



PRESS STATEMENT

CENTRE FOR HUMAN RIGHTS CALLS ON SA GOVERNMENT TO APPOINT TRAINED PROFESSIONALS TO PROCESS APPLICATIONS DEALING WITH ASYLUM SEEKERS ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY

5 March 2018

Granting asylum seekers refugee status on the basis of persecution on the grounds of sexual orientation in Africa – best practice or just best laws from South Africa?

Following a seminar organised by the Centre for Human Rights, which revealed the difficulties of asylum seekers in South Africa applying for refugee status on the basis of sexual orientation or gender identity, the Centre calls on the South African government to appoint trained professionals to process applications in a sensitive manner and in an environment that protects the privacy and dignity of applicants, with a view to achieving a humane yet thorough and expedited process.

Background

On 1 March 2018, the Centre for Human Rights hosted a panel discussion on sexual orientation and gender identity as a basis for asylum and refugee status. The discussion focused on South African domestic law and regional law in Europe that processes asylum seekers' refugee status on the basis of persecution on the grounds of sexual orientation and gender identity, and to better understand the challenges of implementing these laws.

The event was part of a weeklong *Advanced Course on the Rights of Sexual Minorities in Africa*, run annually by the Centre, attended by participants from twenty African countries. The panel included Ulrich Stege, of the Human Rights and Migration Law Clinic at International University College of Turin; and Albert Kafula and Tiwonge Chimbalanga, both seeking refuge in South Africa based on their sexual orientation and gender identity respectively.

The importance of discussing refugee status based on sexual orientation and gender identity in South Africa

The last decade or so has seen a steadily growing number of persons fleeing African countries to seek refuge in other more accepting countries on the basis of their sexual orientation or gender identity. The countries and regions of refuge include European countries, Canada, the USA, Australia -- and also South Africa. Many African states have become progressively unsafe for sexual and gender minority citizens to live in, due to (1) a tightening of laws criminalising consensual adult same-sex sexual conduct, (2) state agency attacks, (3) arbitrary arrests, (4) criminal prosecution, sometimes of a malicious nature, (5) increasing reduction of civil society space to defend sexual and gender minorities, (6) reprisals against human rights defenders defending sexual and gender minorities, (7) and rising vigilantism against sexual and gender minorities among non-state actors. Thirty-three states in Africa still criminalise same-sex conduct between consenting adults.

South Africa as a country which holds the promise of hope for sexual and gender minority asylum seekers

Twenty-two African states have either abolished criminalisation of same-sex conduct or never criminalised it. However, of the 22 states only South Africa is legally safe for sexual and gender minorities because of its clear intolerance of discrimination against sexual and gender minorities through the law. Explicit formal protection is granted by the Constitution and legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (PEPUDA), and the Refugee Act of 1998. Countries such as Rwanda, while not formally criminalising same-sex conduct in their penal code, still persecute sexual and gender minorities, deriving the motivation from provisions in their constitutions that prohibit marriage between same-sex couples.

South African law, through the Refugee Act of 1998, domesticates the UN Refugee Convention. Section 3 allows for granting of asylum and refugee status to persons based on a well-founded fear of persecution based on membership of a 'social group'. A 'social group' is explicitly defined (in section 1 of the Act) as including sexual orientation and gender.

Because of the clarity of the law, it would therefore follow that South Africa would stand out as best practice. But is South Africa best practice or just best laws?

The asylum-seeking and refugee status determination process by the South African Department of Home Affairs is fraught with undue delays, bribery, lack of professionalism and sometimes violence. It emerged from the contributions by panelists that it can take up to 10 years for an applicant to be granted refugee status. The situation is even worse when it involves persons seeking asylum on the grounds of sexual orientation or gender identity. Their reasons for seeking asylum are arbitrarily and unreasonably disbelieved; they are ridiculed, shamed, and preached to by Home Affairs personnel; paraded in Home Affairs offices; and their testimonies are not properly recorded. Transgender asylum seekers are subject to gender restrictive queues and facilities at the refugee reception centres. Asylum seekers have to make countless visits to the refugee reception centres before they are eventually granted an appointment or interview date. The waiting areas outside these reception centres are generally unsafe, with robbery, pick-pocketing and beatings by the private security officers meant to manage the queues. In addition to these acts of violence, persons belonging to sexual minority groups are commonly assaulted by other asylum seekers, affirming the claim that the societies from they have fled are indeed homophobic and intolerant of sexual and gender minorities.

South Africa should take leadership in Africa and around the world in treating all asylum seekers with receptivity and sensitivity; processing their applications with professionalism and expeditiousness; by staff who are diligent and professional; in a physical environment that guarantees privacy and protects the dignity of persons seeking asylum on the basis of sexual orientation and gender identity. Refugee reception centre staff must adhere to a professional code of conduct that guides them to do their work diligently and without bias of any kind, especially towards persons from sexual and gender minorities.

Call to South African government

The South African government, through the Departments of Home Affairs and of International Relations and Cooperation, in so far as far as refugee determination based on sexual orientation and gender identity is concerned, should:

1. Provide formal training to all staff involved in the refugee determination process, on the relevant law and processes to be followed when making a determination;
2. Such training should include a detailed and current appreciation of the socio-legal context across the African continent, at the very least in the countries from which the largest number of sexual minority applicants come;
3. Commit the necessary funds for private interview rooms, as has been done in police stations for survivors of sexual crimes for example, by modifying existing physical spaces;
4. Open more reception centres and hire more staff to reduce overcrowding and the inordinately long periods to submit applications respectively;
5. Make a clear public pronouncement to clarify the position of South Africa as a country that is receptive to asylum seekers, especially those seeking asylum based on the fear of persecution due to their sexual orientation or gender identity, and not one in which they are subject to further harassment, unfair treatment and violence at the hands of its agents;
6. Conduct a public audit on the number of successful and unsuccessful applications for refugee status based on sexual orientation and gender identity, and use this as a clear mark of South Africa's positive practice.

The plight of asylum seekers on the basis of sexual orientation and gender identity is, in many ways, similar to those of other asylum seekers. Improving the treatment of asylum seekers and the refugee-determination process as a whole is, therefore, an important objective.

While admitting the challenges posed by limited funding, staff and facilities, as well as the need to identify fraudulent applications for refugee status in general, the Department of Home Affairs should not appear as an extension or a microcosm of the wider South African society, whose attitude is often dissonant to the country's laws. South Africa is often seen as a place where homophobia and transphobia are pervasive, especially in peri-urban and rural areas, where many asylum seekers reside on account of their limited means, due to their inability to find casual work -- precisely because they belong to sexual and gender minority groups.

This is an opportunity for South Africa to distinguish itself as a leader in Africa, rather than distance itself from its constitutional obligation to treat all persons with dignity and equality.

For further information, please contact:

Mr Geoffrey Ogwaro

Project Manager: SOGIE Unit

Centre for Human Rights

Faculty of Law

University of Pretoria

Tel: +27 (0) 12 420 5409

geoffrey.ogwaro@gmail.com

www.chr.up.ac.za