

REFUGEE LAW TRAINING MANUAL

A practical guide for South African legal and paralegal practitioners to understand the basic principles of refugee status determinations for LGBTQIA+ asylum claimants

Authors: Sherylle Dass and Yanela Frans



TABLE OF CONTENTS

1	Acknowledgements	03
2	Introduction to the Legal Resources Centre	04
3	Overview and Purpose	05
4	Acronyms	07
5	Section A: Eligibility Criteria	15
6	Section B: General Procedural Considerations	30
7	Section C: Exclusion Criteria	33
8	Section D: Cessation	40
9	Section E: Applying for Refugee Status in South Africa	43

ACKNOWLEDGEMENTS

This Guidebook was prepared by the Legal Resources Centre and funded by the Embassy of the Kingdom of the Netherlands in Pretoria, South Africa.

We are very grateful to the Embassy of the Kingdom of the Netherlands who made this training manual possible. We express our sincere gratitude for their generous funding and for the opportunity to work on this project.



Kingdom of the Netherlands

INTRODUCTION OF THE LEGAL RESOURCES CENTRE

The Legal Resources Centre (hereinafter referred to as the LRC) was established in South Africa in 1979 as a human rights organisation.



It has four regional offices in Johannesburg, Cape Town, Durban and Makhanda.



The LRC utilises the law as a mechanism to assist marginalised groups in pursuit of obtaining a fully democratic South African society that embodies equality and non-discrimination.



These groups include women, children, LGBTQIA+ persons and refugees. The legal strategies that the LRC uses to achieve its objectives include legal advocacy in the form of strategic campaigns, legal research and strategic public interest litigation.



The LRC, through the Legacy programme, aims to provide refugee protection education for legal practitioners and paralegal practitioners to ensure that they are equipped to provide adequate legal assistance to LGBTQIA+ refugee clients.



OVERVIEW AND PURPOSE

South Africa is a signatory and has ratified both the 1951 UN Convention and the 1967 Protocol relating to the status of refugees, and they have done so without reservation.

South Africa is also a signatory to the 1969 Organisation for African Union (OAU) Convention Governing specific aspects of refugee problems in Africa. To give effect to these two conventions, the Refugees Act 130 of 1998 was promulgated domesticating its international regional obligations under those treaties.

The Refugee conventions and South African refugee protection laws define who is a refugee and it is critical that in the implementation of both international and domestic law that a refugee must be identified. Refugee status determination is a crucial step for an asylum claimant to guarantee their protection and access to rights afforded to refugees.

The Refugee conventions do not prescribe procedures on how status determinations should be conducted and defers to Contracting State parties to develop procedures in line with their own laws and policies. Contracting States are encouraged to adopt best practices developed through a series of guidelines and general comments issued by the Office of the High Commissioner for Refugees (UNHCR), but it is critical that refugee practitioners are consistently monitoring adherence to both international and domestic laws in refugee status determinations.



LGBTQIA+ asylum claimants face many obstacles in seeking refugee protection and rely almost exclusively on the State officials' ability to apply and implement refugee protection laws.

It is important, in the absence of clear regulations on refugee status determinations for LGBTQIA+ refugees, that they have access to legal representation and legal assistance to ensure that, at the earliest possible moment, they are able to present a credible asylum claim throughout the refugee status determination process.



This guide is intended for legal practitioners, paralegals and other non-governmental organisations that provide assistance to LGBTQIA+ asylum seekers.

It is a tool for persons working with LGBTQIA+ asylum seekers by improving their understanding of the law and procedures that affect LGBTQIA+ asylum seekers to enable them to understand the basic principles of refugee status determination, the eligibility criteria, and fair and just procedures in determining the refugee status of LGBTQIA+ claimants.

This guide will therefore assist service providers in understanding the rights of asylum seekers and thus allows them to provide potential options for legal redress when those rights have been violated by both state and individual actors.

This guide is not intended to replace the need to consult with a lawyer in cases where legal assistance is required and necessary. It is rather aimed to be a resource for those providing services to asylum seekers in South Africa.



IMPORTANT ACRONYMS

DHA: Department of Home Affairs

LGBTQIA+: Collectively, lesbian, gay, bisexual, transgender, queer, intersex and asexual people are referred to as LGBTQIA+

RAASA: Refugee Appeals Authority of South Africa

RRO: Refugee Reception Office

RSDO: Refugee Status Determination Officer

SCRA: Standing Committee on Refugee Affairs

UNHRC: United Nations High Commissioner for Refugees

PAJA: Promotion of Administrative Justice Act, No. 3 of 2000

Terminology

→ **Asylum seeker**

An asylum seeker is a person seeking recognition as a refugee in a Contracting State.

→ **Asexual**

A sexual orientation generally characterised by not feeling sexual attraction or desire for partnered sexuality. Asexuality is distinct from celibacy, which is the abstention from sexual activity. Some asexual people do engage in sexual activity but only in specific circumstances e.g. within the context of a pre-existing emotionally or intimate relationship.

→ **Bisexual**

A person whose primary sexual and affectional orientation is toward people of the same and other sex.



- **Cisgender**
People whose bodies are recognised- socially/ culturally and legally - in a way that corresponds to their gender identity.
- **Female to Male(FTM) Trans Man**
A transgender man, or female to man, starts his life with female sex characteristics but his gender identity is male and uses male pronouns.
- **Gender**
Socially constructed characteristics assigned to a person that may vary according to a society or group one belongs to, and which are learned or assigned to women and men.
- **Gender Binary**
Refers to the idea that there are only two genders, man and woman, and that everyone can be categorised as one or the other.
- **Gender Identity**
Refers to the way that people self-identify and define their gender. This is a person's private sense of their own gender which is separate from their assigned sex and appearance.
- **Gender Non-binary**
Also termed genderqueer or gender non-conforming, is a catchall category for gender identities that are not exclusively masculine or feminine.
- **Homosexual**
Attraction between two people of the same sex.
- **Intersex**
Intersex people may be born with full or partial genitals of both sexes. Some intersex people have underdeveloped or ambiguous genitalia that cannot be easily classified as either male or female.

→ **Membership in a Particular Social Group**

A particular 'social group' comprises persons of a similar background, habits or social status. This Convention ground applies where a claimant belongs to a group of persons who share common characteristics other than the risk of being persecuted or who are perceived as a group by society. Their characteristics are innate, unchangeable and otherwise fundamental to identity, conscience or the exercise of one's human rights.

→ **Male to Female (MTF) Trans Woman**

A Transgender woman, or male to female, starts her life with male sex characteristics but her gender identity is female and uses female pronouns.

→ **Refugee**

A refugee is a person who flees their country of origin, nationality or habitual place of residence:

- i) Due to a well-founded fear of persecution for reasons of their race, tribe, religion, nationality, political opinion, tribe or membership of a particular social group and is unable or unwilling to avail themselves of the protection of that country, or
- ii) Due to war or conflict in either part or the whole of their country of origin or nationality; or
- iii) Is a dependant of a refugee that fled persecution or war.

→ **Sex v Gender**

'Sex' is a biological term referring to attributes of the body, whereas 'gender' is a social term referring to a person's internal experience and self-identity. Sex refers to the biological and physical differences between men and women while gender refers to ascribed social and cultural male and female roles.

→ **Sexual Orientation**

Whether you are intimately attracted to members of the same or the opposite sex. Attraction to the other person's sex and/or gender presentation is the point of departure.

→ **Transgender**

Transgender persons do not identify with the gender assigned to them at birth. They feel that there is a mismatch between their gender identity and their biological/physical sex.

Transgender individuals may display-through their clothing, make-up, hairstyle and behaviour-a gender identity that contrasts with the gender role that is expected of them according to their biological sex or hetero-normative societal expectations. Transgender has nothing to do with sexual orientation.



? What is Refugee Status Determination?

A person is a refugee as soon as they fulfil the criteria contained in the definition of a 'refugee' under international and domestic law. This would necessarily occur prior to the time at which their refugee status is formally determined. Recognition of their refugee status does not therefore make them a refugee but declares them to be one. Refugee status determinations are an examination by a government authority, in this case the Department of Home Affairs (DHA) of whether a claimant who has submitted an asylum application or expressed a need to seek International protection, is a refugee- that is whether their situation meets the criteria specified in the refugee definition under international and domestic Law.

? Who is a Refugee?

South Africa is a signatory and has ratified both the 1951 UN Convention and the 1967 Protocol relating to the status of refugees, and they have done so without reservation. South Africa is also a signatory to the 1969 Organisation for African Union (OAU) Convention Governing specific aspects of refugee problems in Africa.

The 1951 Convention Refugee Definition

In terms of the 1951 Convention, a person is a refugee the moment they fulfil the criteria set out in the definition. The criteria are divided into three parts namely:

1. The inclusion clauses which define the criteria that a person must satisfy before they are declared a refugee.
2. The exclusion clauses which lists circumstances in which a person may be excluded, and
3. The cessation clauses which indicate the conditions under which a refugee ceases to be a refugee.



The 1951 Convention is the foundation of international refugee law and its refugee definition is the principle basis for establishing a claimant's refugee status.

Article 1A(A)(2) of the 1951 Convention defines a refugee as a person who:

"As a result of events occurring before 1 January 1951 and 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."

General Definition of a Refugee in the 1969 OAU Convention:

The 1969 OAU Convention definition incorporates the 1951 UN Convention definition of a refugee and adds the following:

"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."



Domestic law

The Constitution is the supreme law of the Republic of South Africa. This means that all laws must be consistent with the provisions of the Constitution. Everyone has the right to socio-economic rights however such rights are not absolute and can be limited in terms of section 36 of the Constitution.

The state must respect, promote and fulfil the bill of rights. Everyone may enjoy these rights except for the right to vote which is reserved for citizens only.

South Africa enacted the Refugees Act 130 of 1998, provisions found in the Refugees Act such as section 3 mirrors the definitions set out in the 1951 UN Convention as well as the 1969 OAU Convention.

Section 3 of the Refugees Act 130 of 1998 defines a refugee as a person who:

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, 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, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
- (c) is a dependant of a person contemplated in paragraph (a) or (b)."



Key Elements of International Refugee Protection

1 Protection Against refoulement

The principle of non-refoulement is an international law principle and has been referred to as the cornerstone of international refugee protection. The principle is considered a jus cogens norm, which means that this principle is a norm in international law and it cannot be set aside.

Section 2 of the Refugees Act codified this principle and provides that:

“no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where –

- (a) He or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
- (b) His or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing public order in either part or the whole of that country.”

This principle is also applicable to the frontiers or borders of a country and South Africa cannot prohibit entry at their borders if that prohibition would amount to refoulement. Refoulement is done through deportation and extradition.

2 Other Rights and Benefits under International and Human Rights law

The rights and benefits that a refugee is entitled to are drawn from international and human rights law contained in various international human rights instruments and customary international law. As a signatory to the 1951 Convention and 1967 Protocol as well as the 1969 OAU Conventions, South Africa is bound by these instruments and should, insofar as it is not inconsistent with the Constitution of the Republic, be upheld.

These rights and benefits include:

- i) Protection against threats to the physical security of refugees. The State should provide adequate protection against criminal violence, particularly violence incited through racism or xenophobia. There is also an obligation to ensure that refugees are adequately protected from torture, inhumane or degrading treatment by State officials;
- ii) Access to Courts
- iii) Access to socio-economic rights such as Education, Health Care, Housing and Social assistance
- iv) Freedom of movement
- v) Family Reunification
- vi) Access to identity documents and refugee travel documents

3 Constitutional and Legislative Rights in South Africa

Refugees and asylum seekers have all the rights outlined in the Bill of Rights in the South African Constitution, such as, for example, the right to education, dignity, and social security (except for ones that explicitly apply to South African citizens, such as the right to vote or form a political party).

Everyone has the following rights which are particularly significant to LGBTQIA+ asylum claimants:

- i) Equality and Non-Discrimination (Section 9):
 - a. Everyone is equal before the law and has the right to equal protection and benefit of the law.
 - b. The State and persons may not unfairly discriminate directly or indirectly 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.
- ii) Human Dignity (Section 10)
- iii) Freedom and Security of the Person (Section 12). This means that a person has the right
 - a. not to be arbitrarily deprived of their freedom without just cause and cannot be detained without trial.
 - b. to be free from all forms of violence, cannot be tortured or treated or punished in a cruel, inhumane or degrading manner.
 - c. to bodily and psychological integrity, to make their own decisions on reproduction, security and control over their bodies and cannot be subjected to medical or scientific experiments without their informed consent.
- iv) Access to Courts (Section 34)

The general rights afforded to refugees are outlined in chapter five of the Refugees Act. Once an asylum seeker has been granted refugee status in terms of Section 24 of the Refugees Act, they have all the rights afforded to the most favourable non-citizen, being a permanent resident. Generally, refugees are afforded all the same rights as South African citizens except the rights to vote.

A refugee has the following rights and benefits under the Refugees Act:

- i) A refugee can apply for an identity document and a refugee travel document.
- ii) Can apply for permanent residence if they have lived in the Republic for a continuous period of 10 years and SCRA has certified that they will remain a refugee indefinitely.

SECTION A:

ELIGIBILITY CRITERIA



LGBTQIA+ Refugee Status Determinations

The UNHCR guidelines on claims to Refugee Status based on Sexual Orientation provides that main international human rights treaties do not explicitly recognize a right to equality based on sexual orientation and/or gender identity but discrimination on these grounds has been held to be prohibited by international human rights law.

The guidance note further acknowledges that respect for fundamental human rights and the principle of non-discrimination are core features of the 1951 Convention and international refugee law and as such the refugee definition should be interpreted with proper regard to them and the prohibition on discrimination on the basis of sexual orientation and/or gender identity.¹

There is no grey area in South African jurisprudence on the prohibition of discrimination on the ground of sexual orientation and/or gender. The Constitution of the Republic of South Africa² and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)³ specifically prohibits unfair discrimination on the grounds of sexual orientation and gender.



Inclusion Criteria

The 1951 Convention provides the basis for determining who is a refugee and this section draws on UNHCR's guidelines on refugee status determination on claims based on sexual orientation and/or gender identity and determining the inclusion or eligibility criteria in applying the 1951 Convention definition of a refugee. The South African Refugees Act incorporates the eligibility criteria in its refugee definition and this framework is instructive on how these criteria should be used to determine refugee status for LGBTQIA+ refugees.

¹ UNHCR Guidelines on 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. International Protection No 9, HCR/GIP/12/09, 23 October 2012.

² Section 9 of the Constitution of the Republic of South Africa, 1996.

³ Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000.



Elements of the 1951 Convention Refugee Definition

It is important when determining whether a claimant meets the inclusion criteria to consider all relevant facts and circumstances of the case to determine whether all the elements in the definition are present.

There are 4 elements within the refugee definition that needs to be satisfied to meet the inclusion criteria:

- i) The claimant is **outside** the country of origin or habitual place of residence.
- ii) The claimant has a **well-founded fear** of persecution. This involves both a subjective and objective analysis, that is a subjective fear of return which has an objective basis and there is a reasonable possibility that the claimant will suffer harm in their country of origin or place of habitual residence and is therefore unwilling or unable to avail themselves of the protection of that country.
- iii) The harm feared amounts to **persecution**.
- iv) The claimant fears persecution **based on a convention ground**, that is on account of their race, religion, nationality, membership in a particular social group or political opinion.⁴

For the purposes of this manual we will consider the general elements that are applicable to all asylum claims but with a more specific focus on persecution based on membership in a particular social group.

⁴ UNHCR Self Study Module 2: Refugee Status Determination, 1 September 2005, page 29.

1 Outside the country of nationality or habitual residence

A person can only be a refugee once they are outside their country of nationality or habitual residence. This is a factual analysis based on documents, statements or facts presented by the claimant. If a claimant has more than one nationality, they would have to establish that they have a well-founded fear of persecution in each of the countries they hold nationality. A person would not qualify for refugee status if a second nationality is able to offer them protection in that country and they would enjoy the same rights and freedoms enjoyed by citizens of that country. There are instances where a refugee may be out of their country already before circumstances have arisen that brought them within realm of the refugee definition. In such circumstances a claimant might already be in the host country when they became a refugee. These claimants are called Refugees *Sur Place*. [e.g. Same-sex relationships were criminalized while the claimant was in another country].

2 Well-founded fear

The term 'well-founded fear' contains a subjective and an objective element. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status provides that since fear is subjective, the refugee definition involves a '*subjective element*' and a determination of refugee status will primarily involve an evaluation of the claimant's statement rather than the prevailing country conditions.⁵

The claimant's story or account, their personal experiences, personal and family background and the way they interpreted the events that led to their flight from their country, may be sufficient to establish a subjective fear of persecution. In some instances, the fact that they have applied for asylum is enough to establish a fear of returning to their country of nationality or habitual residence.⁶ The Refugee definition however qualifies this subjective fear in that the subjective fear should be 'well-founded'. This implies that claimant's frame of mind must be supported by an objective situation and both the subjective and objective elements must be taken into consideration when examining whether the claimant has a well-founded fear of persecution.⁷

Whether the fear is well-founded must be assessed in the context of the situation in the claimant's country of origin and the claimant's personal circumstances. The experiences of family members or other persons who have had similar experiences might also be relevant.⁸

The claimant's credibility must be evaluated against the objective information on the conditions in the country of origin.⁹ Whether or not the claimant has a well-founded fear would therefore involve a (subjective) credibility assessment and the (objective) country of origin information.¹⁰

⁵ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, January 1992, page 11, para.37.

⁶ UNHCR Self Study Module 2, page 29, *supra*.

⁷ UNHCR Handbook(1992), *supra*, pg 11 & 12, para 38.

⁸ UNHCR Self Study Module 2, *supra*.

⁹ *Ibid*.

¹⁰ Sexual Orientation in Refugee Status Determination, Working Paper Series No. 73, Refugee Studies Centre, April 2011.



Generally, to be eligible for refugee protection the claimant must prove current or future fear of persecution. Persecution has not been expressly defined in the 1951 Convention but is generally considered to involve serious human rights violations, threats to life and freedoms, and systematic or repetitive human rights violations. Additionally lesser forms of harm may cumulatively amount to persecution.¹¹

South Africa has one of the most progressive Constitutions and Bill of Rights in the world and its Equality Clause specifically prohibits discrimination based on sexual orientation and gender. Discrimination remains one of the most common experiences of LGBTQIA+ persons. Discrimination on the basis of sexual orientation and/or gender identity will amount to persecution where *“measures for discrimination, individually or cumulatively lead to consequences of a substantially prejudicial nature for the person concerned.”*¹² Whether such discrimination would amount to persecution would be determined by ‘reliable’, ‘relevant’ and ‘up-to-date’ country of origin information.¹³

If the claimant suffered persecution in the past, it may normally be assumed that they continue to be at risk of persecution. A person may still qualify for asylum if they are avoiding persecution in the future.¹⁴ LGBTQIA+ claimants may not have experienced persecution in the past and the well-foundedness of a claimant’s fear of persecution would be determined on what they might face if they returned to their country.¹⁵

¹¹ UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 16, supra.

¹² Ibid.

¹³ Ibid.

¹⁴ UNHCR Self Study Module 2, supra.

¹⁵ UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 18, supra.

The claimant further need not prove that the State authorities knew about their sexual orientation and/or gender identity before they left their country.¹⁶ If the claimant fears persecution by non-state actors, an adjudicator of an asylum claim would have to establish whether or not the State is able and willing to provide protection. If the State is able or willing to provide protection, the claimants fear will not normally be considered well-founded.

There are situations where the circumstances in the country of origin have fundamentally changed and a claimant who was previously persecuted would no longer face a risk of persecution if they returned. Normally this claimant would no longer have a well-founded fear of persecution. However, there may be exceptional situations where, despite the change in circumstances in the claimant's country, they would still be deserving of refugee protection due to compelling reasons arising out of past persecution. This would be in instances where the persecution experienced by the claimant caused ongoing psychological harm and trauma and which would make their return intolerable.¹⁷

The demeanour, behaviour or activities that may relate to a LGBTQIA+ claimant's sexual orientation and/or gender identity may be expressed or revealed in different ways or not revealed or expressed in any way. The UNHCR is of the view that due to the complex nature of how a person expresses their sexual orientation or gender identity, the distinction between forms of expression that relate to a 'core area' of sexual orientation and those that do not, are irrelevant for the purposes assessing the existence of a well-founded fear of persecution.¹⁸



Burden and Standard of proof

The UNHCR Handbook provides that the general legal principle is that "the burden of proof lies" with the claimant. But in some cases, the claimant may not be able to provide documentary or other proof to corroborate their claims and in such cases the duty to "ascertain and evaluate all the relevant facts" is shared between the claimant and the decision-maker.¹⁹

If the claimant is not in a position to prove every part of their claim and where the claimant has been 'coherent' and 'plausible', and the decision-maker is generally satisfied that the claimant story is credible, the benefit of the doubt should be given to the claimant.²⁰

Asylum claimants are not required to prove their fear beyond a reasonable doubt or that it would be more probable than not that their fear might materialise. The acceptable standard of proof is a reasonable possibility that the claimant would face some form of harm if they were to return to their country of origin.²¹

¹⁶ Ibid.

¹⁷ UNHCR Self Study Module 2, page 30, supra.

¹⁸ UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 19, supra.

¹⁹ UNHCR Handbook(1992), supra, pg 47, para 196.

²⁰ Ibid, pg 48, para 203.

²¹ Ibid.

3 Persecution

The claimant's well-founded fear must relate to persecution. While the 1951 Convention does not expressly define what persecution is, it can be inferred that a threat to life or physical freedom constitutes persecution.²²

Additionally, the UNHCR handbook provides that serious human rights violations may also constitute persecution while less serious harm, such as discrimination in various forms which may have adverse consequences on the claimant, may cumulatively amount to persecution.²³

Protected Rights

When determining whether human rights violations amount to persecution, it is prudent to distinguish between non-derogable and derogable fundamental human rights.

States may never legitimately restrict non-derogable fundamental human rights such as:

- i) The right to life;
- ii) The right to freedom from torture or cruel, inhuman or degrading treatment or punishment;
- iii) The right to freedom from slavery and servitude;
- iv) The right to recognition as a person before the law;
- v) The right to freedom of thought, conscience and religion.²⁴

The enjoyment of other derogable rights may be limited only to the extent that such limitation is necessary, proportionate and does not amount to discrimination.²⁵

Socio-economic and cultural rights, such as housing, healthcare and social security, under international human rights law do not create binding obligations on States and such rights require progressive realisation but in situations where States do extend access to these rights progressively, they may not discriminate against persons or a class of persons within society in terms of accessing those rights.²⁶

²² UNHCR Self Study Module 2, page 31, supra.

²³ UNHCR Handbook(1992), supra, pg 14 & 15, para 51-53.

²⁴ UNHCR Self Study Module 2, page 32, supra.

²⁵ Ibid.

²⁶ Ibid.



Threshold of Persecution

Not every violation of a claimant's human rights or discrimination would amount to persecution.

Serious violations of non-derogable human rights would generally amount to persecution whilst serious or less serious violations cumulatively of other rights may amount to persecution.

Discrimination can amount to persecution if it is related to a protected right, or there is a persistent pattern of discrimination, or the claimant's enjoyment of fundamental human rights are restricted.²⁷

The UNHCR handbook provides that not all persons who receive 'less favourable' treatment are victims of persecution and there are only certain circumstances where discrimination would amount to persecution.²⁸

The Handbook says discrimination would amount to persecution if "*measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned.*"²⁹

The UNHCR's guidelines on claims related to sexual orientation and/or gender identity, provides a number of instances where human rights violations and discrimination rises to the level of persecution.

These include:

- i) Threats of serious abuse and violence. Physical, psychological and sexual violence including rape. Corrective rape is common among LGBTQIA+ claimants and the guideline acknowledge that rape has been identified as being used for purposes of "*intimidation, degradation, humiliation, discrimination, punishment, control or destruction of the person.*"³⁰

²⁷ Ibid, page 34.

²⁸ UNHCR Handbook(1992), supra, pg 15, para 54.

²⁹ Ibid.

³⁰ UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 20, supra.

- ii) Measures taken to change a claimant's sexual orientation and/or gender identity by force or coercion. This may constitute *"torture, or inhuman or degrading treatment"* and violate other serious human rights such as liberty and security of the person. Examples include: *'forced institutionalisation', 'forced sex-reassignment surgery', 'forced electroshock therapy', and 'forced drug injection' or 'hormone therapy, non-consensual medical and scientific experimentation'*.³¹
- iii) Detention solely based on sexual orientation and/or gender identity, including in psychological or medical institutions. Transgender females are at particular risk of sexual and physical abuse when being placed in general male prisoner populations and solitary confinement, only because a claimant is LGBTQIA+ person, and can cause psychological harm.³²
- iv) Family or community disapproval manifests itself in threats of serious physical harm or death. Forced or underage marriage, forced pregnancy and/or marital rape and other forms of corrective measures used as a means of denial or 'correcting' non-conformity may all rise to the level of persecution.³³
- v) Restrictions on the full enjoyment of other human rights. These include: inheritance, custody and visitation rights to children, pension rights, freedom of expression, association and assembly. They may also include access to socio-economic rights, such as housing, education and healthcare. The cumulative effect of the restrictions of these rights may amount to persecution.³⁴
- vi) Discrimination in access to and retention of employment. Whilst being dismissed from employment on its own may not amount to persecution, if the claimant can demonstrate that it would be 'highly improbable' for them to enjoy any kind of gainful employment, it may amount to persecution.³⁵

Persecution vs Prosecution

Where the claimant is fleeing legitimate prosecution, they would not be entitled to international protection as a refugee. A refugee is a victim or potential victim of injustice not a fugitive from justice.

There are two ways where prosecution can amount to persecution:

- i) Where the law or policy may itself be inherently persecutory; and
- ii) Where the implementation of the law or policy is carried out in a manner that amounts to persecution.

³¹ Ibid, para 21.

³² Ibid, para 22.

³³ Ibid, para 23.

³⁴ Ibid, para 24.

³⁵ Ibid, para 25.

It is important to determine in such instances whether the State authorities use criminal law and/or procedures as a tool for persecution and this may be the case where the law in the country of origin defines as crimes those acts that are protected by international human rights standards. In such instances those laws would be inherently persecutory.³⁶

Where criminal procedures also lack basic standards of fairness and justice or where the punishment is unduly excessive or disproportional to the crime committed, prosecution may rise to the level of persecution.³⁷

The UNHCR guidelines acknowledge that many lesbian, gay or bisexual claimants come from countries that criminalise same-sex relationships and affirms that such criminal laws are discriminatory and violate international human rights norms.³⁸ In such instances persecution is evident where claimants are at risk of persecution or punishment such as death penalty, imprisonment or severe corporal punishment.³⁹

Additionally, the UNHCR guidelines determine that even where such laws are irregularly, rarely and never enforced, criminal laws prohibiting same-sex relationships could lead to an intolerable situation for an LGB claimant and could amount to persecution. It can contribute to an oppressive atmosphere, could be used for blackmail or extortion by the authorities, and promote political rhetoric that can expose LGB claimants to risk of persecution.⁴⁰

Whether an LGBTQIA+ claimant has a well-founded fear of persecution involves a fact-based assessment having regard to both the individual and country context. This would involve an examination of the legal system of the country of origin, relevant legislation and how it's interpreted, applied and how it would impact the claimant.⁴¹

Where there is no clarity on whether or not, or the extent to which the laws are enforced against LGBTQIA+ claimants, the UNHCR guidelines provide that a *"pervading and generalised climate of homophobia in the country of origin could be evidence indicative that LGBTI persons are nevertheless being persecuted."*⁴²

In situations where there are no specific laws criminalising same-sex relationships, laws of general application, such as public morality or public order laws, when selectively applied and enforced against LGBTQIA+ persons in a discriminatory manner may amount to persecution.⁴³

³⁶ UNHCR Self Study Module 2, page 33-34, supra.

³⁷ Ibid.

³⁸ UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 26, supra.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid, para 29.



Concealment of sexual orientation and/or gender identity

The UNHCR guidelines provides that a LGBTQIA+ claimant concealing or being 'discreet' about their sexual orientation and/or gender identity to avoid persecution is not a valid reason to deny refugee status. It clearly states that *"a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics to avoid persecution."*⁴⁴

It notes further that *"being compelled to conceal one's sexual orientation and or gender identity may result in significant psychological and other harms"* and could lead to intolerable situations that could amount to persecution.⁴⁵

Agents of Persecution

State persecution may be present through the criminalisation of same-sex relationships and enforcement of such laws. Where there are laws criminalising same-sex relationships it is indicative that state protection is not available, it would be unreasonable to expect a LGBTQIA+ claimant to first seek out State protection and in such instances the presumption is, unless there is evidence to the contrary, that the State is unwilling or unable to provide protection against such harm.⁴⁶

The UNHCR guidelines also clearly states that *"as in other types of claims, a claimant does not need to show that he or she approached authorities for protection before flight. Rather he or she has to establish that the protection was not or unlikely to be available or effective upon return."*⁴⁷

⁴⁴ Ibid, para 30.

⁴⁵ Ibid, para 33.

⁴⁶ Ibid, para 36.

⁴⁷ Ibid.

Agents of persecution are not limited to the State itself or its agencies. Persecution can be at the hands of non-state actors such as non-governmental entities, irregular forces who have de facto authority over a national territory, the local populace or family members. Persecution may emanate from sections of the population that do not respect the laws or rules of the country concerned. The UNHCR handbook provides that “*where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities*”, or if there is an absence or unwillingness of State protection.⁴⁸

Where the threat of harm comes from non-state actors such as family members or the community at large, persecution is established where the State is unable or unwilling to provide protection against such harm.⁴⁹ The UNHCR guidelines provides that where a non-state actor is an agent of persecution, State protection must be ‘available’ and ‘effective’. Instances where there is a lack of response or apathy, or refusal to investigate, prosecute or punish non-state actors for violence against LGBTQIA+ persons, State protection should not be considered available nor effective.

Where the legal and socio-economic circumstances have changed in the country of origin, an assessment of whether State protection is now available should not be only an examination of whether there has been a change in law, policy or procedure. The UNHCR guidelines provides that the availability and effectiveness of state protection must be examined carefully and that *de facto* and not merely *de jure* change must be present.⁵⁰

4 Convention Grounds

The refugee definition under the 1951 Convention requires that a claimant’s well-founded fear of persecution must be based on one or more of the grounds listed. This has been referred to as the ‘causal link’ requirement. The Convention ground should be a ‘contributing’ factor to the well-founded fear of persecution but need not be the sole or dominant cause.⁵¹

It is also not necessary to prove the motives of the persecutor and his intention to persecute is irrelevant.⁵² The UNHCR guidelines provides that “perpetrators may rationalise the violence they inflict on LGBTI individuals by reference to the intention of ‘correcting’, ‘curing’ or ‘treating’ the person” and while the motives of the persecutor may be a relevant factor, it is not a prerequisite. What is important to establish is the claimant’s experience of the harm rather than the mindset of the persecutor.⁵³

⁴⁸ UNHCR Handbook(1992), supra, pg 17, para 65.

⁴⁹ UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 35, supra.

⁵⁰ Ibid, para 37.

⁵¹ Ibid, para 38.

⁵² UNHCR Self Study Module 2, page 35, supra.

⁵³ UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 38, supra.



The causal link is also established where the authorities mistakenly impute a particular belief or attribute a characteristic to an individual. For example, where the authorities mistakenly believe that the claimant is gay. Where it can be shown that the state authority imputes a Convention ground, this is sufficient to establish the 'causal link'.⁵⁴

Where the persecution originates from a non-State actor, the causal link is established where:

- i) The reason for the persecution is linked to a Convention ground; or
- ii) The reason for the persecution is unrelated to a Convention ground, but the absence of State protection is for a Convention reason.⁵⁵

The 1951 Convention lists five grounds, that is race, religion, nationality, political opinion and membership in a particular social group. The South African Refugees Act includes tribe as a sixth ground. For the purposes of this manual we will focus on the most common ground of persecution for LGBTQIA+ claimants which is 'membership in a particular social group'. This does not mean that LGBTQIA+ claimants do not or could not fear persecution on any one or more of the other grounds listed in the 1951 Convention or the South African Refugees Act.

Other grounds, such as political opinion or religion may be also relevant, for example where a LGBTQIA+ activist or human rights defender may fear persecution based on political opinion in addition to membership in a particular social group. A proper refugee status determination will consider all the facts relevant to the claimant and whether the claimant might have a well-founded fear of persecution on one or more of the Convention grounds.

⁵⁴ Ibid.

⁵⁵ UNHCR Self Study Module 2, page 35, supra.

Membership in a Particular Social Group

The UNHCR handbook provides that a 'particular social group' normally "*comprises persons of similar background, habits or social status.*"⁵⁶

The UNHCR defines a 'particular social group' as "*a group of persons who share a common characteristic other than their risk of persecution, or who are perceived as a group by society. The characteristics will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.*"⁵⁷

These characteristics are often described as: **innate** (sex, race, caste, kinship ties, linguistic background, sexual orientation), **unchangeable** (could relate to person's past history such as belonging to the military or trade union) and **otherwise fundamental** to identity, conscience or the exercise of one's human rights (a person should not be expected to change or reject it).

The UNHCR guidelines provide that there are two approaches in determining 'a particular social group': 'protected characteristics' or 'social perception'. The first 'protected characteristics approach involves determining whether the 'group' is "*united either by an innate or immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it.*"⁵⁸

The second, 'social perception' approach examines whether the particular group shares common characteristics which makes it recognisable or differentiates them from society at large.⁵⁹

The UNHCR guidelines clearly states that under either of these two approaches there is broad acknowledgement that lesbians, gay men, bisexuals and transgender persons, are members of a 'particular social group' within the meaning of the refugee definition.

They further acknowledge that even though there are fewer claims of intersex claimants for refugee protection, they would also qualify under either of these two approaches.⁶⁰

Sexual orientation and/or gender identity are considered innate and immutable characteristics or are characteristics that are fundamental to human dignity such that a LGBTQIA+ claimant should not be forced to abandon them.⁶¹

⁵⁶ UNHCR Handbook(1992), supra, pg 19, para 77.

⁵⁷ UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 44, supra.

⁵⁸ UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 45, supra.

⁵⁹ Ibid.

⁶⁰ Ibid, para 46.

⁶¹ Ibid, para 47.

The UNHCR guidelines additionally provide the following considerations when determining whether LGBTQIA+ claimants can be regarded as a social group:

- i) Sexual orientation and/or gender fluidity. It may be that a claimant may still be confused or uncertain about their sexuality and/or gender identity. The characteristics of a person whose sexuality or gender identity is still evolving should be considered as fundamental to their evolving identity which would bring them within the social group ground.⁶²
- ii) There is no requirement that members of the social group associate with one another or that they are socially visible.⁶³
- iii) Decision makers should avoid reliance on stereotypes or assumptions. Not all LGBTQIA+ persons look or behave according to stereotypical concepts.⁶⁴

Internal Flight or Relocation Alternative

Where the claimant's fear of persecution is confined to a certain part of the country, an assessment of whether they could reasonably be expected to move to another part of the country where they could avail themselves of State protection, is required.

The internal flight or relocation alternative is relevant particularly where the claimant's fear of persecution is at the hands of non-State actors.⁶⁵

A determination of whether the internal flight or relocation is an option requires a two-step analysis: ⁶⁶

- i) The Relevance Analysis. This involves an examination of whether the area of relocation is "practically, safely and legally accessible" to the claimant and whether the claimant would face persecution on the same or new grounds in the new location from State or Non-State actors.⁶⁷
- ii) The Reasonableness Analysis: Where internal flight or relocation is relevant, the next step would be to determine whether the claimant could reasonably be expected to establish themselves and live a normal life "without undue hardships." ⁶⁸

Additionally, the UNHCR guidelines provide that when determining the relevance and reasonableness of the internal flight or relocation alternative, gender considerations must be considered.⁶⁹

⁶² Ibid.

⁶³ Ibid, para 48.

⁶⁴ Ibid, para 49.

⁶⁵ UNHCR Self Study Module 2, page 39, supra.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid, page 40.

⁶⁹ UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 52, supra.



Where the country criminalises same-sex relationships the presumption is that this will be applicable to the entire country and as such where the fear of persecution is related to these laws, the internal flight or relocation option would not be relevant.⁷⁰

Additionally where the laws in that country does not allow transgender or intersex person access to gender affirming medical treatment or does not allow them to change their gender markers on their documents, this also should be considered when assessing the internal flight or relocation option.⁷¹

A further consideration in assessing whether internal flight or relocation option is whether there is general intolerance of LGBTQIA+ persons countrywide.

Internal flight or relocation would not be relevant where the claimant would have to continue concealing their sexual orientation or gender identity to be safe.⁷²

In assessing the reasonableness of the internal flight or relocation option, the UNHCR guidelines states that the decision maker, who bears the burden of proof, should examine the claimants *"personal circumstances, the existence of past persecution, safety and security, respect for human rights and possibility of economic survival."*⁷³

Additionally, the claimant should be able to access a *"minimum level of political, social and economic rights."*⁷⁴

⁷⁰ Ibid, para 53.

⁷¹ Ibid.

⁷² Ibid, para 54.

⁷³ Ibid, para 56.

⁷⁴ Ibid.

SECTION B:

GENERAL PROCEDURAL CONSIDERATIONS



The UNHCR guidelines offers the following additional procedural considerations in refugee status determinations for LGBTQIA+ refugee claimants:

Issues pertaining to the interview process:

- i) LGBTQIA+ claimants should be provided with a safe and supportive environment throughout the refugee status determination process, including the provision of a safe environment during consultations with legal representatives.⁷⁵
- ii) Confidentiality is an essential condition of all refugee status determinations. The decision-maker should assure the claimant at the outset that all aspects of their claim would be treated in confidence.⁷⁶
- iii) Interviewers or decision-makers should be objective and not draw conclusions based on stereotypes of LGBTQIA+ persons, such as drawing conclusions about how the claimant behaves or appears.⁷⁷
- iv) The Interviewer or decision-maker should use words that are not offensive and shows a positive disposition towards *"diversity of sexual orientation and/or gender identity."*⁷⁸ References to the LGBTQIA+ community has evolved over the years, and it is important to learn the correct terminology.
- v) An interviewer or decision-maker should acquiesce to a request by a LGBTQIA+ claimant for an interviewer of a certain gender.
- vi) Directing questions to a LGBTQIA+ refugee claimant about sexual violence should be treated with the same sensitivity as generally applied to other survivors of sexual violence.⁷⁹
- vii) Women refugee claimants should be interviewed separately from male family members.⁸⁰

⁷⁵ Ibid, para 58.

⁷⁶ Ibid, para 60.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

- viii) Child claimants should be given specific procedural safeguards, such as prioritising the processing their claims, appointing a legal guardian and providing them with legal representation.⁸¹
- ix) Discrimination, hatred and violence can impact the claimant's ability to present their claims, and, in some instances, the claimant may still not be comfortable with expressing their sexual orientation and/or gender identity. The UNHCR guidelines thus provides that adverse judgements should not be drawn by the claimant not declaring their sexual orientation and/or gender identity at the pre-screening or first interview stage.⁸² In South Africa this would normally be at the port of entry when a claimant expresses their intention to apply for asylum and/or at the first interview stage before a Refugee Reception Officer who assists the claimant in completing the formal application form.



Guidelines on Credibility Assessments

- i) The assessment of credibility of a LGBTQIA+ claimant must be done in an "individualised" and "sensitive" way. The interviewer or decision-maker should focus on exploring the claimant's "*personal perceptions, feelings, stigma and shame*" rather than on their sexual practices.⁸³
- ii) Self-identification as a LGBTQIA+ person should be regarded as the claimant's sexual orientation and/or gender identity while instances where, the claimant does not readily identify as LGBTQIA+ alone should not rule out the claimant's asylum claim.⁸⁴
- iii) A transgender person not undergoing gender affirming treatment or surgery should not be regarded as evidence that they are not transgender.⁸⁵
- iv) A failure to disclose their sexual orientation and/or gender identity to family members or friends or that the claimant was married or had children does not in itself mean that they are not a LGBTQIA+ person. If there are credibility concerns about a claimant that is married or has children, the interviewer should explore the reasons why the claimant got married and had children and if the claimant provides a consistent and reasonable explanation of why they got married or had children, the interviewer or decision-maker should accept that as credible.⁸⁶

⁸¹ Ibid.

⁸² Ibid, para 59.

⁸³ Ibid, para 62.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

- v) The claimant not having past or present romantic or sexual relationships does not mean that they are not LGBTQIA+. It could mean that they were trying to avoid persecution. The UNHCR guidelines clearly states that *“sexual orientation and gender identity are about a person’s identity”, and not whether that identity has been exhibited through sexual acts.*⁸⁷

- vi) A claimant’s lack of knowledge of LGBTQIA+ community meeting places and activities, interactions with other LGBTQIA+ persons or failure to join LGBTQIA+ groups in the country does not mean that they are not LGBTQIA+.⁸⁸



Evidentiary Issues

The UNHCR guidelines provides the following considerations in respect of evidence required and provided at refugee status determinations:

- i) The claimant’s story is primarily the only source of evidence. The claimant should never be asked to produce documentary or photographic evidence of intimate acts and it would be inappropriate to ask a claimant couple to physically demonstrate their relationship to prove their sexual orientation.⁸⁹

- ii) The claimant cannot be asked to undergo medical ‘testing’ to prove their sexual orientation as this would be a violation of their basic human rights.⁹⁰

- iii) The lack of relevant country of origin information on the situation and treatment of LGBTQIA+ persons should not automatically lead to a rejection of the claimant’s application for asylum.⁹¹

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid, para 64.

⁹⁰ Ibid, para 65.

⁹¹ Ibid, para 66.

SECTION C:

EXCLUSION CRITERIA



In Section A we set out the inclusion criteria or the positive elements of the refugee definition, which must be met for a claimant to qualify for refugee status.

In this section we will discuss when a person meeting all requirements for inclusion under the refugee definition (they have fulfilled all the inclusion criteria in the refugee definition), are not eligible for refugee protection and are excluded.

“Exclusion” from refugee protection under the 1951 Convention means that an individual who fulfils the criteria for inclusion cannot nevertheless *“benefit from refugee status because he or she is not in need, or not deserving, of international refugee protection.”*⁹²

The UNHCR Handbook provides that there are 3 groups of persons that are excluded from refugee protection. The first group are those already receiving United Nations protection or assistance (Article 1D⁹³), such as Palestinian refugees who receive protection and assistance from UNRWA; the second group are those who are not in need of international refugee protection (Article 1E⁹⁴); and the third group are those that are not deserving of international refugee protection (Article 1F⁹⁵.)⁹⁶

The UNHCR manual provides that as in all exceptions to human rights provisions, the exclusion clause in the 1951 Convention must be interpreted *“restrictively”* and *“applied cautiously”*; and where exclusion is being considered, procedural safeguards must be in place.⁹⁷

The South African Refugees Act incorporates both Article 1 E and 1 F exclusions and for the purposes of this manual, the UNHCR handbook and manual on how these exclusions should be interpreted and applied will be discussed in turn.

⁹² UNHCR Self Study Module 2: Refugee Status Determination, 1 September 2005, page 70.

⁹³ Article 1D of the 1951 UN Convention Relating to the Status of Refugees.

⁹⁴ Article 1E of the 1951 UN Convention Relating to the Status of Refugees.

⁹⁵ Article 1F of the 1951 UN Convention Relating to the Status of Refugees.

⁹⁶ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, January 1992, page 33, para.140.

⁹⁷ UNHCR Self Study Module 2, page 70, supra.



Persons not considered to be in need of international protection.

Article 1E of the 1951 Convention provides that the convention would not apply *“to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.”*

This exclusion would only apply if the claimant has been granted permanent residence or other residence, besides citizenship and has or enjoys rights and obligations of nationals of that country.⁹⁸ The status afforded to the claimant must provide protection against refoulement, and allow them the right to return, or re-enter, and remain in the country.⁹⁹

The UNHCR Handbook provides that there is no precise definition of what constitutes ‘rights and obligations’ but it is understood that the exclusion clause would be relevant if the claimant has ‘largely assimilated’ as a national of that country would be, and would be fully protected against deportation or expulsion.¹⁰⁰ The UNHCR Handbook further provides that the words ‘taken residence’ implies that the claimant is not merely visiting that country but is continually resident in that country.¹⁰¹

Section 4(1)(d) of the Refugees Act contains a similar provision and provides that a claimant does not qualify for refugee status if they enjoy the protection of any other country in which he or she has taken residence. This provision was amended by the Refugees Amendment Act 11 of 2017 and now reads a claimant is excluded from refugee status if that person *“enjoys the protection of any other country in which he or she is a recognised refugee, resident or citizen.”*

⁹⁸ UNHCR Self Study Module 2, page 73, supra.

⁹⁹ Ibid.

¹⁰⁰ UNHCR Handbook, page 34, para.145.

¹⁰¹ Ibid, para 146.



Persons not deserving of international refugee protection

Article 1F of the 1951 Convention provides the instances where a claimant who would otherwise qualify for refugee status is not deserving of international protection and thus excluded from refugee status. The convention will not apply to a person, where there are '*serious reasons*' to believe that they:

- i) committed a crime against peace, a war crime, or a crime against humanity as defined in human rights instruments;
- ii) committed a serious non-political crime outside the country of refuge prior to his admission into that country; and
- iii) they are guilty of acts contrary to the purposes and principles of the United Nations.

The Refugees Act provides that an asylum seeker does not qualify for refugee status in the following instances:

- i) If the claimant has committed a crime against peace, a war crime or a crime against humanity,¹⁰²
- ii) If the claimant has committed a crime which is not of a political nature and which, if committed in South Africa, would mean the person faces imprisonment here,¹⁰³
- iii) If the claimant has been guilty of acts contrary to the objects and principles of the UN and Organisation of African unity.¹⁰⁴

The Refugees Amendment introduced new exclusions that fall outside the perimeters of the 1951 Convention and the 1967 OAU Convention and is yet to be implemented or tested against South Africa's international and constitutional obligations for refugee protection. The UNHCR regards exclusions under Article 1F as an exhaustive list and "*only conduct which meets the criteria required under one or more of its clauses may lead to exclusion.*"¹⁰⁵

The main reason for excluding claimants from international refugee protection is to deny persons who have committed '*heinous acts*' and serious crimes from receiving international protection and to ensure that these persons do not abuse the asylum process to avoid being held legally accountable for their acts.¹⁰⁶

¹⁰² 4(1)(a).

¹⁰³ 4(1)(b).

¹⁰⁴ 4(1)(c).

¹⁰⁵ UNHCR Self Study Module 2, page 74, *supra*.

¹⁰⁶ *Ibid*.



Application of Article 1F of the 1951 Convention

The UNHCR Manual provides the following guidance on how interviewers or decision-makers should apply this exclusion clause and is equally relevant to the application of exclusions under Section 4 of the Refugees Act:

- i) Inclusion criteria should be considered first before examining the exclusion criteria.
- ii) In considering whether there are “*serious reasons for considering*” that a claimant has committed acts that exclude them from refugee protection, “clear and credible” information is required. The standard of proof need not be beyond a reasonable doubt, but it should be more than on a balance of probabilities.
- iii) The burden of proof lies with the decision maker and only in exceptional cases will this burden shift to the claimant.¹⁰⁷

There are 4 steps to determine whether a claimant comes within the scope of an Article 1F exclusion:

1. Determining whether an exclusion is triggered.
2. Determining whether the claimant is linked to any of the acts that fall within the scope of Article 1F.
3. Determining whether the claimant incurred individual responsibility for these acts.
4. Determining whether the exclusion would meet the general legal principle of proportionality.¹⁰⁸

¹⁰⁷ Ibid, page 74-75.

¹⁰⁸ Ibid, page 75-79.



Determining whether an exclusion is triggered

Generally, this would arise during the interview with the claimant and would be triggered by statements made by claimants themselves or they may be triggered by other information that would suggest that the claimant is associated with an excludable act. If there are reasons to believe that the claimant may have been involved in an excludable act, the interviewer or decision-maker should thoroughly examine all relevant aspects.¹⁰⁹



Determining whether the claimant is linked to any of the acts that fall within the scope of Article 1F.

Article 1F exclusions are an exhaustive list and only those acts listed under Article 1F give rise to an exclusion. The UNHCR manual provides useful criteria of what activities would fall within the purview of this exclusion.

1

Article 1F(a) Crimes against peace, war crimes and crimes against humanity

- i) **Crimes against peace.** The UNHCR manual draws on the 1945 Charter of the International Military Tribunal and provides that a *"crime against peace involves the 'planning, preparation, initiation or waging of war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan of conspiracy for the accomplishment of the foregoing."* The UNHCR manual provides that due to the nature of the crime it can only be committed by those in *"high positions of authority representing the State or State-like entity and only in the context of an international armed conflict."*¹¹⁰
- ii) **War crimes** are serious breaches of international humanitarian law and that are committed during armed conflicts or linked to the armed conflict. War crimes can be committed by and against civilians and military persons. The UNHCR provides that even though war crimes were originally considered to only arise during International armed conflicts, this position was changed in the mid-1990's and serious violations of international human rights laws may also give rise to individual responsibility and could be considered a war crime. War crimes include: *"wilful killing and torture of civilians"*, *"indiscriminate attacks on civilians"* and *"wilfully depriving a civilian or prisoner of war the rights to a fair and regular trial"*.¹¹¹

¹⁰⁹ Ibid, page 75.

¹¹⁰ Ibid, page 76.

¹¹¹ Ibid.



iii) **Crimes against humanity** are “inhumane acts” (genocide, murder, rape and torture), “when committed as part of a systematic or widespread attack against a civilian population” and can take place during an armed conflict or not, and be committed by any person.¹¹²

2 Article 1F(b)- Serious non-political crime committed outside the country of refuge

Whether a claimant has committed an act that constitutes a “serious crime” should be judged against international standards, and whether or not a crime is “non-political” will depend on several factors, including “the motivation, context and method” of the crimes as well as the “proportionality of the crime in relation to its objectives”.¹¹³ Crimes committed within the country of refuge is not excluded under Article 1F(b) of the 1951 Convention.¹¹⁴

3 Article 1F(c)- Acts contrary to the purposes and principles of the United Nations

Any act that is contrary to the purposes and principles set out in the UN Charter would apply to this exclusion and includes acts which “*on account of their gravity and impact, are capable of affecting international peace, security and peaceful relations between States, or serious and sustained human rights violations.*”¹¹⁵

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid, page 77.

¹¹⁵ Ibid, page 77.



Determining whether the claimant incurred individual responsibility for these acts

When it has been established that the claimant has been connected to an excludable act, the next step is to determine whether the claimant is individually responsible for the excludable act. The UNHCR manual provides that this will be present if:

- i) The claimant committed the act themselves.
- ii) The claimant participated in the act committed by other persons, such as planning, ordering or instigating the commission of the act by others.
- iii) The claimant made a substantial contribution to the act by aiding and abetting or participating in a "joint criminal enterprise."¹¹⁶

Further Considerations

- i) Persons in positions of authority may be held responsible for crimes committed by their subordinates.¹¹⁷
- ii) The claimant must have the necessary *mens rea* in the commission of the act, that is they must have the necessary intent in the commission of the act, and the knowledge and appreciation of the consequences of their actions.¹¹⁸ Additionally, it is important to establish whether the claimant has a valid defence that would exempt them from liability.¹¹⁹



Determining whether the exclusion would meet the general legal principle of proportionality.

Interviewers and decision-makers should weigh the seriousness of the crime against the potential consequences for the claimant.¹²⁰

¹¹⁶ Ibid, page 78.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid, page 79.

SECTION D: CESSATION



Refugee status by its very nature was intended to be temporary in nature and as such there are instances where international refugee protection is no longer needed. If a refugee can safely return to their country of origin or habitual residence, then international protection is not justified or necessary.¹²¹ Like the Exclusion Clauses discussed in the preceding section, the 1951 Convention lists an exhaustive list of circumstances where refugee status will cease. Due to the severe consequences of removing refugee protection from a claimant, an application to invoke the cessation clause must be made with careful consideration as to whether all the relevant criteria are met. The UNHCR manual provides that cessation clauses must be interpreted restrictively and with procedural safeguards in place, including the ability for a claimant to challenge the decision to remove their refugee status.¹²²

Article 1C of the 1951 Convention envisages two categories of situations where cessation would apply:

- i) Acts by the claimants giving rise to cessation.
- ii) Fundamental Changes in the Country of Origin/Habitual Residence.



Acts by Claimants

Article 1C of the 1951 Convention provides for cessation where a claimant:

- i) voluntarily re-avails themselves of the protection of their country of nationality; or
- ii) having lost their nationality, voluntarily re-acquires it; or
- iii) acquires a new nationality and enjoys the protection of that country; or
- iv) voluntarily re-establishes himself in his country of origin.

¹²¹ Ibid, page 100.

¹²² Ibid, page 100.



Fundamental change in the circumstances

Article 1C(5) and (6) of the 1951 Convention provides for the cessation of refugee status if:

"(5) He [or she] can no longer, because the circumstances in connection with which he[or she] has been recognized as a refugee have ceased to exist, continue to refuse to avail him[or her]self of the protection of the country of his[or her] nationality;

Provided that this paragraph shall not apply to a refugee failing under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail him[or her]self of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he [or she] has been recognized as a refugee have ceased to exist, able to return to the country of his[her] former habitual residence;

*Provided that this paragraph shall not apply to a refugee failing under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his[her] former habitual residence."*¹²³

The UNHCR manual provides that these clauses are applicable if objective circumstances in the country of origin or former habitual place of residence have changed fundamentally, and such change is "stable and durable." The "compelling reasons" exception reflects a "general humanitarian principle" that a claimant or their family who has suffered severe forms of persecution should not be compelled to return.¹²⁴

¹²³ Article 1C(5)&(6) of the 1951 Convention on Relating to the Status of Refugees.

¹²⁴ UNHCR Self Study Module 2, page 102, supra.



The South African Refugees Act incorporates the cessation clauses of the 1951 UN Convention. According to section 5 of the Refugees Act, a refugee ceases to qualify for refugee status if:

- He or she voluntarily re-avails himself or herself of the protection of the country of his or her nationality,¹²⁵
- Having lost his or her nationality, he or she by some voluntary and formal act reacquires it,¹²⁶
- He or she becomes a citizen of the Republic or acquires the nationality of some other country and enjoys the protection of the country of his or her new nationality,¹²⁷
- He or she voluntarily re-establishes himself or herself in the country which he or she left,¹²⁸
- He or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist and no other circumstances has arisen which justify his or her continued recognition as a refugee,¹²⁹ provided that this subsection does not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality.¹³⁰

As with the new exclusion clauses introduced by the Refugees Amendment Act, new cessation clauses were also included and fall outside the perimeters of the 1951 Convention and the 1967 OAU Convention, and is yet to be implemented or tested against South Africa's international and constitutional obligations for refugee protection. The UNHCR regards the grounds for cessation under Article 1C as an exhaustive list.¹³¹

¹²⁵ Section 5(1)(e) of the Refugees Act.

¹²⁶ 5(1)(b).

¹²⁷ 5(1)(c).

¹²⁸ 5(1)(d).

¹²⁹ 5(1)(e).

¹³⁰ 5(1)(f).

¹³¹ UNHCR Self Study Module 2, page 100, supra.

SECTION E:

APPLYING FOR REFUGEE STATUS IN SOUTH AFRICA



Asylum management falls under a separate competence of the Department of Home Affairs and operates distinctly from general immigration up until the stage where an asylum claim is finally rejected; that is they do not qualify for refugee status.

In such matters a claimant will move from the asylum management system to the immigration system to be dealt with under the Immigration Act 13 of 2002. In this section we will discuss the administrative function of DHA officials that a claimant would come across in making their claim and the process of applying for asylum in South Africa.



Asylum Management Officials

1 Refugee Reception Office

The RROs are under the administration of the Department of Home Affairs. The office serves as the fundamental point of contact for asylum seekers and refugees. It is where the process of the application takes place, from the conducting of interviews, permit renewals and the provision of refugee status documents. There are five offices in South Africa, namely in Durban, Musina, Pretoria, Cape Town and Gqeberha.

2 Refugee Status Determination Officer

An RSDO is a legal and administrative official of DHA. They have the responsibility of determining whether the applicants that are seeking asylum under the Refugee Act meet the eligibility criteria for recognition as a refugee.



3 Refugee Appeals Authority of South Africa

The RAASA is an internal appeals forum that hears appeals of claims that have been rejected for asylum.

According to section 14 of the Refugees Act the Appeal Authority has the powers and duties to:

- (a) hear and determine any question of law referred to it in terms of this Act
- (b) hear and determine any appeal lodged in terms of this Act
- (c) advise the Minister or Standing Committee regarding any matter which the Minister or Standing Committee refers to the Appeal Board

4 Standing Committee for Refugee Affairs

According to section 9 and 11 of the Refugee Act, the SCRA is an independent committee that has the powers and duties to:

- (a) Formulate and implement procedures for the granting of asylum
- (b) Regulate and supervise the work of the Refugee Reception Offices
- (c) Liaise with representatives of the UNHCR or any non-governmental organisation
- (d) Advise the Minister or Director-General on any matter referred to it by the Minister or Director-General
- (e) Review decisions by Refugee Status Determination Officers in respect of manifestly unfounded applications



Stages Of The Asylum Seeker Process In South Africa

1 The asylum seeker enters South Africa

To enter the country lawfully, a non-national should enter the country at a valid port of entry and generally should have an immigration permit issued under the Immigration Act. An asylum seeker who enters the country with or without a visa, should at the earliest possible time express their intention to apply for asylum in South Africa. If such an intention is communicated to Immigration officers at a port of entry, border officials are obligated to issue them an asylum transit permit issued in terms of section 23 of the Immigration Act. The asylum seeker transit permit is only valid for 5 days and a claimant must report to the nearest Refugee Reception Office to complete their application for asylum.

2 Refugee Reception office

Within the 5 days, the asylum seeker must present themselves to one of the five RROs. The asylum seeker is free to choose any office. This is to ensure that an application for asylum is made before the permit expires. A Refugee Reception Officer is to provide a BI-1590 form that will ask for details related to the applicant's identity, their family history, their country's background and their reasons for applying for asylum. Fear of persecution based on sexual orientation is a valid reason to seek asylum. This stage of the process is the first interview.

This application should be accompanied by the following, if available:

- A section 23 asylum transit visa.
- Any proof of identification from the country of origin.
- A travel document if the applicant is in possession of one.

The applicant's biometrics will also be taken prior to the submission of the application.

Temporary asylum seeker permit

Once the application has been made, the asylum seeker is issued a temporary asylum seeker permit in terms of Section 22 of the Refugees Act, pending the outcome of their application.

The validity of the permit can range from one week to six months and the asylum seeker is allowed to work and study in South Africa.

It is important for claimants to be aware that this permit only recognises that they have applied for asylum, it is not confirmation of being granted refugee status.



This permit will contain the following information:

- A photograph of the claimant as well as a fingerprint.
- The claimant's full name, their country of origin and their file number.

The Director-General can withdraw an asylum seeker permit if ¹³²:

- The asylum seeker contravenes conditions granted on the visa,
- If the application for asylum was rejected,
- If the application was found to be manifestly unfounded, abusive or fraudulent; and
- If the asylum seeker becomes ineligible for refugee status because they are excluded from status or they have ceased to qualify for it.

4 Interview by Refugee Status Determination Officer

The asylum seeker is required to return to the RRO for a second in-person interview. RSDOs are the only officials that can determine refugee status, in accordance with section 24 of the Refugees Act. The RSDO's role includes cross-referencing the credibility of the information given to them in the second interview, along with the claimant's BI-1590 form. This is why it is encouraged that claimants be consistent with the reasons for claiming asylum in both interviews. Any inconsistencies in the reasons the claimant feared persecution between the first and second interviews may result in the claim being rejected.

The claimant is permitted to have representation at the hearing, present witnesses or submit affidavits and other any other relevant evidence.¹³³ The claimant bears burden of proof to establish if they meet the requirements to be a refugee.¹³⁴

¹³² Section 22(6) of the Refugee Act.

¹³³ Reg 10(4) of the Refugee Regulations.

¹³⁴ Reg 11 of the Refugee Regulations.

5 Decision by RSDO

The claimant's section 22 asylum seeker permit will be renewed until the RSDO makes their decision.

There are four possible RSDO decisions:

- i) They can grant asylum in terms of section 24 of the Refugee Act.¹³⁵

This means that the asylum seeker has been granted refugee status and will be issued with a formal recognition document (section 24 permit) under section 24 of the Refugees Act, valid for four years. They can apply for a refugee identify card and a refugee travel document.

- ii) They may reject the claim as Unfounded.¹³⁶

This means that the claimant failed to meet their burden of proof, and it could be for numerous reasons. The claimant has 30 days to appeal the RSDO decision. The procedure to appeal entails submitting an affidavit at their RRO and their case will go to the RAASA, under section 26 of the Refugees Act.

- iii) They may reject the claim as Manifestly Unfounded, Abusive or Fraudulent.¹³⁷

This means that the claimant has not met the eligibility criteria of a refugee and failed to enter the Republic for reasons recognised under section 3 of the Act. The procedure thereafter is an automatic referral to the Standing Committee for Refugee Affairs for further review in terms of section 25. The claimant will have 14 working days to make further submissions to the SCRA to prove the validity of their claim.

- iv) They may refer a question of law to the Standing Committee.¹³⁸

Should the RSDO reject the application, they are obligated to provide reasons for the rejection.¹³⁹

¹³⁵ Section 24(3)(a) of the Refugees Act.

¹³⁶ Section 24(3)(b) of the Refugees Act.

¹³⁷ Section 24(3)(c) of the Refugees Act.

¹³⁸ Section 24(3)(d) of the Refugees Act.

¹³⁹ Reg 12(3) of the Refugee Regulations.



Refugee Appeals Authority of South Africa

The RAASA has the powers and duties to adjudicate over cases that the RSDO has rejected as unfounded. If the claimant appeals the decision to reject their asylum claim, they have a second opportunity to present evidence, clear up inconsistencies and discharge their burden of proof. In carrying out their duties, the RAASA has the responsibility to “*function without any bias and must be independent.*”¹⁴⁰

The appeal process with RAASA is as follows:

- The claimant must submit an appeal affidavit to their relevant RRO.
- The claimant will be issued an appeal date to appear before the RAASA. The failure to appear will result in the RAASA making a decision in absentia, without the claimant having the opportunity to make their own submissions or provide further information for their claim.
- The claimant will be allowed legal representation, should they request it.¹⁴¹ The legal representative must submit heads of argument.
- The RAASA can invite representations by a UNHCR representative.

After the submission of the appeal affidavit and the appeal hearing the RAASA has the power to confirm, set aside or substitute any decision taken by a RSDO.¹⁴² The RAASA was previously required to meet its quorum of 3 members for each appeal but that was changed to address the backlog of cases. Only one member needs to be present for an appeal. The RAASA makes administrative decisions and if an asylum seeker would like to review a RAASA decision, they may take the case to the High Court on judicial review in terms of PAJA.

¹⁴⁰ Section 12 of the Refugees Act.

¹⁴¹ Section 26(4) of the Refugees Act.

¹⁴² Section 26(2) of the Refugees Act.



The Standing Committee for Refugee Affairs

The SCRA has the powers and duties to adjudicate over cases that the RSDO has rejected as manifestly unfounded.

The SCRA can call for oral or written representations from a UNHCR representative and to investigate or enquire about more relevant information to assist in them re-considering the RSDO's decision.

Within 14 working days, the asylum seeker may make submissions to the SCRA.

The submission will contain the following information:

- The claimant's claim;
- Proof of the validity of a claim based on sexual orientation.
- Legal submissions that indicate the points of law (procedural or substantive) that may have been applied incorrectly in the RSDO Decision.

Thereafter, the SCRA will confirm¹⁴³ or remit¹⁴⁴ the decision to the RSDO with directions.

If the RSDO has referred a question of law to the SCRA, the SCRA must refer that application back to the RSDO with the necessary directives that will assist the RSDO with making a decision.

Like RAASA, SCRA makes administrative decisions, and an asylum seeker may review a SCRA decision by instituting proceedings in the High Court on judicial review in terms of PAJA.

¹⁴³ Section 25(3)(a) of the Refugees Act.

¹⁴⁴ Section 25(3) of the Refugees Act.

WE LOOK FORWARD TO CONNECTING WITH YOU.

 www.lrc.org.za

 [LRCSouthAfrica](#)

 info@lrc.org.za

 [Legal Resources Centre](#)

 [LRCSouthAfrica](#)

 [LRCSouthAfrica](#)

 [lrcsouthafrica](#)

JOHANNESBURG/NATIONAL OFFICE

Tel: +27 11 038 9709

CAPE TOWN OFFICE

Tel: +27 21 879 2398

DURBAN OFFICE

Tel: +27 31 301 7572

MAKHANDA OFFICE

Tel: +27 46 622 9230