is a thing, somehow less than human. The use of this construction in status adjudications may suggest prejudicial attitudes, especially when read in light of RSDOs' lack of knowledge about gender and sexuality. We recognise, however, that some RSDOs speak English as a second, third or even fourth language. Seemingly disparaging language may stem from confusion over grammar/syntax in written English, rather than a desire to insult the applicant. It is also possible that some RSDOs hold prejudicial views about LGBTI+ asylum seekers. Regardless of the reason for this language, its use in official documents causes great distress to those on the receiving end, many of whom are already dealing with complex trauma stemming from physical and emotional abuse. The negative impacts of this language have been witnessed first-hand by the legal/paralegal clinics involved in this project.

Not a single letter in the sample recognised the treatment of transgender, gender-diverse or intersex persons in applicants' countries of origin. This is concerning, given that transgender asylum claims are part of the dataset. The absence of information on transgender experiences suggests that RSDOs are applying evidence about sexuality-related persecution in lieu of evidence about gender-related persecution. This may indicate that RSDOs are relying on less relevant evidence when adjudicating transgender asylum claims, as compared to those involving cisgender applicants.

RSDOs also relied on country-of-origin information about cisgender gay men when the applicants were identified as lesbian or bisexual women. Sanyu is from Central Africa and was

identified by the RSDO as a 'homosexual' female. Her application for refugee status was denied based on the RSDO's research. In discussing Sanyu's country of origin, the RSDO identified laws criminalising sodomy, as well as evidence that those laws are not strictly enforced. The details provided by the RSDO focus on forms of persecution against gay men that do not necessarily apply to Sanyu's experiences. The use of country-of-origin information related to gay men may unfairly prejudice transgender, intersex, lesbian and bisexual applicants.

Some decision letters reference 'LGBTI' or 'lesbian, gay, bisexual, transgender or intersex' rights and/or advocacy organisations. While this acronym points to experiences of persecution that gender minorities share with sexual minorities, its use does not automatically mean that all identities and experiences are considered equally. Often it falls short of recognising the specificities of transgender, gender-diverse and intersex experiences. The acronym can also obfuscate the sexism that lesbian women endure and the disbelief and ridicule that bisexual people routinely face. The UNHCR Guidelines warn against this kind of homogenising: 'Gay men numerically dominate sexual orientation and gender identity refugee claims, yet their claims should not be taken as a "template" for other cases on sexual orientation and/or gender identity.'

Credibility standard

Amit notes that credibility assessments are sometimes based on RSDOs' personal opinions, unsubstantiated concerns and/or irrelevant details.⁴⁶ While similar dynamics likely shape the credibility concerns raised in this sample, additional factors also seem to be at play. In particular, some RSDOs questioned applicants' *identity* claims rather than elements of their *asylum* claims – in other words, whether the person seeking protection is 'genuinely' LGBTI+. This trend may stem from misconceptions and/or prejudices regarding gender and sexuality.

Credibility concerns were raised in 13 instances across this sample. Of these, eight directly questioned applicants' sexual orientation. When adjudicating Emmanuel's (West Africa, male) claim, the RSDO noted the following credibility concerns:

You seem to be on [sic] the belief that your [sic] suffer what you alleged you suffer because you are a member of a particular social group called gays.

It is my finding that you are not a gay [sic]. In your testimony you stated you knew nothing about gay association in [country of origin] and no one knew your status in [country of origin] except your partner. The community had no interest in your affairs. Your evidence failed to demonstrate that you are a gay.

The text above is an excerpt from a longer justification for denying Emmanuel's application. The RSDO deemed the claim unfounded in part because they did not believe Emmanuel was gay. This conclusion was based on the fact that the applicant did not know of local LGBTI+ rights organisations and because he had not publicly disclosed his identity to his community. It is possible the RSDO had more evidence than was listed in the determination letter, although the failure to include such information would itself be gravely concerning. Taken at face value, this credibility assessment seems to be based on personal opinion (that 'real' gay people come out) and partly relevant details (an applicant's activist history). This approach to adjudication contradicts international guidelines and key findings in academic research, both of which highlight the myriad reasons why LGBTI+ applicants might keep their identities secret and avoid associating with activist organisations in their countries of origin.⁴⁷

There is also evidence to suggest that RSDOs' personal prejudices about LGBTI+ people inform their assessments of SOGI-based claims. This is shockingly illustrated in Anold Mulaisho's (Zambia, male, real name used on request) RSDO letter. In denying Anold's application, the RSDO drew on similar stereotypes to those raised in Emmanuel's case:

The applicant could not name LGBTI groups that are found in his country and yet he claimed that he was a gay. Clearly, this shows that he was intentionally misleading the RSDO by providing false information.

In addition to questioning Anold's lack of familiarity with 'LGBTI groups' – despite an absence of visible LGBTI+ activist organising in Zambia – the RSDO intimated that the applicant could not have been gay because members of his community were unaware of his sexual orientation. This 'reasoning' contradicts the advice given in the UNHCR Guidelines (paragraph 30):

LGBTI individuals frequently keep aspects and sometimes large parts of their lives secret. Many will not have lived openly as LGBTI in their country of origin and some may not have had any intimate relationships. Many suppress their sexual orientation and/or gender identity to avoid the severe consequences of discovery, including the risk of incurring harsh criminal penalties, arbitrary house raids, discrimination, societal disapproval, or family exclusion.

This RSDO's use of stereotypes and misinformation to justify the denial of refugee protection goes much further. The RSDO not only used Anold's friendship with women and his Christian faith as 'evidence' of deception, but also disturbingly claimed that the physical pain Anold experienced when being raped meant he is not actually gay. This RSDO letter is five pages in length and cannot be reproduced in full here. Instead, we include key excerpts, with emphasis added, to illustrate the use of illogical, prejudicial and deeply offensive reasoning:

The basis of his claim is that she [sic] left Zambia because he was afraid that he might be sentenced to more than ten years [in prison] because he is a gay ...

The RSDO finds that the version of events lacks credibility. On page 5 of the RSDO interview notes the applicant was asked if his parents and the people he grew up with knew about his sexual orientation, he said yes. However, on page 4 he was asked as to *why he failed to report the rape incident to the school principal and teachers and his response was that he told his parents who told him that he was tarnishing the name of the family. This therefore implies that his parents and the people he grew up with were not aware of his status and that he was not a gay.* Furthermore, he alluded to the fact that after he had been raped at the boarding school, he stopped playing with boys. A question was put to him as to why he stopped playing with boys, he responded by saying that it made him feel [sic] uncomfortable. He alleged that they were misjudging him and calling him names. *A person who is gay would normally not be in the company of girls. That on its own, contradicts his claim that he is gay.* The applicant also claimed that he did not report this matter to the police because he was still young. He was just fourteen by then. *In addition to that he claimed that he was in pain after he had been raped. Consequently, he would not have chosen to be a gay [sic] if indeed he was in pain after that rape incident ...* There is no credibility in this application. The application is fabricated. It is a lousy excuse for the applicant to claim that he could not follow [the applicant's partner] in his country in the sense that he had lost contact. He also failed to tell the RSDO as to why he is of the view that the authorities would only target him only [sic] and not his partner ...

It seems the applicant left his country in order to venture in [sic] the same sex [sic] business. ... Zambia has a Constitution to protect [sic] and in the preamble of the Constitution, it is stated [sic] Zambia is a Christian nation and as such the citizens of the country live by the Christian values. *The applicant would not have become a gay if he was indeed a Christian. He would have adhered to those values.*

The 'evidence' used by the RSDO to refute Anold's identity was inappropriate, bigoted and factually inaccurate. LGBTI+ Africans engage in a range of religious and spiritual practices and rituals.⁴⁸ A person's faith cannot be used as evidence of their sexuality or gender. Furthermore, the gender of an applicant's friends is irrelevant to their sexuality and cannot be used to assess the credibility of an asylum claim. The RSDO in Anold's case based their adjudication on stereotypes about gay people (for example, that they are not Christian and that they do not like being 'in the company of girls'). This represents a clear violation of Anold's right to non-discrimination, dignity, freedom of religion and freedom of association, as guaranteed in both the Constitution and PEPUDA.

The connections this RSDO drew between Anold's sexual identity and his experience of sexual violence contravened international norms on asylum adjudication related to rape. Sexual violence is considered a form of persecution under international law, as stated in the UNHCR Guidelines (paragraph 20):

[S]exual violence, including rape, would generally meet the threshold level required to establish persecution [for LGBTI+ applicants]. Rape in particular has been recognized as a form of torture, leaving 'deep psychological scars on the victim'. Rape has been identified as being used for such purposes as 'intimidation, degradation, humiliation, discrimination, punishment, control or destruction of the person. Like torture, rape is a violation of personal dignity.'

The UNHCR Guidelines indicate that this RSDO should have at the very least sought to investigate whether Anold's experience of rape was possibly motivated by his sexuality, as this would have amounted to persecution. Instead, the RSDO focused on the fact that Anold did not report the assault to his school principal or state authorities. Rape is notoriously underreported. For this reason, the UNHCR's *Guidelines On International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* advise RSDOs to expect incidents of rape to be underreported. In this case, the RSDO recorded Anold's decision not to report the crime: he was young, he feared being disbelieved and he feared being perceived as violating the country's punitive laws about same-sex relations (see Appendix C). These reasons are legitimate – and yet the RSDO dismissed them as 'facts and information which [the applicant] knows to be false ... intended to materially affect the outcome of his application.' Under both South African and international law, Anold's decision not to report the rape is irrelevant to an asylum credibility assessment. Using this fact as grounds to question Anold's sexual identity represents an egregious contravention of domestic and international legal standards.

Anold's status determination was profoundly derogatory and abusive. He bravely disclosed to the RSDO that his experience of rape was physically painful, only to have this information flagged as suspicious and untrustworthy. According to the RSDO, Anold 'would not have chosen to be a gay if indeed he was in pain after that rape incident'. This represents a horrific conflation of consensual and non-consensual sexual experiences. Moreover, the RSDO incorrectly assumed that a person's sexual orientation is determined by experiences of sexual violence. The 'logic' applied here suggests this RSDO is adjudicating SOGI-based claims with insufficient knowledge of gender or sexuality. They appear to have little regard for the physical and psychological impacts of sexual violence, including the potential for secondary trauma, and fail to understand the South African state's obligations under domestic and international law.

In addition to having doubts raised about their identities, Asma's (West Africa, female) credibility was called into question when she could not recall her partner's name, while Dembe's (Central Africa, male) credibility was questioned due to inconsistencies in his subjective evidence. While a failure to remember key details may seem like damning evidence against an applicant, it may be explained by other factors. Ariel Shidlo and Joanne Ahola note that experiences of violence and feelings of shame or guilt can make it difficult for LGBTI+ claimants to narrate their stories, especially when interrogated by state officials who may themselves hold prejudicial beliefs:

[Asylum] adjudicators expect coherent, consistent and sequential accounts of persecution. But a person's survival of persecution sometimes necessitates amnesia and denial of the impact and severity of traumatic events. Memories of trauma may be stored as fragments – images, sounds, smells and physical sensations – rather than as a verbal narrative, and this poses challenges to recounting a history of persecution.⁴⁹

Other studies report similar findings, noting that LGBTI+ asylum claimants often spend their whole lives concealing their sexuality and/or gender out of fear of violence and may therefore struggle to articulate this aspect of their being in ways that align with bureaucrats' expectations.⁵⁰ For example, an LGBTI+ applicant may feel nervous or ashamed when talking about previous sexual partners and try to find ways to avoid the topic (for example, by 'forgetting' a person's name). The particular difficulties that LGBTI+ asylum claimants face when asked to disclose personal information has also been recognised by South African courts through *Makumba v Minister of Home Affairs and Others* (discussed above). This judgement notes that applicants may withhold key details in interview settings out of fear or confusion.

Burden of proof standard

In 32 of the letters analysed, RSDOs did not appear to conduct objective country-of-origin research. Based on the information provided by RSDOs in their determinations, it seems that roughly half of the claims were denied exclusively or primarily on the basis of asylum seekers' testimonies. This finding accords with Amit's analysis of RSDO letters from a general sample.

We count as evidence of outside research instances where RSDOs incorporated information specific to an applicant's country of origin. We do not count instances where the RSDO repeated information provided elsewhere on the form and/or referenced laws or legal principles. We also do not count unsubstantiated claims about the applicant's capacity to return to or relocate within their country of origin. We recognise that this coding system may not detect all instances where RSDOs searched for objective information. However, the textual data we have available suggests that RSDOs are failing to conduct consistent and rigorous country-of-origin research.

In *Tantoush v Refugee Appeal Board* (see above), the South African High Court held that RSDOs

and applicants share a responsibility for gathering evidence. This obligation is also entrenched in international law, which requires RSDOs to examine subjective evidence (the applicant's personal testimony) in light of objective evidence (academic papers, reports by human rights bodies, newspaper articles and so on). The reason this burden is shared is because many asylum applicants are unable to furnish extensive evidence in support of their claims. Very few people who flee their countries are able to gather corroborating documents. LGBTI+ applicants are unlikely to possess evidentiary materials, such as photos or letters, as these kinds of items can intensify the risk of victimisation.⁵¹ This situation is further complicated by the fact that so much SOGI-based persecution is committed by non-state actors in domestic or social settings.⁵² These obstacles to 'proving' SOGI-based persecution have been well documented in local and international research.⁵³

RSDOs' failure to conduct objective country-of-origin research jeopardises the fair adjudication of claims by basing decisions exclusively on applicants' testimonies. This is particularly concerning given the vulnerability of LGBTI+ persons. As has been noted in academic research, LGBTI+ asylum seekers often struggle to articulate their identities and experiences in ways that are easily understood by state officials. This may be because they are unfamiliar with dominant terminology; because they have spent years concealing their identities out of fear, shame or guilt; or because they are suffering from trauma and related mental health issues.⁵⁴ Basing judgements solely on applicants' testimonies may also heighten the risk of stereotypes informing RSDOs' decision-making. Incorrectly placing the burden of proof on asylum seekers can have dire outcomes, such as the applicant being repatriated to dangerous circumstances or being forced to live without legal documentation in South Africa.

Failure to provide adequate reasons

Next, we examine the evidence RSDOs considered in reaching their decisions. We note the provision of inadequate, illogical or incorrect reasoning, often compounded by the use of unreliable evidentiary sources. The failure to provide detailed reasoning places LGBTI+ asylum seekers at a disadvantage, not only in their initial adjudications, but also when filing for an appeal or review. The analysis in this section focuses on claims denied as unfounded. This is because manifestly unfounded denials rarely provide detailed rationales beyond noting that the claim falls outside the purview of the Refugees Act. We deal with such denials in a separate section.

Shortcomings in reasoning for claim denials

We identified 20 cases in which RSDOs relied exclusively or primarily on generic legal texts or principles as reasons for denying SOGI-based asylum claims. As an example of this practice, we share Abeo's (West Africa, male) RSDO letter in full.

Claim

You claim that you are a gay [sic] and you were afraid to reveal your true identity because the president passed the bill that abolish [sic] same sex activities. You decided to leave the country and come to South Africa to seek refuge.

Credibility

There is no credibility concern

Reason for decision

In reaching the decision the Refugee Status Determination Officer has thoroughly assessed the claim and has had due regard to the objective background information on the applicants [sic] country of origin.

In this claim, the real issue is whether in your particular circumstances there is a reasonable possibility that you would, if returned to your country face persecution. The Refugee Appeal Board's finding that the applicant was required to prove a real risk on balance of probability [sic] was found to be incorrect by the court. The court ruled in the case of Fang v RAB et al, [sic] that the appropriate standard is the one of a reasonable possibility of persecution.

What is persecution: although there is no universal definition of persecution, there are factors generally accepted to amount to persecution. It is generally accepted that activities which may be construed to be threats to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group, undoubtedly constitute persecution.

According to the UNHCR Handbook on Procedure and Criteria for Determining Refugee Status p 14; [sic] a threat to life and freedom on account of race, religion, nationality, political opinion, or membership of a particular social grouping is always persecution.

An international [sic] acclaimed refugee Law Expert: James Hathaway (The Law of Refugee Status p 10) [sic] described persecution as sustained or systemic violation of basic human rights resulting from failure of state protection. Therefore, isolated incident [sic] does not meet the requirement for asylum.

The law requires the applicant to place on record evidence of systematic and sustained persecution against human rights perpetrated by the state. Persecution is defined as

sustained or systemic violation of basic human rights demonstrative of the state protection. There is no evidence that you will face any serious risk of persecution or ill treatment if you returned to [country of origin].

International protection does not extend to allaying fears not objectively justified, however reasonable these fears may appear from the point of view of the individual in question (Sivakumaran (HL): Secretary of State for the Home Department v Sivakumaran et al, United Nations High Commissioner for Refugees Intervening [1988] Imm Ar147, [1988] 1 AC 958).

After a thorough assessment of the claim and careful scrutiny of all the available information the Refugee Status Determination Officer has concluded that, [sic] there is no reasonable ground [sic] that the applicant would, if returned to his country, face persecution.

This RSDO offered legal context for the denial, but failed to provide a rationale based on the applicant's case. It is unclear which element of Abeo's experience the RSDO judged to have fallen short of the threshold of a well-founded fear of persecution. By not outlining the facts used to reach the conclusion, the RSDO fell short of their responsibilities under PAJA.

We found 26 instances where the evidence listed by the RSDO contradicted their decision to deny refugee status. In these cases, RSDOs referenced subjective and/or objective evidence that corroborated applicants' well-founded fear of persecution and yet still denied the application, without further explanation as to why. This sometimes took the form of an RSDO providing generic reasons for a denial – for example, when an applicant provided evidence of persecution in their testimony, but the RSDO failed to address that evidence in their rationale. There was also an issue of RSDOs identifying objective, outside evidence of a well-founded fear of persecution but failing to integrate that information into their final determination. This trend is visible in Garai's (Southern Africa, male) RSDO letter (emphasis added):

Claim

WHY DID YOU LEAVE YOUR COUNTRY?

His life was in danger and he was also persecuted. His father also threatens him [sic] because of different political ideology [sic]. He was one of the people who established [a local LGBTI+ activist organisation]. They were fighting for rights of the lesbian and gays to be recognized [sic]. He was also supporting the opposition party. He was arrested with his colleagues and released late [sic]. Some of them disappeared. This happened in 2008. His father chased him away with an axe.

WHAT HAPPENED TO YOU? Specify to you? [sic]

He was beaten and tortured by police and special unit [sic] in 2008 June/July. What led you to join/to be a part of [LGBTI+ organisation]? He is not about himself whether is gay/straight [sic]. Why? Sometimes he is having some feeling for man [sic]. What was your role in [LGBTI+ organisation]? He was carrying out campaign as team [sic] and educating people about the rights of gays and he was campaigning for opposition party.

IF YOU RETURNED BACK TO YOUR COUNTRY WHAT WOULD HAPPEN TO YOU?

He thinks there is something waiting for him in [country of origin] some dangerous stuff [sic]. And he does not know what would to his future [sic] if he went back. He thinks he was blacklisted in state university.

Were these the only reasons why you left your country?

Yes.

Credibility

Blank

Reason for denial

Persecution has been defined as “serious harm” to the applicant and systematic and discriminatory conduct. The expression “ serious harm” [sic] includes , for example,a [sic] threat to life/liberty,significant [sic] physically [sic] harassment or ill-treatment or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood. The High Court has explained that persecution may be directed against a person as individual [sic] or as member [sic] of the group.

However,the [sic] threat of harm need not be the product of government policy,it [sic] may be enough that the government has failed/is unable to protect the applicant from persecution.

There were no series of incidents that led you to believe that your life was in danger. In your case your fear is unfounded.There [sic] is no evidence that you were marked man nationally [sic] in [country of origin]. Government did not see you as threat [sic] if tha [sic] was the case ,they [sic] were [sic] having a lot of opportunity to kill you while you were in jail.There [sic] is no reasonable threat to your life.

Funny and strange thing you are not sure whether you are gay/you have no access to people of the opposite sex [sic].

There [sic] misunderstanding between you and your father cannot be entertained [sic] here. And most prison deaths are attributed to harsh conditions, hunger, HIV [sic] and due to undequate [sic] facilities.

The RSDO's justification for denying refugee status contradicted the testimonial evidence. Garai identified a number of times where his life was in danger, both within domestic settings (at the hands of his father) and in the public realm (at the hands of the state). He indicated that he was arrested for his political work and then beaten and tortured by police. He shared his concern that a state institution had banned him. This evidence could be understood as Garai being a 'marked man', one who is perceived as a threat by state authorities. However, none of this information was expressly referenced in the RSDO's reasoning for denying refugee status. It is unclear how this RSDO engaged with the testimony and why these details were discounted.

Other RSDO letters contain objective country-of-origin evidence that contradicts the final decision. This was the case with Kennedy's (Malawi, male) RSDO letter. In this case, the applicant's country of origin is central to the claim and has been included in the discussion. We cite the letter in full, with emphasis added. Readers may note empty square boxes in the text below. These were in the original RSDO letter. Microsoft Word uses this symbol to represent a character that is not supported. This means that the program does not have font information for the character being inputted. This often occurs when a punctuation mark is copied and pasted from a PDF file into a Word document. It is improbable that the RSDO intentionally placed these boxes in the text. Their presence bolsters our conviction that this text was plagiarised. At the very least it points to carelessness on the part of the RSDO.

Claim

Applicant is originally from Malawi was born [sic] in [large city] on [date], his claim is based on the fact that he is a gay [sic] and that his life was at risk because on the human rights day of his country as gays they protested [sic] against government and local community members who were harrassin [sic] and beating them for their sexuality, then during that protest two gays were arrested and the rest ran away but police were sent to hunt them down, [sic] he had to run and hide himself to [sic] a friends [sic] place, after he heard the rumours that police are looking for him he then fled away from Malawi, then those two gays were released because of the international pressure from organisations who were fighting for them, [sic] later one gay was re-arrested and he is still in prison, [sic] he also mentioned

that he is afraid to return back [sic] because even his community will never accept him and his life will be at risk.

Credibility

Blank

Reason for denial

You claim that you left your country because of homophobia [sic] by people of Malawi. There is no persecution by the State. Article 20(1) of the Malawi Constitution states that: □ [sic] Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status □ [sic]. Discrimination is deemed to occur if the effect of an action impairs or restricts a person □ s [sic] right, even if the actor did not intend this effect. Government must not discriminate against any person on the basis of age, race, colour, tribe, ethnicity, culture, dialect, gender, birth, disability, religion, political opinion, occupation or wealth.

Malawi □ s [sic] Minister of Justice and Constitutional Affairs, Samuel Tembenu, said that the Malawian Government will not arrest or prosecute gay citizens while lawmakers review existing anti-gay laws. Subsequently prosecutors in Malawi have dropped all charges against same-sex couple [sic]. The last arrest of gays was in 2009, when a gay couple was jailed and convicted in a highly publicized trial. President Bingu wa Mutharika pardoned the pair a year later. Malawi moved to stop prosecuting gay citizens after former President Joyce Banda (2012) [sic] threw her support behind the decriminalization [sic] of same-sex relationships. This suspended the enforcement of colonial-era laws that went against a constitutional guarantee of human rights.

However on 09 February 2016, a court in Malawi's northern region (Lilongwe) has ordered the country's director of prosecutions and the police to arrest those found engaging in homosexual activities.

Justice Dingiswayo Madise warned that anyone who did not abide by this law would be held in contempt of court. This also meant that those who were arrested on charges of homosexuality and were freed while the moratorium was in force would have to be tried in court.

Although the Constitution guarantees the right of a member of a particular social group, in practice these rights are seldom protected, drawing inference to the recent court ruling in Lilongwe. The recent court ruling of, [sic] 09 February 2016, handed down by Justice Dingiswayo Madise has the potential to lead to persecution of homosexual people in Malawi.

It is widely documented that LGBTI individuals are the targets of killings, sexual and gender-based violence, physical attacks, [sic] torture, arbitrary detention, accusation of immoral or deviant behaviour, denial of the rights to assembly, expression and information, and discrimination in employment, health and education in all regions around the world.

The timeline of Kennedy's claim is not clear from the RSDO letter and so we supplement the text with information provided elsewhere in his legal file. In 2009, Kennedy was involved in a protest for gay rights. This occurred in a country that criminalises same-sex sexual practices. Some of Kennedy's co-organisers were arrested, but Kennedy was able to flee the scene. He found temporary shelter at a friend's house and later at a family member's house. He was pursued by the police. A few weeks after the protest, while Kennedy was still in hiding, Malawian police arrested a couple, Tiwonge Chimbalanga and Steven Monjeza, after they held a traditional *chinkhoswe* (engagement ceremony).⁵⁵ In May 2010, Chimbalanga and Monjeza were found guilty under colonial-era laws that criminalise 'carnal knowledge of any person against the order of nature'. They were sentenced to 14 years in jail with hard labour. The couple was pardoned and released a few months later after significant international pressure (including a meeting between UN secretary general, Ban Ki-moon, and the Malawian president, Bingu wa Mutharika). This context is alluded to in the RSDO's determination: 'then those two gays were released because of the international pressure from organisations who were fighting for them'.

In denying Kennedy's claim, the RSDO noted that Malawi has a blanket non-discrimination clause in its Constitution and that a debate has arisen in recent years over whether to repeal the country's 'anti-gay laws'. To better understand the RSDO's engagement with the Malawian legal context, we did a basic Google search using the text in the determination letter. Our research indicates that the RSDO reworded roughly two paragraphs from an *Associated Press* article published in December 2015.⁵⁶ The RSDO then plagiarised a section of a *News24* article about Justice Madise's order to enforce these laws.⁵⁷ The RSDO concluded the denial of status by listing forms of discrimination faced by 'LGBTI individuals' across the world. We were unable to ascertain the source for this statement.

Perhaps the most confounding element of this determination is the fact that the RSDO cited examples of contemporary anti-LGBTI+ persecution in Malawi – not just Chimbanga’s and Monjeza’s arrests, but also a judge calling for increased application of ‘anti-gay laws’. The RSDO even acknowledged that the non-discrimination clause in the Malawian Constitution is insufficient for securing protection for LGBTI+ individuals: ‘The recent court ruling of, 09 February 2016, handed down by Justice Dingiswayo Madise has the potential to lead to persecution of homosexual people in Malawi.’ Given the RSDO’s awareness of the legal context, coupled with the subjective evidence under consideration, it is irrational and unreasonable for the claim to be denied. It is especially perplexing given that many of the examples given by the RSDO occurred in 2016 – the year of Kennedy’s hearing – thus demonstrating current and ongoing persecution.

Finally, we found evidence of RSDOs using incorrect information to justify denials. For example, four RSDOs in the dataset claimed that there is no legal basis for SOGI persecution in Uganda. This is in spite of the fact that Uganda has some of the world’s most draconian penalties for ‘carnal knowledge ... against the order of nature’, including life imprisonment (see Appendix C). RSDOs made similar errors regarding laws in Cameroon and Zimbabwe. One RSDO also claimed that there are no discriminatory laws in DRC, despite documented evidence of public decency laws being used to prosecute LGBTI+ people. The consideration of incorrect information as part of status adjudications contravenes RSDOs’ duty to undertake an unbiased, lawful and fair review of evidence, as required by both PAJA and the Refugees Act.

Sources of evidence for denying a claim

The inclusion of factually inaccurate reasons in RSDO letters is of great concern. It prompted our project team to investigate the sources of evidence used in this sample. Only 35 of the 67 letters show that the RSDOs incorporated evidence beyond that which the applicant provided in their interview. This is, in and of itself, deeply concerning.

Our analysis indicates that RSDOs draw evidence from country reports by the US State Department, the Canadian Board of Immigration Affairs and the United Kingdom’s Home Office, as well as from news sources (such as the *News24* article used in Kennedy’s RSDO letter) and publicly sourced databases (such as *Wikipedia*). It is also likely that some country information is provided to RSDOs directly by DHA, as noted in earlier research.⁵⁸ Worryingly, these sources appear to be presented and viewed as equally credible. None of the RSDO letters contained an acknowledgement that a country report by a state agency (for example, the UK Home Office) is prepared and reviewed by topic specialists, whereas information on publicly sourced websites is unlikely to adhere to stringent research standards.

Reliance on evidentiary material from *Wikipedia* resulted in dubious status determinations. This is apparent in Jacques’ (Cameroon, male) case. Jacques’ nationality is critical for understanding the procedural shortcoming highlighted here and has not been redacted.

Claim

You left your country because [sic] of your sexual orientation. You stated that you are a gay [sic] and gays are not allowed in your country by law and by the community. You stated that you have decided to run away to RSA, in order to practice your sexual orientation [sic].

Credibility

Blank

Reason for denial

A gay Cameroonian man was granted the right to claim asylum in the United Kingdom due to his sexuality in early July 2010. Cameroon's Minister of Communication, Issa Tchiroma, responded to the court's action by acknowledging that homosexuality was definitely illegal in Cameroon, but also arguing that homosexuals were not prosecuted for their private activities. He dismissed the asylum-seeker's claims, saying that the man had nothing to fear from the law: "Do you think he is the only gay person in Cameroon?" In August 2011, a gay Cameroonian man was granted temporary immigration bail from the UK Border Agency after Air France refused to carry him to Yaounde [sic]. In May 2012, the UK Border Agency sought to return asylum-seeker Ediage Valerie Ekwedde, finding "no credible evidence" that he was gay, but was forced to keep Edwedde in custody after he threatened to "make a fuss" on the Air France flight returning him to Cameroon.

With regard to you being Gay [sic], there is no legislation in which [sic] criminalize [sic] homosexual behavior [sic] and there is little, if [sic] any objective evidence that such is in fact enforced. Although it is right to note a prevailing traditional and cultural disapproval of homosexuality, there is nothing to indicate that such has manifested itself in any overt/persecution [sic] action.

A number of support for gay and lesbian organizations [sic] exist and their views have been publicly announced in recent years. There is no indication of any repressive/against [sic] the individuals who made the more public pronouncements. There is nothing that indicate [sic] that you were subjected to persecution and there is no present/future fear.

Jacques sought refuge in South Africa after fleeing a country in which SOGI-based persecution is widely documented – not only in the news media, but also in peer-reviewed scholarly works, in profiles by government agencies and in reports by human rights bodies.⁵⁹ However, instead of referencing reputable materials such as these, the RSDO copied two full paragraphs from

Wikipedia. This lifted text describes three UK asylum cases involving gay applicants from Cameroon: one in 2010, in which refugee status was granted; a second in 2011, in which a temporary immigration bond was authorised; and a third in 2012, in which a deportee protested their being returned to Cameroon. There is little detail about the substance of these cases. The *Wikipedia* text also references a statement by the Cameroonian Minister of Communications in which he clarified that homosexuality 'was definitively illegal in Cameroon'. Yet, the RSDO inexplicably claimed there is 'no legislation which criminalize [sic] homosexual behavior [sic]' in Cameroon. This is followed by text adapted from a UK Asylum Tribunal decision about a gay *Ugandan*: 'Although it is right to note a prevailing traditional and cultural disapproval of homosexuality, there is nothing to indicate that such has manifested itself in any overt/persecution [sic] action.'⁶⁰

The evidence collected from *Wikipedia* is partly relevant, in that it concerns the UK's provision of asylum to gay men from Cameroon. Yet this information is vague and inconclusive. Why did the UK government grant asylum to the first Cameroonian asylum seeker, temporary immigration bail to the next and deportation to the third? Without context and clarity, the connection between these cases and Jacques' application remains unclear. Furthermore, the statement from the Cameroonian minister directly contradicts the RSDO's claim about the absence of legislation criminalising same-sex sexual practices. The third piece of evidence is irrelevant, at least in the form presented here, as it concerns the wrong country.

Though the RSDO took time to research this case, the evidence they gathered was inadequate under South Africa's domestic and international legal obligations. For one thing, the *Wikipedia* page did not provide meaningful insight into legal precedent in SOGI-related asylum case law. The remaining evidence is inapplicable, contradictory and misleading. The RSDO who adjudicated Jacques' claim took text from a government country report, but failed to cite the source of this information. Hence it was not immediately clear that the point made (that persecutory laws are not systematically enforced) was in reference to a different country (Uganda) from the one that Jacques fled (Cameroon).

Jacques' RSDO letter is one of three in this dataset that rely on *Wikipedia* to justify a denial of refugee status. Two of these letters draw on the same *Wikipedia* entry, titled 'LGBT rights in Cameroon.' *Wikipedia* is never a reliable source of information as anyone can write or edit an entry; information that is presented as fact may be opinion, invention, slander or hyperbole. Using *Wikipedia* to source evidence threatens the effectiveness of the adjudication processes by introducing potentially misleading information.

The use of an incorrect country report without attribution was not isolated to Jacques' case. The RSDO who adjudicated Nana's (Central Africa, female) claim copied and pasted text from a country report on Ghana and then wrote about Cameroon – even though Nana is from Central Africa. The RSDO tried to mask this action by changing the word 'Ghana' throughout the decision letter. However, the RSDO missed one mention of 'Ghana', leading us to uncover

this intentionally deceptive act. It is possible there were additional incidents of this practice that our methodology was unable to detect.

The plagiarising of text from outside material may stem from RSDOs' intensive workloads, compounded by the fact they are researching and writing in English. It takes less time and energy to copy text from an outside source than it does to put information into one's own words. However, these factors cannot justify this practice. The extent of plagiarism across the sample could indicate a degree of carelessness on the part of RSDOs. It also underscores the need for internal checks on status denials as part of DHA's quality assurance and accountability measures. As the two examples given above attest, carelessness on the part of RSDOs and/or a lack of compliance oversight come at a heavy price. It means that invalid information may be considered and therefore lead to incorrect adjudications. This is certainly the case with Jacques' determination, in which the RSDO erroneously stated that Cameroon does not criminalise 'homosexual behavior' [sic] despite prejudicial laws being documented in credible sources (see Appendix C).

Concerns about RSDOs copying and pasting text have been flagged repeatedly. It is well documented in Amit's work. The practice has also been noted in relation to SOGI-based asylum determinations, such as in Ingrid Palmary's analysis of RSDO letters. In this sample, there is evidence of intra-determination plagiarism. Gonza (East Africa, male) applied for protection due to homophobic persecution. The RSDO summarised Gonza's claim as follows: 'he left his country because his father is gay and the community wanted to kill all people in the family.' However, the RSDO inexplicably referenced Somalia in justifying the denial of refugee status:

Reason for decision

The burden of proof is on the applicant to prove that he or she is entitled to re fugee [sic] status. The standard of proof is that real risk and must be [sic] considered in light of all the circumstances i.e. past persecution and a looking of [sic] future persecution or risk.

FINDING

The approved approach firstly to consider [sic] the state of mind of the applicant in determining whether genuine fear exist [sic], a subjective test and then objectively determine [sic] upon evidence whether such fear is well founded.

Firstly you claim you left your country because of on going [sic] civil war and there is no peace in your country. You further stated that you cannot return due to the fact that you fear for your life. The Human rights watch [sic] reported that Violations [sic] by the insurgency, a loose coalition of Somali armed groups, include: the indiscriminate firing of mortar rounds into civilian areas; deployment of forces in densely populated

neighborhoods [sic]; targeted killings of civilian officials of the transitional Somali government; and summary executions and mutilation of the bodies of capture combatants: Ethiopian forces backing the Somali transitional government violated the laws of war by widely and indiscriminately bombarding highly populated areas of Mogadishu with rockets, mortars and artillery.

Therefore, currently, there are violations of human rights based on race, tribe, religion, nationality and political opinion.

CONCLUSION

The RSDO finds that the IC has discharged the burden of proof ,therefore th [sic]

Gonza fled a region that is roughly 2,000 kilometres away from the civil war in Somalia. Nor was this conflict the basis of Gonza's application. It appears the RSDO copied text from a determination written on behalf of an applicant from Somalia, in lieu of providing case-specific reasoning. Equally concerning is that fact that the RSDO letter concluded with an incomplete sentence.

Manifestly unfounded standard

Ten claims in this sample were denied as manifestly unfounded. In four of these, applicants told the RSDO that they had fled SOGI-based persecution and yet their claims were determined to be outside the purview of the Refugees Act. This is a misapplication of law, given that the Refugees Act explicitly provides for asylum on the basis of SOGI-related persecution.

Ethan Billy Chigwada's (Zimbabwe, male) RSDO letter provides a chilling example of this practice. Ethan is involved in public activism for LGBTI+ asylum seekers and has requested his personal information be published without redaction.

Claim

Why did you leave you [sic] country?

He states that he came here to visit his gay boyfriend, so the boy boyfriend [sic] posted the video having intimacy [sic] the video went viral both south Africa [sic] and Zimbabwe. He states that after the video posted his parents abandoned

him from coming to Zimbabwe and also the government was looking for him. He states that if he goes back to Zimbabwe he will be arrested.

What happen [sic] to you before you leave the country?

Nothing happened to him but he could not express himself as gay because the community will kill him [sic]. He further states that his parents did not know he is gay until his boyfriend posted video on social media [sic].

How did you know that the government was looking for you?

He states that it was written all over the social media his parents abandoned him [sic].

Credibility

Blank

Reason for decision

This application is made on other grounds than those on which an application for Asylum [sic] can make [sic] in terms of Refugee Act no 130 of 1998.

Decision of the Refugee Status Determination Officer:

MANIFESTLY UNFOUNDED [sic]

The claim section states that Ethan feared arrest and murder. High levels of social stigma and the presence of anti-LGBTI+ laws are both well documented in Zimbabwe. However, the RSDO concluded that the claim was based on grounds beyond those provided for in the Refugees Act. This is factually incorrect and implies that the RSDO was either unfamiliar with the Act (that is, they did not know that sexual orientation is an accepted grounds for asylum) or they intentionally misapplied relevant legislation. Both possibilities warrant serious concern.

In the remaining instances, applicants either did not disclose SOGI-related persecution as a motivating factor for seeking asylum or the RSDO did not record this information when summarising the claim. In a sworn court affidavit, Banga (Southern Africa, male) explains that he did not know SOGI was permitted grounds for seeking asylum in South Africa and therefore did not say as much in his interview. There is also evidence from Namazzi's (Central Africa, female) supplementary documentation that the RSDO did not capture the details of the claim correctly before ruling it manifestly unfounded.

As explored in *Makumba v Minister of Home Affairs*, manifestly unfounded determinations in SOGI cases may be the result of applicants' difficulties in interview settings. Research shows that LGBTI+ asylum seekers may struggle to articulate, or be reluctant to disclose, personal information because they feel intimidated, mocked or threatened. Their hesitation may also stem from complex trauma. From appeal documents, it is clear that Miriro (Southern Africa, female) did not disclose her sexuality in her interview because the setting was inhospitable. First, she was handed a form to complete but was not given any support to do so. When the interviewer came around, Miriro was asked to tell her story in a crowded room with at least 'one hundred other people'. She feared verbalising her sexual identity in this setting. At the time of lodging her claim, Miriro had only recently started using the term lesbian to describe herself. Due to these factors, Miriro did not list SOGI-based persecution as her impetus for leaving her country of origin – though this was central to why she fled. Daudi (Central Africa, male) described a similarly hostile interview environment that prevented him from disclosing experiences of SOGI-based persecutions. Both Miriro's and Daudi's claims were denied as manifestly unfounded.

LGBTI+ applicants are frequently obstructed from claiming asylum due to hostile bureaucratic environments and/or processes. A number of local studies point to discriminatory behaviours on the part of DHA officials, communication barriers stemming from prejudicial interpreters and the intimidating social environment in which applicants are expected to disclose sensitive information (for example, being forced to out themselves in a crowded office, often in front of people from their own national, ethnic or linguistic community).⁶¹ The findings from this study appear to support these earlier observations and suggest an entrenched culture of hostility within DHA.

Violation or misapplication of international legal principles

We found evidence of DHA officials falling short on obligations under international refugee law. Specifically, we noted contraventions of three principles outlined in the UNHCR Guidelines:

1. That applicants do not need to be known to the authorities in their country of origin in order to have a well-founded fear of persecution (referred to as 'high profile').
2. That applicants should not need to hide their identities as a precondition of safety (referred to as the 'discretion principle').
3. That applicants should not be offered internal relocation as an alternative to an adequate asylum adjudication.

Erroneous use of 'high-profile' status

In 23 instances across the dataset, RSDOs denied protection claims either wholly or in part because applicants' identities were not widely known in their communities. Here is the full text of Abbo's (Uganda, female) denial, with emphasis added. Her country of origin has not

been redacted as the ongoing persecution of LGBTI+ people in Uganda provides context for understanding this misapplication of law.

Claim

You [sic] claim that you left Uganda because your [sic] lost your parents in [date] and life was not right for you. You claim that you then were staying with relatives that ill treated you. You [sic] claim that you then decide to come to south africa [sic] to better your life. You [sic] also claim that you were sexually violated and ended up being a lesbian. You [sic] claim that being lesbian is illegal in Uganda and you were afraid thta [sic] you might be arrested [sic] or even worse be killed.

Credibility

There were no credibility concerns both on your written application and the oral interview with the refugee status determination officer.

Reason for denial

You [sic] claim that you left Uganda because your [sic] lost your parents in [date] and life was not right for you. You claim that you then were staying with relatives that ill treated you. You [sic] claim that you then decide to come to south africa [sic] to better your life. You [sic] also claim that you were sexually violated and ended up being a lesbian. You [sic] claim that being lesbian is illegal in Uganda and you were afraid thta [sic] you might be arrested [sic] or even worse be killed.

Past persecution as you claimed you were subjected to, does not necessary [sic] establish a well-founded fear of persecution. It is therefore, necessary to look to the likelihood of persecution if returned to your country which is highly unlikely in your case. I am therefore, obliged to look to the future to ascertain whether you had a well-founded fear of persecution and what had happened in the past could be persuasive as to what would happen if returned to your country. Not only should past persecution be considered, but also the prospective risk of persecution should you be returned to your country. Therefore taking into consideration you country of origin information and the initial claim you advanced to the RSDO *there is no reasonable chance that you will be subjected to persecution in your country if returned because you are not at the adverse attention of the Ugandan [sic] authorities compelling you to leave your country.*

The UNHCR Guidelines are clear that an applicant's public profile is an insufficient basis upon which to deny a claim for protection. An LGBTI+ person might, for instance, have a well-founded fear of persecution due to the existence of laws criminalising particular sexual activities. These laws could at any point be used to penalise people. It is both the existence

of these laws and their *potential* for use that creates a climate of fear and often leads LGBTI+ persons to conceal their identities.

The rationale that Abbo was not a high-profile person in her community was used in lieu of adequate consideration of country conditions. Not only does Ugandan law stipulate harsh penalties for ‘crimes’ linked to LGBTI+ persons, but the country also has a documented history of public outings (often in tabloid newspapers) and of SOGI-motivated murders.⁶² LGBTI+ persons in Uganda are arbitrarily arrested and detained by the police. State authorities routinely interrupt and stop meetings by LGBTI+ activists. Politicians, including the president, and other influential figures are on record spouting anti-LGBTI+ rhetoric and inciting SOGI-based violence.

The Ugandan Constitution prohibits discrimination on a number of grounds, but this does not extend to SOGI-based discrimination. The country’s penal code criminalises same-sex sexual conduct and punishes such acts with up to life imprisonment (see Appendix C). Recent years have also seen repeated efforts by the government to strengthen criminalisation, such as the adoption of the Anti-Homosexuality Act in 2014. This legislation extended the applicable sentences for those convicted under laws criminalising same-sex sexual acts and created the offence of promoting homosexuality (the Act has since been set aside by the Ugandan Constitutional Court). Even with this successful court challenge, LGBTI+ individuals experience forms of discrimination that their heterosexual counterparts do not and are subjected to various forms of state-sanctioned persecution. All of these factors explain why an LGBTI+ person from Uganda might conceal their identity from their community and/or family, but still seek protection in another country.

Even those applicants whose identities were publicly known in their countries of origin were unsuccessful in their refugee applications. Namono (East Africa, female) told the RSDO that her community knew about her sexuality and intended to ‘arrest her, and hand her over to authorities because to be gay/lesbian is against the law in her country.’ The RSDO ignored the fact that Namono had been outed and threatened with punitive action. Namono’s claim was denied on the following basis: ‘there is nothing from the applicant which will set her apart to the extend [sic] that she will be selected from persecution upon return.’ This suggests that LGBTI+ applicants’ public profiles may be used to justify denying refugee status, in lieu of adequate attention to each individual’s case.

Violations of the discretion principle

International law holds as a norm that individuals should not need to hide who they are in order to live safely. This is called the discretion principle. In effect, the principle says that if a person needs to hide who they are in order to avoid harm, then they are not safe in any meaningful sense.⁶³ The oft-cited UK Supreme Court case *HJ (Iran) and HT (Cameroon) v Secretary for the Home Department* found that this principle holds true for sexual and gender minorities (see above).

In eight instances in this sample, RSDOs recommended that LGBTI+ applicants hide their identities. Sanyu (East Africa, female) was advised by the RSDO to return to her country of

origin, despite the presence of explicitly persecutory laws, and to live discreetly by adopting a lifestyle that aligns with social norms. Pressure to be inconspicuous is itself considered a form of persecution under international law. RSDOs' assertions that LGBTI+ individuals might be safe in countries that criminalise them if they remain 'low profile' violates both the spirit of refugee law and specific legal obligations, including those set out in the UNHCR Guidelines.

Incorrect application of the internal relocation standard

In 12 cases, RSDOs suggested that applicants try relocating within their countries of origin, rather than seeking asylum in South Africa, or as a precondition of receiving refugee status in South Africa. Angel's (Southern Africa, female) case provides a disturbing example of this practice. She came to South Africa after being threatened with extreme brutality by community members, to the extent that she was uncomfortable attending university. However, the RSDO denied her application on the basis that she did not try relocating before seeking asylum. The same reasoning was applied in Aamadu's (West Africa, male) and Afiya's (East Africa, female) cases. The RSDO who adjudicated these applications deemed them unfounded because – like Angel – they had failed to relocate within their countries of origins.

The UNHCR Guidelines and other international legal standards do not place an obligation on a threatened individual to ensure they have exhausted all options within their country of origin before seeking asylum. They further state that any consideration of a relocation alternative cannot be done in the abstract. An RSDO must identify a particular area in the claimant's country of origin in which the threat of persecution is demonstrably absent. Any suggested place of relocation would have to be carefully assessed to ensure it is both relevant and reasonable. We note that a specific region to which applicants might relocate is not mentioned in any of the letters in our sample. The UNHCR Guidelines are also clear that internal relocation cannot be a substitute for adequate asylum adjudication and should only be offered in light of evidence that applicants would be safe in the proposed location. We are concerned that internal relocation may be cited in SOGI-based adjudications without clear attention given to individual circumstances.

Misapplication of the legal concept of a well-founded fear of persecution

RSDOs rejected applications from individuals who may have been eligible for refugee status under international law. Protection was denied to people who had suffered extreme physical and sexual abuse at the hands of both state and non-state actors – from Anold and Abdo, who both survived sexual violence, to Kennedy, who was pursued by police for months, and Ethan, who feared his community may murder him. RSDOs also denied applications for protection from those whose loved ones were brutalised and/or killed by community members. In these cases, RSDOs were asked to determine if applicants had a well-founded fear of persecution due to association with an LGBTI+ person.

We reiterate that LGBTI+ persons can be exposed to myriad forms of abuse, ranging from murder, torture and sexual assault through to bullying, harassment, social exclusion and forced marriage. In many cases, LGBTI+ asylum seekers flee their homes before verbal threats escalate into physical violence. International case law shows that a well-founded fear of persecution can encompass a wide range of discriminatory practices in relation to SOGI

cases – including, but not limited to, extreme physical violence. According to the UNHCR Guidelines, '(p)ast persecution is not a prerequisite to refugee status and, in fact, the well-foundedness of the fear of persecution is to be based on the assessment of the predicament that the applicant would have to face if returned to the country of origin' (paragraph 18).

As in Amit's study, our analysis reveals significant shortcomings in RSDOs' implementation of this key legal concept. We recall Garai's decision letter, which stated that the applicant failed to prove his sense of fear was well founded in part because the '[g]overnment did not see you as threat [sic] if tha [sic] was the case ,they [sic] were [sic] having a lot of opportunity to kill you while you were in jail.' In effect, this RSDO reduced the legal concept of persecution to a state killing a person. This standard of persecution is untenable; it threatens both the applicant and the asylum system. Indeed, it negates the purpose of refugee law, which intends at the very least to protect human life.

Palmary finds that RSDOs limit their notion of SOGI-based persecution to 'excessive violence'⁶⁴ and in doing so normalise less exceptional forms of brutality, discrimination and harm. This means that RSDOs' threshold for acknowledging SOGI-based persecution is unduly high. Under international law, individuals do not need to prove themselves victims of excessive violence to be eligible for protection. Thus, Garai's case serves as an example of how the legal principle of a well-founded fear of persecution is being incorrectly applied.

RSDOs also denied protection to applicants whose countries of origin had demonstrated a failure to protect them. Tonino's (Central Africa, male) case offers a distressing example:

You claimed that you were born in [redacted] and grew up in [redacted]. You said prior leaving [sic] your country you were satying [sic] in the same area. You said you had your own business and you were a stylist in your salon. You claimed that you a homosexual [sic] and you were caught on the act [sic] by your client's brother who happened to be the brother in law for [sic] your lover. You claimed that he wanted to hurt you but your lover defended you and yhou [sic] managed to escape. You said the incident happened in [date] and you immidiately [sic] went to the police to report it and you were not assisted and the officer told you that " you [sic] deserved to die."

Tonino was outed to his community; he and his partner were subsequently threatened. The police responded to Tonino's request for assistance with inaction and bigotry: 'you deserve to die'. The state was authorising brutality against the applicant. This implies a potential of future persecution. Yet, the RSDO claimed there is 'no persecution by your government, so no external protection is required.'

As noted above, international refugee law protects against impunity for non-state actors who perpetrate SOGI-based discrimination. This is established when a state is unable or unwilling to provide protection from persecution, including harm committed by relatives, neighbours, colleagues or the broader community. Similarly, the Yogyakarta Principles consider impunity

for non-state actors who commit SOGI-based prejudice to be a human rights violation. The RSDO in Tonino's case violated this norm in international refugee law.

Next, RSDOs misinterpreted evidence of violence against applicants' loved ones. Under international law, such experiences can serve as evidence of an applicant's fear of persecution. Violence perpetrated against people in one's vicinity builds a climate of fear; a person is not safe when their loved ones are victimised.

Abdo (Northern Africa, male) identifies as gay. According to Abdo's RSDO letter, his application for protection was lodged on the following grounds:

I left my country in [date] due to the fact that our country subscribe [sic] to Shariah law which does not allow same sex relationship [sic] and do not wish to return unless the situation has normalised. I was living with a same sex partner and one night in [date] while I was not home the community came to our house and killed my partner. I than [sic] relocated to my uncle in [redacted] but because my uncle fled the area due to the civil unrest in the area at the time my family arranged with my cousin living in RSA to accomodate [sic] since the community were [sic] looking for me to kill me. Our country is also currently eperiencing [sic] a war due to [redacted].

The RSDO denied Abdo's application, even though his partner was murdered by community members. According to international law, violence perpetrated against a loved one – in this case a romantic partner – can constitute a well-founded fear of persecution. Furthermore, Abdo's fear of SOGI-based persecution was compounded by an ongoing conflict that prevented him from finding safety at his uncle's house. Given Abdo's experiences and the social context in which they occurred, his claim appears to have met the definition of a well-founded fear of persecution under both the 1951 Refugee Convention and the OAU Convention.

This legal norm was similarly misapplied in relation to Asma's (West Africa, female) application. This is how the RSDO summarised her claim for protection:

Applicant claims she is a homosexual woman. She claims that in [date] her partner was arrested and sentenced to 5 years [sic] imprisonment or R100 000 fine ... The applicant also claims that she was scared after her partner's arrest and went to live in the town area. She also claims that lawyers who was [sic] fighting for the rights of homosexuals were killed...

Asma's partner was imprisoned and her lawyers were murdered; she herself tried relocating within her country of origin. Still, the RSDO determined 'there is no evidence that suggest (sic) that your life was in danger whilst in your country at any stage as a matter of fact.' Based on the information available, this conclusion appears illogical and unreasonable. International legal principles hold that targeted murders of non-state actors – which happened to Asma's

lawyers – could constitute a well-founded fear of persecution. Furthermore, the incarceration of a romantic partner in a country that criminalises same-sex sexual practices would likely engender a climate of fear. Both of these facts could have constituted evidence of a well-founded fear of persecution under international law.

Persecution by association can become so intense as to prompt friends or relations of persons presumed to be LGBTI+ to seek protection. We recorded this happening in three instances across the dataset. One example is Bale (Central Africa, male). In his application, Bale recounted that his house had been burnt down following a vigilante murder of a gay friend. It was his fear of further violence that prompted Bale to flee. However, in all three cases, the RSDO dismissed such evidence as constituting a well-founded fear of persecution.

Principle of non-refoulement

Non-refoulement is a cornerstone of international refugee law and must be carefully considered during all status adjudications. The principle holds countries receiving asylum seekers responsible for not returning individuals to contexts where they may reasonably fear future persecution. We cannot estimate the number of times this principle has been violated in South Africa with regards to LGBTI+ applicants, given that we do not know how many people have been deported or how many claims are still under consideration or on appeal. However, in analysing this sample, we have come to hold grave fears for LGBTI+ asylum seekers' safety and well-being.

Summary of findings

The RSDO letters analysed here point to worrying trends in DHA's handling of SOGI-based asylum claims. They suggest that the South African state is leaving LGBTI+ asylum seekers vulnerable to deportation and future harm, while also exposing them to psychological distress, secondary trauma and potentially death. The state's failure to correctly apply domestic and international law may also force potential LGBTI+ refugees to remain undocumented in South Africa and therefore increase their risk of exploitation and violence.

Violations of the South African Constitution and PEPUA

We note that the following constitutes discriminatory treatment of LGBTI+ asylum applicants and thus violates the legal guarantee to non-discrimination:

- **The use of stereotypes about sexual and/or gender minorities to justify denials.**
- **Displays of bigotry or hostility towards applicants who applied for SOGI-related protection, as evidenced by the use of derogatory language in official documentation.**
- **The conflation of objective evidence about cisgender applicants with evidence about transgender, intersex and gender-diverse applicants, and the conflation of objective evidence about gay men with evidence about lesbian women and bisexual persons.**
- **The relatively high proportion of credibility concerns raised about applicants' identities rather than their asylum claims.**

Basing adjudications on stereotypes is not only substantively and procedurally flawed, but also suggestive of entrenched prejudices. The fact that an applicant has a child, is a person of faith, or was injured during a rape – to highlight just a few examples from this dataset – is not evidence of their 'true' sexual identity and cannot be used as a basis for determining a well-founded fear of persecution. Furthermore, the collapsing of distinctions between LGBTI+ experiences constitutes a systemic and discriminatory barrier to adequate asylum adjudication for people who are disadvantaged by both their sexuality and gender.

Misapplication of the Refugees Act

DHA officials ignored the internationally accepted standard for the burden of proof in asylum claims. In over half of the cases in this sample (an estimated 37 out of 67 cases), RSDOs based

their adjudications primarily or exclusively on applicants' testimony. This practice threatens to undermine the validity of the adjudication process by excluding relevant information. It also heightens the potential for prejudicial interpretations. Such a risk is particularly strong for applicants applying for protection due to SOGI-based persecution, given the pervasiveness of stereotypes and misconceptions in South Africa.

Even in cases where RSDOs undertook outside research, substantial evidentiary concerns have been identified. These include, but are not limited to, the following:

- **The provision of generic reasons. In at least 20 cases, RSDOs simply recited international law without referencing details specific to the application being considered.**
- **The provision of reasons disconnected from the conclusion to deny asylum. In at least 26 cases, RSDOs listed evidence of persecution and yet denied the claim without adequate explanation.**
- **The provision of irrelevant reasons. In at least three cases, evidence related to a different country was provided.**
- **The reliance on incorrect reasons. At least seven RSDO letters stated that there are no persecutory laws against LGBTI+ persons in applicants' countries of origin, despite the opposite being true (this was done in relation to Cameroon, Uganda, Zimbabwe and DRC).**

We also note four cases in which an RSDO misused the 'manifestly unfounded' category to deny protection. Some RSDOs in the sample seem unaware that SOGI-based persecution is accepted grounds for asylum, or that sexual and gender minorities constitute a protected social group under the Refugees Act.

Given the seemingly limited sensitisation training offered to RSDOs and the very real obstacles this creates for applicants lodging SOGI-related claims, we draw attention to the *Makumba v Minister of Home Affairs* finding. This case recognises the unique barriers facing LGBTI+ applicants in interview settings and could be salient for many SOGI-based claims. Clinics should be familiar with this case and incorporate it into appeal documentation on behalf of clients who were unable to disclose their identities to RSDOs and/or those whose cases were deemed manifestly unfounded.

Violations of PAJA

Our analysis shows that RSDOs are failing to provide adequate, logical and correct reasoning when denying refugee protection. We find examples of superfluous details being included

in adjudications, the use of misleading country-of-origin information, the selective use of evidence and the copying of text from non-credible sources, including *Wikipedia*. There is also evidence of RSDOs replicating text from other decision letters, though this practice seems to be less prevalent in this sample than in previous research.

Overall, there is a noticeable failure to link the evidence under consideration to the conclusions drawn. Our findings suggest that one major function of appeal documentation could be to provide accurate, relevant and up-to-date information on country-of-origin conditions and to link this concretely to an applicant's claims.

Violation or misapplication of international legal principles

The UNHCR Guidelines are clear that applicants do not need to be known to the authorities in their countries of origin in order to have a well-founded fear of persecution; that applicants should not need to hide their identities or practise discretion as a precondition of their safety; and that applicants should not be expected to undertake internal relocation in lieu of an adequate asylum adjudication.

Our analysis reveals evidence of RSDOs falling short of these standards, including 23 instances where officials suggested that applicants might be safe because they were not high profile enough to be persecuted; eight instances where officials recommended individuals return to their countries of origin and hide who they are; and 12 instances where officials suggested that applicants move within their countries of origin, rather than, or as a precondition of, receiving refuge in South Africa. We also note that none of the letters in this sample provided viable relocation options, as is required under international law. Recommendations for internal relocation and discreet behaviours, as well as the excuse that applicants were not high-profile figures, appear to be presented in lieu of adequate reasoning.

It is possible that many RSDOs have misapplied international legal norms regarding a well-founded fear of persecution and in doing so violated South Africa's commitment to non-refoulement. RSDOs in this sample denied refugee protection to applicants from countries that criminalise specific sexual practices; to applicants who were persecuted and/or extremely physically violated by state actors; to applicants who were beaten or raped by non-state actors; and to applicants whose loved ones were brutalised and/or killed. The principle of non-refoulement holds that signatories to international refugee laws cannot return individuals to circumstances where they might reasonably fear persecution. Activist and scholar Guillain Koko writes about South Africa's chronic violation of the principle of non-refoulement for LGBTI+ applicants.⁶⁵ It is impossible to determine how many times the principle of non-refoulement was violated in this sample, yet the data that is available is sufficient to warrant concern.

Key recommendations

In light of the above findings, we call on DHA to take the following steps as a matter of urgency:

- **To roll out a mandatory SOGI sensitisation programme for all employees.**
- **To provide additional training for RSDOs to ensure they have the legal knowledge and research skills to fairly adjudicate SOGI-based applications.**
- **To undertake a review of internal policies and procedures to ensure all administrative actions meet domestic, regional and international legal obligations.**
- **To institute internal checks on status denials as part of its quality assurance and accountability measures.**
- **To ensure accurate, reliable and up-to-date country-of-origin information is available to RSDOs and that clear protocols are in place regarding the types of materials that constitute objective evidence.**
- **To create a safe, secure and private environment in which LGBTI+ applicants can disclose personal information, including displaying SOGI-affirming messaging that provides reassurance and guidance for LGBTI+ applicants.**
- **To recognise and respond to the unique barriers facing trans and gender-diverse applicants. This may involve creating alternative access points and either ending the use of gendered queues or allowing asylum seekers to queue on the basis of self-identification.**
- **To forge ongoing collaborations with civil society, LGBTI+ organisations, SOGI experts and other key stakeholders.**

Appendix A: Table summarising the findings

	Count	Percentage of sample	Participant IDs
Potential violations of South African Constitution and PEPUA			
Explicitly relied on stereotypes to adjudicate asylum claim	10	15%	3, 14, 34, 38, 41, 57, 58, 77, 85, 89
Used the term 'a gay' to describe applicant	22	33%	18, 22, 26, 27, 28, 29, 34, 35, 38, 39, 41, 45, 46, 47, 48, 54, 54.1, 57, 58, 61, 77, 85
Raised credibility concerns about the application	13	20%	6, 11, 16, 17, 34, 41, 44, 57, 58, 60, 62, 85, 103
Raised credibility concerns about the applicant's sexual orientation	8	11%	6, 17, 34, 41, 62, 57, 58, 85
Potential violations of the Refugees Act or related case law			
Estimated number of RSDO letters that did not include objective country-of-origin research	32	48%	3, 5, 6, 11, 12, 13, 14, 16, 18, 19, 22, 24, 27, 34, 35, 38, 41, 44, 45, 51, 53, 55, 57, 61, 63, 66, 77, 81, 82, 85, 89, 100
Claims deemed 'manifestly unfounded' despite applicant disclosing SOGI-based persecution in interview	4	6%	37, 54.1, 89, 111
Claims deemed 'manifestly unfounded' that are comparable to <i>Makumba v Home Affairs</i>	4	6%	2, 25, 50, 56
Potential PAJA violations			
Objective and/or subjective evidence that contradicts the decision to deny refugee status	26	39%	3, 6, 9, 12, 17, 18, 19, 22, 23, 27, 30, 33, 34, 39, 43, 45, 48, 52, 58, 61, 66, 77, 81, 82, 99, 103
RSDO letters inaccurately represent laws in applicants' countries of origin	7	11%	13, 14, 16, 20, 30, 44, 54
Evidence from incorrect country given in reasoning	3	4%	54, 62, 81
Provision of generic legal text or principles in lieu of adequate reasons for denying claim	20	30%	5, 12, 13, 18, 21, 24, 27, 30, 33, 38, 45, 51, 52, 55, 57, 61, 63, 66, 82, 100
Documented use of <i>Wikipedia</i> for country-of-origin research	3	5%	54, 83, 99
Potential violations or misapplication of international legal principles			
Erroneous use of 'high-profile' requirement	23	34%	6, 12, 13, 18, 19, 20, 22, 24, 26, 27, 29, 34, 38, 41, 45, 46, 47, 53, 57, 58, 62, 77, 82
Violation of discretion principle	8	12%	12, 17, 19, 26, 34, 57, 62, 89
Incorrect application of internal relocation standard	12	18%	14, 15, 17, 20, 26, 29, 35, 48, 53, 66, 99, 100

Appendix B:

Consolidated responses to

the Refugees Amendment

Act and Regulations

The Refugees Amendment Act and the new Regulations make it more difficult for an asylum applicant to get documentation in South Africa and harder to stay legally documented once here. At the time of writing, it remains unclear how the new provisions will be enforced.

The LRC has raised a number of concerns, including, but not limited to, the following:

- Asylum seekers and refugees are not allowed to be involved in politics in South Africa nor in their country of origin. This could preclude their rightful capacity to advocate for their needs.
- Asylum seekers and refugees are not allowed to request any document from their country of origin's embassy. This could inter alia obstruct their capacity to apply for asylum.
- Asylum seekers are obliged to show DHA officials an asylum transit visa issued at a port of entry or, under permitted circumstances, a valid visa. If they do not, they may be refused the possibility of applying for asylum. This has the potential to violate the international principle of non-refoulement.
- Asylum seekers and refugees must undergo an assessment of their capacity to sustain themselves and their dependants as a precondition of being granted work rights. This could limit their access to employment.
- Asylum seekers and refugees must provide DHA with a letter of employment, or of enrolment at an educational institution, in the prescribed form within a period of 14 days from the date of the asylum seeker taking up employment or being enrolled. This could limit their capacity to work or study.
- Refugees must reside in the country for 10 years before they are eligible to apply for permanent residence. This leaves individuals vulnerable to deportation for a longer period of time than under the previous version of the Act.

- Asylum seekers and refugees who do not renew their papers within 30 days from the date of expiration will be deemed to have abandoned their asylum applications and will be excluded from applying for asylum again. Given the known regularity with which asylum seekers must renew their permits, and the widely documented barriers to doing so (for example, delayed admittance to RROs), this regulation primarily functions to exclude applicants from the system, rather than provide for a fair adjudication of refugee claims.

The Scalabrini Centre⁶⁶ has raised the following concerns (among others) about the Amendment Act and new Regulations:

- It expands on reasons for exclusion from asylum or revocation of refugee status.
- It creates wholly unrealistic and impractical time frames, which have the potential to exclude significant numbers of people from their right to seek asylum in South Africa.
- It potentially undermines the rights of asylum seekers to work and study in South Africa.
- It introduces overly onerous and unrealistic procedures and requirements for those seeking asylum – procedures that will likely exacerbate bureaucratic backlogs.
- It reduces the responsibilities and mechanisms of accountability, as well as safeguards in respect of departmental officials responsible for assisting asylum seekers and refugees in South Africa.
- It provides for detention procedures that may be considered unconstitutional.

As the authors of this study, we are deeply concerned by the Amendment Act's provision to deny or revoke asylum from those who have committed crimes in other countries. Most of the people whose cases are analysed in this report could be legally prosecuted in their countries of origin for violating laws regulating sexual acts, gender expressions and/or LGBTI+ activism (see Appendix C). This means that LGBTI+ asylum seekers, including those represented here, could be excluded from refugee protections in South Africa due to their very experiences of persecution. The Amendment Act therefore has the potential to create an additional barrier for those seeking protection. This form of exclusion would violate an applicant's right to non-discrimination and administrative justice.

Appendix C: Examples of persecutory laws

Here we summarise the legal context in the countries from which individuals in this sample fled. We draw specifically on legal data collected by the International Lesbian and Gay Association (ILGA).⁶⁷ We also include information on Somalia — even though this country is not represented in our sample — as PASSOP and LRC have worked with clients from this region. ILGA annually releases reports on laws across the globe pertaining to SOGI. We encourage those preparing appeals to refer to ILGA's resources so as to ensure they have up-to-date information on applicants' countries of origin.

In 2019, 68 UN member states criminalised consensual same-sex activities and two member states de facto criminalised consensual same-sex activities.⁶⁸ Below we note laws as of 2019 in the countries represented in our sample. Like ILGA, we identify laws concerning sexual practices as well as gender recognition. The latter can put individuals at risk of violence and humiliation, while also stymieing their access to legal rights and citizenship. It is only one of many potential measures of transgender legal inclusion. The below is not an exhaustive list of legal persecution of LGBTI+ persons. Furthermore, we note that individuals' motivations for migrating across national borders are seldom reducible to a single factor.⁶⁹

Explicitly persecutory laws

Burundi: Law No 1/05 of 22 April 2009 concerning the revision of the Penal Code Article 567 states: 'Whoever has sexual relations with someone of the same sex shall be punished with imprisonment for three months to two years and a fine of 50,000 to 100,000 francs or one of those penalties.'

Burundi does not provide for legal gender recognition.

Cameroon: Penal Code (No 2016/007 of 12 July 2016) Article 347-1 criminalises 'sexual relations with a person of the same sex.' Those found guilty are subject to up to five years in prison, as well as a fine. Both men and women can be found guilty of this offence. Cameroon updated its penal code in 2016, but did not change its prohibitions on same-sex sexual activities.

Article 83 of the Law on Cybersecurity and Cybercrime (No 2010/012 of 21 December 2010) prohibits same-sex sexual propositioning through electronic communications. Those found guilty of making sexual propositions to a person of their sex through electronic communications are subject to imprisonment of up to two years and/or a fine of 500,000 to 1,000,000 CFA francs. The penalties under Section 83 are doubled in the event such propositions are followed by sexual intercourse.

Cameroon does not provide for legal gender recognition.

Ethiopia: Penal Code of the Federal Democratic Republic of Ethiopia (Proclamation No 414/2004) Article 629 states: 'Whoever performs with another person of the same sex a homosexual act, or any other indecent act, is punishable with simple imprisonment.'

Article 630(1) of the Penal Code states: 'The punishment shall be simple imprisonment for not less than one year, or, in grave cases, rigorous imprisonment not exceeding ten years, where the criminal (b) makes a profession of such activities within the meaning of the law.'

Ethiopia does not provide for legal gender recognition.

Kenya: Penal Code (No 5 of 2003) Section 162 criminalises 'carnal knowledge of any person against the order of nature,' which is understood to cover anal and oral intercourse between individuals perceived by state officials to be of the same sex.⁷⁰ Those found guilty under this law are subject to up to 14 years in prison. Section 163 criminalises the attempt of acts against the order of nature, with a penalty of up to seven years in prison. Both men and women can be found guilty under Section 162 and 163.

Penal Code Section 165 threatens men charged with 'gross indecency' with between five years in prison. 'Gross indecency' applies specifically to acts between men.

In 2014, a Kenyan court removed the gender marker on a trans woman's Certificate of Secondary Education. The case, *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu (2014)*,⁷¹ was watershed. Legal gender marker change is available in Kenya, as is legal name change.

Malawi: Penal Code (Cap. 7:01) Section 153 criminalises 'anyone who has carnal knowledge of any person against the order of nature.' Those found guilty under this law are subject to up to 14 years in prison, with or without corporal punishment. Section 154 of this Code criminalises people who attempt to commit unnatural offences, with a penalty of up to seven years in prison. Section 156 criminalises 'indecent activities between males' and, as of 2010, Section 137A criminalises 'indecent activities between females.'

Legal name change and gender-marker change are nominally possible in Malawi, under Section 20(1) and 21(1) of the National Registration Act 13 of 2010. This legislation is not trans specific.

Nigeria: Criminal Code Act, Chapter 77 (Laws of the Federation of Nigeria 1990) section 214, criminalises any person who 'has carnal knowledge of any person against the order of nature.' Those found guilty under this law are vulnerable to imprisonment for up to 14 years. Section 215 criminalises attempting such 'offences,' with the possibility of incarceration for up to seven years. The Act specifies that individuals suspected of attempting same-sex sexual activities can be arrested without a warrant. Section 217 criminalises 'gross indecency.'

On 17 December 2013, the Nigerian Senate and House of Representatives passed an explicit

prohibition on same-sex marriage, civil unions, and 'gay clubs, societies, and organisations.' Nigerian law also criminalises anyone who 'supports the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings.' This means that those who do not engage in same-sex sexual activities are also liable to prosecution.

Individuals who enter into same-sex marriage or civil union are each liable upon conviction to imprisonment of 14 years. A person who operates a gay club or society, or who 'makes public show of same-sex amorous relationship in Nigeria, is liable upon conviction to imprisonment of up to ten years.' This provision came into force in January 2014 and renders void even marriage contracts or civil unions from other countries.

Several Northern Nigerian states prescribe the death penalty for men who engage in same-sex sexual activities, as it is seen as a violation of Sharia laws in those regions. Women who are found guilty under these provisions are subject to whipping and/or imprisonment.

Nigeria does not provide for legal gender recognition.

Somalia: Penal Code (Legislative Decree No 5/1962) Article 409 reads: 'Whoever has carnal intercourse with a person of the same sex shall be punished, where the act does not constitute a more serious crime, with imprisonment from three months to three years. Where the act committed is an act of lust different from carnal intercourse, the punishment imposed shall be reduced by one third.'

Article 406 reads: 'Whoever, in a public place or a place open to the public, incites anyone to lewd acts, even in an indirect manner, shall be punished, where the act does not constitute a more serious offence, with imprisonment to one year or with fine up to Shillings 2,000.'

Somalia does not provide for legal gender recognition.

Sudan: Penal Code (Act No 8 of 1991) Section 148 criminalises sodomy. Those found guilty under Section 148 are subject to up to 100 lashes and up to five years' imprisonment. Second-time offenders are subject to up to 100 lashes and up to another five years in prison. A third-time offender will be punished by death or lifetime imprisonment.

Section 151 of the Penal Code criminalises acts of 'gross indecency', the penalty for which includes up to 40 lashes, up to a year in prison, and potentially a fine.

Sudan does not provide for legal gender recognition.

Tanzania: Penal Code Chapter XV: Offences Against Morality (1945, as amended by the Sexual Offences Special Provisions Act, 1998), Section 154 criminalises ‘carnal knowledge against the order of nature.’ Those found guilty under this law are liable to ‘imprisonment for life and in any case to imprisonment for a term of not less than thirty years.’ Attempting to commit ‘unnatural offences’ is also criminalised, with a minimum sentence of 20 years (Section 155). Section 157 criminalises ‘gross indecency’ between males and section 138A criminalises ‘gross indecency’ committed by ‘any person.’

Penal Decree Amendment Act (2004), which applies only to Zanzibar, criminalises lesbian acts. Those found guilty under this Act are vulnerable to a prison sentence of up to five years and a fine of up to 500,000 shillings.

Tanzania does not provide for legal gender recognition.

Uganda: Penal Code (1950) VI Laws of Uganda, Cap 120 (revised edition 2000) Section 145 criminalises ‘carnal knowledge of any person against the order of nature.’ Those found guilty under this law can be subjected to life imprisonment. Section 146 of this law criminalises the attempt to commit unnatural offences, with possible imprisonment of up to seven years. Section 148 criminalises ‘indecent practices,’ with a penalty of up to seven years.

Uganda has taken a series of measures to strengthen its criminalisation. In 2016, with the Non-Governmental Organisations Act (2016), Uganda impeded the registration of NGOs that would provide support to people known to have broken the law, such as individuals who have sex with people of the same sex.

Uganda does not provide for legal gender recognition.

Zambia: Section 155 of the Penal Code Act (Chapter 87 of the Laws of Zambia) criminalises unnatural offences, defined as ‘any person who: (a) has carnal knowledge of any person against the order of nature’, and prescribes a punishment of imprisonment for not less than 15 years and up to imprisonment for life. Furthermore, under Section 156, anyone caught attempting to commit an unnatural offence is liable, upon conviction, of not less than seven years but not exceeding 14 years in prison.

Section 158 defines ‘gross indecency’ between persons of the same sex, including both males and females. Those convicted are liable to imprisonment for a term of not less than seven years and not exceeding 14 years.

Section 8 of the Societies Act 1958 empowers the Registrar of Societies to refuse to register any society that is prejudicial to or incompatible with the peace, welfare or good order in Zambia. This law has been used to discriminate against LGBTI+ activist groups.

Zimbabwe: Criminal Law Reform Act (2006) criminalises sodomy and ‘any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act.’ Those found guilty under this law are subject to a penalty of up to a year in prison as well as a fine.

Zimbabwe provides for legal name change, under the Births and Deaths Registration Act 11 of 1986, s. 18(2). Zimbabwe does not provide for gender-marker change.

De facto persecutory laws

DRC: There are no provisions outlawing consensual same-sex sexual acts between adults in the 2004 Penal Code. However, Article 176 of the Criminal Code criminalises ‘activities against public decency,’ which the United Nations Human Rights Committee cautions has been used to criminalise LGBTI+ persons.

DRC does not provide for legal gender recognition.

Jordan: Jordan is one of the few Muslim-majority countries in the Middle East where consensual same-sex sexual acts are not criminalised. However, ILGA cautions that stigma and discrimination are acute, which has allowed for de facto persecution. Article 37 (1998) of the Press and Publication Law prohibits the publication of content that ‘encourages perversion or lead(s) to moral corruption.’ Article 3 of the Law of Societies (Law No. 51 of 2008 as amended by Law No. 22 of 2009) prohibits the registration of any society that has illegal goals or purposes. These laws have been used to inhibit free speech, including discussion of non-procreative sexual activities.

Jordan does not provide for legal gender recognition.

Appendix D: Glossary

Refugee-related definitions

Asylum seeker – A person who has left their country of origin or residence and is seeking protection from persecution, but who has not yet been formally recognised as a refugee (they are still waiting to receive an administrative decision on their asylum claim). Seeking asylum is a human right. This means everyone should be allowed to enter another country to seek asylum.

Cross-border migrant – A person who has traversed a national boundary, be it for work, study, to join family members or any other reason. Many cross-border migrants feel they must leave their country of origin or residence because of poverty, political unrest, gang violence, natural disasters or other serious circumstances. A cross-border migrant is someone who has sought recognition through immigration mechanisms, rather than the asylum system, or has chosen to remain undocumented.

Global protection mechanisms – The international bodies, treaties, laws, policies and practices designed to safeguard vulnerable populations. In this context, it refers to systems set up to protect displaced individuals and/or communities (those who have been forced to leave their countries of birth). Examples of global protections mechanisms include the UNHCR, third-country resettlement programmes, and regional- or national-level responses to refugees.

Refugee – A person who has been granted refugee status and related protections by a state. This means that the person was judged to meet the conditions stipulated in the 1951 Refugee Convention: ‘a person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country, or is stateless, being outside of the country of former habitual residence for the same reasons as mentioned before, is unable or, owing to such fear, unwilling to return to it.’

UNHCR – The United Nations High Commissioner for Refugees is a UN agency mandated to aid and protect refugees, forcibly displaced communities and stateless people.

SOGI-related definitions

Bisexual – An individual who is physically, romantically and/or emotionally attracted to both men and women.

Cisgender (or cis) – A person whose gender identity corresponds to their assigned sex. For example, a person who was designated male at birth and who continues to identify and express as a man would be considered cisgender (cf. transgender).

Gay – A man whose enduring physical, romantic and/or emotional attraction is to other men

(NB: while 'gay' is most commonly associated with men, it is occasionally used in relation to women – that is, a 'gay man' or a 'gay woman').

Gender – The roles, activities and attributes that a particular society or community considers appropriate for men and for women. Gender is distinguished from sex, with the latter referring to biological characteristics, such as sex organs, chromosomes and hormones.

Gender-diverse – An adjective used to describe an ever-evolving array of labels people may apply when their gender identity, expression and/or self-perception does not conform to social norms, stereotypes or expectations. People who identify as gender-diverse may vary their gender identity/expression depending on how they feel (that is, sometimes identifying as a man and other times identifying as a woman) or may not identify with a binary conceptualisation of gender (that is, they identify as neither a man nor a woman).

Gender expression – How a person expresses their gender identity (for instance, through clothing, behaviours, mannerisms, speech patterns and social activities).

Gender identity – An individual's inner sense of being a man or a woman, or both, or neither. For some people, their gender identity differs from that which has been assigned to them or expected social roles (see 'transgender').

Heteronormativity – The belief or assumption that heterosexuality is the only natural and normal expression of human desire (in other words, that heterosexuality is the default state of being). A heteronormative society reinforces this belief through practices, systems and institutions that privilege and benefit those who are heterosexual.

Heterosexuality – The quality or characteristic of being sexually attracted solely to people of the opposite sex (see 'straight').

Homophobia – Negative attitudes and feelings toward those assumed to be lesbian, gay or bisexual, and of anything connected to these persons and their communities, sometimes leading to acts of violence and expressions of hostility.

Homosexuality – The quality or characteristic of being sexually attracted solely to people of one's own sex.

Intersex – An umbrella term used to describe a wide range of natural bodily variations in sex characteristics. Intersex people are born with sex characteristics that do not fit normative binary notions of male or female bodies. Such variations may involve atypical genitalia, hormonal differences, or combinations of chromosomal genotypes and sexual phenotypes other than XY and XX. Some intersex traits are visible at birth, while others are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all.

Lesbian – A woman whose enduring physical, romantic and/or emotional attraction is to other women.

Sexual identity – How a person understands themselves in relation to their sexual, emotional and romantic attractions. A person’s sexual identity and sexual behaviours are closely related to their sexual orientation, but are distinguished as separate concepts: *identity* refers to an individual’s self-perception of their sexuality, *behaviour* refers to their actual sexual practices and *orientation* refers to their overall sexual, emotional and romantic attractions.

Sexual orientation – An enduring pattern of sexual, emotional and romantic attraction.

Straight – A person who is sexually, emotionally and romantically attracted to people of the opposite sex.

Transgender (or trans) – An umbrella term for anyone whose internal experience of gender does not match the sex they were assigned at birth (cf. cisgender). Transgender people may experience discomfort or distress due to their gender not aligning with their sex and therefore wish to transition to the gender with which they identify.

Transphobia – Negative attitudes and feelings toward transgender people or those seen to transgress or blur social expectations of gender, and of anything connected to these persons and their communities, sometimes leading to acts of violence and expressions of hostility.

General legal definitions

Administrative justice – At its core, administrative justice is about ensuring that state agencies/institutions and those who exercise public functions make the right decisions and take the right actions (according to existing laws). In South Africa, PAJA maps out what it means for the state to act in ways that are responsive, accountable, affordable and efficient, as well as providing mechanisms for providing redress when things go wrong. The Batho Pele principles also mandate how public servants must act in order to ensure quality and transparent service delivery.

Burden of proof – A legal requirement that determines the viability of a claim based on the factual evidence produced. Typically, the onus for burden of proof lies with the party initiating or filing a claim, but this is different in asylum cases. In adjudicating asylum claims, a state (through the RSDO) shares the responsibility for sourcing evidence.

Credibility – Whether a person’s testimony is considered worthy of belief, based on the competence of the witness and likelihood that it is true. Credibility is assessed differently in asylum adjudications than in other legal processes. This is because international law acknowledges that many factors need to be taken into account when assessing credibility in the context of an asylum claim.

Equality – The full enjoyment of all rights and freedoms, including equal protection and benefit of the law. South African law clearly defines unfair discrimination in order to promote equality among social groups that have previously been disadvantaged.

Notes

¹ For an exploration of how the term transgender came to and operates in South Africa, in tandem with how asylum seekers in South Africa navigate the term, see Camminga, B. (2019) *Transgender Refugees and the Imagined South Africa: Bodies over Borders and Borders over Bodies*. London: Palgrave Macmillan.

² The most commonly used legal term for these documents is 'RSDO decisions'. However, our clients usually refer to them as 'letters'. We have decided to adopt this term so that the report more accurately reflects common understandings and language usage.

³ The RRO in Tshwane was opened as an interim office between 2009 and 2016. In some documents it is referred to as Tshwane Interim Refugee Reception Office (TIRRO).

⁴ The Constitution of the Republic of South Africa (1996), available at <https://www.gov.za/sites/default/files/images/a108-96.pdf> (accessed 12 December 2020).

⁵ This has been tested in a number of court cases, including *Larbi-Odam and Others v MEC for Education (North-West Province) and Another 1997 (12) BCLR 1655*; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 1999*; and *Khosa and Others v Minister of Social Development and Others 2003*.

⁶ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) (1998) ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)*.

⁷ The Refugees Act (1998), available at http://www.dha.gov.za/images/REFUGEES_ACT_130_OF_1998.pdf (accessed 12 February 2021).

⁸ For analysis of how the Constitution and the Refugees Act can be read to include asylum for gender refugees, see Camminga, B. (2018) "The Stigma of Western Words": Asylum Law, Transgender Identity and Sexual Orientation in South Africa,' *Global Discourse* 8 (3): 452–469.

⁹ The Promotion of Equality and Prevention of Unfair Discrimination Act (2000), available at <https://www.justice.gov.za/legislation/acts/2000-004.pdf> (accessed 15 January 2021).

¹⁰ The Promotion of Administrative Justice Act (2000), available at https://www.gov.za/sites/default/files/gcis_document/201409/a3-000.pdf (accessed 9 February 2021).

¹¹ de Andrade, J.H.F. (2012) 'On the Development of the Concept of "Persecution" in International Refugee Law,' *III Anuário Brasileiro de Direito Internacional* 2: 114–136.

¹² Akin, D. (2018) 'Discursive Construction of Genuine LGBT Refugees,' *Lambda Nordica* 3/4: 21–46.

¹³ The option of internal relocation was considered in the UK Supreme Court judgement *HJ (Iran) and HT (Cameroon) v Secretary of the State for the Home Department*. The court found that '(t)here is no place, in countries such as Iran and Cameroon, to which a gay applicant could safely relocate.' This

reasoning regarding the lack of safe relocation alternatives can be extended to any country where LGBTI+ individuals are unable to avail themselves of state protection due to *inter alia* punitive laws.

¹⁴ Amnesty International (2019) *Living in Limbo: Rights of Asylum Seekers Denied*, available at <https://www.amnesty.org/download/Documents/AFR5309832019ENGLISH.PDF> (accessed 23 December 2020).

¹⁵ Alessi, J. et al. (2020) “Those Tablets, They Are Finding an Empty Stomach”: A Qualitative Investigation of HIV Risk among Sexual And Gender Minority Migrants in Cape Town, South Africa,’ *Ethnicity and Health*, <https://doi.org/10.1080/13557858.2020.1817342> (accessed 11 January 2021); Dill, L. et al. (2016) “‘Son of the Soil ... Daughters of the Land’: Poetry Writing as a Strategy of Citizen-Making for Lesbian, Gay, and Bisexual Migrants and Asylum Seekers in Johannesburg,’ *Agenda* 30 (1): 85–95.

¹⁶ Beetar, M. (2016) ‘Intersectional (Un)Belongings: Lived Experiences of Xenophobia and Homophobia,’ *Agenda* 30 (1): 96–103.

¹⁷ Marnell, J., Oliviera, E. & Khan, G.H. (2021) “‘It’s About Being Safe and Free to Be Who You Are’: Exploring the Lived Experiences of Queer Migrants, Refugees and Asylum Seekers in South Africa,’ *Sexualities* 24 (1/2): 90.

¹⁸ Hucke, V. (in press) ‘Differential Movements: Lesbian Migrant Women’s Encounters with, and Negotiations of, South Africa’s Border Regime.’ In: Camminga, B. & Marnell, J. (eds) *Queer and Trans African Mobilities: Migration, Asylum and Diaspora*. London: ZED.

¹⁹ Bhagat, A. (2018) ‘Forced (Queer) Migration and Everyday Violence: The Geographies of Life, Death, and Access in Cape Town,’ *Geoforum* 89: 155–163.

²⁰ Marnell, J. (2021) *Seeking Sanctuary: Stories of Sexuality, Faith and Migration*. Johannesburg: Wits University Press.

²¹ Quoted in Marnell, J. (in press) ‘Telling a Different Story: On the Politics of Representing African LGBT Migrants, Refugees and Asylum Seekers.’ In: Camminga, B. & Marnell, J. (eds) *Queer and Trans African Mobilities: Migration, Asylum and Diaspora*. London: ZED.

²² Koko, G., Monroe, S. & Smith, K. (2018) ‘Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) Forced Migrants and Asylum Seekers: Multiple Discriminations.’ In: Matebeni, Z., Monroe, S. & Reddy, V. (eds) *Queer in Africa: LGBTQI Identities, Citizenship and Activism*. Oxon: Routledge, 158–177.

²³ Palmary, I. (2016) *Gender, Sexuality and Migration in South Africa: Governing Morality*. Cham: Palgrave Macmillan; Moodley, Y. (2012) *Receiving LGBTI Refugees in South Africa: Towards a Culture of Non-Discrimination and Human Rights*, working paper series – UCT Refugee Rights Unit, available at http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Paper_5_of_2012.pdf (accessed 28 January 2021).

²⁴ Camminga, *Transgender Refugees and the Imagined South Africa*.

²⁵ Camminga, B. (2017) ‘Categories and Queues: The Structural Realities of Gender and the South African Asylum System,’ *TSQ: Transgender Studies Quarterly* 4 (1): 61–77.

²⁶ Similar experiences are described in Letsike, M.S. (2019) *The Voice: Life Experiences of LGBTI Refugees and Asylum Seekers in South Africa*. Pretoria: Access Chapter 2; PASSOP (2012) *A Dream Deferred: Is the Equality Clause in the South African Constitution's Bill of Rights Just a Far-Off Hope for LGBTI Asylum Seekers and Refugees?* Cape Town: Open Society Foundation of South Africa.

²⁷ Andrade, V.L. (2020) 'The British and South African Approaches to Asylum Based on Sexual Orientation and Gender Identity,' *REMHU: Revista Interdisciplinar da Mobilidade Humana* 28 (59), <http://dx.doi.org/10.1590/1980-85852503880005906> (accessed 5 January 2021).

²⁸ Full judgement available at http://www.refugeerights.uct.ac.za/usr/refugee/Case_Law_Reader/Van_Garderen_v_RAB.pdf (accessed 12 February 2021).

²⁹ Full judgement available at <http://www.saflii.org/za/cases/ZAGPHC/2007/191.pdf> (accessed 12 February 2021).

³⁰ Full judgement available at <http://www.saflii.org/za/cases/ZAWCHC/2014/183.pdf> (accessed 12 February 2021).

³¹ Full judgement available at <http://hrlibrary.umn.edu/undocs/html/vws488.htm> (accessed 12 February 2021).

³² Full judgement available at <https://www.refworld.org/pdfid/4c3456752.pdf> (accessed 12 February 2021).

³³ Full judgement available at <https://www.no5.com/media/1536/cv-2018-tab-2-1c-albania.pdf> (accessed 12 February 2021).

³⁴ Legal data beyond applicants' RSDO letters were available for 38 individuals represented in this sample.

³⁵ Palmary, *Governing Morality*; VanOverloop, K. (unpublished) *Comparison of Refugee Law Relating to LGBTI Asylum Seekers in South Africa and the United States*. Cape Town: UCT Refugee Rights Clinic.

³⁶ We received consent for using text examples from 19 of the 65 individuals whose RSDO letters are referenced in this report. An additional 12 RSDO letters were made available to the project for the sake of providing text examples. These letters had been authorised for use in previous research publications. The remaining 36 RSDO letters were analysed in terms of larger trends. We read and included in the trend analysis RSDO letters for individuals from whom we were unable to contact so as to increase the sample size. This worked both to bolster the findings and to better ensure anonymity for clinics and their clients. Our intention is to make clear that the issues identified in this report are not isolated to one client or RSDO/RRO, while at the same time involving and protecting LGBTI+ asylum seekers as much as possible in the research produced on their behalf.

³⁷ Amnesty International, *Living in Limbo*.

³⁸ The UNHCR estimated that, in 2015, asylum applications in South Africa were mainly from the following countries: DRC, Somalia, Burundi, Ethiopia, Rwanda and Zimbabwe. See UNHCR (2015) *Global 2015 Update – South Africa*, available at <https://africasacountry.com/2018/10/how-many-immigrants-live-in-south-africa> (accessed 3 January 2021); Amit, R. (2015) 'Paying for Protection: Corruption in South Africa's Asylum System,' *Migration Policy Institute*, available at <https://www.migrationpolicy.org/article/paying-protection-corruption-south-africa%E2%80%99s-asylum-system> (accessed 3 January 2021). In 2018 – the latest period for which figures are available – applicants came mainly from Zimbabwe, Ethiopia, Nigeria and DRC. The main reasons for fleeing to South Africa are to escape poverty, conflict and political violence. See Masuku, S. (2020) 'How South Africa is Denying Refugees Their Rights: What Needs to Change,' *The Conversation*, 12 May, available at <https://theconversation.com/how-south-africa-is-denying-refugees-their-rights-what-needs-to-change-135692> (accessed 3 January 2021); Heleta, S. (2018) 'How Many Immigrants Live in South Africa?' *Africa is a Country*, available at <https://africasacountry.com/2018/10/how-many-immigrants-live-in-south-africa> (accessed 3 January 2021).

³⁹ Amit, R. (2012) *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination*. Johannesburg: ACMS; Amit, R. (2010) *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions*. Johannesburg: FMSP.

⁴⁰ Department of Home Affairs (2018), *Annual Report 2017 – 2018*, available at <http://www.dha.gov.za/files/Annual%20Reports/AnnualReport2017-18.pdf> (accessed on 11 February 2021).

⁴¹ Camminga, B. (2020) 'Marooned: Transgender Asylum Seekers in Johannesburg.' In: Falkof, N. & Van Staden, C. (eds) *Anxious in Joburg: The Inner Lives of a Global South City*. Johannesburg: Wits University Press, 187–207; Camminga, *Transgender Refugees and the Imagined South Africa*.

⁴² Postman, Z. (2018) 'Most Asylum Seekers in SA are Young Males Looking for Economic Opportunities,' *News24*, 10 February, available at <https://www.news24.com/news24/SouthAfrica/News/most-asylum-seekers-in-sa-are-young-males-looking-for-economic-opportunities-20180210> (accessed 21 January 2021). A similar trend holds true in Europe. See Pew Research Center (2016) *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, available at <https://www.pewresearch.org/global/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/> (accessed 21 January 2021).

⁴³ UNHCR (2010) *The Protection of Lesbian, Gay, Bisexual, Transgender And Intersex Asylum-Seekers And Refugees*, discussion paper, available at <https://www.refworld.org/pdfid/4cff9a8f2.pdf> (accessed 24 February 2021).

⁴⁴ Homophobic and transphobic attitudes are not restricted to DHA employees within the Asylum Seeker Management directorate. Prejudice, mistreatment and stereotypical assumptions have also been documented in DHA's Civic Services division, such as when same-sex couples have attempted to have marriages solemnised or when transgender individuals have attempted to have their sex markers changed on official identity documentation. The South African government has taken steps to address these forms of discrimination, including enacting legislative reform (such as the Civil Union Amendment Act 8 of 2020) and initiating public consultations to update DHA's Official Identity Management Policy. For examples of these types of discrimination, see Collison, C. (2016) 'Home Affairs Officials' Homophobic

“Government-Sanctioned Discrimination” Revealed,’ *Mail & Guardian*, 13 September, available at <https://mg.co.za/article/2016-09-13-homophobic-home-affairs-officials-government-sanctioned-discrimination/> (accessed 13 February 2021); DeBarros, L. (2016) ‘Lesbian & Gay Marriage in South Africa: Part 2 – Second Class Citizens,’ *MambaOnline*, 29 March, available at <https://www.mambaonline.com/2016/03/29/lesbian-gay-marriage-south-africa-part-2-second-class-citizens/> (accessed 13 February 2021); Sanasie, J. (2016) ‘Transgender SA Woman Speaks Out About Prejudice and Public Humiliation,’ *News24*, 27 June, available at <https://www.news24.com/news24/video/southafrica/news/watch-a-transgender-life-in-south-africa-20160627> (accessed 11 February 2021); Hurt, S. (2015) ‘South Africa: The State Versus Identity,’ *MambaOnline*, 17 February, available at <https://www.mambaonline.com/2015/02/17/south-africa-state-versus-identity/> (accessed 11 February 2021).

⁴⁵ The use of problematic stereotypes when adjudicating SOGI-based claims has been widely documented, especially in Global North contexts. The studies cited here represent only a small fraction of research on this topic. See Güler, A. (2019) ‘Refugee Status Determination Process for LGBTI Asylum Seekers: (In)Consistencies of States’ Implementations with UNHCR’s Authoritative Guidance.’ In: Güler, A., Shevtsova, M. & Venturi, D. (eds) *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration*. Cham: Springer, pp. 117–139; Dhoest, A. (2019) ‘Learning to Be Gay: LGBTQ Forced Migrant Identities and Narratives in Belgium,’ *Journal of Ethnic and Migration Studies* 45 (7): 1075–1089; Giannetta, C. (2017) *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System*. New York: Routledge; Murray, D. (2014) ‘The (Not So) Straight Story: Queering Migration Narratives of Sexual Orientation and Gendered Identity Refugee Claimants,’ *Sexualities* 17 (4): 451–471; Jansen, S. (2013) ‘Introduction: Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe.’ In: Spijkerboer, T. (ed.) *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*. Oxon: Routledge, 1–31.

⁴⁶ Amit, *All Roads Lead to Rejection*.

⁴⁷ This point is made across the academic literature. The citations given here are only a small sample of evidence relating to this point. See McDonald-Norman, D. (2017) ‘No One to Bear Witness: Country Information and LGBTQ Asylum Seekers,’ *Refuge: Canada’s Journal on Refugees* 33 (2): 88–100; Raboin, T. (2017) *Discourses on LGBT Asylum in the UK: Constructing a Queer Haven*. Manchester: Manchester University Press; Vogler, S. (2016) ‘Legally Queer: The Construction of Sexuality in LGBQ Asylum Claims,’ *Law and Society Review* 50 (4): 856–889; Lewis, R. (2014) “‘Gay? Prove it’”: The Politics of Queer Anti-Deportation Activism,’ *Sexualities* 17 (8): 958–975; Berg, L. and Millbank, J. (2009) ‘Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants,’ *Journal of Refugee Studies* 22 (2): 195–223.

⁴⁸ Marnell, *Seeking Sanctuary*; Fiocchetto, E. (2020) ‘LGBTIQ+ Refugees Exist and Believe,’ *Network for Migration Matters*, 11 December, available at <https://www.networkformigrationmatters.com/post/lgbtiq-refugees-exist-and-believe> (accessed 9 February 2021); van Klinken, A. (2019) *Kenyan, Christian, Queer: Religion, LGBT Activism, and Arts of Resistance in Africa*. Pennsylvania: Penn State University Press.

⁴⁹ Shidlo, A. & Ahola, J. (2013) ‘Mental Health Challenges of LGBT Forced Migrants,’ *Forced Migration Review* 42: 9.

⁵⁰ Academic research highlights myriad reasons why LGBTI+ asylum claimants can struggle to narrate their experiences in ways that align with a heteronormative state's expectations. The references listed here are just a small sample of studies dealing with this issue. See Güler, 'Refugee Status Determination Process for LGBTI Asylum Seekers'; Dhoest, 'Learning to Be Gay'; Fobear, K. (2015) "'I Thought We Had No Rights" – Challenges in Listening, Storytelling, and Representation of LGBT refugees,' *Studies in Social Justice* 9 (1): 102–117; Fassin, E. & Salcedo, M. (2015) 'Becoming Gay? Immigration Policies and the Truth of Sexual Identity,' *Archives of Sexual Behaviour* 44: 1117–1125; Randazzo, T. (2005) 'Social and Legal Barriers: Sexual Orientation and Asylum in the United States.' In: Luibhéid, E. & Cantú, L. (eds) *Queer Migrations: Sexuality, U.S. Citizenship, and Border Crossings*. Minneapolis: University of Minnesota Press, 30–60. Similar trends have also been identified in local scholarship. Examples include Marnell, *Seeking Sanctuary*; Camminga, *Transgender Refugees and the Imagined South Africa*; Bhagat, 'Forced (Queer) Migration and Everyday Violence'.

⁵¹ Massaquoi, N. (2013) 'No Place Like Home: African Refugees and the Emergence of a New Queer Frame of Reference.' In: Nyeck, S. N. & Epprecht, M. (eds) *Sexual Diversity in Africa: Politics, Theory and Citizenship*. Montreal: McGill-Queen's University Press, 37–53; Jakulevičienė, L., Biekša, L & Samuchovaitė, E. (2012) 'Procedural Problems in LGBT Asylum Cases,' *Jurisprudence* 19 (1): 195–207; LaViolette, N. (2009) 'Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process,' *The International Journal of Human Rights* 13 (2): 437–76.

⁵² Akin, 'Discursive Construction of Genuine LGBT Refugees'; Giametta, *The Sexual Politics of Asylum*.

⁵³ Koko, Monro & Smith, 'Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) Forced Migrants and Asylum Seekers'; Lewis, "'Gay? Prove it": The Politics of Queer Anti-Deportation Activism'; Jansen, 'Introduction: Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe.'

⁵⁴ Dhoest, 'Learning to Be Gay: LGBTQ Forced Migrant Identities and Narratives in Belgium'; Giametta, *The Sexual Politics of Asylum*; Fobear, "'I Thought We Had No Rights" – Challenges in Listening, Storytelling, and Representation of LGBT Refugees'; Fassin & Salcedo, 'Becoming Gay? Immigration Policies and the Truth of Sexual Identity'; Murray, 'The (Not So) Straight Story: Queering Migration Narratives of Sexual Orientation and Gendered Identity Refugee Claimants'; Shidlo & Ahola, 'Mental Health Challenges of LGBT Forced Migrants'; Berg & Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants.'

⁵⁵ Gevisser, M. (2020) *The Pink Line: Journeys Across the World's Queer Frontiers*. New York: Farrar, Straus and Giroux.

⁵⁶ Chutel, L. (2015) 'Malawi Will Not Arrest, Prosecute Gays Despite Anti-Gay Laws,' *Associated Press*, 22 December, available at <https://apnews.com/article/1efbda9976214030bd95fc81d1c00677> (accessed 12 December 2020).

⁵⁷ Staff reporter (2016) 'Malawi Court Orders Police to Arrest Homosexuals,' *News24*, 11 February, available at <https://www.news24.com/news24/Africa/News/malawi-court-orders-police-to-arrest-homosexuals-20160211> (accessed 12 December 2020).

⁵⁸ Palmary, *Governing Morality*.

⁵⁹ Examples include UK Home Office (2020) *Country Policy and Information Note – Cameroon: Sexual Orientation and Gender Identity or Expression*, available at <https://www.justice.gov/eoir/page/file/1249766/download> (accessed 13 February 2021); Freedom House (2020) *Freedom in the World 2020 – Cameroon*, available at <https://freedomhouse.org/country/cameroon/freedom-world/2020> (accessed 13 February 2021); International Federation for Human Rights (2015) *Cameroon: Homophobia and Violence Against Defenders of the Rights of LGBTI Persons*, available at <https://www.refworld.org/docid/54ef28a34.html> (accessed 13 February 2021); Human Rights Watch (2013) *Guilty by Association Human Rights Violations in the Enforcement of Cameroon’s Anti-Homosexuality Law*, available at https://www.hrw.org/sites/default/files/reports/cameroon0313_ForUpload.pdf (accessed 13 February 2021).

⁶⁰ *JM (homosexuality: risk) Uganda CG (2008) UKIAT 00065 (2008)*, available at <https://tribunalsdecisions.service.gov.uk/utiac/2008-ukait-65> (accessed 12 December 2020).

⁶¹ Marnell, Oliviera & Khan, “‘It’s About Being Safe and Free to Be Who You Are’”; Camminga, B. (2019) ‘Shifting in the City: Being and Longing in Cape Town.’ In: Matebeni, Z. & Camminga, B. (eds) *Beyond the Mountain: Queer Life in Africa’s ‘Gay Capital.’* Johannesburg: Unisa Press, 60–70; Bhagat, ‘Forced (Queer) Migration and Everyday Violence.’

⁶² Examples of reliable, publicly available sources providing contextual information on Uganda include UK Home Office (2019) *Country Policy and Information Note – Uganda: Sexual Orientation and Gender Identity or Expression*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792036/CPIN_Uganda_SOGIE_EXT_April_2019.pdf (accessed 21 January 2021); Burke, J. & Okiror, S. (2019) ‘Ugandan MPs Press for Death Penalty for Homosexual Acts,’ *The Guardian*, 15 October, available at <https://www.theguardian.com/world/2019/oct/15/ugandan-mps-press-for-death-penalty-for-homosexual-acts> (accessed 21 January 2021); Seo, H-J. (2017) ‘The Origins and Consequences of Uganda’s Brutal Homophobia,’ *Harvard International Review* 38 (3): 40–43.

⁶³ The discretion principle, as it relates to SOGI-based asylum claims, is widely discussed in academic literature. See, for example, Güler, A., Shevtsova, M. & Venturi, D. (eds) (2019) *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration*. Cham: Springer; Spijkerboer, T. (ed.) (2013) *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*. Oxon: Routledge.

⁶⁴ Palmary, *Governing Morality*, 41.

⁶⁵ Koko, G. (2016) ‘A Legal Analysis of the Implementation of Non-Refoulement Principle as Applied to Claims Based on Sexual Orientation and Gender Identity in Terms of Article 2 of the South African Refugee Act of 1998,’ MA thesis, University of Pretoria.

⁶⁶ Scalabrini Centre of Cape Town (2020) 'New Refugee Laws Undermine Human Rights of Refugees,' press statement, 10 January, available at <https://www.scalabrini.org.za/news/press-statement-new-refugee-laws-undermine-human-rights-of-refugees/> (accessed 12 February 2021).

⁶⁷ Mendos, L.R. (2019) *State-Sponsored Homophobia* (13th Edition). Geneva: ILGA; Chiam, Z., Duffy, S. & González M.G. (2017) *Trans Legal Mapping Report: Recognition Before the Law* (2nd edition). Geneva: IGLA.

⁶⁸ As of 2019 the following UN Member States criminalise same-sex sexual activities: Africa (Algeria, Botswana, Burundi, Cameroon, Chad, Comoros, Egypt (de facto), Eritrea, Eswatini, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Malawi, Mauritania, Mauritius, Morocco, Namibia, Nigeria, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe); Latin America and the Caribbean (Antigua and Barbuda, Barbados, Dominica, Grenada, Guyana, Jamaica, St Kitts & Nevis, St Lucia, St Vincent & the Grenadines); Asia (Afghanistan, Bangladesh, Bhutan, Brunei Darussaim, Iraq (de facto), Iran, Kuwait, Lebanon, Malaysia, Maldives, Myanmar, Oman, Pakistan, Qatar, Saudi Arabia, Singapore, Sri Lanka, Syria, Turkmenistan, United Arab Emirates, Uzbekistan, Yemen); and Oceania (Cook Islands, Kiribati, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu).

⁶⁹ Carrillo, H. (2017) *Pathways of Desire: The Sexual Migration of Mexican Gay Men*. Chicago: University of Chicago Press.

⁷⁰ Kyama, R. & Pérez-Peña, R. (2019) 'Kenya's High Court Upholds a Ban on Gay Sex,' *New York Times*, 24 May, available at <https://www.nytimes.com/2019/05/24/world/africa/kenya-gay-ban-british.html> (accessed 7 February 2021).

⁷¹ Full judgement available at <http://kenyalaw.org/caselaw/cases/view/101979/> (accessed 12 February 2021).



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