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*RECEIVING LGBTI REFUGEES IN SOUTH AFRICA:
TOWARDS A CULTURE OF NON-DISCRIMINATION
AND HUMAN RIGHTS*

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CONTENTS

INTRODUCTION	3
PUSH FACTORS	5
PROCEDURAL FRAMEWORK.....	6
SUBSTANTIVE LAW	8
Social Group	8
Well-founded Fear	8
IMPLEMENTATION OF THE LAW.....	10
Systemic Problems within the Department of Home Affairs	10
Length of the Interview.....	10
Badly Written and incorrect decisions by RSDO	11
RAB Decisions.....	12
Refugee Appeal Board Decision (Nigeria), South Africa	12
Criminalisation of same sex conduct	13
Illegality and ‘discretion’ to avoid harm.....	14
Refugee Appeal Board Decision (Tanzania), South Africa.....	15
Country of Origin Reports	17
RECOMMENDATIONS	18

RECEIVING LGBTI REFUGEES IN SOUTH AFRICA: TOWARDS A CULTURE OF NON-DISCRIMINATION AND HUMAN RIGHTS

INTRODUCTION

More than a decade has passed since the promulgation of the Refugees Act¹, the object of which is to give effect to South Africa's commitment to the international legal refugee instruments² it has signed and ratified. The subsequent refugee legislation and concomitant opening of its borders combined with the push factors in Africa has ensured that South Africa remains the top destination for asylum seekers in the world, this for the fourth consecutive year in a row admitting³ 816 000 new asylum applications for the 2006 to 2011 period. At the end of 2011, South Africa had accorded refugee status to 57 899.⁴ While the political and economic situation in Africa has contributed to the increasing number of asylum seekers entering South Africa, it is without a doubt, the progressive legislation encapsulated within the Refugees Act that has attracted so many to its shores. Asylum seekers are afforded freedom of movement, the right to work, study and to access health care services. In addition to socio-economic rights there are guarantees to equality, dignity and non-discrimination⁵ accorded to 'everyone' who finds themselves in South Africa. This is especially significant for an increasing number of people who experience discrimination and persecution in their countries of origin based on their sexual orientation, thereby forcing them to seek asylum elsewhere. Lesbians, Gays, Bisexuals, Transgender and Intersex persons (LGBTI) have fled

¹ Act 130 of 1988. The Refugees Act was assented to on the 2 December 1998 however the official commencement date of the Act was the 1 April 2000. Regulations to the Act were enacted on the 6 April 2000 in terms of Regulation No. R 366.

² South Africa has signed the following international legal instruments pertaining to the rights and protection of refugees: They are: the Convention Relating to the Status of Refugees which was adopted on the 28 July 1958 and was entered into force in the 22 April 1954; the Protocol relating to the Status of Refugees was adopted on the 31 January 1967 and entered into force on 4 October 1967 and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa which was adopted on the 10 September 1969 and entered into force on 20 June 1974.

³ Information from the 2011 UNHCR Global Trends. Accessed at: <http://www.unhcr.org/4fd6f87f9.html>

⁴ Ibid.

⁵ Sections 9 and 10 of the Constitution of the Republic of South Africa Act 108 of 1996 as adopted on the 8 May 1996 and amended on the 11 October 1996 by the Constitutional Assembly. Section 9(3) of the Constitution states: 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.

persecution because of their sexual orientation and have come to seek protection in South Africa.

South Africa's Constitution was the first in the world to legislate against discrimination⁶ based on 'sexual orientation', given that none of the international human rights treaties have had any prior reference to sexual orientation. The Refugees Act of 1998⁷ naturally followed this lead by affording surrogate protection to persons fleeing persecution on account of their membership of a particular social group in their countries of origin or place of habitual residence. Within the Refugees Act, social group is defined to include amongst others, a group of persons of particular gender, sexual orientation, disability, class or caste.⁸ A decade after the promulgation of this Act, South Africa tabled a historic resolution at the United Nations in 2011, entitled '*Human Rights, Sexual Orientation and Gender Identity*'. In this resolution the Human Rights Council⁹ requested the United Nations High Commissioner to 'commission a study that would document discriminatory laws, practices, and acts of violence against individuals based on the sexual orientation and gender throughout the world, and to document how international human rights can be used to end violence and related human rights violations based on sexual orientation and gender identity'.¹⁰

Given South Africa's role at the international level, this article will reveal that there is a disconnect with the way South Africa portrays itself at the international level and the reality facing asylum seekers within the asylum determination process, particularly with regard to those fleeing on account of their sexual orientation. This disconnect appears to function at the level of implementation. While the law is progressive and generous, implementation on the ground appears to adopt restrictive and narrow policies. While refugee jurisprudence is still in its developmental stages in South Africa there have been significant changes in international jurisprudence on sexual orientation cases which South Africa must adopt if it is to continue to promote human rights and offer international protection to those in real need.

⁶ Section 9 of the Constitution of the RSA, Act 108 of 1996.

⁷ Section 3 (a) of the Refugees Act.

⁸ Section 1(xxxi) of the Refugees Act.

⁹ Information accessed at <http://www.ishr.ch/council/122-arcive-council/1094-south-africa-tables-historic-resolution-...> accessed on the 2012/08/07. This was tabled at the 16th session of the Council in March 2011

¹⁰ A/HRC/17/L.9 Rev.1

This article will evaluate the manner in which sexual orientation cases are decided within the asylum process in South Africa by comprehensively outlining the procedural processes and substantive law with regard to the asylum determination process and then to analyse the very few South African decisions in the light of recent international decisions and best practice guidelines from other jurisdictions. This article will conclude by offering recommendations to decision makers.

PUSH FACTORS

At the outset it is important to contextualise the reasons why LGBTI refugees flee to South Africa by identifying significant ‘push’ factors that propel movement to South Africa. Such factors include the criminalisation of homosexual acts in seventy six countries in Africa¹¹ (figure for end of 2011) as well as the egregious legislation that punishes homosexual acts with the death penalty.¹² In many African countries there are also those who hold the view that that ‘gay rights’ is seen as an affront to traditional culture, sovereignty and a western preoccupation’.¹³ Homosexuality is also seen to be Un-Christian or even Un-Islamic in some communities¹⁴ with claimants fleeing the wrath of their families and religious communities with no recourse to the state who more often than not condemn such practices.

President Robert Mugabe of Zimbabwe has condemned homosexuals as being worse than dogs and pigs,¹⁵ and openly attacked British Prime Minister for insisting that countries who want aid must do away with homosexuality¹⁶ Likewise, Gambian President, Yahya Jammeh, is also on record for saying, “we will not be coerced into supporting homosexuality

¹¹ Bruce-Jones and Itaborahy, State Sponsored Homophobia; An ILGA Report, 9

¹² Ibid, 10. Homosexual Acts are punishable by the death penalty in Mauritania, Sudan as well as 12 Northern states in Nigeria and parts of Somalia.

¹³ Gevisser,M, Gay Rights: Towards a progressive culture, Mail and Guardian, March 16-22 2012, 14

¹⁴ Fleshman,M, African gays and lesbians combat bias, 12. Some scholars assert that same sex unions are condemned in the Bible or Qur’an while others are still debating the scriptural reference. Other research challenges the notion that homosexuality was imported to Africa by colonialism or that it is not compatible with traditions and culture. Accessed at

<http://www.un.org/en/africarenewal/vol21no1/211-gays-lesbians-combat-bias.html>

¹⁵ The Africa Report, 24 November 2011. Accessed at

<http://www.theafricareport.com/index.php/2011112450176048/southern-africa/%E2%80%AAgay-debate-moves-to-zimbabwe-s-parliament%E2%80%AC-50176048.html>

¹⁶ Ibid,

because of international aid'.¹⁷ Such remarks have contributed to an increasingly homophobic culture wherein at least fourteen people arrested in Gambia suspected of homosexuality.¹⁸

In addition to the rhetoric of some African leaders, the imposition of a fourteen year sentence with hard labour for a Malawian homosexual couple who announced their engagement in 2010 sparked international condemnation and outrage bringing attention to Malawi's antiquated laws.¹⁹ Similar media attention was drawn to the killing of Ugandan gay activist, Daniel Kato who was murdered after the publication of an article entitled 'one hundred top homos' in a local tabloid listing him as one of the hundred.²⁰

Within this context, South Africa has admitted LGBTI claimants from African countries such as Angola; Malawi; Uganda; Tanzania; Burundi; Democratic Republic of Congo; Nigeria; Cameroon; Ethiopia, Zambia and Zimbabwe.

PROCEDURAL FRAMEWORK

Upon entry to South Africa, asylum seekers to the Republic must approach a Refugee Reception Office under the auspices of the Department of Home Affairs (DHA) in order to apply for asylum.²¹ The application requires the filling out of a prescribed form, taking of fingerprints and photographs.²² Where necessary the Refugee Status Determination Officer must assist the applicant to fill in the prescribed form while confidentiality is ensured in terms of the legislation.²³ The regulations to the Act also provides for the use of an interpreter provided by the DHA when it is practical and necessary to do so. When the Department is unable to provide an interpreter then then the applicant will be required to provide for one.²⁴ Once the initial application is fully completed the applicant is issued with an asylum seeker permit. The Refugee Reception Officer may extend the permit from time to time.

¹⁷ Shryock, R, Gambian President says no to aid money tied to gay rights, *Vocie of America*, April 2012, <http://www.voanews.com/content/gambian-president-says-country-wont-accept-aid-money-tied-to-gay-rights-148530235/370448.html>

¹⁸ *Ibid.*

¹⁹ Malawi gay couple get maximum sentence of fourteen years, *BBC New Africa*, 20 May 2010. Accessed at <http://www.bbc.co.uk/news/10130240>

²⁰ Ward, J Dear Ugandan Christians: Stop Torturing Your Citizens, *Huffington Post*, 1 Jan 2011. Accessed at http://www.huffingtonpost.com/joseph-ward-iii/dear-ugandan-rolling-ston_1_b_8149

²¹ Section 21 of the Refugees Act.

²² Section 21(2) and (3) of the Refugees Act.

²³ Section 21(5) of the Refugees Act.

²⁴ Regulation 5 of the Refugees Act, 130 of 1998. Regulation 5 relates to interpretation and sets out specifics with regard to use of interpreters.

Applications for asylum are then adjudicated by a Refugee status Determination Officer (RSDO)²⁵ who has to make the decision based on whether or not the person is a refugee in terms of the Refugees Act.

The regulations to the Act specify that that the adjudication process take a hundred and eighty days.²⁶ It is at this stage that the application may be granted asylum; rejected and be allowed the right to appeal to the Refugee Appeal Board (RAB); or rejected and such application sent for review to a body called the Standing Committee for Refugee Affairs (SCRA).²⁷ Applications sent to SCRA are those applications referred to as manifestly unfounded applications. A manifestly unfounded application is made on grounds other than those which may be made under the act.²⁸ Once a claimant is rejected they must be provided with a written decision identifying the reason for the rejection.²⁹

The Standing Committee for Refugee Affairs may confirm or set aside the decision³⁰ and likewise the Refugee Appeal Board may after hearing the appeal, confirm, set aside or substitute any decision of the Refugee Status Determination Officer who rejected the initial application.³¹ Applicants have the right to apply for legal representation and are entitled to just administrative action in terms of the Constitution³² even at the stage of their removal from the Republic.

The RSDO is critical in upholding the refugee regime's primary objective which is to provide protection. In essence an RSDO should be able to extract the claim in gender sensitive manner. They must know the law well, be able to apply it and should remain up to date with the latest country of origin information.

²⁵ Section 24 of the Refugees Act.

²⁶ Regulation 3 of the R.366 of the Refugees Act . In government gazette No.21075 published on the 6 April 2000.

²⁷ Section 24(3) of the Refugees Act.

²⁸ Section 1(xxi) of the Refugees Act. This section is the definition section of the Act.

²⁹ Regulation 12(3) of the Refugees Act.

³⁰ Section 25 (3) of the Refugees Act.

³¹ Section 26(2) of the Refugees Act.

³² Section 33 of the Constitution of the RSA. Section 28 (2) of the Refugees Act makes provision for this rights

SUBSTANTIVE LAW

Social Group

The Refugees Act provides protection to anyone who ‘owing to a well-founded fear of being persecuted by reason of his race or her race, tribe, religion, nationality, political opinion or membership within a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country ...is unable or owing to such fear, unwilling to return to it;’³³ This definition of a refugee in the Refugees Act is an almost direct translation from the 1951 UN Convention Relating to the Status of Refugees³⁴ (1951 UN Convention).

In the 1951 UN Convention, ‘social group’ is one of the least clear of the 5 enumerated grounds. Clarity was offered by the United Nations High Commissioner for Refugees (UNHCR) Guidelines³⁵ which provides that there be ‘no closed list for what constitutes a social group and that this term be read in an evolutionary manner’.

In South Africa the Refugees Act defines social group to include a group of persons of particular gender, sexual orientation, disability, class or caste’.³⁶ Decision makers are therefore not tasked with the extra hurdle of having to show that someone who is facing persecution on account of their sexual orientation is part of a social group because they are part of ‘a group of persons who share a common characteristic other than their risk of being persecuted or who are perceived as a group by society’³⁷ as per the United Nations Guidelines.

Well-founded Fear

A refugee is a person who has a well-founded fear of persecution based on one of the enumerated grounds. A claimant’s ‘well-founded fear’ of persecution comprises both the subjective and objective elements.³⁸ Fear is an emotion and therefore experienced

³³ Section 3(a) of the Refugees Act.

³⁴ Supra. Note 2.

³⁵ UNHCR Guidelines on International Protection: “Membership of a particular social group” within the context

of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 2002, HCR/GIP/02/02

³⁶ Defined in the definitions section of the Refugees Act, section 1(xxi).

³⁷ Supra. Note 30.

³⁸ Handbook on Procedures and Criteria for Determining Refugee Status, A general analysis of a well-founded fear ‘is dealt with in Para’s – 37-50, 11-14.

subjectively however the requirement that it be 'well founded' implies that the subjective fear experienced must be grounded in an objective reality. In other words a claimant may have experienced severe trauma and anxiety as a result of the persecution meted out to him or her on account of their sexual orientation. He or she may have been beaten, arrested and incarcerated, etc. The subjective element of the well-founded fear can be evidenced from the claimant's statements and must be contextualised within the family and personal background of the person, taking into account personality as well.³⁹ The objective element of that fear is the verification of the claimant's statements by credible country of origin information from a number of sources.

While, the well-founded fear may have been experienced in the past, refugee law is prospective in that a claimant will have to show that s/he has a well-founded fear of persecution upon return to the country or origin or place of habitual residence from where they fled.

In sexual orientation cases many claimants reveal that they have hidden their sexual identity for fear of being punished, arrested or subjected to the death penalty. In these cases it may appear that the subjective element is missing because the avoidant behaviour has resulted in impeding the persecutory harm however it has been argued that the effect of the modification of the behaviour on the applicant is persecutory harm.⁴⁰ This non-physical or serious psychological harm, termed as endogenous harm can be contrasted from the exogenous harm. The endogenous harm according to international scholars Hathaway and Pobjoy, is a form of persecutory harm which can be objectively well-founded.⁴¹ Furthermore they suggest that the applicants bear some responsibility for pointing out to the decision makers that the endogenous harm they experience in modifying their behaviour is persecution.⁴²

³⁹ Ibid,12.

⁴⁰ Hathaway and Pobjoy, 'Queer Cases Make Bad Law' 333

⁴¹ Ibid,338.

⁴² Ibid,347.

IMPLEMENTATION OF THE LAW

While a brief outline of the substantive law has been described above, the main purpose of this article is to address the manner in which legal adjudicators and decision makers have decided cases based on LGBTI claims. Below are documented accounts from claimants identifying systemic problems encountered within the Department of Home Affairs followed by an analysis of the two decisions at the level of the Refugee Appeal Board.

Systemic Problems within the Department of Home Affairs

PASSOP, a nongovernmental organisation based in Cape Town published a report on LGBTI claimants and their experiences within the Department of Home Affairs.⁴³ They gathered information from twenty five LGBTI claimants who faced discrimination from their communities, family and friends.

Of the twenty five interviewed, two applicants received refugee status while the remainder are still on asylum seekers permits until such time their cases are determined.

Eleven of the twenty five claimants did not state sexual orientation or gender identity in their claims as a reason for claiming asylum because some said they did not know that it was a valid ground for claiming asylum whilst others felt ashamed or scared of the DHA officials or the interpreters.⁴⁴ Some have been rejected and are in the appeal process while the majority of this group are still waiting for a second interview. They have been in the asylum process between six months to two years.⁴⁵

Length of the Interview

The Refugee Status Determination is crucial in determining refugee status. The officer interviews the claimant and it is within this space that the claimant must feel free to be open. The officer must ensure the claimant of the confidentiality of the process. It is in this space that the RSDO is able, through proper questioning, to determine credibility of the claimant;

⁴³ LGBTI Refugee Support and Advocacy Project, A Passop Report June 2012, 6

⁴⁴ Ibid, 16.

⁴⁵ Ibid, 17.

the nature of the persecution and the possibility of its future recurrence. The length of this interview is therefore significant.

In a national survey⁴⁶ conducted by the *Forced Migration Studies Programme (University of Witwatersrand)* on the refugee reception offices and asylum determination process, the issue of the length of time of the interview was assessed. The findings were particularly telling. Of those interviewed at the Cape Town offices, sixty nine percent said that the length of their interview took under twenty minutes whilst thirty seven percent said their interviews lasted under ten minutes.⁴⁷ On the whole national results reflected that interviews ‘were often short and cursory, denying applicants an opportunity to fully explain their asylum claim’.⁴⁸

Badly Written and incorrect decisions by RSDO

Once the interviewing process is completed written decisions are issued to those who are rejected. A subsequent survey⁴⁹ of the written decisions reveal a dearth of well-reasoned decisions with critical errors of laws recurring such misapplication of essential concepts in refugee law such as persecution; well-founded fear and social groups; incorrect standards for standard and burden of proof; the failure of the RSDOs to apply their mind and inaccurate country of origin assessments to name but a few.

On the subject of country of origin assessment it was evident from the assessment that RSDOs relied on outdated information⁵⁰ or in some cases they were totally uninformed as in the case of a Ugandan claimant who fled persecution on account of his sexual orientation⁵¹. In the written decision, the RSDO claimed that there was no Ugandan legislation criminalising homosexuality; no persecution of homosexuals’ whilst the country information confirmed the opposite.

⁴⁶ National survey of the refugee reception and status determination system in South Africa, Forced Migration Studies Programme, Feb 2009, 43.

⁴⁷ Ibid 43

⁴⁸ National survey of the refugee reception and status determination system in South Africa, Forced Migration Studies Programme, Feb 2009, 7.

⁴⁹ African Centre for Migration and Society, All Roads lead to Rejection: Persistent Bias & Incapacity in South African Refugee Status Determination, June 2012, 10

⁵⁰ Ibid, 64

⁵¹ Ibid, 64. This is an example taken from the survey.

RAB Decisions

Currently there is no jurisprudence on sexual orientation refugee claimants at the level of the Constitutional Court, Supreme Court of Appeal or High Court.

There are two written decisions of the Refugee Appeal Board dismissing both appeals based upon the sexual orientation of the claimant. The first decision was handed down in 2002, followed by the second, heard in December 2009 with judgement delivered three years later on the December 2011. Both decisions provide insight into the reasoning and applicable standards used by South African decision makers. It is important when comparing these judgements to be mindful of the fact that the first decision below (2002) preceded significant changes in international law especially with regard to what judges expected sexual orientation to do in order to avoid persecution. The decision in 2011 failed to address the changes in international refugee jurisprudence nor does it take cognisance of suggested best practice guidelines

Refugee Appeal Board Decision (Nigeria), South Africa

In this case⁵² a Nigerian national sought asylum based on his political opinion and his membership within a particular social group on account of his sexual orientation which is illegal in Nigeria. The Appellant was arrested in Lagos during a raid on an underground gay meeting. He states with the help of a lawyer the charge was reduced from homosexual conduct to loitering.⁵³ He came to South Africa and was unaware at the time he applied that he could lodge a claim based on his sexual orientation. The RAB did not find that the Appellant's political profile to warrant any attention thereby dismissing his claim based on his political opinion and instead focussed specifically on his sexual orientation claim.

Initially, the RAB went through the rather superfluous process of determining whether a "homosexual person falls within the membership of particular social group ignoring the fact that 'social group' is already defined within the definition section of the Refugees Act and that such enquiry was no longer necessary.

⁵² Refugee Appeal Board Decision (Nigeria), South Africa: Refugee Appeal Board, 13 May 2002, available at: [http://www.unhcr.org/refworld/docid/4b\)e98fc2.html](http://www.unhcr.org/refworld/docid/4b)e98fc2.html) [accessed at 10 August 2012]

⁵³ Supra, note 48, page3.

Criminalisation of same sex conduct

An issue for determination was whether homosexuality was illegal in Nigeria. He found that homosexuality per se is not illegal although a penal code criminalises certain homosexual conduct. In essence this differentiation between the sexual behaviour/conduct and 'homosexuality' of the person is fraught. Many will argue and quite correctly so that it is impossible to separate a person's identity from their sexuality both being inextricably connected.

The applicable law was section 214 of the Penal Code which states that 'every person who has carnal knowledge of another person which is against the order of nature is guilty of a felony and liable to fourteen years imprisonment'.⁵⁴ Gross indecency is also criminalised in the Code. In identifying legislation which criminalised same sex sexual acts, the RAB then focussed on the prevalence of prosecutions and the severity the sentences imposed under these laws. Harsh laws without any enforcement did not amount to persecution according to the RAB.⁵⁵

A practice currently adopted in most European Union states where asylum is not granted solely on the basis of criminalisation only but requires that the relevant legislation also be enforced in practice.⁵⁶ Certain states go as far as requiring the applicant to show that she/he has been individually threatened with the law.⁵⁷

The RAB concluded that despite the existence of a Penal Code criminalising homosexuality and the threat of punishment, homosexuality thrives in some of the major cities in Nigeria.⁵⁸ Assessing country of origin information the judge, the judge came to the conclusion that 'prosecutions for homosexual behaviour in Nigeria are possibly and presumably discussed but never seen in criminal courts'⁵⁹ without exploring more fully the evidence and statements led by the Appellant.

Amnesty International suggests that decision makers must question the unavailability of reports documenting persecution and be mindful that 'lesbian and gay men who have experienced torture or ill-treatment may not have access to documented evidence of their

⁵⁴ Ibid, 18.

⁵⁵ Ibid, 18.

⁵⁶ Summary Report of Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity, Sept 2011. South Africa is a member of the IARLJ, 3.

⁵⁷ Ibid

⁵⁸ Supra, Note 48, page 22.

⁵⁹ Ibid, 25.

personal experiences' taking into consideration that abuses are not documented in many countries.⁶⁰

Illegality and 'discretion' to avoid harm

As previously alluded to the RAB had come to the conclusion that while homosexuality in Nigeria is not a criminal offence/illegal, 'the act of homosexual person or persons engaging in the act of coitus anus or as stated, carnal knowledge of another male or female person is a criminal offence'. According to the RAB because the act is always committed in private it is virtually impossible for the police to gather the necessary evidence needed to convict a person".

The RAB used the private versus public argument to dismiss the claim, an argument previously relied upon by other decision makers in a number of jurisdictions who believed that LGBTI claimants could avoid persecution from the State if they avoided public attention and chose to live discreetly outside the public gaze.

The Refugee Appeal Board dismissed the claim requiring the application of a 'certain degree of discretion which required the appellant to avoid overt, public, or publicly provocative, homosexual activity and accepting these limitations did not amount to persecution.'⁶¹ The Australian High Court in 2002⁶² found this reasoning to be flawed because 'persecution does not cease to be persecution for the purposes of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality.'⁶³

This expectation that sexual orientation claimants be expected to live or conduct themselves discreetly was overturned in the Australian case. This particular case concerned two Bangladeshi men who fled persecution in Bangladesh on account of their sexual orientation.⁶⁴ In this case three important issues were addressed; the unnecessary categorisation of homosexual men into discreet and non-discreet homosexual men; the failure to consider whether the need to act discreetly to avoid the threat of serious harm constituted

⁶⁰ Amnesty International, Crimes of Hate, Conspiracy of Silence: Torture and Ill-treatment Based in Sexual Identity, 33 available at <http://www.amnesty.org/en/library/info/ACT40/016/2001>

⁶¹ Ibid,35.

⁶² Matter No S395/2002 and 396/2002 and Min for Immigration and Multicultural Affairs.

⁶³ Ibid,12.

⁶⁴ Matter No S395/2002 and 396/2002 and Min for Immigration and Multicultural Affairs.

persecution and the failure to consider whether the appellants might suffer serious harm if they were discovered to be homosexual.⁶⁵ The categorisation of homosexual men into ‘discreet and non-discreet’ was considered an error,⁶⁶ that sought to distract from the real issue which was what would happen to the Appellant’s if they lived openly in the same way heterosexual people in Bangladesh lived,⁶⁷ an issue not considered by the RAB in their case.

The RAB remains silent on the psychological and mental effects of forcing a claimant to hide his or her sexuality and whether this amounts to persecution. It is a moot point in refugee jurisprudence that claimants who flee on account of their political opinion and religion should not be forced to ‘hide’ their political opinions or religious convictions.

The RAB considered the occasional interference with the exercise of a human right as not necessarily persecution.⁶⁸ Given that anti-discrimination legislation is at the heart of South Africa’s Constitution, the expectation from the RAB that the claimant should be expected to endure an interference with the exercise of their human rights makes little sense, especially when the founding provisions of our Constitution are based on human dignity, the achievement of equality and the advancement of human rights and freedoms.⁶⁹ The expectation that homosexual claimants be entitled to different standards of behaviour compared to their heterosexual counterparts is to make a mockery of the gains made in respect of equality legislation especially in this era of advancing human rights. LGBTI claimants are entitled to the full protection of our law, and as such must not be allowed not to endure further discrimination not expected of their heterosexual counterparts.

Refugee Appeal Board Decision (Tanzania), South Africa

Nine years later the RAB disallowed the claim for asylum against a Tanzanian national⁷⁰ who encountered familial and community harassment on account of his homosexuality forcing him to flee from his place of residence. The Appellant stated that it was against his religion and tribe to be gay. In addition the RAB noted that the Tanzanian government does not allow homosexuality. Furthermore while the appellant was never arrested, the RAB

⁶⁵ Ibid.

⁶⁶ Matter No S395/2002 and 396/2002 and Min for Immigration and Multicultural Affairs, 18.

⁶⁷ Ibid, 16.

⁶⁸ Nigeria v SA, 32.

⁶⁹ Section 1(a) of the Constitution, Act 108 of 1996.

⁷⁰ *Refugee Appeal Board Decision (Tanzania)*, South Africa: Refugee Appeal Board, 5 December 2011, available at: <http://www.unhcr.org/refworld/docid/5034f59a2.html> [accessed 27 August 2012]

acknowledged that he was not openly gay.⁷¹ The RAB accepted the Appellant to be homosexual, his credibility thus not being in being in dispute.

In a brief decision, the RAB found that no evidence of persecution existed. Persecution was described as ‘harassment that was so unrelenting and constant’⁷² thereby causing the appellant to flee. The RAB as in the Nigerian decision reiterated that ‘to be gay or homosexual is not illegal’,⁷³ however according to the RAB an illegality arose if one was charged and sentenced under section 154 of Tanzanian Penal Code of 2002. In this Code a violation occurs when a ‘person has carnal knowledge of another person against the order of nature or when a person permits a male person to have has carnal knowledge of him against the order of nature.’⁷⁴

The RAB found that the social discrimination encountered by the Appellant not to amount to persecution, failing to enquire why it was that the Appellant ‘was not openly gay’.

While the RAB did not question the fact that the claimant was not openly gay, an issue addressed in the Australian (2003) and UK (2010) cases, it has been suggested the pertinent question with regard to concealment of sexual identity must be, “what would happen if the claimant was returned to his or her country of origin and lived openly revealing his /her sexual identity?”⁷⁵ In the UK case, Sach’s J reasoning in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,⁷⁶ was relied upon to address issue of concealment. He said that to require an applicant to live in a state of self-denial was to require him to live in a state of self –induced oppression⁷⁷. This view is in keeping with Professor Hathaway, a leading expert in refugee law who contends that the ‘modification of behaviour itself or the impact that the modification has on the applicant ...is the relevant persecutory harm’.⁷⁸ The psychological impact of the behaviour modification is referred to as the endogenous harm as distinct from exogenous harms which is often what decision makers rely on. Hathaway

⁷¹ Ibid, para 6.

⁷² Supra, note 49, para 17.

⁷³ Supra, note 49, page 3.

⁷⁴ Supra,note 49,para 15.

⁷⁵ Summary Report of Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity, Sept 2011. South Africa is a member of the IARLJ, 3

⁷⁶ 1999 (1) SA 6 para 130

⁷⁷ HJ and HT v Secretary of State 15

⁷⁸ Hathaway and Pobjoy in Queer Cases makes Bad Law 333

furthermore very accurately submits that it is not within the mandate of the decision makers to mandate conduct; rather they have to assess risk.⁷⁹

Country of Origin Reports

In making its decision the RAB relied on only one country information report, being the 2006 *Department of State report on Human Rights Practices*. The report indicated no one had been punished for transgressing the Tanzanian Penal Code in that year, which according to the RAB is ‘rarely enforced because of the difficulty of obtaining proof’.⁸⁰ One is not sure how the RAB came to this conclusion because later reports including a shadow report submitted to the UN Human Rights Committee in 2009 on ‘*The violations of the rights of lesbian, gay, bisexual, transgender persons in the Republic of Tanzania*’⁸¹ submits that the Penal Code extends to ‘gross indecency’ and includes acts that ‘fall short of actual intercourse and may include masturbation and indecent behaviour without any physical contact’.⁸²

The offending legislation has lent itself to ‘invasions of privacy committed by both public and state actors’⁸³ well documented in the media. In 2009 the Tanzanian government arbitrarily arrested and detained gay and lesbian activists on trumped up charges of debauchery and loitering⁸⁴ while a few months’ later police singled out thirty nine gay and lesbian activists charging them as prostitutes and vagrants⁸⁵.

The RAB in handing down the judgement, three years later failed to make a forward looking assessment and neglected to include the arbitrary arrests that had taken place in Tanzania over the past three years. A more thorough search would have revealed that in April 2012, the United Kingdom granted refugee status to a Tanzanian national who had been rejected a year earlier, admitting that Tanzania is ‘dangerous for gay men.’⁸⁶

⁷⁹ Ibid 334.

⁸⁰ Ibid.

⁸¹ Tanzania: Shadow Report to the United Nations Human Rights Committee. Accessed at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/290-1.pdf>.

⁸² Ibid, 3.

⁸³ Ibid, 5.

⁸⁴ Tanzania: Arbitrary Arrests and Detention of Gay and Lesbian Activists, 10/03/2009. Available at <http://www.iglhrc.org/cgi-bin/iowa/print/993.html>.

⁸⁵ Ibid.

⁸⁶ U.K admits Tanzania is dangerous for gay men, Colin Steward. Available at <http://76crimes.com/2012/04/20/u-k-admits-tanzania-is-dangerous-for-gay-men>

The RAB in its failure to present a comprehensive view of all the country evidence quoted from the **UNHCR Handbook on Procedure and Criteria for Determining Refugee Status**⁸⁷ using paragraph 196 which provides: *It is a general principle that the burden of proof lies on the person submitting the claim.* The RAB however only quotes the first sentence of the paragraph setting out the onus. The rest of the paragraph appears to have been deliberately omitted in the decision because it takes cognisance of the fact that the claimants are often not in position to provide proof or documentary evidence of their statements⁸⁷ therefore the full weight of paragraph must read and be applied. It provides as follows:

'It is a general principle that the burden of proof lies on the person submitting the claim....thus while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner'. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of his application...'

In this case the RAB failed to comprehensively take into consideration international case law, which had abandoned the so called 'discretion' requirement wherein claimants are expected to be discreet about their sexuality. Furthermore the RAB failed to adhere to proper evidentiary standards with regard to burden of proof and also employed faulty reasoning in finding homosexuality per se not to be illegal whereas homosexual conduct was considered to be so in terms of national legislation. Finally the RAB failed to apply proper human rights standards by mandating the claimant be expected to hide his homosexuality.

RECOMMENDATIONS

The two RAB decisions analysed above reveal how South Africa has failed to keep abreast of international jurisprudence, guidelines and best practices already adopted in other jurisdictions. The failure to adhere to these guidelines will no doubt have disastrous consequences on those seeking surrogate protection from the South African government. While South Africa is seen as a progressive country at the international level it is

⁸⁷ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, para 196.

recommended that it uses its present position within the African Union Commission⁸⁸ to press countries in Africa to abolish egregious legislation that criminalises same sex conduct and to actively promote a human rights culture. This must be in keeping with the stance South Africa has adopted at the international level within the Human Rights Council at the United Nations in respect of sexual identity.

At home, South Africa must ensure that administrative staff receives the necessary training in the law to make informed decisions whilst at the same time they must adhere strictly to the law.

⁸⁸ Minister Nkosasana Dlamini Zuma was elected as Chairperson of the African Union Commission on the 16 July 2012. Accessed at www.news24.com/SouthAfrica/Politics/Nkosazana-Dlamini-Zuma-SAs-iron-lady-20120716.