



**Safeguarding sexual minorities in South Africa:
Asylum Seeker Management System Leading to Immigration Detention**

Submitted in partial fulfilment of a Master's degree in the field of Human Rights & Democratisation
in Africa

By

ZEKHETHELO CELE – 24093557

Prepared under the supervision of

Supervisor:

LANDILANI BANDA (Ph.D.)

AT THE FACULTY OF LAW, CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA

Co-Supervisor

ZELALEM TEFERRA (Ph.D.)

AT THE SCHOOL OF LAW, ADDIS ABABA UNIVERSITY

23 OCTOBER 2024

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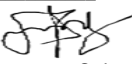
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Researcher's Signature: 

Under the Supervision of:

Dr Landilani Banda, Centre for Human Rights, University of Pretoria.

Signature:  BMB

&
Zelalem Teferra,  School of Law, Addis Ababa University

Signature: _____

BIOGRAPHY

Zekhethelo Nokubonga Cele is a dedicated human rights attorney from the coastal region of KwaZulu-Natal, South Africa, specifically from the towns of Richards Bay and Eshowe. She holds a Bachelor of Laws from the University of Zululand and is currently pursuing a Master's Degree in Human Rights and Democratisation in Africa at the University of Pretoria, in partnership with Addis Ababa University. As an admitted attorney of the High Court of South Africa, Zekhethelo has been practicing with Lawyers for Human Rights, specialising in the Refugee and Migrant Rights Programme, Detention Monitoring, and Penal Reform. Her legal expertise has taken her up to the South African Supreme Court of Appeal.

Zekhethelo is deeply passionate about advancing the human rights of refugees and asylum seekers, safeguarding socio-economic rights in South Africa, and championing the rights of sexual and gender minorities.

DEDICATION

To my beloved mother, Duduzile Xulu, for your unwavering love, boundless sacrifices and endless encouragement. This work is a testament of your strength, faith and resilience. I am eternally grateful for your love and support.

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ANNEXURE 2: SUBMISSION FORM FOR RESEARCH

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ABSTRACT

This study examines the adjudication of sexual minority asylum claims in South Africa, exploring how challenges plaguing the adjudication process often leads to rejection of refugee claims based on sexual orientation. It provides an overview of the administrative and structural barriers that sexual minority asylum seekers face and makes recommendations to overcome these challenges with a view of ensuring that sexual and gender minority asylum seekers are not returned to countries where they are at risk of persecution. The study highlights key agents of persecution, and the institutional and legislative gaps in South Africa that render the asylum-seeking process for sexual minorities particularly challenging. Drawing on intersectionality theory and existing scholarship, the research demonstrates that while sexual minorities are not inherently vulnerable, the fear of persecution and the specific risks they face in seeking asylum make them particularly susceptible to harm. The study concludes that these challenges make immigration detention and deportation a likely outcome, requiring the need for reforms to better protect sexual and gender minority asylum seekers. Furthermore, the research demonstrates that because of these challenges, immigration detention and deportation have become a foregone conclusion.

Key Words: *Sexual minorities, Asylum seeker adjudication process, B-1590, Refugee Reception Offices, Refugee Status Determination Officers, SOGIESC, South Africa*

Commented [JM1]: SOGIESC and not SOGIECS.

Table of domestic legal and policy framework

- Aliens Control Act 40 of 1973
- Aliens Control Act 76 of 1995
- Constitution of the Republic of South Africa, 1996
- Immigration Act 13 of 2002
- Immigration Act 13 of 2022 Regulations
- Promotion of Administrative Justice Act 3 of 2000
- The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
- Refugee Act 130 of 1998
- Refugee Amendment Act 11 of 2017
- Refugee Act 130 of 1998 Regulations

Table of regional legal framework/instruments

- African Charter on Human and Peoples' Rights
- The Convention Governing the Specific Aspects of Refugee Problems in Africa
- The Refugee Protection Within Southern Africa Declaration

Table of international legal framework/instruments

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- 1951 Convention Relating to the Status of Refugees
- 1951 Convention Relating to the Status of Refugees: 1967 Protocol

Table of soft laws

- Yogyakarta Principles
- Resolution 275 (Resolution on Protection against Violence and other Human Rights Violation Against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.
- UNHCR International Protection Guidelines No 9 Claims to Refugee Status based on Sexual Orientation and/or Gender Identity

LIST OF ACRONYMS

Commented [JM2]: Please list in alphabetical order

ACHPR	African Commission on Human and Peoples' Rights
AU	African Union
DHA	Department of Home Affairs
ICCPR	International Convention of Civil and Political Rights
LGBTQI+	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, inclusive of other identity formations, categories, and labels
OAU	Organisation of African Unity
PEPUDA	The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
RAASA	Refugee Appeal Board of South Africa
RRO	Refugee Reception Office
RSD	Refugee Status Determination
RSDO	Refugee Status Determination Officer
SCRA	Standing Committee for Refugee Affairs
SOGI	Sexual Orientation and Gender Identity
SOGIESC	Sexual Orientation, Gender Identity, Gender Expression, and Sex Characteristics
UNHCR	United Nations High Commissioner for Refugees

DEFINITIONS

Commented [JM3]: Please list in alphabetical order

Asylum: A status that describes a person who has left their home country to seek protection in another country.

Asylum Seeker: An individual who has fled their country of origin or habitual residence to seek protection elsewhere, but whose refugee status has not yet been officially recognized by the relevant authorities. This person may be undocumented, hold a Section 23 Transit Visa, or have a Section 22 permit under the Refugee Act.

Bisexual: An individual who is sexually and/or romantically attracted to people of the same gender and people of another gender. Bisexuality does not necessarily assume there are only two genders.

Gay: An individual who identifies as a man and is sexually and/or romantically attracted to other people who identify as men. The term *gay* can also be used in relation to women who are sexually and romantically attracted to other women.

Gender Expression: Refers to how a person chooses to publicly express or present their gender. This can include behaviour and outward appearance, including clothing, hair, make-up, body language, and voice.

Gender Identity: One's sense of whether they are a man, woman, non-binary, agender, genderqueer, genderfluid, or a combination of one or more of these definitions. Gender can be binary (either a man or a woman), or non-binary (including people who have no binary gender at all and people who have some relationship to binary gender/s).

Heteronormativity: The view that heterosexual relationships are the natural and normal expression of sexual orientation and relationships.

Heterosexual: An individual who is sexually and/or romantically attracted to the opposite gender.

Lesbian: An individual who identifies as a woman and is sexually and/or romantically attracted to other people who identify as women.

Migrant: An individual who relocates from one location to another in search of employment or improved living conditions. This term refers to someone who voluntarily departs their home country for reasons that do not fall under the refugee definition.

Refoulement: Refugee law is founded on the principle of non-refoulement, a term stemming from the French word “*refouler*” which means to “*drive back*” or to “*repel*”. This principle provides that a state is obliged to refrain from forcibly returning a refugee to a state where he or she is likely to suffer persecution or danger to life or unlawful danger to freedom or person.

Refugee: Refugee status is not conferred by states but rather acknowledged by them. According to the 1951 Convention (and, in South Africa, section 3 of the Refugees Act), a person qualifies as a refugee as soon as they meet the criteria outlined in the definition, which can happen before their status is officially confirmed. Recognition of refugee status does not create their status but rather affirms that they already qualify as a refugee. The individual is not a refugee because they are recognized; they are recognized because they meet the criteria of a refugee.

Refugee Reception Office: A Refugee Reception Office (RRO) is established under section 8(1) of the Refugees Act. It handles the processing of asylum applications, including accepting or rejecting them, and is also where asylum seeker permits are renewed. Each office must have at least one Refugee Reception Officer and one Refugee Status Determination Officer on staff.

Refugee Status Determination Officer: An officer working for the Department of Home Affairs (DHA) at the Refugee Reception Office is designated in section 8(2) of the Refugees Act. This officer, known as the Refugee Status Determination Officer (RSDO), is responsible for completing the B-1590 form and conducting a second interview with an asylum seeker. The RSDO ultimately decides whether to approve or deny the asylum application.

Sexual Orientation: Refers to an individual's sexual and romantic attraction to another person. This can include, but is not limited to, heterosexual, lesbian, gay, bisexual, and asexual. It is important to note, however, that these are just a handful of sexual orientations.

“Every LGBTQI+ refugee has a unique situation, but the fear and pain they endured -before finding a place of safety - is universal.”-

Arsham Parsi

CHAPTER ONE

INTRODUCTION

“If the state gives you rights, it can take them away. Rights have to be inscribed into the social fabric, not just in law.” – Judith Butler

1.1 Background

The protection of human rights is the cornerstone of democratic societies, yet the realities faced by sexual minorities within asylum seeker systems and immigration detention centres in South Africa reveal a stark deviation from the human rights protection principles. South Africa is a nation renowned for its progressive constitution that explicitly prohibits discrimination on the basis of sexual orientation.¹ However, the situation for asylum seekers and refugees who are sexual minorities is paradoxically fraught with challenges and systemic inadequacies.²

This dissertation explores the multifaceted issues confronting sexual minorities in the context of asylum and immigration detention in South Africa. It aims to provide a comprehensive analysis of the legal, social, and humanitarian dimensions of safeguarding their rights, emphasising the gap between legal protections and practical enforcement. The unique vulnerabilities of lesbian, gay, bisexual, transgender, and intersex (LGBTQI+) individuals in these contexts necessitate a focused examination of both policy frameworks and legal frameworks.

The 1951 Convention Relating to the Status of Refugees (the 1951 Refugee Convention) does not specifically define an asylum seeker, but it does provide a definition of a refugee. According to Article 1 of the Convention, the term ‘refugee’ shall *apply* to persons who:

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

¹ The Constitution of the Republic of South Africa, 1996.

² <https://theconversation.com/lgbtq-migrants-and-asylum-seekers-in-south-africa-major-new-study-identifies-a-diverse-wide-spread-community-199227%2> (accessed 8 August 2024).

The Organisation of African Unity 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 OAU Refugee Convention) expands the definition of the 1951 Convention by defining 'refugee' to mean:

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

Furthermore:

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

In its Constitution, South Africa protects persons from discrimination based on their sexual orientation.³ It follows that in 1998, the Refugee Act⁴ was enacted into legislation, therefore domesticating the abovementioned legal instruments. It is in this domestic legal framework that the term "*asylum seeker*" finds a definition that is relevant to this study. An asylum seeker is regarded as a person who is seeking recognition as a refugee in the Republic. The United Nations High Commissioner for Refugees ('UNHCR') defines asylum seekers as persons who are seeking international protection by requesting refuge and whose applications for refugee status is yet to be processed or they may not yet have requested asylum but they intend to do so.⁵

³ The Constitution of South Africa Section 9 (3).

⁴ Refugee Act 130 of 1998.

⁵ UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection' UNHCR, The UN Refugee Agency (2019) 37.

1.2 Problem Statement

Sexual minority asylum seekers leave their countries of origin to seek safety from persecution based on their sexual orientation. This form of persecution is in the form of the return of anti-sodomy laws, criminalisation of same-sex sexual relations between adults leading to ultimate discrimination and persecution based on sexual orientation or gender identity.

South Africa is one of the few countries in Africa that has decriminalised consensual same-sex sexual conduct⁶ and offers protection to LGBTQI+ persons in its legislation specifically against discrimination on the grounds of sexual orientation.⁷ In this regard, South Africa is an attractive legal environment for sexual minority asylum seekers. However, the issue this study will focus on is how the administrative processes of the Department of Home Affairs (DHA) falls short of recognising the vulnerability of sexual and gender minority persons during the refugee application process. The failure to properly adjudicate LGBTQI+ related refugee claims in general and particularly for sexual minorities leads to rejection of refugee applications. As a result, this subjects sexual minority asylum seekers to immigration detention and refoulement to countries of origin where they face persecution based on sexual orientation and gender identity.

South Africa, within its legislative and policy framework has mechanisms to offer protection to those seeking refugee from persecution in the Republic.⁸ The DHA, primarily manages the adjudication of refugee claims and documentation of asylum seekers through Department of Home Affairs Refugee Reception Offices ('RROs').⁹ There are currently five such centres in the country situated in Durban, Cape Town, Gqeberha, Musina and Pretoria. The centres are responsible for accepting and processing asylum seeker applications and determining refugee status eligibility.¹⁰

South Africa receives the largest number of refugees within the Southern African Development Community ('SADC'). As of August/September 2024 there were over 250,250 refugees living in the

⁶ Constitutional Court of south Africa 'Gay and Lesbian Rights' <https://www.concourt.org.za/index.php/gay-and-lesbian-rights> (accessed 8 August 2024).

⁷ National Coalition for Gay and Lesbian Equality & Another v Minister of Justice (CCT11) (1998) ZACC (1).

⁸ Department of Home Affairs, Refugees and Asylum Seekers <https://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum> (accessed 8 August 2024).

⁹ Department of Home Affairs Refugee Reception Centres <https://www.dha.gov.za/index.php/contact-us/refugee-centres> (accessed 8 August 2024).

¹⁰ Scalabrini Guide to Refugee Law in South Africa <https://www.scalabrini.org.za/wp-content/uploads/2021/02/Scalabrini-Centre-Cape-TownYour-Guide-Refugee-Law-South-Africa-full-guide-3.pdf> (accessed 8 August 2024).

country and a backlog of undetermined refugee status application of over 150,000 cases.¹¹ The latter is high because of the limited refugee reception offices and reported backlog which has resulted in the DHA being unable to accept and process new applications two years after the Covid-19 pandemic.¹²

This systematic challenge has received criticism from civil society organisations¹³ and the South African courts.¹⁴ In an attempt to deal with large volumes of applications, the DHA, through the immigration inspectorate has resorted to arbitrary arrests of asylum seekers.¹⁵

1.3 Significance of Study

The significance of this study requires an overview of the historical context of migration to and from South Africa. As a starting point, the issues of migration in South Africa are largely attributed to colonialism and apartheid.¹⁶ The apartheid system itself created a system that forestalled non-white immigration into South Africa both by creating inhospitable environments for Africans and refusing to grant any legal documentation allowing entry into South Africa by the enactment of colonial borders.¹⁷

The Aliens Control Act of 1991 was the last piece of unmodified legislation that sought to control the flow of people across the borders of South Africa.¹⁸ Its 1995 amendment is largely viewed as repressive allowing for state actors to act more brutally and illegally.¹⁹ Administratively, in 1998, the

¹¹ UNCHR Country Profile: South Africa <https://www.unhcr.org/countries/south-africa> (accessed 8 August 2024).

¹² Department of Home Affairs backlog 2024 <https://www.da.org.za/2024/04/departement-of-home-affairs-visa-backlog-is-up-by-20-000-in-6-months> (accessed on 8 August 2024)

¹³ Scalabrini Centre & Lawyers for Human Rights to Challenge Unlawful Arrests of New Asylum Seekers <https://www.lhr.org.za/lhr-news/press-statement-scalabrini-centre-lawyers-for-human-rights-to-challenge-unlawful-arrests-of-new-asylum-seekers/> (accessed 8 August 2024)

¹⁴ *Ruta v Minister of Home Affairs* (CCT02/18) (2018) ZACC 52

¹⁵ *Ashebo v Minister of Home Affairs* (CCT 250/22) (2023) ZACC 16

¹⁶ A Klotz 'Migration after apartheid: Deracialising South Africa foreign policy' (2000) 831-874 *Third World Quarterly* 21.

¹⁷ Klotz (n 17) 23.

¹⁸ Aliens Control Act 69 of 1991.

¹⁹ S Peberdy, 'Obscuring history? Contemporary patterns of regional migration to South Africa' https://www.atlanticphilanthropies.org/wp-content/uploads/2010/07/3_Setting_the_scene_c.pdf (accessed 8 August 2024).

Refugee Act was introduced and later the Immigration Act.²⁰ Crush²¹ argues that these two pieces of legislation still seek to drastically limit population inflows and bolster enforcement measures.²² However, Jonathan Klaaren²³ commends the Refugee Act for making significant strides in honouring the country's international commitments by offering refugee protection. The Immigration Act framework on the other hand, is more stringent and lacks significant provisions that ought to cater to vulnerable groups, such as sexual minorities in immigration detention settings.

The Department of Home Affairs has been subjected to judicial reviews for poor decision-making on refugee status determination interviews and some of these reviews have been based on SOGIESC claims.²⁴ It is argued that poor decision-making is as a result of a lack of fully resourced refugee reception offices and the pressure that the Department receives from stakeholders to decrease the backlog.²⁵ In response to the accusation of a failing asylum seeker system, instead of acknowledging its failures, the DHA has attempted to overhaul the entire immigration system under the misconception that the demand for asylum cannot be met due to the abuse of the system by economic migrants.²⁶ Nevertheless, this study aims to highlight that despite these challenges, sexual minority persons claims are not given the appropriate attention and care, especially with the aim of avoiding immigration detention and refoulement to countries of persecution.

The significance of this study extends beyond examining the historical trajectory of South African migration policies, including the legacies of colonialism and apartheid that shaped restrictive immigration frameworks. It provides a critical lens through which to understand the evolution of legal instruments such as the Refugee Act and Immigration Act, and identifying how these laws, despite

²⁰ Immigration Act 13 of 2002.

²¹ J Crush 'Benign Neglect or Active Destruction? A critical analysis of refugee and informal sector policy and practice in South Africa' (2020) *Scalabrini Institute of Human Mobility in Africa* 755-758.

²² J Crush 'Beyond Control: Immigration and Human Rights in a Democratic South Africa' (1998) *Southern Africa Migration Project* 4.

²³ Jeff Handmaker & Jonathan Klaaren 'Advancing Refugee Protection in Africa' (2007) *Berghahn Books* 47.

²⁴ R Amit 'All roads lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status determination' (2012) *African Centre for Migration & Society* 1.

²⁵ Amnesty International South Africa: Failing asylum system is exacerbating xenophobia <https://www.amnesty.org/en/latest/press-release/2019/10/south-africa-failing-asylum-system-is-exacerbating-xenophobia/> (accessed 8 August 2024).

²⁶ Publication of the White paper on Citizenship, Immigration and Refugee Protection 2024 <https://www.dha.gov.za/index.php/notices/1726-white-paper-on-citizenship-immigration-and-refugee-protection-2023> (accessed 8 August 2024).

reforms, still fall short in accommodating the needs and protecting marginalised groups, particularly sexual minorities.

This research provides nuance to existing scholarship by delving into the intersection of immigration law, sexual orientation, and gender identity, and addressing a gap often overlooked in analysis of the country's migration policies. While previous studies, such as those by Crush and Klaaren, have explored the broader enforcement and reform measures within these laws, this study focuses on how systemic flaws—exacerbated by the DHA administrative failures and resource constraints—impact sexual minority asylum seekers. Specifically, it critiques the misapplication of principles during refugee status determination and the detrimental consequences for sexual minority applicants, who often face detention or refoulement without adequate consideration of their vulnerabilities.

1.4 Rationale of study

The Immigration Act 13 of 2002 criminalises the entrance and presence of an “*illegal foreigner*” in the Republic. The usage of the term “*illegal foreigner*” in the Immigration Act is problematic as it already introduces a nuance of criminality. Section 49 of the Act read together with the Immigration Act regulations details who an illegal foreigner is and to what extent, a person who is considered as such, can be arrested, detained and deported from South Africa.²⁷ The Refugee Act, on the other hand, was enacted to give effect to the international and regional legal instruments on the protection of refugees, namely, the 1951 Refugee Convention and the 1969 OAU Refugee Convention. The Refugee Act is designed to provide for the reception of refugees and asylum seekers, regulate the adjudication process of refugee status recognition, the rights and obligations of the State towards protection of persons claiming refugee status in South Africa.²⁸

Section 23 of the Refugee Act specifically deals with the detention of asylum seekers and refugees. It provides that should the Director-General of the DHA withdraw refugee status or in other cases, decline it altogether, they cause the asylum seeker or refugee to be arrested and detained in the manner and place determined with due regard to human dignity.²⁹ In this respect, the DHA has

²⁷ Immigration Act Section (49).

²⁸ Preamble of the Refugee Act 130 of 1998.

²⁹ Section (23) of the Refugee Act

issued a list of designated places of immigration detention across the country with the last port of exit being Lindela Repatriation Centre.³⁰

The South African Constitution is one of the few in Africa that prohibits unfair discrimination based on sexual orientation.³¹ Section 9 of the Constitution states that:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.³²

This provision prohibits unfair discrimination based on sexual orientation and has been interpreted by the Constitutional Court in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice* to infer applicability into matters relating to sexual minority persons, especially in respect of their sexual orientation.³³ Furthermore, South African courts have also been clear that Section 9 extends to refugees and asylum seekers in various cases such as the case of *Watchenuka v Minister of Home Affairs*³⁴ and *Centre for Child Law v Minister of Basic Education* where the court held that provisions in the Constitution, referring to ‘everyone’ or ‘no one’, the clauses should be interpreted to mean everyone or anyone within the borders of South Africa, unconditionally, including sexual minority persons who are asylum seekers.³⁵

1.5 Research Objectives

This study is designed to achieve the following objectives:

1.1.1 Overall objective

This study aims to examine the status determination interviews and conditions faced by sexual minority asylum seekers at refugee reception offices, highlighting procedural gaps in the adjudication process. These gaps often lead to immigration detention and refoulement to countries where they

³⁰ Places of Detention of Illegal Foreigners <https://www.dha.gov.za/index.php/immigration-services/places-of-detention-for-those-pending-deportation> (accessed 30 April 2024).

³¹ The Constitution of South Africa Section 9(3).

³² The Constitution of South Africa Section (9).

³³ *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice* (CCT11/98) ZACC 15 1999.

³⁴ *Watchenuka v Minister of Home Affairs* 2003 (1) SA 619 (C).

³⁵ *Centre for Child Law v Minister of Basic Education* (2840/2017) (2019) ZAECGHC 126.

face persecution because of their sexual orientation. By analysing legal frameworks and existing literature, the research aims to expose systemic failures and offer practical recommendations to enhance protections for this vulnerable group.

1.1.2 Specific objectives

1. To scrutinise the interview process adopted by the Refugee Reception Centres, specifically, the B-1590 form.
2. To conduct an in-depth investigation on how irregularities and poor decision-making during the asylum application adjudication process negatively impacts refugee claims by sexual minorities.
3. To recommend effective legislative and administrative measures that can be adopted to address the irregularities and ensure the recognition of sexual minority asylum seekers as refugees in South Africa.
4. Lastly, to make recommendations on how sexual minority asylum seekers may be protected from inhumane or degrading treatment in immigration detention conditions.

1.6 Research Questions

Primary Research Question

- (I) To what extent do South African immigration authorities consider the unique vulnerabilities of sexual minority persons during the adjudication of asylum claims and immigration detention?

Sub-research Questions

- (II) How do South African immigration authorities assess and address the specific needs and risks faced by sexual minorities during the asylum claim adjudication process?
- (III) What are the policies and practices in place within South African immigration detention centres to protect sexual minorities, and how effectively are they implemented?

- (IV) What recommendations can be made in ensuring the full realisation of the commitments of the Refugee Act where sexual minorities are concerned?

1.7 Research Assumptions

1.1.3 Assumption 1: The Refugee Act on its own offers sufficient framework to allow for adequate protection to asylum seeking sexual minority persons. The full realisation of this protection falls short is on the administrative level and relationship with the Immigration Act.

1.1.4 Assumption 2: Due to various challenges faced by the Department of Home Affairs in dealing with the backlog and the influx of people seeking asylum in South Africa, the assumption is that the adjudication process results in more rejections than recognitions, which leads to arbitrary immigration detention and *refoulement*.

Commented [JM4]: This is not defined in the Definitions section above. Yet the word is used throughout this text. Kindly please include a meaning at the 'Definitions' section above.

1.8 Scope and Limitations

The scope of this study is mainly focused on South Africa and asylum seekers who leave their countries of origin because of fear of persecution based on their sexual orientation. This study focuses on the experiences of sexual minorities within South Africa's asylum seeker system and immigration detention centres, specifically examining how immigration authorities account for the unique vulnerabilities of sexual minority individuals during asylum adjudication, detention, release, and overall *treatment*. The limitations of the study is the lack of available statistics specifically LGBTQI+ asylum seeker persons. Since not all asylum seekers are detained, the study's insights reflects the circumstances of those that can be subjected to detention due to the adjudication process - which could differ from the experiences of non-detained asylum seekers within the same system. The study is also subject to limitations such as the availability of data in the specific units of the Department of Home Affairs and availability of sensitive information in respect of the cases that involve sexual minority persons on account of their privacy. To mitigate this limitation, the research draws on lived-experiences from published testimonies, articles and journals of sexual minority asylum seekers.

Commented [JM5]: Scope is well defined, however, please describe the limitations of the study.

1.8.1. Data collection methods

The study is based on desktop research. The majority of the literature is sourced from reports by NGOs such as Scalabrini, Lawyers for Human Rights and UCT Refugee Law clinic and international Civil Society Organisations such as Human Rights Watch and Amnesty International. These reports will be utilised to highlight the challenges faced by asylum seekers in South Africa.

1.8.2 Study focus

The study is mainly focused on sexual minority refugees; however, this is not an exclusion of the rights of other types of refugees and gender minorities. The vulnerability of sexual minorities is often ignored in the adjudication process because of the nuanced nature of a sexual minority claim.

1.8.3 Researcher Positionality

The researcher discloses her work as an attorney at Lawyers for Human Rights Refugee & Migrants Rights, Penal Reform and Detention Monitoring Units and has been subject to representing asylum seekers and refugees whose claims are based on sexual orientation. In the scope of her work, she has taken matters that are subject to this study to the Refugee Appeal Board, Standing Committee for Refugee Affairs and South African High Courts. This knowledge could introduce a limitation due to potential for bias. This disclosure is important to acknowledge for transparency and the validity of the study.

1.9 Structure

1.1.5 Chapter 1

Chapter one offers an overview and motivation of this study by providing a background and context. The research question, aim, rationale and methodology are introduced as well as the overview of the chapters.

1.1.6 Chapter 2

Chapter two provides a detailed overview of the domestic, regional and international legal framework on refugees and asylum seekers with a focus on sexual minorities.

1.1.7 Chapter 3

Chapter three discusses the challenges, intersectionality between the immigration system and the vulnerability of sexual minorities. This chapter also addresses the impact of legislative and institutional gaps, the consequences of detention and subsequent refoulement.

1.1.8 Chapter 4

This chapter discusses the effects of a flawed asylum seeker system, the effect of legislative gaps and the resultant immigration detention and refoulement.

1.1.9 Chapter 5

This chapter briefly discusses the summary of the findings and makes recommendations.

1.10 Literature Review

The protection of sexual minorities within the context of asylum seekers in immigration detention has globally become an issue of growing concern.³⁶ In South Africa, sexual minority asylum seekers often find themselves in these settings, due to rejections by Refugee Status Determination Officers (RSDO).³⁷

The Department of Home Affairs has reported several challenges to the asylum seeker system, resulting in the United Nations High Commissioner for Refugees (UNHCR) assisting the department.³⁸ The \$7 Million aid came following the plight of Covid-19, which forced the Department to close its refugee reception offices for over two years.³⁹ The pressure to deal with the backlog resulted in the Department finding creative ways to deal with the demand, including summary arrests and arbitrary detention of asylum seekers.⁴⁰

³⁶ <https://www.ohchr.org/en/press-releases/2019/06/un-rights-experts-urge-more-protection-lgbti-refugees> (accessed 6 August 2024).

³⁷ <https://www.msf.org.za/news-and-resources/latest-news/SAMigrantsFacts> (accessed 6 August 2024).

³⁸ UNHCR and the Government pledge to clear the asylum backlog by 2024 <https://southafrica.un.org/en/136315-unhcr-and-government-pledge-clear-asylum-backlog-2024> (accessed 9 August 2024).

³⁹ Press Statement "DHA announces online renewal process for asylum seeker and refugee documentation" available at <https://www.lhr.org.za/lhr-news/press-statement-dha-announces-online-renewal-process-for-asylum-seeker-and-refugeedocumentation/> (accessed 9 August 2024).

⁴⁰ Press Statement: Scalabrini and Lawyers for Human Rights Challenge Unlawful Arrests of New Asylum Seekers: May 2024 <https://www.scalabrini.org.za/press-release-unlawful-arrests-of-new-asylum-seekers/> (accessed 8 August 2024).

In a 2011 study investigating the adjudication of SOGIESC claims in Europe, Jansen and Spijkerboer⁴¹ highlighted the complexities faced by sexual minority persons in asylum seeker processes. They discussed the hurdles in proving sexual orientation or gender identity in the adjudication processes. This research provides insight into these hurdles and proposes recommendations aimed at addressing these hurdles from an administrative point of view.

Klaaren and Springman⁴² commend the South African legal framework in respect of its robust nature for the basis of protection against discrimination as it is one of the few countries that offers non-discrimination based on sexual orientation in its Constitution. However, they note that the implementation of non-discrimination in the Constitution and the Refugee Act remains inconsistent.⁴³ This research will unpack these inconsistencies and offer insight into the intersecting factors that see the country falling short in its aim to recognise the vulnerability and avoid refoulement of sexual minority persons to countries where they face persecution.

Mbiyozo delved into the issue of refugee status determination processes and the ramifications of inconsistent application of the Refugee Act.⁴⁴ She investigated whether these inconsistencies cause a failure of the duty to protect by South Africa as a member state to the 1951 Convention. Further into the discussion, it is noted that while the adjudication process is somewhat precise, there remains a significant gap in the implementation and enforcement of these protections. This gap persists between the recognition of vulnerability and actual administrative practices.

The intersectionality framework as proposed by Crenshaw is important in understanding the complexity of vulnerabilities faced by sexual minority asylum seekers and refugees.⁴⁵ Although her study does not specifically mention asylum seekers and refugees, she makes an interesting

⁴¹ S Jansen & T Spijkerboer 'Fleeing homophobia, asylum claims related to sexual orientation and gender identity in Europe' (2011) *University of Amsterdam* <https://www.refworld.org/reference/themreport/vuu/2011/en/83496> (accessed 5 July 2024)

⁴² J Klaaren & Chris Springman 'Refugee status determination in South African Law' (2000) *Wits Institute for Social and Economic Research* <https://wiser.wits.ac.za/sites/default/files/Klaaren%20and%20Sprigman%20Refugee%20Status%20Determination%20Procedures%202008.pdf> (accessed 5 July 2024).

⁴³ Jansen & Spijkerboer (n 42) 24.

⁴⁴ A Mbiyozo 'Gender and migration in South Africa' (2018) *Institute for Security Studies*. <https://issafrica.s3.amazonaws.com/site/uploads/sar-16.pdf> (accessed 5 July 2024)

⁴⁵ K Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of anti-discrimination doctrine, feminist theory and antiracist politics' (1989) *Chicago Legal*. https://scholarship.law.columbia.edu/faculty_scholarship/3007 (accessed 5 July 2024)

observation on treating factors such as race and gender as mutually exclusive categories of experience and analysis.⁴⁶ The observation by Crenshaw brings about another challenge that hinders the full realisation of protection of sexual minority asylum seekers and refugees in administrative and immigration detention because the vulnerability caused by various intersecting factors is not recognised.

Rachel Lewis has explored how deportability structures impacted the experiences of lesbian refugees and asylum seekers in the United Kingdom.⁴⁷ Interestingly, she highlights the application process in the UK and how the racial and gendered process through the UK asylum system transforms lesbian migrants into deportable subjects. In the context of Africa, this research looks at the repatriation patterns of South Africa and investigates where the sexual minority persons are being detained and repatriated. It specifically highlights the dangers of a careless asylum seeker application process that leads to refoulement.

Lastly, Sean Rehaag advocates for targeted legal reforms to address the challenges faced by sexual minorities in respect of the adjudication of their claims. He suggests for instance, the implementation of specialised training programmes for adjudicators on SOGIESC based applications.⁴⁸ Sean suggests that these trainings will assist in the avoidance of poor adjudication processes that lead to immigration detention and refoulement.

There is a significant lack of research on these intersecting experiences when it comes to the South African context. The vulnerability of these individuals is compounded not only by legislative frameworks but also by factors such as forced migration, fear of persecution, and the socio-political contexts of countries of origin. The absence of specific policies and guidelines tailored to their refugee claims further exacerbates these issues. Addressing these gaps in the literature is therefore crucial for informing policy reform and advocacy efforts.

⁴⁶ Crenshaw (n 39) 10.

⁴⁷ R Lewis 'Queering deportability: The racial and gendered politics of lesbian anti-deportation activism' (2021) <https://journals.sagepub.com/doi/abs/10.1177/13634607211047516> (accessed 5 July 2024)

⁴⁸ S Rehaag 'Patrolling the Borders of Sexual Orientation: *Bisexual refugee claims in Canada*' (2008) 53 *McGill Law Journal* 59 https://digitalcommons.osgoode.yorku.ca/scholarly_works/2226/ (accessed 5 July 2024)

1.11 Research Gap

While the above-mentioned studies identify challenges into the various asylum seeker adjudication systems, including South Africa, they primarily consider the asylum seekers holistically and overlook the fact that sexual minorities face a different level of vulnerability that should be given a higher degree of attention in the adjudication process. Attention should be placed to ensure that sexual minority asylum seekers are not subjected to immigration detention and refoulement to countries where they could possibly face persecution because of their sexual orientation.

1.12 Methodology

This study is desktop research based. In answering the main research questions and the sub-questions, this study will employ the aid of books, journal articles, case law and reports related to the subject matter. When the study refers to lived-experiences, it will be doing so based on the information of judicial and administrative resources of the Department of Home Affairs and reported case law.

CHAPTER TWO

LEGAL FRAMEWORK AND PROTECTION OF SEXUAL MINORITY ASYLUM SEEKERS IN SOUTH AFRICA

“Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected by the Bill of Rights.” - Justice Nugent in Minister of Home Affairs v Watchenuka

2.1 Introduction

The international human rights legal framework does not sufficiently address the issues around the protection and advancement of rights of sexual minority persons.⁴⁹ Alfred Kinsey brought the notion of sexuality and its practices into Western public discussion in the 1940s and the 1950s, with much fanfare and controversy.⁵⁰ The use of the term ‘sexual minorities’ was not frequent until the 1990s when the term was casually used to describe ‘sexual minority identity’.⁵¹ Deployed as such, it was offered without much explanation for its usage. This term was used almost casually to describe the sexual attractions and behaviours of lesbian and bisexual women from mixed ethnic backgrounds.⁵²

The term “sexual minority” alleviates some of the colonising patterns that are often critiqued of “LGBT” usage in non-Western contexts.⁵³ Thus, it acts as a transnational concept sensitive to persons with same-sex sexualities in non-Western cultural, transcultural, and diaspora communities who perceive Western sexuality labels such as “LGBT” and “queer” as being counter-cultural, taboo, and destructive of indigenous movements around sexuality-difference.⁵⁴

On the other hand, international human rights legal framework does not specifically emphasise the protection of ‘sexual minority asylum seekers’ as a separate group of persons. The 1951 Convention

⁴⁹ R Mizzi ‘Catchalls and Conundrums: Theorizing ‘Sexual Minority’ in Social, Cultural and Political Contexts’ (2014) 81- 90 *Paideusis*.

⁵⁰ Dr. Alfred C Kinsey profile <https://kinseyinstitute.org/about/history/alfred-kinsey.php> (accessed 11 August 2024).

⁵¹ P Rust ‘Coming out in the age of social constructionism: Sexual Identity Formation among Lesbian and Bisexual Women’ (1993) 50-77 *Gender and Society* 7

⁵² Rust (n 51) 52

⁵³ Rust (n 51) 72

⁵⁴ M A Eichler – R Mizzi ‘Negotiating the Confluence: Middle Eastern Immigrants, Sexual Minority Men and Concerns for Learning and Identity’ (2013) *Brock Education* 22.

as the main legal instrument governing the issues of refugees does not specifically define who is an asylum seeker. It follows that the regional and domestic legal frameworks tend to use *refugee* and *asylum seekers* interchangeably,⁵⁵ implying that they are indeed the same or rather the extent of the protection and rights afforded to both are the same.

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It follows that when one speaks of a sexual minority asylum seeker, the legal framework is void. Prior to the 1993 Vienna Declaration⁵⁶ international legal framework and accompanying framework barely reference sexuality or expressly focus on sexual orientation.⁵⁷

2.2 International legal framework (South Africa's obligations towards protection and advancement of the rights of asylum seeker sexual minority persons)

The Universal Declaration of Human Rights offers recognition of inherent dignity, equality and inalienable rights of people based on the foundation of human family, freedom, justice and peace on the world.⁵⁸ South Africa's Constitution is almost a spitting image of the principles of the Universal Declaration.⁵⁹ Article 2 of the Universal Declaration states that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶⁰ Although it does not specifically reference sexual orientation, subsequent Article 7 states that everyone is equal before the law and are entitled, without discrimination to equal protection of the law. Article 9 further states that no one shall be subjected to arbitrary arrest, detention or exile. Furthermore, Article 14 states that everyone has a right to seek and to enjoy in other countries asylum from persecution.

⁵⁵ Migrants, asylum seekers, refugees and immigrants: What's the difference? <https://www.rescue.org/article/migrants-asylum-seekers-refugees-and-immigrants-whats-difference> (accessed 11 August 2024).

⁵⁶ Vienna Declaration and Programme of Action <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action> (accessed 11 August 2024).

⁵⁷ O Sode 'A critical Analysis of the Rights of older Women in Africa' unpublished dissertation, University of Pretoria, (2019) 2.

⁵⁸ Preamble of the Universal Declaration of Human Rights Proclaimed by UN General Assembly in 1948

⁵⁹ Abigail Noko 'South Africa's Constitution and the Universal Declaration' OHCHR <https://southafrica.un.org/en/211139-10-december-marks-two-anniversaries-south-africa%E2%80%99s-constitution-and-universal-declaration> (accessed 11 August 2024).

⁶⁰ Article 2 of the Universal Declaration on Human Rights

During its transition from apartheid, South Africa mirrored the sentiments of this instrument and⁶¹ although the Universal Declaration does not specifically mention sexual orientation, it recognises the overall dignity,⁶² security⁶³ and non-discrimination of persons.⁶⁴ It is in this spirit that South Africa has shown its willingness to participate in a larger international community with efforts directed towards the protection and advancement of human rights.⁶⁵

Among the ratifications showing this international commitment, South Africa in 1996 ratified the 1951 Refugee Convention and its 1967 Protocol.⁶⁶ The Convention is the international instrument that offers specific matters relating to refugees, including the rights that member states should afford to refugees and asylum seekers.⁶⁷ South African signed and ratified the Convention on 12 January 1996.⁶⁸ The Convention consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees at the international level.

The International Covenant on Civil and Political Rights (ICCPR) does not specifically address sexual minorities separately from any other groups of people. However, it does address non-discrimination⁶⁹ and the right to liberty and protection from arbitrary arrests.⁷⁰

The Human Rights Committee (HRC), the treaty monitoring body of the ICCPR, in its landmark decision in *Toonen v Australia*, stated that the word 'sex' and 'other status' in the ICCPR should be read to include sexual orientation and gender identity.⁷¹ As such, the HRC pronounced that the ICCPR and indeed other treaties in the UN human rights system prohibit discrimination on the basis of sexual orientation and gender identity. In this regard, it can be argued that all treaties under the UN system, are to be read in a manner that protects sexual minorities from discrimination and protects

⁶¹ Noko (n 59)

⁶² Article 1 of the Universal Declaration on Human Rights

⁶³ Article 3 of the Universal Declaration on Human Rights

⁶⁴ Article 7 of the Universal Declaration on Human Rights

⁶⁵ Department of International Relations & Cooperation RSA Treaty Registry <https://dirco.gov.za/treaty-section/> (accessed 11 August 2024)

⁶⁶ State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol <https://www.unhcr.org/sites/default/files/legacy-pdf/3b73b0d63.pdf> (accessed 11 August 2024)

⁶⁷ Preamble 1951 Convention

⁶⁸ (n 66) State Parties.

⁶⁹ Article 16 of the International Covenant on Civil and Political Rights.

⁷⁰ Article 9 of the International Covenant on Civil and Political Rights.

⁷¹ *Toonen v Australia* (1994) CCPR/C/50/D/448.

the rights thematic to the treaty as if the words sexual orientation and gender identity are specifically stated in the respective treaty.⁷²

2.3 Regional legal framework (South Africa's obligations towards the protection and advancement of the rights of asylum seeker sexual minority persons)

To ensure the protection of sexual minority refugees and asylum seekers in Africa, several legal and policy framework initiatives have been adopted at a regional level and South Africa has been part of these initiatives. Firstly, while the African Charter on Human and Peoples' Rights ('African Charter') does not explicitly address the rights of sexual minorities, including LGBTQ+ individuals,⁷³ the Charter does include broad provisions that uphold human dignity and protect all individuals from discrimination. Article 2 prohibits discrimination on various grounds, including "*any other status*," which can be interpreted to include sexual orientation. "*Any other*" is not always construed literally and it does not require the agency to disregard otherwise applicable laws or limits the subject matters.⁷⁴

The Charter further guarantees the right to equality before the law and equal protection of the law.⁷⁵ It further ensures the right to dignity and recognition of legal status. It further prohibits torture, cruel, inhuman, or degrading punishment or treatment.⁷⁶ Although the Charter does not specifically mention sexual minorities, these provisions can be invoked to advocate for the protection of the rights of LGBTQ+ asylum seekers and refugees in immigration detention across Africa, including South Africa.

Article 12 of the Charter provides that every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of that countries and international conventions.⁷⁷

⁷² International Court of Justice: Sexual Orientation, Gender Identity and International Law Practitioner's Guide No: 4 (2009) <https://www.icj.org/wp-content/uploads/2009/07/sexual-orientation-international-law-Practitioners-Guide-2009-eng.pdf> (accessed 15 October 2024).

⁷³ F Viljoen 'The African Charter on Human and Peoples' Rights: The Travaux préparatoires in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 313.

⁷⁴ L M. Eig 'Statutory Interpretation: General Principles and Recent Trends' (2014) *Congressional Research Service* 10-19

⁷⁵ Article 3 of the African Charter on Human and Peoples' Rights.

⁷⁶ Article 5 of the African Charter on Human and Peoples' Rights.

⁷⁷ Article 12 of the African Charter on Human and Peoples' Rights.

Recognising this disparity and alarmed by acts of violence and discrimination, the African Commission on Human and Peoples' Rights ("African Commission") issued Resolution 275 (Resolution on Protection against Violence and other Human Rights Violation Against Persons) on the basis of their real or imputed sexual orientation or gender identity.⁷⁸ The Commission takes a strong stance by urging the member states to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities by ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.⁷⁹

The 1967 OAU Refugee Convention came into force in 1974 with the primary concern being the large number of Africans fleeing conflict arising from the effects of struggles against colonialism. As then President of Tanzania, Mwalimu Julius Nyerere said: "We saw refugees coming out of colonial countries and our idea was, treat these people well."⁸⁰

This Convention was adopted to address and set the standards for treatment of refugees in war-ridden and conflict countries, However, currently in most African countries, refugees are not welcomed with the exuberant sense of solidarity that surrounded the promulgation of the Convention.⁸¹ Instead, African states are increasingly following the lead of other regions by closing their borders and threatening to forcibly expel those arriving at their territories.⁸² Although the Convention affirms the rights of refugees to be protected and seek asylum without any exclusion, discrimination and violations of their dignity, it does not explicitly address the rights of sexual minorities, such as LGBTQ+ asylum seekers and refugees. This omission reflects the broader silence in regional instruments concerning sexual minorities, leaving LGBTQ+ refugees vulnerable in countries where same-sex relations are criminalised or heavily stigmatised.

⁷⁸ ACHPR/Res.275(LV)2014

⁷⁹ Resolution 275 (n 79).

⁸⁰ Africa: Innocence lost': In an interview for UNHCR *Refugees* magazine, 1999.

⁸¹ J O M Okello 'The 1969 OAU Convention and the continuing challenge for the African Union' (2023) *Forced Migration Review* 3

⁸² Okello (n 81) 7

What the Convention does however, is to expand the definition of a refugee beyond the 1951 UN Refugee Convention to include people fleeing "*events seriously disturbing public order*" in their countries of origin.⁸³ It is also in this instrument where a consistent usage of the term "*asylum seeker*" is found.⁸⁴ This is particularly important for this study because it defines a process of offering temporary asylum seeker permit of residence while the claim for refugee status is being adjudicated upon.⁸⁵ It is during this stage of adjudication that the basis of this study finds a violation of the rights of sexual minority asylum seekers in the DHA adjudication process and immigration detention.

The Refugee Protection Within Southern Africa Declaration reaffirms the commitment of member states of the Southern Africa Development Communities⁸⁶ to the governing principles of the 1951 Convention and its Protocol and the OAU Convention Governing Specific Refugee Problems in Africa.⁸⁷ The member states undertook to give full effect to these Conventions and accompanying principles by enshrining them into national legislation, including the principle of non-refoulement. By so doing, member states observe international standards for refugee protection, and are well aware of the humanitarian character of asylum. It is in this spirit that the South African Refugee Act codified the principle of non-refoulement in its Section 2(a) and (b) stating that:⁸⁸

Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where: He or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; OR his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.

⁸³ Article 1 of the Convention Governing the Specific Refugee Problems in Africa

⁸⁴ Article 2 of the Convention Governing the Specific Refugee Problems in Africa

⁸⁵ Article 2(5) of the Convention Governing the Specific Refugee Problems in Africa

⁸⁶ Declaration on Refugee Protection within Southern Africa, 1998

⁸⁷ (n 85) Preamble of the Declaration on Refugee Protection within Southern Africa

⁸⁸ Section (2) of the Refugee Act

2.4 Domestic Law and Policies

The Constitution of the Republic of South Africa is the cornerstone of the country's democracy. It enshrines human rights and duties binding on all its citizens, all spheres of government, the judiciary and the executive.⁸⁹ Sections 39 and 233 of the Constitution require South African law to be read in conjunction with international law. In the case of *Ruta v Minister of Home Affairs*,⁹⁰ it was noted by the Constitutional Court that asylum seeking persons may not be detained and deported to the countries where they will face persecution and whenever an asylum seekers declare their intention to apply for refugee status, they should immediately be provided the opportunity to do so.⁹¹ Although the Court has provided ample jurisprudence on the issue of the extent of protection of refugees,⁹² in *Ruta*, the Court pointed out that the principle of non-refoulement underscores the very essence of the constitution, noting that:

Non-refoulement, the concept that one fleeing persecution or threats to “his or her life, physical safety or freedom” should not be made to return to the country inflicting it.⁹³

The principle of non-refoulement informs Section 2 of the Refugee Act.⁹⁴ This Act came into effect after the 1951 Convention, the Protocol and the AOU Convention on Refugees came into effect. Prior to the Refugee Act, issues of migration in South Africa were primarily governed by the Aliens Control Act. Asylum seekers and refugees were dealt with in terms of the Aliens Control Act 96 of 1991 which provided for the control, and the admission of persons to, their residence in, and their departure from South Africa.⁹⁵ In order to codify its international obligations after the promulgation of the Constitution, the Refugee Act came into force in 1998 to give effect to the relevant international legal instruments, principles and standards relating to refugees;⁹⁶ and to provide for the reception into

⁸⁹ Preamble of the Constitution of the Republic of South Africa.

⁹⁰ *Ruta v Minister of Home Affairs* (CCT02/18) (2018) ZACC 52.

⁹¹ *Ruta* (n 92) in order.

⁹² *Khosa v Minister of Social Development* (CCT 13/03) (2004) ZACC 11, *Mahtlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC), *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* [2006] ZACC 23; (2007)(4) BCLR 339 (CC); *Gavric v Refugee Status Determination Officer Cape Town (People Against Suppression Suffering Oppression and Poverty as Amicus Curiae)* [2018] ZACC 38.

⁹³ *Ruta* (n 90) in order.

⁹⁴ *Ruta* (n 90) in order.

⁹⁵ Aliens Control Act 96 of 1991.

⁹⁶ Preamble of the Refugee Act 130 of 1998.

South Africa of asylum seekers; to regulate applications for and recognition of refugee status;⁹⁷ to provide for the rights and obligations flowing from such status.⁹⁸ The Act largely corresponds to and emulates provisions of the Convention and the OAU Convention.⁹⁹

The Refugee Act is accompanied by its 2020 amendment¹⁰⁰ and the Refugee Regulations (Forms and Procedures), 2000 (the Regulations) published under GN R366 in GG 21075 of 6 April 2000 and amended by GN R938 in GG 21573 of 15 September 2000.¹⁰¹ The regulations formulate the procedure that should be applied by refugee reception officers when considering refugee applications. For instance, the Refugees Act requires South Africa to extend protection to individuals who have a well-founded fear of SOGI-based persecution.¹⁰² 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 which codifies the universal principle of non-refoulement. This provision is important to this study to demonstrate that the Refugee Act requires a deeper analysis of SOGIESC claims than a few others because of the heightened levels of vulnerability because of their “*belonging to a particular social group*”.

The Refugee Act is founded on the principle of non-refoulement, a term stemming from the French word “*refouler*” which means to “drive back” or to “repel”.¹⁰³ This principle provides that a state is obliged to refrain from forcibly returning a refugee to a state where he or she is likely to suffer persecution or danger to life or unlawful danger to freedom. This customary international law rule was codified under Article 33(1) of the Convention and provides that no Contracting State shall expel or return (“refoul”) a refugee in any manner whatsoever to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.

⁹⁷ Preamble of the Refugee Act 130 of 1998.

⁹⁸ Preamble of the Refugee Act 130 of 1998.

⁹⁹ M Sharpe ‘The relationship between 1951 and 1969 Conventions’ (2018) *The Regional Law of Refugee Protection in Africa* 84-121

¹⁰⁰ Refugee Amendment Act 11 of 2017

¹⁰¹ Refugee Act 130 of 1998, Refugees Regulations
https://www.gov.za/sites/default/files/gcis_document/202001/42932rg11024gon1707.pdf (accessed 12 August 2024)

¹⁰² Section 3(a) of the Refugee Act 130 of 1998.

¹⁰³ GS Goodwin-Gill ‘*The Refugee in International Law*’ (1996) 117

The Court in *Kabuika v Minister of Home Affairs* recognised that the principle of non-refoulement has become a rule of customary international law.¹⁰⁴ *Makumba v Minister of Home Affairs*¹⁰⁵ and *Azanian Peoples' Organisation (AZAPO) and others v President of the Republic of South Africa*¹⁰⁶ reaffirmed the application of this customary international law principle in South Africa. The principle of non-refoulement is an exception to the international law rule which provides that, because of inherent sovereignty, every state is entitled to forbid the entrance of foreigners into its territory or to admit foreigners other than in circumstances it deems fit.¹⁰⁷

The Refugee Act does not operate in isolation to other domestic legislation in South Africa. The Immigration Act also applies to refugee matters. The Immigration Act replaced the Aliens Control Act and it regulates how non-South Africans enter into, depart from, and live in South Africa - and it provides legalisation options for those coming to South Africa for non-refugee reasons – for example, to work, to study, to start a business and so on. However, for the purposes of this study, the Immigration Act comes into play on refugee matters when an asylum seeker has been declined recognition as a refugee¹⁰⁸ or if refugee status has been revoked.¹⁰⁹

Section 34 of the the Immigration Act deals with arrest, detention and deportation of persons who are in South Africa illegally. What is happening in respect of asylum seekers since the Constitutional Court decision on *Ashebo*¹¹⁰ is that the process of arrest for the purposes of deportation has been occurring prior to the rejection of asylum claims. What alarmed civil society in respect of this matter was the pace in which asylum seekers were being arrested and detained at refugee reception offices.¹¹¹ The Department of Home Affairs relied on this judgement arguing that it is necessary that applications for asylum be brought within a reasonable time period after an individual enters a country, to do otherwise would render the Immigration Act an empty vessel, as any foreigner who is

¹⁰⁴ *Kabuika v Minister of Home Affairs* 1997 (4) SA 241 (CC)

¹⁰⁵ *Makumba v Minister of Home Affairs* (6183/14) (2014) ZAWCHC 183

¹⁰⁶ *Azanian People's Organisation v President of the Republic of South Africa* (CCT17/96) (1996) ZACC (8) BCLR 1015

¹⁰⁷ State Sovereignty and Human Rights <https://emm.iom.int/handbooks/human-rights-migrants-overview/state-sovereignty-and-human-rights> (accessed 12 August 2024)

¹⁰⁸ Section (36) of the Refugee Act

¹⁰⁹ Section (36)(b) of the Refugee Act

¹¹⁰ *Ashebo v Minister of Home Affairs* (CCT 250/22) (2023) ZACC 16

¹¹¹ <https://www.lhr.org.za/lhr-news/press-statement-scalabrini-centre-lawyers-for-human-rights-to-challenge-unlawful-arrests-of-new-asylum-seekers/> (accessed 12 August 2024)

detained after being in the country for an extended time, can make assertions that they intend on applying for asylum.¹¹²

With regards to the issue of detention and deportation of asylum seekers before being provided an opportunity to apply for refugee status, the Constitutional Court had already made landmark judgements in the case of *Ruta*¹¹³ and *Abore*.¹¹⁴ In both matters the Court cemented that if a foreigner unlawfully present in South Africa has indicated their intention to apply for asylum, they must be afforded an opportunity to do so and further, that a delay in expressing that intention does not bar the individual from applying.¹¹⁵ It held that even though a delay in applying for asylum is significant in determining an individual's credibility and authenticity, it does not "*function as an absolute disqualification from initiating the asylum application process*".¹¹⁶ Therefore, until an applicant's application has been finally adjudicated, the principle of non-refoulement protects the applicant from deportation.¹¹⁷

The Court in *Ashebo* turned its attention to the issue that informs the subject of this study and specifically considered the extent to which the provisions relating to the asylum application processes have been amended, particularly in respect of the 2020 amendment.¹¹⁸ An important consideration was the fact that the previous regulations made provision for an illegal foreigner, who intended on applying for asylum, to be temporarily released pending the making of the application – this does not exist in the current framework.¹¹⁹ Instead, the amended Regulation 7,¹²⁰ which deals with asylum transit visas, imposes more stringent conditions and requires that the individual declare their intention to apply for asylum at the port of entry. Similarly, Regulation 8 is also quite strict as it requires a person who does not have an asylum transit visa to show good cause, when attended to at an RRO, for entering the country illegally.¹²¹ The Constitutional Court concluded that the combined

¹¹² *Ashebo* Item record <https://collections.concourt.org.za/handle/20.500.12144/38250?show=full> (accessed 12 August 2024).

¹¹³ Judgement *Ruta* (n 90)

¹¹⁴ *Abore v Minister of Home Affairs and Another* (CCT 115/21) [2021] ZACC 50; 2022 (4) BCLR 387 (CC); 2022 (2) SA 321 (CC)

¹¹⁵ *Ruta* (n 90) Order

¹¹⁶ *Ruta* (n 90) Order

¹¹⁷ *Ashebo* (n 110) in summary.

¹¹⁸ *Ashebo* (n 110) in considerations.

¹¹⁹ Refugee Amendment Act Explained <https://genderjustice.org.za/card/the-refugees-amendment-act-explained/> (accessed 13 August 2024)

¹²⁰ Government Notice 42932, GG, 27 December 2019, 1707 (Regulations issued in terms of the Refugee Act)

¹²¹ Regulation 8 GN, 42932, (n 120)

effect of the amended provisions is to provide an illegal foreigner who intends on applying for asylum but who did not arrive at a port of entry and express their interest there, with a method to demonstrate the intention even after the five-day period.¹²²

Although the Court was clear in stating that the door to asylum is not closed just because the applicant is without the transit visa, it still made a further determination in respect of the implication in terms of the Immigration Act.¹²³ Notably, the Court stated that while an illegal foreigner is still entitled to apply for asylum, it does not negate the fact that they have contravened the Immigration Act.¹²⁴ The question that arose, irrespective of the charge, was whether the applicant's expression of an intention to apply for asylum entitled him to be released from detention. To this, the Constitutional Court answered, no.¹²⁵ The Court determined that if they were to accept the applicant's argument that he was entitled to be released pending his asylum application, it would create a practical challenge that would result in any illegal foreigner in immigration detention having to be released once they've declared their intention to apply for asylum, which was not a tenable situation. Justice Maya pointed out that:

These provisions do not offend the principle of non-refoulement embodied in section 2 of the Refugees Act. Their effect is by no means out of kilter with article 31 of the Convention, the fount of section 2. Rather, they accord with its import because it too does not provide an asylum seeker with unrestricted indemnity from penalties. The article provides that a Contracting State may not impose penalties on refugees on account of their illegal entry or presence in the country provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.¹²⁶

As a result, the Department of Home Affairs (DHA) utilises this judgement to arrest and detain asylum seekers who present themselves to the refugee reception offices without transit visas. This process creates another goal post for asylum seekers to attain protection. Considering the vulnerability

¹²² Ashebo (n 110) order

¹²³ Ashebo (n 112) para (33)

¹²⁴ Section 23(1) of the Immigration Act.

¹²⁵ Ashebo (n 110) conclusion.

¹²⁶ Ashebo (n 110) order.

attached to sexual minorities, being subjected to arrest and detention before being able to articulate their claims further exacerbates the risks of being deported to countries where they face persecution.

2.5 Soft Laws

The Yogyakarta Principles are a collection of guidelines for how human rights law should be applied in the context of sexual orientation and gender identity. Its focus is on the need to respect LGBTQI+ rights in closed settings such as correctional facilities.¹²⁷ Principle 17 provides that everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Principle 23 deals with the rights to seek asylum and provides that states must;

Accept the self-identification of a person seeking asylum on the basis of sexual orientation, gender identity, gender expression or sexual characteristics as the starting point for consideration of their asylum claim;¹²⁸

Furthermore;

Ensure that placement in detention, where used, avoids further marginalising persons on the basis of sexual orientation, gender identity, gender expression or sex characteristics or subjecting them to violence, discrimination or other harm.

South Africa provides an opportunity for an asylum seeker to advance their claim, based on sexual orientation based on the principle of non-discrimination in its Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act.¹²⁹ As such, in contexts such as immigration detention and the refugee reception offices, acts of discrimination based on nationality and sexual orientation are strictly prohibited. It is in this spirit that the Department of Home Affairs and

¹²⁷ International Commission of Jurists (ICJ) Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity 2007.

<https://www.refworld.org/legal/resolution/icjurists/2007/en/58135> (accessed 13 August 2024)

¹²⁸ Principle 23 of the Yogyakarta Principles

¹²⁹ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Department of Correctional Services has gazetted¹³⁰ designated places of immigration detention.¹³¹ The minimum standards of these facilities find a home in the Immigration Act regulations.¹³²

On paper, these designated places are supposed to ensure that the placement in detention centres does not further marginalise a person on the basis of sexual orientation. In South Africa, only Lindela Repatriation Centre has immigration detention facilities known to be fully functional for this purpose.¹³³ The immigration inspectorate also uses police stations and correctional facilities to detain for immigration purposes.¹³⁴ It is important to note that, a rejection of asylum application does not imply criminality on the part of the applicant, therefore, detention in correctional facilities and police stations for this purpose is punitive.¹³⁵

The UNHCR International Protection Guidelines No 9 provides a further interpretation into 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.¹³⁶ Under procedural issues, it affirms that LGBTQI+ individuals require a supportive environment throughout the refugee status determination procedure, including pre-screening so that they can present their claims fully and without fear. A safe environment is equally important during consultations with legal representatives.¹³⁷ Discrimination, hatred and violence in all its forms can impact detrimentally on the applicant's capacity to present a claim. Some may be deeply affected by feelings of shame, internalized homophobia and trauma, and their capacity to present their case may be greatly diminished as a consequence.¹³⁸ Where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared.

¹³⁰ Section 34 (1) of the Immigration Act

¹³¹ <https://www.dha.gov.za/index.php/immigration-services/places-of-detention-for-those-pending-deportation> (accessed 12 August 2024)

¹³² Government Notice 24952, GG, 21 February 2003, 487 (Regulations in terms of the Immigration Act of 2002)

¹³³ Global Detention Project: South Africa <https://www.globaldetentionproject.org/countries/africa/south-africa> (accessed 12 August 2024)

¹³⁴ Designated places of immigration detention (n 131)

¹³⁵ A Shaw 'LGBTQI+ Refugees and Asylum Seekers' (2022) *UCLA School of Law, Williams Institute*

¹³⁶ UNHCR International Protection Guidelines <https://www.unhcr.org/sites/default/files/legacy-pdf/509136ca9.pdf> (accessed 12 August 2024)

¹³⁷ (n 136) Para 58

¹³⁸ (n 136) Para 59.

The nuanced vulnerabilities of asylum seekers who are sexual minorities are further emphasised in the UNHCR Guidelines on International Protection concerning *membership of a particular social group* under Article 1A(2) of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. The guidelines recognise LGBTQI+ persons as a particular social group, unified by an innate or unchangeable characteristic that is essential to their human dignity and should not be forced to change. Additionally, they are identifiable and distinct from the broader society.¹³⁹ In turn, the status determination officers have the duty to not draw adverse decisions based on an applicant's apprehension of sexual orientation or gender identity at screening stages.¹⁴⁰

2.6 Conclusion

While South Africa has ratified various international human rights instruments that emphasise the protection of sexual minorities, the translation of these commitments into domestic law and practice remains inconsistent as will be further explained in the chapter that follows.

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¹³⁹ (n 139) Para 60.

¹⁴⁰ UNHCR, "Statement on the right to an effective remedy in relation to accelerated asylum procedures", 21 May 2010, available at: <http://www.unhcr.org/refworld/docid/4bf67fa12.html>, paras. 11–12.

CHAPTER 3

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CHALLENGES, ADJUDICATION FLAWS, MISAPPLICATION OF PRINCIPLES, AND THEIR IMPACT ON IMMIGRATION DETENTION

It is not our differences that divide us. It is our inability to recognise, accept and celebrate those differences. – Audre Lord

3.1 Introduction

The South African legal framework provides for asylum on the basis of persecution on account of sexual orientation and gender identity.¹⁴¹ The Refugee Act states that a person may qualify for a refugee status in South Africa if they have a ‘well-founded fear of being persecuted on account of their race, tribe, religion, nationality, political opinion or membership of a particular social group’.¹⁴²

Where homosexuality for instance, is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct amounts to persecution, just as it would for refusing to wear the veil by women in some societies.¹⁴³ Even where homosexual practices are not criminalised, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.¹⁴⁴ Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.¹⁴⁵ Equally, this definition would encompass homosexuals, transsexuals, or transvestites.¹⁴⁶

3.2 South Africa’s attempts at improving the asylum seeker adjudication process and extend protections.

1. **Law and Policy Framework:** South Africa has developed laws and policies to inform the Refugee Status Determination Officers (RSDO) on the adjudication of claims. Such

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¹⁴¹ Section (2)(a) of the Refugee Act.

¹⁴² (n 141) Section 2(a)(b) and (c) of the Refugee Act.

¹⁴³ UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity 17 <https://www.unhcr.org/media/unhcr-guidelines-international-protection-no-9-claims-refugee-status-based-sexual-orientation> (accessed 8 August 2024)

¹⁴⁴ UNHCR Guidelines (n 143) para 17.

¹⁴⁵ Executive Committee Conclusion No. 39, Refugee Women and International Protection, 1985.

¹⁴⁶ UNHCR Guidelines (n 6) para 30.

developments include the Refugee Act Regulations and gazetted ‘designated places of immigration detention’ for people, who according to the Immigration Act’ committed immigration offences.¹⁴⁷ This gazette ought to ensure that these persons are not subjected to the same environment as criminal/violent crime offenders.

2. **Improving Jurisprudence:** The South African Constitutional Court has made various decisions that ensure avoidance of immigration of asylum seekers due to bad decision making by RSDO officers and avoidance of refoulment to countries where asylum seekers will face persecution.¹⁴⁸
3. **Established practices of non-prosecutorial admissions at the Magistrates’ Court:** The National Prosecuting Authority (NPA) allows for the admission of representations in cases where an asylum seeker declares their intention to apply for refugee status at the time of arrest.¹⁴⁹

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3.3 Challenges faced by sexual minority asylum seekers during the asylum seeking adjudication process

Although the above-mentioned attempts have been made by South Africa at every branch of state, sexual minority asylum seekers find their applications for refugee status being rejected without appropriate attention being given to their vulnerabilities and the recognition of the dangers of returning them to countries where they will face persecution.¹⁵⁰ The challenges, include, but are not limited to the following:

3.3.1 BI-1590 Form:¹⁵¹

To crystallise the issue of poor-decision making in respect of sexual minority claims, this study draws the attention of the reader to the B-1590 form.¹⁵² The form has specific sections that inform the

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¹⁴⁷ Government Gazette (n 32).

¹⁴⁸ Constitutional Court Judgements (n 92).

¹⁴⁹ Criminal Procedure Act and regulations 51 of 1977.

¹⁵⁰ S L Arenila ‘Violations to the Principle of Non-Refoulement under the Asylum Policy of the United States’ (2013) *Ciudad de México* 15

¹⁵¹ Department of Home Affairs Refugee Status Determination Interview Form: <https://www.passport2000.com/files/BI-1590.pdf> (accessed 6 August 2024)

¹⁵² Current B-1590 form (n 151)

adjudication process of claims based on Section 3 (a) (b) and (c) of the Refugee Act. Briefly, the sections that speak directly to claims according to the Act are Section A5 and A6.¹⁵³

Section A5 briefly asks questions related to military service and Section A6 outlines brief questions related to membership to a political, religious, ethnic or social group. This study has already stated that, by definition, sexual and gender minority persons belong to a *particular social group*. The form goes further to allow the applicant to verbalise their asylum claim under Section C of the form. This section is simply titled '*Applicant's claim*' and it poses five questions that do not relate to the evaluation of a SOGIESC-based claim:

- A) Describe reasons for leaving your country of origin and events that took place prior to your departure.
- B) What steps did you take to address the challenges?
- C) Did you report the incident that occurred to the relevant authorities?
- D) If yes, what did the authorities do?
- E) Did you avail yourself to friends and family who may offer you protection?"

From the outset, the 1951 Convention read together with the Refugee Act requires that during the adjudication of an asylum claim, objective and subjective elements should be satisfied when determining whether a *well-founded* fear exists.¹⁵⁴ These elements will be discussed below to highlight the void in the B-1590 form, especially because of the way that the form is formulated, which does not have a specific section or guidelines that allow the proper solicitation of a SOGIESC-based claim.

In the case of *Garvic v Refugee Status Determination Officer Cape Town*, the Court was confronted with making a determination on the administrative correctness and justification of the refusal to grant Mr. Garvic refugee status.¹⁵⁵ The main reason for the refusal by the RSDO was based on the exclusionary clauses of Section 4(1)(b) of the Refugee Act, however, what is important about this

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¹⁵³ Government Gazette/42932 (28) 27 December 2019

¹⁵⁴ Immigration and Refugee Board of Canada Legal Services 'Interpretation of Convention Refugee and Person in need of Protection in the Case Law' (2020) (5) [https://www.irb-cisr.gc.ca/en/legal-policy/legal-concepts/Documents/Interpretation%20of%20Convention%20Refugee%20and%20Person%20in%20Need%20of%20Protection%20in%20the%20Case%20Law%20\(31%20Dec%202020\).pdf](https://www.irb-cisr.gc.ca/en/legal-policy/legal-concepts/Documents/Interpretation%20of%20Convention%20Refugee%20and%20Person%20in%20Need%20of%20Protection%20in%20the%20Case%20Law%20(31%20Dec%202020).pdf) (Accessed 24 August 2024)

¹⁵⁵ *Gavrić v Refugee Status Determination Officer Cape Town and Others (People Against Suppression Suffering Oppression and Poverty as Amicus Curiae)* CCT217/17 [2018] ZACC 38

Constitutional Court judgement is that the Court noting that the RSDO had come to the decision without properly investigating the asylum claim or simply lacked the administrative guiding principles to do so.¹⁵⁶

In the case of *EKS v Refugee Appeal Board*,¹⁵⁷ a matter that was remitted back to the Refugee Appeal Board in 2024.¹⁵⁸ The applicant was from Uganda and fled his country of origin in 2015 after fear of persecution based on sexual orientation. In arriving at its decision, the RSDO used the guiding B-1590 form to arrive at the rejection of Mr. E's SOGIESC claim which was based on Uganda's anti-homosexuality penal code. The RSDO noted that the applicant relied on the Anti-Homosexuality Act of 2014 which criminalised "carnal knowledge".

To reject his application, the RSDO relied on the 2008 country guidance case of *JM Uganda* Country Guidance where it was held that there was little evidence that the legal provisions of the Anti-homosexuality Act were enforced in Uganda.¹⁵⁹

The RSDO ignored two critical caveats made in this judgement. Firstly by ignoring that the judgement went further to say that the situation of the development and treatment of LGBTQ persons in Uganda since the case law of *JM* was handed down, it cannot be relied upon, as the situation has been described as '*producing a climate of fear and insecurity*'. Secondly, the RSDO did not use the same guidelines that are employed by the United Kingdom SOGIESC refugee asylum claim. Hence the High Court decided that the matter must be remitted to the Refugee Appeals Authority for reconsideration.

What is critical about this case is that the applicant consulted with Lawyers for Human Rights in transit of being deported to Uganda. The applicant had already been issued with a notice of deportation in terms of Section 7(1)(g), regulation 30(4) of the Immigration Act. The applicant was at the brink of being returned to Uganda where he would face persecution because of the misapplication of the law and poor evaluation of his claim based on sexual orientation.

¹⁵⁶ Summary of Judgement, Garvic v RSDO <https://www.concourt.org.za/index.php/judgement/268-garvic-v-refugee-status-determination-officer-cape-town-and-others-people-against-suppression-suffering-oppression-and-poverty-as-amicus-curiae> (accessed 10 September 2024)

¹⁵⁷ *EKS V Refugee Appeal Board* Durban High Court case 3991/15 Unreported

¹⁵⁸ Refugee Appeal Board DBNUGA000150513

¹⁵⁹ *J M (Homosexuality: Risk) Uganda v. Secretary of State for the Home Department UKIAT 00065* <https://www.refworld.org/jurisprudence/caselaw/gbrait/2008/en/61881> (accessed 13 October 2024)

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As mentioned above, the refugee status determination – according to UNHCR and various instruments- requires a satisfaction of both subjective and objective elements. The B-1590 form lacks this critical element. Pointedly:

Subjective Element: Although the 1951 Convention and the Refugee Act do not define what a well-founded fear is, Regulation 12 of the Refugee Act guides that each claim must be decided on a case by case basis, because fear is subjective. The UNHCR Handbook further guides that rather than just making a judgement on the factual situation in the asylum seeker’s country of origin,¹⁶⁰ an adjudication of the claim must include subjectivity. Subjectivity includes one’s state of mind and how they perceive certain circumstances and feelings.¹⁶¹ It would therefore be prudent for the B-1590 form to go further to consider what the claim is but also investigate the state of mind of a sexual minority person.¹⁶²

The subjective fear can only be logically determined through the testimony of the applicant.¹⁶³ This reasoning was applied in the Canadian Refugee Appeal Board where the chairperson stated that the lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, since both elements of the refugee definition – subjective and objective – must be met.¹⁶⁴

The B-1590 form, outside of Section C questions, mentioned above fails to investigate the subjective elements of SOGIESC claims. Consequently, implying that objective elements are more important than determining the subjective elements. This results in the rejection of asylum claims because if an asylum seeker is unable or unwilling to show that they actually suffered abuse or discrimination then the fear should not exist. Which is simply not true. This nuance will be further discussed below under intersectionality.

¹⁶⁰ UNHCR Handbook page 37 – 39

¹⁶¹ (n 154) chapter 5

¹⁶² (n 154) chapter 5

¹⁶³ (n 154) chapter 5

¹⁶⁴ Kamana, Jimmy v. M.C.I. (F.C.T.D., no. IMM-5998-98), Tremblay-Lamer, September 24, 1999

The bareness of the B-1590 form can be regarded as a direct cause of RSDO being unable to adjudicate SOGIESC refugee claims properly because it simply does not guide them to do so. This is to say that psychological reactions of different individuals may not be the same in identical conditions.¹⁶⁵ Sexual minority persons may fear coming out to their family or larger community because of religious, political or cultural beliefs.¹⁶⁶ Existing in such a community has proven unsafe and fatal,¹⁶⁷ even in circumstances where an objective element cannot be satisfied.

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Objective Element: The objective element of a SOGIESC claim on the other hand is far easier to prove. An evaluation of the applicants claim cannot be considered in abstract and so the objective fear of persecution requires that the conditions of the applicant's country of origin must be considered.¹⁶⁸ The most obvious example of an objective element is if the country of origin criminalised same-sex sexual relations such as Uganda.¹⁶⁹ As of July 2023, 62 UN member states still criminalise consensual same-sex acts and ban same-sex marriages/life-partnerships.¹⁷⁰

The pertinent question in establishing the objective well-founded fear becomes - whether the fact that same-sex sexual acts or non-heteronormative relations - are criminalised in the country of origin with severe penalties – means that as asylum seekers recognition as a refugee is a foregone conclusion? Moreover, should the initial application form reflect this subjective and objective nuance? To answer these questions, it is important to consider intersectionality and vulnerability.

3.3.2 Intersectionality and Vulnerability: Failure to recognise intersecting factors of vulnerability

The concept of intersectionality is crucial in understanding the depth of the experienced challenges of sexual minorities within the refugee and immigration detention framework. LGBTQ+ refugees who claim asylum in other countries seek protection from various forms of persecution both exogenous harm such as systematic violence and discrimination and endogenous harm such as internalised

¹⁶⁵ (n 156) chapter 5

¹⁶⁶ J Gibbs ' Religious Conflict, Sexual Identity, Suicidal Behaviours Among LGBT Young Adults' (2015) *National Library of Medicine* (19) 4

¹⁶⁷ N Pillay ' What David Kato's death can teach the world' Africa Renewal, <https://www.un.org/africarenewal/web-features/what-david-katos-death-can-teach-world> (accessed 6 August 2024)

¹⁶⁸ UNHCR Handbook page 87-96

¹⁶⁹ Human Rights Watch ' Uganda: Court Upholds Anti-Homosexuality Act' 4 April 2024

¹⁷⁰ <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/> (accessed 6 August 2024)

shame, stigma, fear, trauma and forced concealment of identity.¹⁷¹ The vagueness of the initial status determination form leaves room for the Department of Home Affairs to choose how they operationalise it without recognising the intersecting factors that require the adjudication process to have a heightened level of attention towards sexual minority persons.

Vulnerability is not a new concept in the human rights discourse, but it has recently gained traction where refugees and migrants are concerned.¹⁷² The notion of intersectionality originated in feminist and gender studies¹⁷³ and it refers to the existence of a “cumulative” effect of disadvantages due to certain inherent characteristics such as gender, ethnicity or religion that exceeds the sum of the detrimental effects derived from each single characteristic.¹⁷⁴

The table below based on research by Mendola and Pera describes two forms of vulnerability in respect of refugees and migrants on the move:¹⁷⁵

Mode	Dispositional Vulnerability	Occurrent Vulnerability (Actual)
Inherent Vulnerability -IV- (personal) IV depends on intrinsic characteristics of human nature connected to corporeality, dependence on others, and affective and social natures.	Being a young migrant woman makes you DV to sexual exploitation. Being a young migrant woman makes you DV to sexual violence/harassment in detention centres. Being a migrant child makes you DV due to lack of agency. Being homosexual makes you DV to persecution.	Being a young migrant woman from Benin City (Nigeria) makes you OV to trafficking and sexual exploitation in Europe. Being a young woman who believes in voodoo rituals, and a victim of trafficking in Europe, makes you OV to blackmail and exploitation. Being a sub-Saharan migrant in a Libyan detention centre makes you OV to torture and physical and mental disease. Being a sub-Saharan migrant in a Libyan detention centre makes you OV to torture and physical and mental disease. Being an unaccompanied minor outside of the official reception and protection system makes you OV to sexual exploitation and human organ trafficking.
Situational Vulnerability -SV- (context) SV depends mostly on the external context and may be influenced by the personal, social, political, economic or environmental circumstances in which individuals or social groups live, including those	Being hosted in a detention centre makes you DV to torture and poor mental and physical health. Living in a non-democratic country makes journalists DV to persecution, imprisonment or violent death. Living in a migrant hotspot makes asylum seekers DV to an alien environment, anxiety due to uncertainty about the future and disrespectful treatment by authorities.	Being hosted in a detention centre causes you to be injured, and, when you arrive in the host country, this experience makes you OV to post-traumatic stress and to being unable to enter the local labour market. Living in Belarus makes opposition politicians OV to the risk of being killed or imprisoned. Witnessing the torture of adults in migrant detention centres makes children OV to mental health distress.

¹⁷¹ Hathaway-Pobjoy ‘Queer cases make bad law’ (2012) 44:315 *International Law and Politics* 320

¹⁷² M Heikkilä ‘Vulnerability as a human rights variable: African and European Developments’ (2020) 20 *African Human Rights Law Journal* 1.

¹⁷³ Crenshaw (n 45)

¹⁷⁴ HJ Bürkner ‘Intersectionality: How gender studies might inspire the analysis of social inequality among migrants’ (2012) 18(2) *Population, Space and Place* 181–195.

¹⁷⁵ Mendola-Pera ‘Vulnerability of refugees: Some reflections on definitions and measurements’ (2021) *International Migration* <https://onlinelibrary.wiley.com/doi/pdf/10.1111/imig.12942> (accessed 21 August 2024).

Sexual minority persons in the context of the South African asylum system face these intersecting vulnerabilities.¹⁷⁶ The most potent perhaps is the discrimination based on country of origin, xenophobia and the discrimination that is attributed to belonging to the LGBTQI+ community. While attempts are made by the DHA to avoid anti-migrant sentiments, the Department itself is at times complicit in perpetuating negative refugee and migrant stereotypes.¹⁷⁷ The discourse should consider the relevance of the different and concurring factors of vulnerability, and how they affect migrants, the conditions and treatment of asylum seekers and refugees, and assessments of state and non-state measures.

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3.3.3 Capacity of Refugee Reception Offices

In 2012, the Department of Home Affairs closed the Cape Town Refugee Reception Office (RRO).¹⁷⁸ The reason behind the closure was that the intention of the government was to move the reception offices to border areas.¹⁷⁹ Within four months of its closure, at least 6000 asylum applications were lodged and the office, at the time, the second busiest in the country.¹⁸⁰ More than ten years later, the Department of Home Affairs is still reeling from the aftermath,¹⁸¹ with the newly appointment Minister Shreiber urging the international community to support South Africa to manage issues of migration.

Attempts have been made by UNHCR to aid the burdened asylum seeker system in South Africa through a UNHCR funded Appeals Backlog Project which was aimed at resolving the pending Refugee Appeals Authority cases.¹⁸² The aim of this project was targeted at RSDO levels because the decision-making process is poor, resulting in applicants seeking appeals and reviews of the decisions of the RSDO.¹⁸³ However, the Refugee Appeals Authority itself lacked the capacity to deal

¹⁷⁶ I Palmary 'Refugees, safety and xenophobia in South African Cities: The role of local government' <https://www.csvr.org.za/docs/foreigners/refugeessafteyand.pdf> accessed 25 August 2024).

¹⁷⁷ Department of Home Affairs Threatens to deport illegal immigrants <https://www.enca.com/news/home-affairs-minister-threatens-deport-illegal-immigrants> (accessed 24 August 2024)

¹⁷⁸ Scalabrini: Reflection on our legal battle to reopen Cape Town Refugee Office <https://www.scalabrini.org.za/where-to-from-here/> (accessed 24 August 2024)

¹⁷⁹ Scalabrini: CTRRO Closure case, explained <https://www.scalabrini.org.za/the-cape-town-refugee-reception-office-closure-case-explained/> (accessed 25 August 2024)

¹⁸⁰ (n 178) above

¹⁸¹ Minister Leon Schreiber Undertakes oversight visit to Cape Town Refugee Reception Office <https://www.gov.za/news/media-advisor/government-activities/minister-leon-schreiber-undertakes-oversight-visit-cape> (accessed 25 August 2024)

¹⁸² Appeals Backlog Project <https://help.unhcr.org/southafrica/2022/04/14/appeals-backlog-project/> (accessed 26 August 2024)

¹⁸³ (n 182) above

with the volume of appeals. The implication is that, the asylum seeker management system simply does not have the capacity, within the five RROs, to deal with the volume of applications. If that is the case, the RSDO resort to merely rubber stamping decisions and rejecting the applications without giving proper attention to individual cases.¹⁸⁴

3.3.4 Lack of interview and adjudication skills: Refugee Status Determination Officers

The asylum application process requires that the applicant must present themselves to the refugee reception office five days after arriving at a South African border.¹⁸⁵ An asylum seeker may present themselves at any of the five RROs. If the asylum seeker entered the country illegally, they will be subjected to an interview with an immigration official to ascertain whether there are valid reasons for their illegal entry.¹⁸⁶ This is the first hurdle and the source of the debate in the *Ashebo* judgement.¹⁸⁷

If an asylum seeker is able to advance reasonable grounds for their illegal entry, they are subjected to the B-1590 form through an interview with the RSDO. The lack of interview and adjudication skills occur within these two instances, where an asylum seeker is arrested and detained for not being in possession of a transit visa, and where RSDO officers utilise the B-1590 form to arrive at decisions.

Two glaring lack of skills to determine qualification for refugee status arise here:

A lack of knowledge essential for decision-making, including knowledge of refugee protection law – both domestic and international – and knowledge of country conditions.¹⁸⁸

The first example of the lack of decision-making skills is evidenced by the Appeals Backlog Project 2022. The second example being the large volume of arrests following the *Ashebo* judgement where the immigration officers incorrectly interpreted the direction of the Court to mean that applicants with no transit visas must be arrested and detained without being given an opportunity to apply.¹⁸⁹

¹⁸⁴ R Amit 'All roads lead o rejection: Persistent Bias and Incapacity in the South African Refugee Status Determination' (2012) *African Centre of Migration and Society* 10

¹⁸⁵ Section (23) of the Refugee Act

¹⁸⁶ *Ashebo* (n 110) Respondent Replying Affidavit

¹⁸⁷ *Ashebo* Judgement (n 110) Applicant Founding Affidavit

¹⁸⁸ (n 176) above

¹⁸⁹ <https://www.cliffedekkerhofmeyr.com/news/publications/2023/Practice/ProBono/pro-bono-and-human-rights-alert-23-june-2023-the-right-to-apply-for-asylum-in-south-africa> (accessed 6 August 2024)

A severe absence of analytical ability such that even the clearest patterns of persecution went unnoticed.

As mentioned above, the RSDO fail to conduct interviews in a manner wherein both subjective and objective elements are applied. A rejection of a person's claim for asylum because they have not been subjected to corrective rape is blatant ignorance of the principles governing refugee protection of sexual minority persons.¹⁹⁰ Bearing in mind the intersecting vulnerabilities discussed above, the lack of attention of the B-1590 form perpetuates an unacceptable lack of either literacy or care, leading to decisions with little or no bearing on the actual content of SOGIESC claims.

3.3.5 Legal Gap

To properly understand the essence of this challenge, the legal gaps and its results identified below will inform the need to safeguard the sexual minorities in asylum seeker system and immigration detention in South Africa.

Gap: The relationship between the Refugee Act and the Immigration Act

The Immigration Act fails to align itself, not only with the Refugee Act but also with regional and international standards when it comes to addressing realities of irregular migration and most importantly sexual minority persons. This is evidenced by Section 34 of the Immigration Act that allows for the warrantless arrest of the illegal immigrants for the purposes of their detention.¹⁹¹ The decision of *Ashebo* partially echoes this sentiment as quoted above. However, Article 31 of the 1951 Convention states that refugees should not be penalised for their illegal entry or stay in the country if they are coming from a territory where their life and freedom was threatened.¹⁹² The Constitutional Court in *Ruta* echoed this sentiment, guarding the Department of Home Affairs against arbitrary detention of asylum seekers who have expressed their intention to apply for refugee status.¹⁹³

¹⁹⁰ <https://za.boell.org/en/2018/10/11/double-challenge-lgbti-refugees-and-asylum-seekers-south-africa> (accessed 6 August 2024)

¹⁹¹ Section (34) of the Immigration Act

¹⁹² Art (31) of the 1951 Refugee Convention

¹⁹³ *Ruta* Judgement

Effect and result: Summary arrests and detention of asylum seekers

What is most alarming about the gap in the relationship between the Immigration Act and the Refugee Act is that it leads to arbitrary arrests and detention of asylum seekers. Section 49 of the Immigration Act simply provides that if a person is found without documentation in South Africa, they may be arrested and detained until their immigration status is determined. This means that the Immigration Act introduces criminality for asylum seekers. Section 49 itself is worded “*illegal foreigner*”¹⁹⁴ which has a negative connotation of criminality, which asylum seeking is not.

In case of asylum seekers, one needs to declare their intention to apply for refugee status, although this intention is accepted, the immigration officer must be satisfied that there are valid reasons why a person entered the country illegally otherwise they are subjected to continuous detention.¹⁹⁵ Realistically what happens is that if the immigration officer, in their discretion is not satisfied of the reasons, they may proceed with the detention for the purposes of deportation in terms of Section 34 of the Immigration Act.

The implication here is that sexual minority persons are facing the following challenges:

- Punitive detention without being presented to the Refugee Status Determination Officer, although problematic themselves, could be in a position to at least hear the asylum claim.
- Subject to detention facilities where they may face corrective rape, stigma and victimisation because of their sexual orientation.
- Lastly, refoulement to countries of origin where they may face persecution.

3.4 Conclusion

This chapter has discussed challenges that hinder the full realisation of protection rights of sexual minorities in South Africa. The discussion highlighted the inadequacies of current refugee and immigration frameworks, particularly the lack of explicit protections for sexual minorities seeking asylum. This legislative gap also exposes these individuals to the threat of refoulement. The following chapter will focus on the various factors that deter asylum seekers from being able to drive their own asylum narratives, the agents of persecution and the causal link between challenges and their effect.

¹⁹⁴ Section (49) of the Immigration Act

¹⁹⁵ (n 110) Ashebo Judgement order

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CHAPTER FOUR

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AGENTS OF PERSECUTION, CHALLENGES IN DRIVING ASYLUM NARRATIVE FOR SEXUAL MINORITY ASYLUM SEEKERS AND IMMIGRATION DETENTION AS A FOREGONE CONCLUSION

“There is no such thing as a lesser human being; everyone deserves protection from violence, especially in the places society tries to forget.” — Bell Hooks

4.1 Introduction

This chapter discusses the agents of persecution of sexual minority persons. It pivots to in-depth challenges faced by sexual minority persons in constructing an asylum narrative. These challenges follow the discussion of the vulnerabilities, legal and institutional challenges highlighted above. This chapter concludes by demonstrating that when sexual minority refugees and asylum seekers fail to recount a generally accepted SOGIESC refugee narrative, then immigration detention and refoulement becomes a foregone conclusion.

4.2 Agents of persecution

In discussing the challenges faced by sexual minority persons, it is important to identify who the agents of persecutions are. This, simply put is to determine who refugees and asylum seekers are fleeing from. The UNHCR Handbook describes “*agent of persecution*” as:

“- persecution can be perpetrated by "the local populace" or "sizeable fractions of the population" as well as by the "authorities of the country". "Sizeable fractions of the population" embraces any non-governmental group such as a guerilla organization, "death squads, anti- as well as pro- government paramilitary groups, etc.. It also includes, a fortiori, non-recognized entities exercising de facto authority over a part of the national territory. The fact must be acknowledged that in today's world, serious violations of human rights and threats to life, liberty and security of person that constitute persecution are not perpetrated solely by agents of the State. Persecution that does not involve State complicity is still, nonetheless, persecution. Non-governmental groups have persecuted individuals for

reasons of race, religion, nationality, membership of a particular social group or political opinion.¹⁹⁶

4.2.1 State Agents

State agents as a violator of human rights is simple, in most countries, to determine a state as an agent of persecution simply requires an objective fact as discussed above – in all likelihood, a situation where a gay, lesbian or bisexual person may be arrested or prosecuted for their sexuality.¹⁹⁷

4.2.2 Non-state agent: Religious groups

Religious groups are one of the most powerful groups in any society., Due to their influence, they are, at times, responsible for legislative influence over criminalisation of same-sex relations and relationships.¹⁹⁸ In as much as LGBTQI+ rights movements have gained traction and support over the years among religious groups, the majority of these groups have largely been positioned against these rights motivated by religious convictions.¹⁹⁹

4.2.3 Non-state agent: Cultural and traditional authorities

Cultural and traditional authorities often play significant roles in the persecution of LGBTQI+ individuals in many African countries. These authorities, deeply rooted in societal norms, customs, and values, often propagate and enforce homophobic attitudes.²⁰⁰ In Ghana for instance, although the Supreme Court of Ghana has recently declared anti-gay law as unconstitutional,²⁰¹ the number of cultural and traditional leaders opposed to it at the inception of the Bill was apparent.

4.2.4 Non-state actors: Political groups and political elites

Political figures can use inflammatory or discriminatory rhetoric against LGBTQI+ individuals. This type of rhetoric can contribute to a culture of intolerance and violence, making it more difficult for

¹⁹⁶ UNHCR Handbook para 68

¹⁹⁷ <https://euaa.europa.eu/easo-practical-guide-qualification-international-protection/actors-persecution-or-serious-harm#:~:text=State%20actors%20of%20persecution%20or,the%20scope%20of%20their%20legal> (accessed 15 September 2024)

¹⁹⁸ Agents of Persecution (n 197)

¹⁹⁹ R Modi 'How Religious and LGBTQI+ rights Intersect in Media Coverage' (2020) *American Progress*

²⁰⁰ Ghana Country Report <https://www.hrw.org/africa/ghana> (accessed 9 September 2024)

²⁰¹ Dr Prince Obiri Korang v Attorney General Accra AD (2024) 31 (18) 2021

LGBTQI+ persons to live openly and safely. Some political figures may leverage anti-LGBTQI+ stances to align with other conservative governments or to receive support from specific international donors.²⁰²

4.2.5 Non-state agents: Families and other refugee communities

It is often the case that sexual minority refugees and asylum seekers are threatened by their own families and communities at large. An example of this is when they flee their countries because of state persecution but face further abuse from their own countrymen. In Ghana for instance, when Patrick Williams told his mother he was gay, she packed his bags and threw him out of the house, disowning her son for what she considered as an evil act.²⁰³ Even in places of asylum such as the Kenya refugee camp in Turkana, refugees still subject other gay, bisexual, and lesbian refugees to judgement and abuse.²⁰⁴

4.3 Construction of the asylum narrative

As discussed above, it is critical that an asylum seeker establishes their refugee narrative by demonstrating the persecution on both subjective and objective levels. The more demonstrative and expressive an individual is in providing a chronologically accurate factual and realistic linear narration of their story, the greater are their chances of being granted asylum.²⁰⁵ Therefore, the refugee narrative is supposed to provide a cohesive and legible account of a sexual or gender journey of an asylum seeker oppressed in their country of origin and them being visible and open in the host country.²⁰⁶

Because of the bareness of the B-1590 form and the lack of capacity and skill of RSD officers, the asylum seeker system does not allow for this approach to prosper in South Africa. The RSD officers

²⁰² T Coleman 'A human rights critique of Ghana's anti-LGBTQ+ Bill of 2021' (2023) 23 *African Human Rights Journal* 96-124

²⁰³ 'Ghana secret gay community' Orla Ryan, BBC News (2007) <http://news.bbc.co.uk/2/hi/africa/6445337.stm> (accessed 9 September 2024)

²⁰⁴ 'I was driven from Uganda for being a lesbian' Juliet Wabule (2023) *Chatham House* <https://www.chathamhouse.org/publications/the-world-today/2023-06/i-was-driven-uganda-being-lesbian> (accessed 9 September 2024)

²⁰⁵ T Johnson 'On silence, sexuality and skeletons: Reconceptualising Narrative in Asylum Hearings' (2011) *Social & Legal Studies* 20 (1) 57-78

²⁰⁶ D Murray 'Real Queer: Authentic LGBT Refugee claimants and homonationalism in the Canadian Refugee System' (2014) York University 56

are given the power to name and decide what sexual orientation means.²⁰⁷ From this standpoint, the officers are people with biases that are well-known. It is not to say that all RSD officers harbour homophobic biases, but due to the lack of uniform and codified standards within the asylum seeker system, RSD officers can believe or disbelieve claims based on a range of subjective factors, including personal bias.²⁰⁸

4.3.1 Requirement to differentiate sexual orientation

As stated above, when seeking refugee protection, LGBTQI+ refugees and asylum seekers are evaluated against “expected” narratives of the refugee flight and LGBT identity.²⁰⁹ For asylum seekers and refugees who flee because of persecution by their families, or religious groups in cases where they have not for instance, engaged in any same-sex sexual relations, SOGIESC claims are generally rejected.²¹⁰ This is because RSD officers have their own definition of what a SOGIESC claim is, and this definition is uninformed because the initial interview (B-1590) form lacks guidelines. For claimants who are unable to provide evidence of sexual orientation or demonstrate their identity to satisfy the requirement of belonging to a particular social group, rejection, arrest and deportation chances increase dramatically.²¹¹

A) Gay asylum seekers and refugees

RSD officers have been known to require refugees and asylum seekers to recount their sexual and intimate details to satisfy their narrative for a credible SOGIESC claim.²¹² For gay asylum seekers, they are expected to show that they have in fact engaged in same-sex sexual relations and are often asked the question “what did that feel like? Or “did you really enjoy it?” subjecting them to an

²⁰⁷ J Millbank ‘Constructing the personal narratives of lesbian, gay and bisexual asylum claimants’ (2009) *Journal of Refugee Studies* 22 (1)

²⁰⁸ A Cerezo, A Morales, D Quintero & S Rothman ‘Trans migrations: Exploring life at the intersection of transgender identity and immigration’ (2014) *Psychology of Sexual Orientation and Gender Diversity*, 1(2), 170–180.

²⁰⁹ S Jordan ‘Conventional Refugees: Conceptualising the accounts of refugees facing homophobic or transphobic persecution’ (2009) *Canada’s Periodical Review on Refugees* 26

²¹⁰ (n 205) abstract

²¹¹ (n 205) page 58

²¹² Passop ‘Reflections by LGBTQI+ refugees in South Africa’ <https://www.passop.co.za/wp-content/uploads/2019/05/My-Home-My-Body-and-My-Dreams-Reflections-by-African-LGBTQI-Refugees-in-South-Africa.pdf> (accessed 27 August 2024)

inappropriate line of questioning and exposure to homophobic interviews that infringes on their right to dignity.

B) Lesbian asylum seekers and refugees

For lesbian asylum seekers on the other hand, the adjudication processes is met with homophobia that is coupled with patriarchal line of questioning, sometimes to a point of derision where they are subjected to questions such as “How do you enjoy sex with another woman?” and “So who is the man between you and your partner?”.²¹³

C) Bisexual asylum seekers and refugees

Studies of bisexual asylum claimants reveal the misguided belief that bisexual migrants can simply choose partners of the opposite sex and therefore avoid persecution. This is based on the fact that adjudicators with no understanding of the sexual minority nuances tend to ask “well, if you are arrested or persecuted for being bisexual, why don’t you just choose one gender that you like better?”

Conclusively, not all applicants will self-identify with the LGBTI terminology and constructs as presented above or may be unaware of these labels. Some may only be able to draw upon (derogatory) terms used by the persecutor. Decision makers therefore need to be cautious about inflexibly applying such labels as this could lead to adverse credibility assessments or failure to recognise valid claims.

4.3.2 Causation and Effects

Refugees and asylum seekers who fail to build a credible refugee narrative find themselves being denied recognition as refugees. Below is a brief discussion of the link between the causes of failure and its effects.

4.3.2.1 Internalised shame

²¹³ European Research Project ‘Fleeing homophobia, seeking safety in Europe’ https://www.sogica.org/wp-content/uploads/2017/04/Kalkmann_Questionnaire-Fleeing-Homophobia_-2010.pdf (accessed 27 August 2024)

Many LGBTQI+ refugees and asylum seekers flee their countries of origin because of persecution from various actors, including families, immediate communities and state actors. The agents of persecution usually use buzz words and phrases such as “sexual acts with the person of the same gender is a sin or its against African or traditional values”.²¹⁴ Moreover, relaying intimate details about one’s sexual desires and relationships has been proven to be exceedingly difficult because such disclosure is met with homophobia and stigma.²¹⁵

4.3.2.2 Stigma and fear of further violations

Studies show that asylum seeking claimants may experience anxiety or fear at the prospect of divulging the most intimate aspects of their identity and “find it difficult to publicly admit their sexual orientation right away or provide humiliating details of their experiences of persecution in their countries of origin”.²¹⁶ In one study, migrants reported feeling too traumatised or ashamed to speak at all or recount details in these early stages, noting that in their culture it was considered wrong to discuss them.²¹⁷ In refugee reception offices, some SOGIESC asylum seekers employ the services of their pastors or countrymen to assist them with relaying their claims because of the language barrier. What occurs is that this claimant may be afraid to divulge details of their sexual orientation because their countrymen will shun them even from outside the country of origin.

These two elements have an effect on how the asylum claim is relayed, because should one fail to make these credible submissions, the result is rejection which leads to refoulement. The effect is that these strong formulaic factors render the claimants unable to speak on certain issues and provide a clear trajectory of their claims. This leads to their claims being dubbed as “*manifestly unfounded*”²¹⁸ or “*unfounded*”.²¹⁹

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²¹⁴ ‘What does the bible say about homosexuality?’ <https://www.hrc.org/resources/what-does-the-bible-say-about-homosexuality> (accessed 24 August 2024)

²¹⁵ (n 212) above

²¹⁶ (n 209) above

²¹⁷ (n 212) Reflections by LGBTQI+ refugees in South Africa

²¹⁸ Section 24(3)(b) of the Refugee Act

²¹⁹ Section 24(3) (c) of the Refugee Act

4.4 Detention and refoulement: a foregone conclusion?

International law holds a norm that a person should not have to hide who they are to live safely. In effect, if a person needs to hide who they are to an extent that refugee sexual minority persons have to, they are not safe in a meaningful sense.²²⁰ The principle of non-refoulement is the cornerstone of international refugee law as it holds countries responsible for ensuring that refugees and asylum seekers are not returned to countries where they may face persecution. South Africa finds itself violating this principle more often than not as over 90% of applications for asylum are rejected nationwide. The Marabastad RRO is particularly problematic with a 0% recognition rate in 2015.²²¹

4.4.1 Violation of the principle of non-refoulement

Based on the above institutional gaps and procedural irregularities in the asylum seeker system, this study holds the notion that SOGIESC claimants are part of the vacuum of rejections that the DHA seems poised to make.²²² The poor decision-making or no decision at all from the Department analysed here suggests a worrying trend that the rejections leaves the SOGIESC based claims made by asylum seekers prone to refoulement to countries where they may face persecution.

As of 2024, there are 64 countries that have laws that criminalise homosexuality and nearly half of them are in Africa.²²³ South Africa is the only African country that formally extends refugee protection to the LGBTQI+ community while facing significant challenges with the refugee law framework.²²⁴ The Department of Home Affairs encumbers the country to fulfil the commitments of the Refugee Act.

²²⁰ A Güler & M Shevtsova 'LGBTQI Asylum Seekers and Refugees from a Legal and Political Perspective Persecution, Asylum and Integration' (2019) Springer 1

²²¹ LHR & LRC Submissions on the green paper on international migration <https://www.lssa.org.za/wp-content/uploads/2020/01/GREEN-PAPER-ON-INTERNATIONAL-MIGRATION-LSSA-COMMENTS.pdf> (accessed 26 August 2024)

²²² Scalabrini Asylum and Refugee Statistics South Africa 2017-2020 <https://www.scalabrini.org.za/migration-statistics/> (accessed 15 October 2024)

²²³ Human Dignity Trust 'Map of Jurisdictions that criminalise LGBTQ people' https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?gad_source=1&gclid=CjwKCAjw0aS3BhA3EiwAKaD2ZXbCPbcr4qUFR4IKdnczCmWRReKNrcn0LsGWIKkBGsm28UZrY817iMRoCTAAQAvD_BwE (accessed 24 August 2024)

²²⁴ J Marnel 'Major new study on LGBTQI+ migrants and asylum seekers' *University of Witwatersrand* [https://www.wits.ac.za/news/latest-news/opinion/2023/2023-03/major-new-study-on-lgbtqi-migrants-and-asylum-seekers-.html#:~:text=Since%201998%2C%20South%20Africa%20has,and%20intersex%20\(LGBTI%2B\)%20persons](https://www.wits.ac.za/news/latest-news/opinion/2023/2023-03/major-new-study-on-lgbtqi-migrants-and-asylum-seekers-.html#:~:text=Since%201998%2C%20South%20Africa%20has,and%20intersex%20(LGBTI%2B)%20persons) (accessed 24 August 2024).

These challenges have been evident in the appeal and review processes as argued in the *Scalabrini v Minister of Home Affairs* case.²²⁵ Scalabrini argued that the lack of explicit guidelines in the law and practical implementation regarding the practice of submission of representation leads to the risk of arbitrary arrests, detention and deportation. As a result, asylum seekers are returned/refouled to countries where they face persecution, thus violating the principle of non-refoulement of refugees under international law and the Constitution.²²⁶

LGBTQI+ refugees and asylum seekers in South Africa face a double challenge. While the Constitution prohibits discrimination based on sexual orientation and gender identity, the reality on the ground is often much less favourable.²²⁷ Many LGBTQI+ refugees come from countries such as Cameroon, Uganda, and Zimbabwe where homosexuality is criminalised, leading to persecution, violence, and discrimination.²²⁸

These countries typically have hostile environments for sexual minorities, which involves criminalisation of same-sex relationships, lack of legal recognition for gender non-conforming individuals, and societal persecution that can escalate to physical harm or state-sanctioned punishment.²²⁹ The return and expulsion to countries where there is lack of safety and security protections exposes LGBTQIA+ persons to violence from their communities, with little recourse besides fleeing to places of safety.

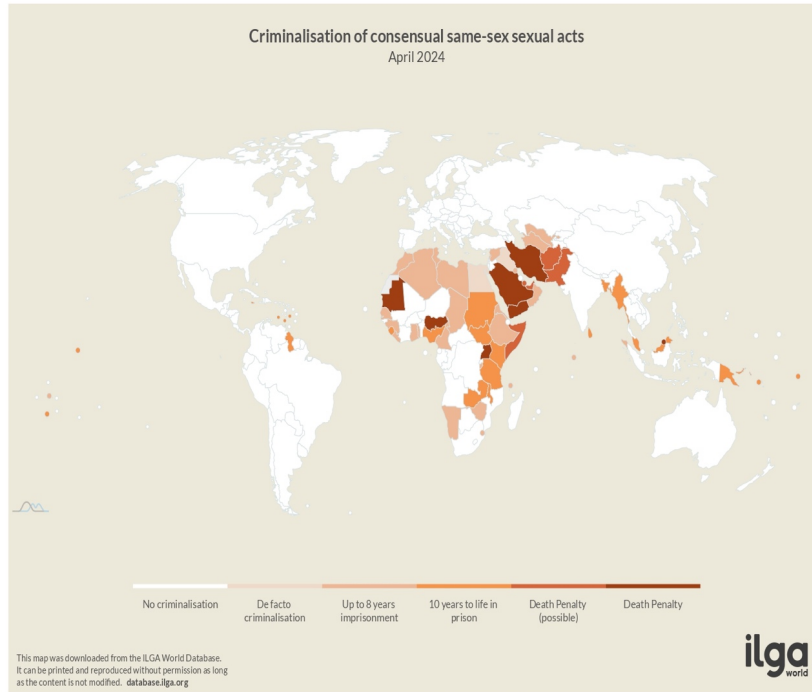
²²⁵ *Scalabrini Centre for Cape Town v Minister of Home Affairs* (2023) ZACHC 28

²²⁶ (n 225) Applicants Founding Affidavit

²²⁷ (n 212) Reflections by Refugees in South Africa

²²⁸ HIAS Factsheet <https://hias.org/news/refugees-south-africa-what-you-need-know/> (accessed 15 October 2024)

²²⁹ Anti-gay laws: Africa's human rights regression <https://issafrica.org/iss-today/anti-gay-laws-africas-human-rights-regression> (accessed 15 October 2024)



4.5 A diagnosis of the issues

4.5.1 Sexual minority persons fleeing violence and persecution in countries deemed 'safe'

South Africa as well as the United Kingdom (UK), the United States of America (USA) and Canada are deemed as 'safe countries' that offer protection and promote the rights of sexual minority persons.²³⁰ However, administrative processes hinder the full realisation of these rights. In South Africa for instance, refugees, regardless of their claims face xenophobia which renders the country intolerable for migrant and refugee communities.²³¹

²³⁰ <https://www.cntraveller.com/article/safest-countries-for-lgbtq-people> (accessed 4 September 2024)

²³¹ B Drastwa 'Xenophobia: A pervasive crisis in post-apartheid South Africa' 26 May 2024, Georgetown Journal of International Studies <https://gija.georgetown.edu/2024/05/26/xenophobia-a-pervasive-crisis-in-post-apartheid-south->

In contrast, the UK has made strides in recognising the rights of LGBTQI+ asylum seekers, however, their system is plagued with lengthy processing times and the potential for detention is more pronounced. LGBTQI+ activists such as Aderonke Apata faced this reality in the UK.²³² Originally from Nigeria, she is a well-known LGBTQ+ rights activist who fled her home country due to persecution based on her sexuality.²³³ In Nigeria homosexuality is criminalised and carries severe penalties,²³⁴ and Apata faced extreme discrimination, threats, and imprisonment. After the murder of her girlfriend and fearing for her own life, she sought asylum in the UK, however, her journey was fraught with legal battles. The UK Home Office initially rejected her asylum claim,²³⁵ questioning the authenticity of her sexuality. This decision sparked widespread criticism, as LGBTQ+ asylum seekers often face systemic disbelief and scepticism from authorities.

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Apata became an advocate for LGBTQ+ asylum seekers, publicly fighting her case while raising awareness about the struggles faced by sexual minorities fleeing persecution. She eventually won her case in 2017 after a long legal battle. Of this victory, she famously said: *"I was persecuted because of my sexuality, and when I sought refuge, I faced disbelief. No one should have to prove their identity to be safe."*²³⁶

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While Canada has taken a proactive approach by offering specific resettlement options for LGBTQI+ refugees, the challenge is limited resources because funding for these resettlements largely depend on the government and sponsorship initiatives.²³⁷ Under the Biden administration and prioritisation of foreign policy, the US made varying degrees of progress on asylum protection but detention and deportation conditions for asylum seekers remains a significant hurdle.²³⁸

[africa/#:~:text=Xenophobia%20in%20South%20Africa%20stands,between%201994%20and%20March%202024.](#) (accessed 4 September 2024)

²³² Dian Taylor 'Barrister says she became a legal expert while in Home Office immigration detention' 2 October 2022, *The Guardian*

²³³ (n 232) above

²³⁴ Outright International: Nigeria country overview <https://outrightinternational.org/our-work/sub-saharan-africa/nigeria> (accessed 24 August 2024)

²³⁵ Nigerian Gay Rights Activist wins asylum in UK after 13-year Battle <https://www.starckuberoi.co.uk/our-legal-services/nigerian-gay-rights-activist-wins-asylum-after-13-years/> (accessed 4 August 2024)

²³⁶ Spotify Episode 'Changes with Annie Macmanus' <https://open.spotify.com/episode/5DGpIKAlq6UvUkq9R2DN5Q> (accessed 4 August 2024)

²³⁷ Immigration system in Canada <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/about-refugee-system/how-system-works.html> (accessed 24 August 2024)

²³⁸ Biden-Harris Administration Immediate Priorities <https://www.whitehouse.gov/priorities/> (accessed 24 August 2024)

In all these countries, the recurring theme is that detention is part and parcel of the asylum system. In the face of pervasive discrimination and systemic barriers, it is imperative that nations collectively enhance their asylum frameworks to ensure the safety and dignity of LGBTQI+ refugees, safeguarding their fundamental human rights and fostering a more inclusive global community.

4.5.2 Arrests at Refugee Reception Offices

The Covid-19 pandemic brought a plethora of issues within the asylum seeker management system to the surface. While the pandemic affected all communities and the geographics alike, the research around migrants and other forcibly displaced persons has been prevalent.²³⁹ However, there is limited research on the specific impact of the pandemic on LGBTQI+ refugees and asylum seekers. The research tends to focus on the issues of refugees and asylum seekers in a vacuum. One study conducted in Brazil found that the pandemic exacerbated vulnerabilities that LGBTQI+ migrants already faced.²⁴⁰ While in South Africa, studies focused on the socio-economic effects of the pandemic such as access to housing, food, employment and medical assistance.²⁴¹ However, the pandemic also brought to the surface the issue of detention of refugees and asylum seekers.

4.5.3 Discretionary application of Court decisions

The Constitutional Court in *Ruta* was clear that once a person declares their intention to apply for refugee status, they should be allowed to do so without any further prejudice. The *Ashebo* judgement on the other hand, has been potentially misinterpreted by immigration officers to mean that they have discretionary powers to arrest any new applicant who finds themselves without a transit visa,²⁴² despite the nature of flight of refugees.

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Nevertheless, before the *Ashebo* judgement, the refugee reception offices had a practice of arresting asylum seekers and refugees at the reception offices if their asylum seeker applications are

²³⁹ Migration Data Portal [https://www.migrationdataportal.org/themes/migration-data-relevant-covid-19-pandemic#:~:text=Forced%20migration%20or%20displacement,COVID%2D19%20\(2021\)](https://www.migrationdataportal.org/themes/migration-data-relevant-covid-19-pandemic#:~:text=Forced%20migration%20or%20displacement,COVID%2D19%20(2021)) (accessed 24 August 2024)

²⁴⁰ Y Cowper-Smith, Y Su & T Valiquette 'Masks are for sissies: The story of LGBTQI+ asylum seekers in Brazil during Covid-19' (2021) *Journal of Gender Studies* 14

²⁴¹ G Reid & S Ritholtz 'A queer approach to understanding LGBT Vulnerability during the Covid-19 Pandemic' (2020) *Human Rights Watch/Politics and Gender* 16

²⁴² *Shamore v Minister of Home Affairs* (2024/021412) ZAGPJHC 414

rejected.²⁴³ The rationale behind this practice is that once the RSDO has rejected one's application and they do not pursue Refugee Appeals Authority of South Africa appeal or Standing Committee on Refugee Affairs review, it signifies that they are, at that point, illegal foreigners and must be dealt with in terms of Section 49 of the Immigration Act. The second wave of arrests at the RROs stems from the preliminary interviews that are conducted by immigration officials who assess whether applicants have good cause for failing to enter the country through designated ports of entry. The constitutionality of these practices are currently in Court in two jurisdictions in South Africa, including, the Durban High Court by Lawyers for Human Rights and in Cape Town High Court by Scalabrini Centre of Cape Town.²⁴⁴

4.5.4 Lack of statistics and lack of gender, sexuality and expression affirming detention facilities

What is often the case with LGBTQI+ asylum seekers and refugees is that one can almost always discern the violations and abuses they fled from in their countries of origin. The culture of disbelief and the poor adjudication process of asylum claims results in these persons not having an opportunity to have their claims adjudicated upon fully, neither to ensure recognition as refugees, nor to also ensure that they are not subjected to immigration detention settings where they will possibly face further violations.

This study does not suggest that LGBTQI+ asylum seekers should be given preferential treatment in detention settings, however, the Constitution of South Africa and the Correctional Services Act emphasise the protection of human rights, including the right to non-discrimination based on sexual orientation or gender identity.²⁴⁵ LGBTQI+ persons, especially transgender individuals,²⁴⁶ may face challenges such as discrimination, violence, and sexual abuse in prison environments as evidenced in the Equality Court case of Jade September.²⁴⁷ The Court found that the respondents' refusal to allow September to express her gender identity amounted to unfair discrimination. This relates specifically to confiscating her female underwear and make-up; forcing her to cut her hair and

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²⁴³ Ongoing case of *Lukongo v Minister of Home Affairs* case number D8484/2022 ZADBNHC

²⁴⁴ Press statement: Lawyers for Human Rights <https://www.lhr.org.za/lhr-news/press-statement-scalabrini-centre-lawyers-for-human-rights-to-challenge-unlawful-arrests-of-new-asylum-seekers/> (accessed 25 August 2024)

²⁴⁵ Prison Insider South Africa <https://www.prison-insider.com/en/articles/south-africa-prisons-in-2023> (accessed 24 August 2024)

²⁴⁶ <https://www.arcusfoundation.org/blog/social-justice-lgbt/south-africa-rights-groups-step-up-watch-on-transgender-prisoners-after-covid-19-lockdown/> (accessed 24 August 2024)

²⁴⁷ *September v Sobramoney* NO EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC)

refusing to address her as a woman.²⁴⁸ The Court further made an important declaration directing the Department of Correctional Services to develop counter Standard Operating Procedures that recognise the vulnerability of September and other LGBTQI+ detainees in detention contexts.

The Department of Correctional Services in recent years has developed Standard Operating Procedures stating that LGBTQI+ persons must be detained separately from others.²⁴⁹ However, requests for placements is a self-reporting process which may not be done by prisoners for fear of discrimination, as such, the information is statistically scarce.²⁵⁰

Conclusively, there are no available statistics outlining how many LGBTQI+ detainees do not fit into the heteronormative spectrum, much less for asylum seekers and refugees. The only available narration of these stories would be recorded through reports of detainee complaints or violations through the South African Human Rights Commission²⁵¹ or the Judicial Inspectorate of Correctional Services.²⁵² The lack of quantitative data makes it difficult to hold the Department of Home Affairs to account.

4.6 Conclusion

The challenges faced by LGBTQI+ refugees and asylum seekers in constructing credible asylum narratives reveal a troubling intersection of systemic bias, inadequate legal frameworks, and institutional failures. The asylum process, particularly in South Africa, is marred by the subjective interpretations of RSD officers, who often impose their own biases on the narratives presented to them. This results in a significant number of claims being dismissed, leading to the risk of detention and refoulement to countries where these individuals may face severe persecution. The lack of uniform guidelines and the stigmatisation of sexual minority identities further exacerbate the vulnerabilities of these refugees, making it imperative for countries to reform their asylum systems.

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²⁴⁸ (n 247) September V Sobramoney order

²⁴⁹ Department of Correctional Services, "Standard Operating Procedure (SOP) on the management of lesbian, gay, bisexual, transgender, intersex, and queer plus inmates" <https://www.prison-insider.com/en/countryprofile/afrique-du-sud-2023?s=populations-specifiques-5d9b19c2d4a4f#personnes-lgbtqi-entrycodegroup> (accessed 4 September 2024)

²⁵⁰ Gender Mainstreaming and Transformation within Correctional Services 2023/2024 https://www.parliament.gov.za/storage/app/media/OISD/Reports/Commission_for_Gender_Equality/2024/01-08-2024/Gender_Mainstreaming_and_Transformation_within_Correctional_Services.pdf (accessed 24 August 2024)

²⁵¹ NANHRI & SAHRC 'In-country meeting on Social Orientation, gender identity and expression' <https://www.sahrc.org.za/home/21/files/South%20Africa%20Incountry%20Meeting%20Report.pdf> (accessed 4 September 2024)

²⁵² JICS Annual report 2022 https://static.png.org.za/JICS_2021-22_Annual_Report_Final.pdf (accessed 24 August 2024)

CHAPTER 5

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SUMMARY OF THE FINDINGS AND RECOMMENDATIONS

Being an LGBTQ+ asylum seeker is a double battle. You are fighting for your survival, for your right to live openly and authentically, while also fighting a system that often doesn't believe your truth. – Aderonke Apata

5.1 Introduction

In this final chapter of the dissertation, we consider the findings and recommendations to address the inefficiencies in the South African asylum seeker system especially in respect of SOGIESC related asylum claims. This chapter also includes a minor policy brief for the Department of Home Affairs.

As stated in the previous chapters, South Africa has several challenges within the Department of Home Affairs that hinder the realisation of the commitments of the Refugee Act. These challenges lead to immigration detention and refoulement of LGBTQI+ sexual minority persons to countries where they face persecution either criminally, culturally, religiously, politically and broader social contexts.

5.2 Key findings and Insights

5.2.1 Failure of Department of Home Affairs to recognise the vulnerability of sexual minority persons within the adjudication process

As previously stated, the B-1590 form fails to include SOGIESC-based claims. The Constitution and the Refugee Act aims to protect asylum seekers and refugees from persecution based on sexual orientation and gender expression/identity. This study, in perusing the B-1590 form has revealed that it is void of the standard of questions that should be extended to SOGIESC claims.

5.2.2 Ineffective and discretionary application of Court decisions

While the Refugee Act provides a wider net of protection for persons belonging to a particular social group, the interpretation of the spirit of this message varies. It is often the case that courts provide direction in this regard, however, because of the duty of DHA to deport migrants, the Court's decisions in *Ashebo* for instance, was widely misinterpreted by the DHA leading to mass deportations to countries of persecution.

5.2.3 Heteronormative biases

The African continent is still subject to biases against sexual minority persons and this is evidenced by several countries that still criminalise same-sex relations. Religious, cultural and political norms continue to represent a family as the conventional heteronormative standards of a woman and man. These norms also suggest that if a person is bisexual, they could simply pick who they want to have sexual relations with promotes these biases during the adjudication processes.

5.2.4 Access barriers to protection

The Department of Home Affairs is plagued with access challenges. As of 2024, the various Refugee Reception Offices have adopted an online application and an appointment system which is not easy to navigate. This raises issues of access to technology and digital literacy. While asylum seekers wait for these appointments, they are under the constant fear of arrests and deportation for not having legal documents in the country.

5.2.5 Lack of sexual minority education for RSDO

As this research has shown, RSDO are the primary adjudicators of asylum claims and frankly, they do not have the legal knowledge of sexual minority rights to allow them the opportunity to objectively and subjectively investigate the SOGIESC asylum claims.

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5.2.6 Policy gaps & legislative gaps

While the Department of Home Affairs has embarked on a journey to eradicate the backlogs and employ Refugee Appeals Authority members with legal background to deal with the case load, the policies in respect of transit visa, entry denial and summary deportations means that the Department is still waiting for the foundational documents on judgements such as *Ashebo*. On the other hand, the Department of Correctional Services is silent on the protection of sexual minority persons in detention settings.

5.3 Pertinent issues

To ensure an inclusive and protective adjudication process for SOGIESC claims, it is essential to recognise the intersectionality of sexual minority experiences and effectively implement court decisions by integrating relevant legislation and jurisprudence into departmental policies.

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5.3.1 Recognition of intersectionality

Achieving an inclusive and protective adjudication process of SOGIESC claims requires recognition of intersectionality of nuanced sexual minority claims, socio-economic contexts of the country of origin, pre-existing trauma and agents of persecution. The recognition of these intersecting factors will ensure that the Department is able to create unique and targeted protective measures.

5.3.2 Effective implementation of Court decisions

It is crucial for the Department to combine legislation and jurisprudence in their institutional frameworks and policies. Being aware of Court decisions and legislation is no longer sufficient, as evidenced in the *Ashebo* judgement, as such arguments have already been validated by the Court in *Ruta*, therefore, it is crucial that if a Court's decision is unclear, it is crucial to seek clarity from the Court itself.

5.4 Recommendations

The recommendations outlined below are largely drawn from the recommendations from various stakeholders, such as courts and international civil organisations. These include the Constitutional Court decision of *Ashebo*, Scalabrini Centre for Cape Town, Lawyers for Human Rights, Human Rights Watch and International, Lesbian, Gay, Trans and Intersex Association. In its concluding observations, the African Commission as raised concerns about the treatment of sexual minorities, including refugees and asylum seekers.²⁵³

5.4.1 Mandatory certification of sexual and gender minority rights for RSDO

²⁵³ <https://achpr.au.int/index.php/en/soft-law/african-guiding-principles-human-rights-all-migrants-refugees> (accessed 7 September 2024)

RSDO generally lack the nuanced and the degree of attention that should be afforded to status determination interviews. It is recommended that they be afforded with sufficient training and resources to produce administratively fair and individualised decisions, rather than measuring performance by quantity. Most importantly, they should be provided regular trainings on all possible claims, including that of sexual minorities.

5.4.2 Mandatory research and adjudication courses for RSDO for SOGIESC-based asylum claims

It is important to establish a required set of qualifications for RSDOs to ensure that officers have relevant skillsets. It is recommended that the system of the DHA creates a “country of origin” database to ensure from the onset that as soon as a person declares that they are from a particular country, objective elements of the country of origin reports are available.

5.4.3 Uniform policy and legislative reform of the Refugee Act and Immigration Act

It is important to create uniformity within the Refugee Act and the Immigration Act. As stated above, the Immigration Act refers to anyone without documentation as an “illegal foreigner” therefore implying criminality. There is no point between fleeing a country and seeking asylum, even when undocumented, if an asylum seeker is automatically considered a criminal according to the Refugee Act.

5.4.4 Alternatives to Immigration Detention ²⁵⁴

Alternatives to immigration detention offer a more humane approach to asylum seekers and refugees. Detention facilities often lack adequate protections or policies that safeguard the dignity and safety of sexual minorities. Alternatives to Immigration Detention measures such as community-based housing or supervised release, can offer a safe and supportive environment, thereby reducing the likelihood of abuse.²⁵⁵

5.4.5 Support and resource assistance

²⁵⁴ Alternatives to immigration detention <https://www.unhcr.org/il/en/protection/detention/alternatives-to-detention#:~:text=While%20there%20is%20no%20internationally,number%20of%20conditions%20or%20restrictions> (accessed 7 September 2024)

²⁵⁵ International Detention Coalition ‘There are alternatives: A handbook for preventing unnecessary immigration detention’ (2015) 16

It is no longer sufficient for international and regional organisations and donor agencies to advocate within countries of persecution. It is important that they consciously advocate across borders by taking responsibility of sexual minority refugees outside countries of persecution. It is recommended that these organisations assist the South African asylum process through financial support and country reports on the situation of human rights.

5.4.6 Research and data sharing

Civil society organisations and government stakeholders should strive to produce and make available country-of-origin reports on government websites to ensure proper evaluations of asylum claims.

5.4.7 Open lines of communication between government agencies

If refugees migrate to other countries as a result of persecution, the countries of origin should not simply desert the course of ensuring it is able to protect its own citizens. Countries of persecution should not simply ignore their citizens because they fled to other countries. Instead, there should be collaboration between governments in an open and viable manner to ensure that people are safe in the contexts in which they want to exist.

5.5 Critical blowback analysis

This analysis addresses the complexities of prioritising SOGIESC claims in South Africa's asylum system while acknowledging the need for equitable treatment of all asylum seekers and recognising the resource constraints of an overburdened system.

5.5.1 Arguments & defence

Prioritisation of sexual minority asylum seekers

The language of this research may imply that special attention must be provided to sexual minority asylum seeker applications as opposed to all asylum seekers and refugees. However, that would be an over simplification of this research, as all asylum seekers and refugees should be treated fairly and without discrimination. However, the SOGIESC claims involve nuances and varying intersectionality that simply do not exist in other claims such as fleeing because of political impunity or external aggressions.

5.5.2 Resource constraints and overburdened system

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Misguided patriotism often states that South Africa does not have the resources to handle the demands for asylum. To this end, this research recommends that South Africa undertakes focused engagements with other countries to adjudicate over issues of refugees and why people leave their countries, including extra-judicial litigation strategies.

5.6 Conclusion

This study has highlighted the challenges faced by sexual minority asylum seekers within the South African asylum system and immigration detention. Despite the progressive legal framework that ostensibly protects the rights of LGBTQI+ individuals, the realities of systemic failures, inadequate adjudication processes, and pervasive discrimination reveal a stark contradiction. The intersection of xenophobia and homophobia exacerbates the vulnerabilities of these individuals, leading to unjust immigration detention and potential refoulement to countries where they face persecution.

Ultimately, this research serves as a clarion call for action, urging stakeholders to confront the systemic inequities within the asylum process and to champion reforms that will safeguard the rights and lives of those who seek refuge from persecution based on their sexual orientation and gender identity.

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ANNEXURE 1: SUGGESTED ADDITION TO THE B-1590 FORM

ANNEXURE 1

ELIGIBILITY DETERMINATION FORM FOR SOGIECS RELATED ASYLUM SEEKERS

GUIDANCE FOR REFUGEE STATUS DETERMINATION OFFICER:

- Use gender-neutral language when unsure of the applicant's pronouns
- Do not ask invasive or inappropriate questions about the applicant's sexual practices unless the applicant brings them up as relevance to their claim
- Be sensitive of cultural differences and avoid assuming the applicant's understanding or experience of their identity aligns with your own concept of SOGIE
- Avoid making assumptions based on the applicant's physical appearance or mannerisms

BEFORE STARTING THE INTERVIEW

- Explain the purpose of the interview
- Reassure confidentiality
- Explain the application process
- Offer services of an interpreter

Case Number:

Country of Origin:

Date of Interview:

RSDO Name & Surname:

Interpreter (if applicable)

Applicants Gender/Pronouns:

Applicant Background Information

Full names:

Date of Birth:

Place of Birth:

Address of Habitual Residence:

Gender Identity:

Pronouns:

Sex assigned at birth:

Next of Kin:

NOK Details:

COUNTRY OF ORIGIN CONTEXT (Objective element)

Describe your country's general attitude towards people of diverse sexual orientation, gender identities or expressions:

Are there any laws or policies that discriminate against LGBTQI persons? Would one get arrested or penalized for belonging into this community? If yes, in what way?

ASYLUM CLAIM (Subjective element)

Can you describe your sexual orientation and/or gender identity?

When did you first realise or become aware of your sexual orientation and/or gender identity?

How did you express your sexual orientation or gender identity in your country? Was this private or public?

FAMILY AND SOCIAL RELATIONS

Describe your family dynamic:

How did your family, community, church or workspaces react to your sexual orientation or gender identity? If they know at all,

Have you been in a same-sex relationship/relations, or do you identify as transgender or non-binary?

PERSECUTION

Why do you believe it is unsafe for you to return your country of origin?

Have you faced any arrest, harassment, detention, criminal charges or any type of abuse because of your identity, sexual orientation or gender expression? If yes, give details

Are there any protection mechanisms in your country for LGBTQI+ persons and did you ever seek assistance from authorities? If yes, give details

FLIGHT AND RELOCATION TO SOUTH AFRICA

Why did you come to South Africa?

How did you travel, and which port of entry did you use?

During your transit, did you face any harm or persecution because of who you are? Give details

CURRENT CIRCUMSTANCES

How do you feel about your current situation regarding safety, community and support in South Africa?

Have you received any support from any LGBTQI+ organisations in South Africa? If no, would you like to be referred to one for mental and emotional support?

Is there anything you would like to share that you believe would be important to your claim? (Allow the applicant to orate his claim freely)

Signature of applicant:

Signature of Interpreter:

Date of interview:

OFFICE USE:

DETERMINATION SKELETON: SUMMARY OF CLAIM AND FINDING

1. **Applicability:** Does the claim fall under Section 3(a) of the Refugee Act?

YES NO

2. **Well-Founded Fear:** Does the client satisfy the objective and subjective elements of fear of persecution?

YES NO

3. **Persecution:** Has the applicant been persecuted? If so, how? Or if not, why?

4. On what ground have they been persecuted?

Race | Religion | Ethnicity | Nationality | Political Opinion | Membership of Social Group

DECISION-MAKING GUIDELINES:

- Give a brief description of the client
- Offer principal allegations of persecution
- Give a statement of the adjudication and investigative process of the country-of-origin context
- Brief overview of facts
- Analysis (objective and subjective elements, issues, checklist of facts)

FINDING:

REASONS:

Signature of the Refugee Status Determination Officer:

Date of Decision:
