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Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions

FMSP Report
April 2010



**Protection and Pragmatism:
Addressing Administrative Failures in South
Africa's Refugee Status Determination Decisions**

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Executive Summary and Recommendations

Scope

This report analyses the quality of status determination decisions issued at South Africa's five permanent refugee reception offices (Johannesburg, Pretoria, Durban, Cape Town and Port Elizabeth), as well as the additional temporary office established in Pretoria (Tshwane Interim Refugee Reception Office, or TIRRO). The analysis is based on a review of 324 negative status determination decisions, or rejection letters, from these offices.

The decision letters, which represent the culmination of the status determination process conducted by the Refugee Status Determination Officer, play a crucial role in providing protection for asylum seekers who can no longer seek the protection of their home countries. Because asylum seekers whose claims are not properly evaluated may be returned to their home countries, where they face serious threats to their lives and freedom, a flawed status determination process has grave human rights repercussions.

Both micro and macro level causes have influenced the quality of status determination decisions. At the macro level, the broader migration context has given rise to several systemic factors that affect the proper functioning of the status determination process:

- An immigration policy that does not provide adequate opportunities for legal economic migration, resulting in artificially high numbers of people seeking asylum as a means of temporarily regularising their status;
- The failure to address large migration flows from Zimbabwe. Because the government has not implemented any alternative documentation options, large numbers of Zimbabweans have been forced into the refugee system, increasing demand beyond the capacity of the system;¹

¹ For a discussion of group-based status determination and other documentation options to deal with Zimbabwean migration, see Polzer, T. (2009). Immigration Policy Responses to Zimbabweans in South Africa: Implementing Special

- General capacity constraints throughout the Department of Home Affairs.

The Department of Home Affairs has been open about these challenges and has been working to address them through an administrative ‘turn-around strategy’ and a policy and legislative review process of refugee and immigration law. FMSP recognises the challenges facing the Department and the efforts to address them. By focusing on the details of refugee status determination decisions, this report aims to support the DHA’s ongoing administrative reform processes in the refugee status determination system, while acknowledging that this system is unlikely to become fully functional without broader policy and legislative changes to the immigration system.

At the micro level, a properly functioning status determination system is characterized by an administratively fair procedure, which includes a fair status determination hearing, a well-researched decision, and a decision that properly implements the provisions of refugee and administrative law and gives effect to the Constitutional guarantee of administrative justice.

In analyzing the content of these letters, this report focuses on the following aspects:

- The accuracy of information regarding the asylum seeker and his or her claim;
- The proper application of the provisions of South Africa’s Refugees Act (Act 130 of 1998);
- The giving of adequate and rational reasons for the decision;
- A decision that gives effect to the Constitutional guarantee of administrative justice and reflects the procedural guarantees provided by the Promotion of Administrative Justice Act (PAJA).

Implications of flawed status determination decisions

Even while administrative and policy reform processes are ongoing, however, the integrity of the refugee status determination process remains essential. The key point for evaluating the integrity of the overall process is the status determination decision, as represented by status determination letters.

Deficiencies in this process have serious repercussions not just for the asylum seeker, but also affect the credibility of DHA in carrying out its functions in accordance with the law. Moreover, these deficiencies have financial implications. Some of the most serious consequences include the following:

- **Protection:** the individuals whom the refugee system was designed to protect—those who have fled serious rights abuses, are not receiving this protection. Instead, genuine asylum seekers may be returned to the prosecution from which they fled, in violation of the international law prohibition against refoulement—returning an asylum seeker to a life-threatening situation. Furthermore, the lack of individualised assessment, as identified by this research, goes against the provisions of refugee and administrative law and has resulted in a system that is based on general categories of eligibility depending on country of origin—effectively basing the status determination outcome on a set of refugee and non-refugee producing countries without consideration of individual experiences.
- **Administrative justice:** All administrative processes in South Africa are governed by the law, including the Constitution and the Promotion of Administrative Justice Act (PAJA), which regulate the interactions between state institutions and their clients on a transparent and accountable basis. Disregard for the Constitutional guarantee of administrative justice erodes the rule of law in South Africa, undermines public confidence in the institutions of the state, and threatens the vibrancy of democracy. In addition to undermining the administrative rights of genuine refugees, the flaws and delays in the current refugee status determination process have created an

opportunity for individuals who are not fleeing persecution to exploit the system, with implications for public confidence in the refugee system overall.

- Financial and institutional rationality: Significant state resources are being spent on a refugee status determination system that is failing to fulfil its core function, meaning that these resources are, in effect, being wasted. Attempts to increase the speed and efficiency of status determination in order to reduce a large backlog have had the unintended consequence of reducing the quality of decisions and have therefore merely shifted the burden of decision-making from status determination officers to the Refugee Appeal Board. This has resulted in major delays in the final adjudication of asylum claims for those asylum seekers who are able to take advantage of the appeals process, and has not reduced the cost of the system or the opportunities for abuse.

Findings

This report reveals that there are serious flaws in the status determination process as it is being conducted by Refugee Status Determination Officers. Virtually none of the letters reviewed contained a proper evaluation of the asylum claim in accordance with refugee and administrative law. Some of the key problems identified include the following:

- A cursory interview and status determination process that is weighted toward the issuing of rejections for reasons not connected to the strength of the asylum claim;
- Errors of law: Refugee Status Determination Officers mistakenly applied several aspects of refugee law. These included:
 - Misapplying the concept of persecution;
 - Failing to properly assess the well-founded fear criterion;
 - Misusing the credibility concept;
 - Misusing the concept of “social group” as defined by the Refugees Act;
 - Employing the wrong standard of proof.

- Improperly applying Section 3(b) of the Refugees Act and failing to differentiate the requirements of Section 3(a) from Section 3(b);
- Cutting and pasting from other decisions, resulting in identical decisions and decision letters containing information on the wrong claimant;
- Failure to provide adequate reasons and in some instances, any reasons at all;
- Reliance on sparse, immaterial, or outdated country information;
- Failure to apply the mind, including:
 - Failure to undertake a proper deliberation;
 - The consideration of irrelevant factors or the failure to consider relevant factors;
 - No rational connection between the decision and the information before the status determination officer;
 - No rational connection between the decision and the reasons given by the status determination officer;
 - Illogical conclusions and speculation without supporting evidence;
 - Mistakes of fact and selective use of country information.

As a result of these deficiencies, most asylum seekers received generalized rejection letters that contained no individualized assessment of the particulars of their asylum claim. Most of the decisions reviewed were in essence generic rejections that could have been issued without any status determination interview even taking place; they were based solely on the asylum seeker's country of origin.

Recommendations

As noted above, reform of the refugee reception system without broader reform of South Africa's immigration management system is unlikely to be effective. As the immigration framework is reformed, the system of refugee protection must be fundamentally re-shaped to recognise that the refugee system is not an immigration

control system; it must stand separate from and parallel to the system of immigration control. The protective purpose of refugee law must be made paramount, in accord with South Africa's domestic and international legal obligations, so that individuals who are entitled to this protection are able to avail themselves of it.

However, while such broader reforms are being debated, there is already significant scope for immediately addressing the most egregious failings in status determination decisions. Several changes to the system are necessary in order to achieve both greater administrative effectiveness and justice, and to move toward the fundamental reorientation of the refugee framework towards protection:

- Ensure the status determination officers are given sufficient time and resources to interview an asylum seeker, do the necessary country research, and write a well-reasoned decision that includes an individualized assessment of the asylum claim and the reasons for the rejection. This means eliminating the targets currently in place requiring status determination officers to process a certain number of claims per day;
- Provide status determination officers with adequate training so that they can produce administratively fair and individualised decisions based on a proper application of the law;
- Establish review mechanisms that ensure that status determination decisions are fulfilling the requirements of administrative justice and are properly applying the elements of refugee law;
- Eliminate the current review procedures that focus on checking only positive decisions. Establish a system of random reviews of both positive and negative decisions that ensures that decisions are being administered in accordance with PAJA and the Refugees Act;
- Reduce the burden on the Refugee Appeal Board by ensuring that the Refugee Status Determination Officers are able to operate effectively and without sacrificing quality for efficiency.

Introduction

This report evaluates the quality of negative refugee status determination decisions, or rejection letters, issued to asylum seekers by the Department of Home Affairs.

In reaching its conclusions, the analysis recognizes that systemic factors and migration patterns in South Africa greatly impede the proper functioning of the status determination process. Specific challenges include:

- An immigration policy that does not provide adequate opportunities for legal economic migration, resulting in artificially high numbers of people seeking asylum as a means of temporarily regularising their status;
- The failure to address large migration flows from Zimbabwe. Because the government has not implemented any alternative documentation options, large numbers of Zimbabweans have been forced into the refugee system, increasing demand beyond the capacity of the system;
- General capacity constraints throughout the Department of Home Affairs.

The Department of Home Affairs has acknowledged the challenges it faces and has been working to address them through an administrative ‘turn-around strategy’ and a policy and legislative review process of refugee and immigration law. By focusing on the details of refugee status determination decisions, this report aims to support the DHA’s ongoing administrative reform processes in the refugee status determination system, while acknowledging that this system is unlikely to become fully functional without broader policy and legislative changes to the immigration system.

Even while administrative and policy reform processes are ongoing, however, the integrity of the refugee status determination process remains essential. The issuing of status determination decisions is a crucial step in the substantive and administrative process of adjudicating asylum applications. Constituting the determination of a

person's eligibility to remain in South Africa as a refugee, these decisions reflect the outcome of the status determination interview between an asylum seeker and a Refugee Status Determination Officer (RSDO). During the status determination interview, the asylum seeker describes his or her situation and the reasons that he or she cannot return to the country of origin while the RSDO investigates the asylum claim. The decision represents the assessment of this claim.

When the decisions are negative, the decision letter also provides the material on which an asylum seeker must base his or her appeal. In most cases, this means preparing an appeal on the basis of a decision that lacks concrete reasons. Moreover, given that many asylum seekers do not understand their right to appeal, the RSDO's determination often constitutes a final decision regarding who is able to stay in South Africa legally and receive protection, and who must return to their country of origin, despite risk of persecution, or else remain in South Africa illegally and without protection. The asylum decision is therefore central to whether South Africa fulfils its international and domestic legal obligations to provide protection to persons fleeing persecution and conflict.

In addition to this crucial substantive role, status determination decisions also must be procedurally fair in accordance with the Constitutional guarantee of administrative justice. Yet, Refugee Status Determination Officers are under increasing pressure to speed up the status determination process both to reduce the backlog of unprocessed cases and to meet the overwhelming demand at the reception offices. Badly motivated and unsubstantiated rejection letters, however, slow down the appeals process—simply relocating the backlog to the Refugee Appeal Board (RAB) rather than reducing it.

Moreover, where the calibre of letters is so poor that the content provides no basis for review, the Refugee Appeal Board is effectively turned into a court of first instance, forced to re-hear most cases that come before it in order to reach a decision. This means it takes over the role of the Refugee Status Determination Officers even though, as an appeal body, the RAB is not designed to conduct *de novo* hearings of asylum

applications.² This added burden, in combination with the large demand for appeals, has overwhelmed the appeal board and created a large backlog. Waiting times for an appeal hearing often stretch beyond a year.

A review of rejection letters from the country's refugee reception offices reveals profound and widespread failures in the status determination system. In light of the centrality of RSDO decisions to the asylum system, the findings of this study are extremely troubling.

RSDOs must decide whether to return an asylum seeker to a potentially life-threatening situation. Yet, despite the fundamental rights that are at stake, none of the 324 letters reviewed could be categorised as fulfilling the Constitutional guarantee of administrative justice. Instead, they were characterised by errors of law, an absence of reasons, a lack of individualised decision-making, and a widespread failure to apply the mind.

What is clear from these decisions is that the first stage of status determination is not operating in accordance with any legal standards and is, in fact, hardly operating at all. Many decisions amounted to generic rejections that could be given to anyone, without the benefit of an interview. They demonstrated no connection to the particular claimant and no consideration of the specifics of the individual claim. Often, they were filled with irrelevant background information. In addition, a number of letters contained outdated and inaccurate information, or information about the wrong claimant. Finally, the presence of numerous identical letters reveals that individualized decision-making is not taking place; instead, the crucial determination of whether it is safe for an individual to return to his or her country of origin relies on the unthinking cutting and pasting of material.

² In *Tantoush*, the court rejected as an error of law the RAB's practice of hearing appeals as *de novo* hearings (para. 93), ruling that "the RAB is still required to have regard to the proceedings and the evidence adduced before the RSDO" (para 92). *Ibrahim Ali Abubaker Tantoush v The Refugee Appeal Board and Others*, 13182/06, High Court (Transvaal Provincial Division), 11 September 2007.

This analysis does not assume that the individuals in question are entitled to refugee status. The crucial point is that, by failing to meet the standard of administrative justice, the decision-making process is fatally flawed. As a result, it is not possible to ascertain the strength of an individual's claim, and the accuracy of the RSDO's assessment, from the content of the decisions. Even those who do not meet the criteria for refugee status are entitled to administratively fair decisions. The need is even more crucial for those who do in fact qualify for asylum. The failure to issue such decisions creates grounds for appeal—even in cases where the individual may not be entitled to refugee status—because the decision itself does not provide an adequate basis for making a status determination.

Deficiencies in the status determination decision have serious effects on three counts: refugee protection, administrative justice, and financial and institutional rationality. These impact not only on the asylum seeker, but on the legitimacy of South Africa's refugee system and the Department of Home Affairs itself.

- **Protection:** The decision letters play a crucial role in providing protection for asylum seekers who can no longer seek the protection of their home countries. Because asylum seekers whose claims are not properly evaluated may be returned to their home countries, where they may face serious threats to their lives and freedom, a flawed status determination decision has grave human rights repercussions. It may also lead to the violation of the international law prohibition against refoulement—returning an asylum seeker to a life-threatening situation. Furthermore, the lack of individualised assessment, as identified by this research, goes against the provisions of refugee and administrative law and has resulted in a system that is based on general categories of eligibility depending on country of origin—effectively basing the status determination outcome on a set of refugee and non-refugee producing countries without consideration of individual experiences.
- **Administrative justice:** All administrative processes in South Africa are governed by laws, including the Constitution and the Promotion of Administrative Justice Act

(PAJA), which regulate the interactions between state institutions and their clients on a transparent and accountable basis. Disregard for the Constitutional guarantee of administrative justice erodes the rule of law in South Africa, undermines public confidence in the institutions of the state, and threatens the vibrancy of democracy. In addition to undermining the administrative rights of genuine refugees, the flaws and delays in the current refugee status determination process have created an opportunity for individuals who are not fleeing persecution to exploit the system, with implications for public confidence in the refugee system and concept overall.

- Financial and institutional rationality: Significant state resources are being spent on a refugee status determination system that is failing to fulfil its core function, meaning that these resources are, in effect, being wasted. Attempts to increase the speed and efficiency of status determination in order to reduce a large backlog have had the unintended consequence of reducing the quality of decisions and have therefore merely shifted the burden of decision-making from status determination officers to the Refugee Appeal Board. This has resulted in major delays in the final adjudication of asylum claims for those asylum seekers who are able to take advantage of the appeals process, and has not reduced the cost of the system or the opportunities for abuse.

Methods

This report is based on a review of 324 rejection letters, collected from asylum seekers at all five permanent Refugee Reception Offices as well as the additional temporary office set up in Pretoria (Tshwane Interim Refugee Reception Office, or TIRRO).³ The letters reviewed were issued between January and March 2009. All of the details of the asylum claims discussed below are taken solely from the content of the decision letters.

³ These offices are located at Crown Mines (Johannesburg), Pretoria Showgrounds (TIRRO), Marabastad (Pretoria), Cape Town, Durban, and Port Elizabeth. The TIRRO office was initially established for SADC nationals. As of January 2010, the Marabastad office services Zimbabweans, and the TIRRO office services all other nationals.

The table below summarizes the distribution of letters:

Refugee Reception Office	Code For Each Reception Office	Number of Letters Reviewed
Crown Mines	1	88
Marabastad	2	29
Durban	3	166
Cape Town	4	9
Port Elizabeth	5	13
Tshwane Interim Refugee Reception Office (TIRRO)	6	19

During the research, decision letters were labelled with the code reflecting which office they came from, as well an additional alphabetical label that was used for identification purposes only and is not related to the content of the letters. These labels are included in the discussion that follows to in order to link the problems identified to concrete decisions.

Most of the letters were obtained from legal advice centres. In addition, some letters were copied with the permission of asylum seekers as they left refugee reception offices.

While this form of sampling is not statistically random, there are nonetheless strong reasons why the rejection letters sampled here are not merely exceptions, nor are they due to the vagaries of individual RSDOs. Instead, they illustrate the severe structural problems within the status determination system:

- Of all the rejection letters reviewed, virtually none measured up to a standard of administrative justice. This means that severely flawed rejection letters are the rule rather than the exception;
- There is a high level of repetition in the various kinds of problems identified, with many individual letters showing the same flaws;
- Similar problems are present in letters from different Refugee Reception Offices.

The discussion below begins with a description of refugee and administrative law and the status determination process in South Africa. The remaining sections explore in detail the ways in which status determination decisions violate the Promotion of Administrative Justice Act (PAJA) and the Refugees Act, beginning with errors of law. These errors include failing to properly understand the core concepts of persecution, social group, well-founded fear, and credibility, as well as employing the wrong standard of proof and misinterpreting Section 3(b) of the Refugees Act. The discussion then addresses other recurring problems, such as decisions based on information from another claimant, and the failure to provide adequate reasons. The analysis subsequently turns to failures to apply the mind, including various elements of reasonableness and rationality. Finally, it explores the misplaced reliance on the internal relocation option, the use of outdated country information, and the failure to thoroughly investigate country conditions. The review of letters also unearthed rampant cutting and pasting of the same material. The appendix illustrates the extent of this problem by providing a list of identical and almost identical letters.

Legal Framework

This section sets out the legal basis on which refugee status determination in South Africa is supposed to take place. It then provides an interpretation of key elements of an administratively just process. This discussion frames the assessment of rejection letters that follows in the rest of this report.

Several pieces of law govern the refugee status determination process. These include:

- **International Law:** Section 39 and 233 of the Constitution require that South African law be interpreted in accordance with international law. In addition, South Africa has ratified the 1951 Convention and the 1967 Protocol Relating to the Status of

Refugees, making them binding law in the Republic. These instruments define who is a refugee and set out the obligations of states with respect to refugees. South Africa has also incorporated Article 1(2) of the Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa. This provision expands the definition of a refugee to include those fleeing from threats stemming from general instability in a country.

- Constitution (Act 108 of 1996): Section 33 of South Africa's Bill of Rights provides that all administrative action be lawful, reasonable, and procedurally fair.
- Refugees Act (Act 130 of 1998): The Refugees Act incorporates protections found in international and regional law, including protection against refoulement, e.g. involuntary return to a place where a person's life or safety may be endangered. Procedurally, section 24(2) of the Refugees Act refers back to Section 33 of the Constitution.
- Promotion of Administrative Justice Act (PAJA) (Act 3 of 2000): PAJA gives effect to the Section 33 guarantee of administrative justice. It entitles individuals to reasons and establishes clear grounds for review of administrative decisions. It thereby reflects a system that favours government accountability and places individual rights at the heart of administrative decisions.

Refugee Law and the Status Determination Process

Under the international refugee framework, individuals subjected to particular forms of persecution in their home country are entitled to the protection of another country. International law establishes who is eligible for protection by setting out the forms of persecution that give rise to refugee status. Only particular types of persecution qualify. By definition, recognising someone as a refugee includes an acknowledgement that it is not safe for that individual to return to his or her home country.

Because of the extreme personal security issues at stake, determining whether an asylum seeker meets the criteria for refugee status is a demanding process that requires a detailed investigation of the facts of an individual's story, together with background research on the conditions in the country of origin, and an assessment of how these elements correspond to the criteria laid out in the law.

South Africa's Refugees Act clearly lays out who qualifies for refugee status in South Africa. Drawing on international and regional law, Section 3 of the Act defines three categories of persons qualifying for refugee status:

- 1) a person forced to flee his country of origin because of a well-founded fear of persecution based on race, tribe, religion, nationality, political opinion, or membership in a particular social group⁴ and who is unable or unwilling to seek the protection of his or her country of origin;
- 2) a person who is compelled to leave his or her place of habitual residence as a result of 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 or origin;
- 3) a dependant of a person described in the above two categories.

The various elements of this definition, particularly the first category, have been elaborated upon both by the Office of the United Nations High Commissioner for Refugees (UNHCR), in its *Handbook on Procedures and Criteria for Determining Refugee Status*, and by scholars of refugee law. These sources are accepted as valid interpretations by the Department of Home Affairs and are used regularly in RSDO decisions.

To establish whether an individual asylum seeker falls into these categories, asylum seekers in South Africa must undergo a brief status determination interview with a

⁴ Section 1(1)(xxi) of the Refugees Act states: " 'Social group' includes, among others, a group of persons of particular gender, sexual orientation, disability, class or caste."

Refugee Status Determination Officer. The RSDO then issues a decision, generally a 2-3 page letter given to the asylum seeker on the same day as the interview or shortly thereafter. These letters are the main focus of this report. These decision letters—issued from the country’s five permanent refugee reception offices and two temporary offices⁵—all follow the same general structure:

- 1) *Introduction*: a brief introduction giving information on gender, age, nationality, and date of entry into South Africa;
- 2) *Claim*: a 2-3 sentence description of the reasons the individual fled;
- 3) *Law*: a restatement of Section 3 of the Refugees Act;
- 4) *Burden of proof*: a partial restatement of paragraph 196 of the UNHCR Handbook, explaining that the burden of proof rests on the person submitting a claim (although the decisions generally include an incomplete restatement that misrepresents the UNHCR instructions);
- 5) *Reasons/findings*: the reasons for the decision;
- 6) *Right of appeal*: an explanation of the time period within which to lodge an appeal.

The decision letter has three possible outcomes:

- 1) The RSDO approves the asylum claim and the asylum seeker is granted refugee status;
- 2) The RSDO rejects the asylum claim as unfounded and the asylum seeker is denied refugee status. Asylum claims deemed inadequate within the terms of the Refugees Act will be rejected as unfounded. Asylum seekers who are rejected on this basis may lodge an appeal with the Refugee Appeal Board;

⁵ In addition to the Pretoria office, there is also a temporary refugee reception office in Musina. Decisions from this office were not evaluated for this report.

3) The RSDO rejects the decision as manifestly unfounded and the asylum seeker is denied refugee status. Individuals who make a claim for reasons other than those covered in the Refugees Act are rejected as manifestly unfounded. Decisions that are rejected on this basis are automatically sent to the Standing Committee for Refugee Affairs for review. An asylum seeker does not appear before the Committee, but has the right to make written representations.

Administrative Justice

In addition to the Refugees Act, the refugee status determination process also is bounded by PAJA. Administrative justice is a necessary component of a fair status determination process—one that functions in accordance with the procedural guarantees found in the law. According to Section 33 of the Constitution, just administrative action is characterized by procedural fairness, lawfulness and reasonableness. PAJA lays out the elements of just administrative action in greater detail, and also describes the grounds for challenging an administrative decision.

A procedurally fair decision requires a fair hearing conducted by a neutral decision-maker.⁶ Section 3(2) of PAJA lays out the core elements of procedurally fair administrative action:

- notice of the nature and purpose of the proposed administration action
- an opportunity to make representations
- a clear statement of the administrative action
- notice of the right of review or appeal
- notice of the right to request reasons

In addition, Section 6 of PAJA lays out several grounds for challenging an administrative decision. These elements will be discussed below in the context of the decisions.

⁶ Cora Hoexter, *Administrative Law in South Africa*. Cape Town: Juta, 2007 p. 326.

Although PAJA provides a variety of individual grounds for review, these grounds are not always discrete. As Cora Hoexter explains in her authoritative treatise on administrative law in South Africa:

The classification of grounds has always been an uncertain and idiosyncratic business, partly because there is a considerable overlapping of the grounds. A single instance of administrative action will often fall foul of several grounds of review, though one ground may be more obviously relevant than another.⁷

This caveat applies to the discussion below as well. Many of the examples violate multiple and overlapping provisions of PAJA, although they are discussed within distinct categories.

Evaluating the Quality of Rejection Letters

The following analysis quotes heavily from RSDO decisions to demonstrate the scope of the deficiencies. The quoted sections are representative of the problems found in the majority of the letters. They reveal a widespread failure to give effect to the protections envisioned by international and domestic law, as well those found in South Africa's administrative law.

The key problems identified include errors of law, a failure to provide adequate reasons and a general failure to apply the mind. This latter category includes several elements: rationality, reasonableness, the consideration of irrelevant factors or the failure to consider relevant factors, the use of outdated information, mistakes of fact, and the inclusion of information on the wrong claimant. These factors are exacerbated by a biased incentive system that encourages the issuing of rejections. Each of these factors will be discussed below.

⁷ Hoexter, p. 225.

Biased Incentive System

Pressures to increase efficiency and reduce the backlog have compromised the procedural fairness of the status determination process. As a result, it is characterized by a cursory interview process, and a review procedure that encourages RSDOs to issue rejections regardless of the validity of the asylum claim.

Status determination officers are expected to issue approximately ten asylum decisions a day, a process that includes interviewing the asylum seeker, doing the necessary background research, and writing a decision with adequate reasons on the same day. Under the most optimistic of assessments, this leaves no more than 20-30 minutes to conduct a status determination interview. Yet, because many asylum seekers may be traumatized, fearful of government authorities, and unsure of precisely what information is required of them, significantly more time may be required to get to the core of their asylum claims. A fair hearing “is concerned with giving people an opportunity to participate in the decisions that will affect them, and—crucially—a chance of influencing the outcome of those decisions.”⁸ A cursory interview with an asylum seeker affords them no real chance to participate or influence the outcome.

Hoexter has aptly described the importance of procedural fairness through meaningful participation in the decision-making process:

Such participation is a safeguard that not only signals respect for the dignity and worth of the participants but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.⁹

The critical importance of such participation, and the consequences when it is lacking, are evident in the quality of decision letters received by asylum seekers in South Africa.

Added to this is the fact that current procedures require a mandatory review of all positive decisions—to protect against corruption—while most negative decisions are not subject to internal review. As a result, RSDOs know that any positive decisions they

⁸ Hoexter, p. 326.

⁹ Hoexter, p. 326-7.

issue must be of a higher quality and must demonstrate adequate reasons for granting refugee status. Because they lack sufficient time to write such decisions, however, RSDOs have an incentive to issue rejections and have indicated that they frequently do so in the knowledge that the Appeal Board will ultimately identify bona fide asylum seekers.¹⁰ While asylum seekers who understand and take advantage of the appeals process may ultimately receive a procedurally fair decision from the RAB, a lot of asylum seekers do not have a sufficient grasp of the system to pursue appeals. Consequently, many of those individuals that the refugee system was designed to safeguard are not being protected as a result of administrative deficiencies at the first stage of status determination.

Errors of Law

Section 6(2)(d) of PAJA provides for judicial review of an administrative action that “was materially influenced by an error of law.” RSDO decisions contained numerous errors and misapplications of the law. An overwhelming number of letters did not accurately employ the concept of persecution. The decisions also revealed widespread failures to properly apply the well-founded fear and credibility elements. In addition, few RSDOs correctly understood or utilised Section 3(b) of the Refugees Act.¹¹ Finally, many RSDOs improperly employed a more rigorous standard of proof than that required by refugee law.

Forms of persecution

At the core of any asylum claim is the notion that an individual is fleeing from persecution. Many decisions, however, misconstrued this core concept. Rejection letters generally referenced two authoritative sources that have explicated the elements of

¹⁰ See, generally, Hoag, C. “Fear, Enervation and the Systematisation of Disorder: Challenges to Reforming the Department of Home Affairs” (Unpublished). See also, Hoag, C. “The Magic of the Populace: an Ethnography of Illegibility at the South African Immigration Bureaucracy. *Political and Legal Anthropology Review*, (Forthcoming).

¹¹ Section 3(b) incorporates the OAU definition of a refugee, which includes anyone fleeing “external aggression, occupation, foreign domination, or events seriously disturbing or disrupting public order.”

refugee law and the status determination process: the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* [hereinafter, *Handbook*] and James Hathaway, *The Law of Refugee Status*.¹² Although informed by these documents, RSDOs employed several elements of the persecution concept incorrectly. These include the ideas of past persecution, sustained persecution, persecution of others, persecution of large groups and persecution by non-state actors. Furthermore, RSDOs generally limited the application of persecution to those individuals who had been members of a political party while failing to recognize the other grounds of persecution included in the Refugees Act. Finally, they demonstrated no understanding of the concept of social group as found in the Act.

Past persecution

The *Handbook* explains that individuals may possess a well-founded fear of persecution not only as past victims, but also if they face a risk of future persecution (para 45). Such persecution may involve a threat to life or freedom, as well as other serious human rights violations, including discrimination and unfounded or excessive punishment (paras. 51-58). Most RSDOs, however, overlooked these factors and employed an overly narrow understanding of the concept of persecution. This narrowing included demonstrating that “something did happen to you while you were in your country” (1J), or requiring the actual infliction of pain (1V).

As Hathaway explained, however—in accordance with the *Handbook*—past persecution is not a requirement for granting refugee status. Because the Convention is primarily concerned with the possibility of future persecution, it “does not require that an individual should already have been victimized.”¹³ Yet, several decisions used the fact that an asylum seeker had not been physically harmed as a basis for rejection (1B, 1JJ, 1MM, 1AN, 1ABF, 3W, 3W2, 3W4, 3BB2, 3BB4, 4A, 6F, 6L). Individuals who left

¹² James C. Hathaway, *The Law of Refugee Status*. Toronto: Butterworths, 1991.

¹³ Hathaway, p. 87.

“voluntarily and without force”—those who fled to avoid danger—were denied asylum (5D).

Under this flawed approach, it was persecution itself, rather than a well-founded fear of persecution, that was necessary to establish an asylum claim. As a result, RSDOs incorrectly denied asylum to those at risk of future persecution, asserting, for example, that the fact that an “applicant was at risk of being arrested by the security forces or police officials, does not necessarily make the applicant’s claim valid” (1I). Instead, RSDOs regularly required that threats actually be carried out before an applicant would qualify for refugee status. In other words, a well-founded fear of persecution could only be based on persecution itself. Even someone fearing for his or her life would have to wait until there was an actual attempt on his or her life in order to obtain refugee status. This approach to persecution diverges from well-established understandings of the concept.

Sustained persecution

Even where harm could be established, RSDOs created still greater thresholds to be met, rejecting a single incident of persecution and requiring that the persecution be sustained:

The Refugee Status Determination Officer is prepared to accept that the applicant might have been badly treated or beaten by the alleged ZANU-PF.¹⁴ However, for an act to amount to persecution, the level or degree of severity, as well as the number of occasions the applicant had been subjected to the alleged harassment are important. (1AS)

RSDOs, therefore, excessively relied on a single element of Hathaway’s discussion—describing persecution as a “sustained or systemic violation of basic human rights”

¹⁴ Zimbabwe African National Union-Patriotic Front, the ruling party in Zimbabwe led by President Robert Mugabe.

extending beyond an isolated incident (p. 105)—in order to discount the presence of persecution in the majority of cases where individuals had not suffered multiple and extreme abuse. Rather than assessing the prospects for future persecution, they mistakenly created a threshold of cumulative past harassment.

Moreover, while arrest was frequently presented as a necessary threshold to establish persecution (1S), it was often not sufficient if not accompanied by beatings or torture (3BB3). As one decision stated, “You did not experience any persecution because you have never been arrested or tortured by anyone” (1R). Expanding the threshold still further, the fact that there were no reports of politically motivated killings in 2007 in the applicant’s country was treated as tantamount to a lack of persecution (3EE).

Similar examples demonstrate the problems with this threshold approach, and its divergence from accepted understandings of the well-founded fear of persecution standard that rests on the threat of future persecution:

- With respect to a claimant who had provided evidence of being brutally tortured in detention, the decision noted that, despite reports of torture, “there were no reports that security forces killed suspected collaborators during 2005” (1ABG).
- Without explaining the incident to which he was referring, the RSDO stated: “You said that there is nothing life threatening except that thing,” indicating that multiple life threatening factors must be present (1ABF).
- “Beaten once does not reach the threshold of being persecuted” (3C).
- The past persecution of an applicant who fled after being arrested and beaten several times, and who was known because of her television appearances, was dismissed as wholly irrelevant: “Although the applicant had been arrested and assaulted by the police in Zimbabwe, there is no evidence that he [sic] will be subjected to the same treatment”(3V3).
- A claimant who was harassed and threatened with death because of her support for the opposition party was rejected because she did not suffer “a sustained violation of basic human rights at the hands of the authorities in her country” (1P) [See also 2O].
- Not recognizing that persecution could take forms other than torture and physical abuse, the RSDO stated: “...[A]nd there’s nothing suggesting the threat, beatings,

torture [sic] the only problem was that your freedom of movement and that of association was violated” (4C).

These examples highlight the practice of employing improper threshold requirements, and equating persecution to beatings and torture without recognizing additional forms of persecution. They also demonstrate the inconsistent use of past persecution as a factor in assessing future risk. These deficiencies have generated an overly narrow conception of persecution, one that discounts the role of future persecution as the primary determining factor.

Persecution of others

A proper assessment of the risk of persecution cannot be done by examining the individual’s situation in isolation, but must necessarily take the relevant context into account. As the UNHCR Handbook explains, an individual need not him or herself be the victim of persecution. Persecution suffered by friends, family, or other similarly situated individuals may be sufficient to establish a well-founded fear that the applicant also will suffer persecution (para 43). RSDOs, however, regularly rejected applicants on the grounds that it was their family member, not them, who suffered persecution. (1JJ, 1Y, 2F, 3O6). One asylum seeker reported that the authorities refused to investigate his grandfather’s murder, and that his mother was raped while his father narrowly escaped being killed. But his claim was rejected on the basis that he was not harmed in any way (3M). Failing to recognize that individuals often suffered persecution as a result of the actions of family members, one RSDO concluded that there was no fear of persecution because “the person who was active was your husband but not you” (2P).

Persecution targeting large groups

The persecution of others was not the only relevant context that RSDOs ignored in determining that an individual did not have an asylum claim. Several asylum seekers

were rejected on the grounds that they themselves were not singled out but were targeted together with others (1AO, 1ABB, 1N, 2P, 3M14). As a Zimbabwean asylum seeker who was harassed because of his activities in support of the MDC¹⁵ was told: “Nothing happened to you in particular but you were attacked [sic] as part of the group” (3M14).

While these rejections often disregarded information in the claim demonstrating that the individual had in fact been targeted, they also fundamentally misunderstood the legal requirement of persecution. The view that an individual must be ‘personally singled out’ for persecution conflates the notion of considering the person’s individual circumstances with a mistaken requirement that persecution must be established solely on these personal circumstances.¹⁶ Explaining why this approach is incorrect, Hathaway clarifies that where “the harm is both sufficiently serious and has a differential impact based on civil or political status,” an asylum claim exists regardless of how many others may also suffer the same harm (p. 94).

In contrast to this view, RSDOs regularly portrayed individuals who were targeted for participating in opposition rallies as victims of random violence, while failing to acknowledge that it was in fact their political actions that had subjected them to persecution (1AS, 2P, 3EE, 3BB, 3BB2, 3BB3, 3BB4, 3BB5). Disregarding the fact that an individual had been targeted specifically because of his or her opposition activities, they based their negative determinations solely on the grounds that these activities had taken place within a group. RSDOs applied similar logic to individuals who were targeted for refusing to participate in the political activities of the dominant party: “This incidents [sic] did not only happen to you but to the whole community” (4D). Even applicants who were raped or beaten in their homes were denied asylum on the grounds that they were not individually targeted (1UU, 1AK, 2K, 3V, 3V3, 3H3).

A Zimbabwean teacher was beaten and harassed by ZANU-PF members who accused her of using her position to get people to vote for the MDC. Despite being singled out,

¹⁵ Movement for Democratic Change, the main opposition party in Zimbabwe, led by Morgan Tsvangirai.

¹⁶ See Hathaway, pp. 91-2.

the RSDO cited a UK Operational Guidance Note stating that “taking part in mass demonstration or being assaulted in mass random violence associated with the demonstration is unlikely to result in an ongoing interest.” He then concluded, despite her having been singled out for abuse, that the risk of persecution was low for “a person of obscurity” (3V3).

Persecution by non-state actors

Another significant element of persecution in the status determination process is the identity of the actor committing the persecution. Where the persecution in question is not committed by the state, an asylum seeker must prove that he or she is unable to seek the protection of the state. Many RSDOs, however, automatically rejected asylum seekers who were persecuted by non-state actors rather than investigating whether they could in fact have sought the protection of the state (2AA, 2K). These decisions assumed that the persecution could be reported to the authorities, even in areas where there was no state control. Many letters included unsupported statements, for example: “It is clear that you can seek the protection of your country and you will not face persecution if you returned to the Democratic Republic of Congo.” (2K).

Limiting persecution to membership in a political party

Both international and domestic law hold that persecution on any one of five grounds qualifies an individual for refugee status: race, tribe, religion, nationality, political opinion, or membership in a particular social group. In practice, however, RSDO’s based many of their rejections on the fact that an individual did not belong to a political party, or, alternatively, was a low level member of a political party, without considering the nature of the specific claim or the alternative bases of persecution (1AN, 1J, 1N, 1AS, 1AV, 1AN, 1AO, 1AZ, 2AA, 2L, 2A, 2O, 2S, 2V, 2E, 2J, 3E, 3M14, 3M3, 3V, 3W2, 3V3, 3AA, 3D6, 3P).

Several letters contained the following or similar language: “[The applicant] did not show a sustained or systemic risk, rather than a generalized fear of harm and [s]he did not mention that [s]he was personally targeted for reason of his [or her] political affiliation,” adding, “in this regard your testimony is not sufficient to sustain a claim for refugee status.” (3V3, 3AA, 3G, 3G3, 3H3, 3H4,3H5, 3H6, 3H7, 3Q, 3Q2, 3Q3, 3Q4). A number of asylum seekers were rejected on this basis without any consideration of their particular claims, which described having been persecuted for reasons other than political opinion. Moreover, those who were persecuted for refusing to join a political party, which also constitutes persecution on political grounds, similarly failed to qualify under this narrow standard: “The was [sic] isolated incidents and you were not to the adverse attention by [sic] the perpetrators, because you were not politically active” (4D).

RSDOs also took a very narrow view of the criteria for persecution on political grounds. Generally, an asylum seeker only qualified for asylum on political grounds if he or she was an active and prominent member of a political party. Individuals who were targeted for political activities but did not meet these criteria were denied asylum. Accordingly, those applicants who were individually persecuted because of their political affiliation nonetheless were denied refugee status on the grounds that they were not high-ranking members of their political parties:

- Ignoring the fact that a claimant was beaten and his house set on fire, the RSDO stated: “You do not qualify for status because you were not the prominent member of MDC. There is no reason for you to be targeted” (3DD)
- Regarding an individual who campaigned for the MDC: “The people who were targeted by the ruling party in Zimbabwe are prominent members of the MDC. You do not qualify for status because you were not the prominent member of MDC. Nothing happened to you in particular but you were attacked [sic] as part of the group” (3M14).

The latter example contains the dual mistakes of discounting the claim of an individual who was deemed not to be a sufficiently prominent member of a political party, and of incorrectly dismissing the persecution because it happened to the individual together with others.

Several decisions relied on language from the UK Operational Guidance Notes for the DRC and Zimbabwe, stating that low-level members of the opposition parties were not likely to be persecuted. This language was cited without any regard for the details of the individual’s claim and whether he or she actually did suffer persecution (1F,1K, 6H, 6I, 2N, 2C). RSDOs relied on other language from these reports pointing to the low risk of persecution while similarly disregarding the details of the claim (2J, 2U, 2W, 1AV, 1AZ 1ABB).

One such letter, for example, ignored the fact that a Congolese claimant was beaten and his sister raped for political reasons. Overlooking more recent events, it cited the 2007 DRC Operational Guide, which stated that “members of political parties who have in the past encountered ill-treatment by the authorities will not necessarily have a well founded fear of persecution in the future” (1EE). The same language was employed in a decision rejecting a Congolese claimant whose father and sister were killed and whose mother was raped, also for political reasons (1LL). Both letters relied solely on the language in the Operational Guide—language that did not definitively state that there was no risk—to conclude that the applicants were not at risk, without conducting any individualized assessment of the claims.

Social group

In addition to political opinion, membership in a particular social group also constitutes one of the bases of persecution that qualify an individual for refugee status. The Refugees Act defines “social group” as including, among others, “a group of persons of particular gender, sexual orientation, disability, class or caste” (Section 1(1)(xxi)). In contravention of this legal standard, a claimant who sought asylum on the grounds of sexual orientation, after fleeing persecution because of his homosexuality, was rejected as manifestly unfounded.¹⁷ Although sexual orientation is a stated component of the

¹⁷ Manifestly unfounded claims are those that are made on grounds other than those specified in the Refugees Act, e.g. economic hardship or persecution for reasons other than the specified grounds.

social group category, the RSDO concluded: “Your claim is made on the grounds other than those on which an application for asylum may be made. The claim is based on sexually related issues [sic]” (5E).

As the discussion above illustrates, South Africa’s refugee determination process is characterized by various misuses of the concept of persecution—a concept that is fundamental to any asylum decision. Persecution, however, is not the only concept that has been misconstrued. Decision-makers also have failed to understand two other core concepts that are an integral part of the status determination process: well-founded fear and credibility.

Well-founded fear

The *Handbook* explains that the well-founded fear determination incorporates both a subjective and an objective element. While the determination rests primarily on the applicant’s state of mind, this state of mind must have some link to the external reality of his or her situation.¹⁸ Both elements must be present, but it is the subjective element that is central to an individualised decision: “[d]etermination of refugee status will therefore primarily require an evaluation of the applicant’s statements rather than a judgment on the situation prevailing in his country of origin.”¹⁹

Status determination officers generally failed to operationalise this distinction and did not recognize that the individual’s state of mind should serve as the primary determinative factor. Instead, most decisions were based on a bare assessment of country conditions, often resting on inaccurate or outdated information.

Even when RSDOs did acknowledge the distinction between the subjective and objective factors, they nonetheless failed to apply the objective and subjective tests correctly.

Unfounded claims are those that are made under the specified grounds, but are determined not to have made out a sufficient case.

¹⁸ Para. 38.

¹⁹ *Handbook*, para. 37.

Accordingly, in a case in which Zanu-PF members burned down the applicant's house and harmed some of his relatives, the RSDO stated: "The applicant suffered no persecution (by reasons of his political opinion), in that he was harassed by members of the ZANU-PF (the subjective test does exist), but fear alone is not enough, it must be well-founded." (3Y).

Credibility

The credibility of a claimant often assumes a principal role in the status determination process because asylum seekers are unlikely to have fled with supporting documentation in hand. The *Handbook* asserts that the status determination officer must attempt to verify the applicant's story, and to a large degree must rely on the applicant's credibility in the absence of supporting evidence.²⁰ The assessment of credibility rests on the consideration of a variety of factors, including "the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences—in other words, everything that may serve to indicate that the predominant motive for his application is fear."²¹

Status determination officers, however, rarely engaged in a reasoned consideration of the specified factors meant to aid in assessing an applicant's credibility, nor did they employ the credibility concept with any rigor. Instead, they invoked credibility as a general category, applying it to rejections made on various other grounds, or in situations where there was no clear basis for rejection.

A claimant who described fleeing after being forced to join rebel forces in the DRC was rejected for failing to demonstrate that he was individually targeted as a result of his political affiliation. The RSDO relied on the fact that the claimant did not give the name of his political party as a basis for challenging the claimant's credibility, an approach that

²⁰ Para. 196.

²¹ *Handbook*, para. 41.

both ignored the fact that the claim was not based on political affiliation, and also reverted to the overly narrow understanding of persecution, limiting its application to political opinion alone (3H). Rather than engage with the nature of the persecution in his analysis, the RSDO incorrectly raised credibility as a basis for the rejection.

In situations where evidence was difficult to obtain, RSDOs did not employ the factors described in the *Handbook*; instead, they relied on the lack of evidence as grounds to question the claimant's credibility:

- “Thus, it seems that you did not suffer any persecution whatsoever in your country except that the ruling party wanted to burn your house. There is no evidence at hand to corroborate that your house indeed was on the verge of being burnt. The credibility of your claim is really doubtful and a reasonable RSDO applying the Refugee Act would not grant you asylum” (3B2).
- “There is no proof to support your claim and this makes the RSDO to conclude that you are in the country for other reasons than political asylum, the applicant have submitted no proof of persecution” (3Y).

RSDOs used the lack of evidence as a shortcut for rejecting the claim, avoiding a more rigorous investigation of the claim and the applicant's credibility.

The *Handbook* also emphasizes that a person who fled in fear of the authorities in his country of origin may be unlikely to reveal all of the relevant information, and the full details of his or her story, in the initial status determination interview being conducted by the authorities of another country, or to explain everything on an eligibility questionnaire (paras. 198, 200). Nonetheless, status determination officers treated negatively the fact that certain information was not revealed on the BI-590 form—the eligibility form that applicants must fill out when first applying for asylum—and was only disclosed during the interview, or that the information provided in the limited form was less detailed: “You [sic] claim lack the credibility because in the BI-1590 you never mentioned what you have mentioned during the second interview” (3M).

This approach overlooks several significant facts:

- 1) the BI-590 form is a standard form that does not provide sufficient space for full or detailed explanations;
- 2) applicants fill out this form at the beginning of the process, without any assistance, and may not understand specifically what information is expected of them;
- 3) asylum seekers who have just arrived in South Africa after fleeing persecution by their governments may be reluctant to reveal all the relevant information to government officials in South Africa upon arrival at a refugee reception office;
- 4) asylum seekers may not be fluent enough in English to be able to communicate their story fully in written form.

RSDOs often grasped onto small, insignificant discrepancies in order to create credibility questions. A claimant who stated on his eligibility form that he was not politically active, for example, was deemed to not be credible because he revealed during his interview that he was an MLC²² supporter (1D). Although support for a party is not synonymous with political activism, the RSDO found fault with the claimant's credibility. The RSDO did not probe the extent of the claimant's MLC support, which may have amounted to nothing more than preferring the MLC to other parties, to determine if there was in fact a discrepancy.

RSDOs also failed to consider that multiple factors may have caused a claimant to flee. To the contrary, they characterized the existence of multiple causes as discrepancies in the claim that placed the individual's credibility in doubt, even where these causes were not inconsistent or contradictory, such as fleeing political instability and economic hardship (5B1).

In a stark example, a Congolese woman described how she was raped after a group of political opponents came to look for her husband, who had fled because of his affiliation with the UDPS²³. The RSDO characterized her account as inconsistent on the following grounds:

²² Movement for the Liberation of Congo, formerly a rebel group and now the main opposition party in the DRC, led by Jean-Pierre Bemba.

²³ Union for Democracy and Social Progress, an opposition party in the DRC.

On your Eligibility Determination Form, you pointed out that you left your country because they wanted to arrest your husband due to his membership to the UDPS. However, in your second interview with the RSDO, you claimed that you were raped by two people who were in group that was looking for your husband. The RSDO could therefore not believe that you were telling the truth, nevertheless, you were given a benefit of doubt.” (2K).

The RSDO treated the failure to immediately disclose the rape as inconsistent and as indicating a lack of credibility, while demonstrating no sensitivity to the issue of rape and the effect it may have had on her willingness to fully share her experience. UNHCR and other service providers have cautioned status determination officers to be sensitive to the fact that rape victims are unlikely to disclose their rape right away, and may be unwilling altogether to disclose it to male status determination officers. Showing no appreciation of this reality, the RSDO treated the failure to immediately disclose the rape on a written form as grounds for challenging the claimant’s credibility.

The RSDO then wholly disregarded the rape and concluded: “Save for mentioning incidences that normally occur around election times, you did not furnish evidence that brings your claim within the abovementioned ambit [describing persecution]” (2K).

Another claimant was similarly rejected as not credible for failing to disclose her rape on her eligibility form: “Your claim is not credible, in your first interview (BI-590) you claimed that your parents were missing and life was difficult for you and you fail to mention that you raped [sic]” (3K15).

Many letters referenced abstract credibility issues without any elaboration (5B2, 6M, 1AT), despite the fact that PAJA entitles individuals to a clear statement of the administrative action (Section 3(2)(b)), which includes a description of the basis on which the decision was made. Without this information, any right of appeal becomes “pointless.”²⁴

²⁴ Hoexter, p. 337.

With respect to an applicant who fled from rebel forces after they killed his parents, the RSDO stated at the end of the decision: “It is difficult to establish a well founded fear of persecution where the applicant have [sic] submitted two different claims for his application to recognized as a refugee [sic] without providing a satisfactory explanation” (3N). The letter contained no additional information explaining the content of the differing claims. Without this information, the applicant could not adequately challenge the allegation, nor could the appeal board adequately assess the strength of the appeal. Similarly, another RSDO stated that a claimant was unlikely to suffer persecution because his story was “contradicting,” but the decision did not include the information that was contradictory (1BB).

RSDOs also incorrectly relied on broader developments in the country of origin to challenge the credibility of accounts of particular instances of persecution:

After assessing your claim I have established that even though you might have legitimate claims but your government had engaged into peaceful negotiations with the rebel groups and seemed to be reaching consensus on ending civil war and relocating internally displaced people which defeats credibility on your claim for asylum (3L).

In this case, the RSDO did not actually consider whether the individual’s claim was credible, nor did he assess the prospects of future persecution.

Standard of proof

Both the UNHCR Handbook and South African case law make clear that the appropriate standard of proof to be employed in refugee status determination is one of “real risk” based on “a reasonable possibility of persecution.”²⁵ This is in contrast to the more demanding civil law standard of balance of probabilities, which demands proof that something is more likely to occur than not. For an asylum seeker, this means demonstrating that it was more likely than not that he or she would be persecuted if

²⁵ *Tantoush* (supra Note 1), at para. 97.

returned to the country of origin. Given that most asylum seekers flee without much documentary evidence, it is unlikely that they would be able to meet this higher standard of proof.

South Africa's courts have acknowledged this reality and have explicitly rejected the more demanding balance of probabilities standard as "too onerous." Instead, "the burden is mitigated by a lower standard of proof and a liberal application of the benefit of doubt principle."²⁶ The courts have deemed the use of the balance of probability standard to be an error of law.²⁷ Nonetheless, several RSDO decisions inappropriately employed this standard (1J, 2L, 2S, 3CC, 3CC2, 3CC4, 3CC5, 3F, 3F2, 3F3, 1G, 1ABL).

Section 3(b) of the Refugees Act

In addition to misapplying these core concepts of domestic and international refugee law, status determination officers have also failed to correctly apply specific aspects of South Africa's refugee law. Domestic legislation has incorporated a provision from the OAU refugee convention: Section 3(b) of South Africa's Refugees Act grants refugee status to individuals who have been compelled to leave their place of habitual residence "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."

RSDO's seemed largely ignorant of this provision. In fact, they often cited British case law stating exactly the opposite proposition, that fleeing the instability of civil war does not qualify an individual for asylum:

A general civil war situation is not in itself sufficient grounds for granting asylum. Where a state of civil war exists it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show a differential impact. In other words, he must be able to

²⁶ Van Garderen N.O. v Refugee Appeal Board (unreported decision 30720/2006 of 19. June 2007), cited in Tantoush at para. 97,

²⁷ Tantoush at para. 99.

show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare (1P, 1TT; see also 1W).

The differential impact criteria that the RSDO cites is specifically and uniquely a requirement of Section 3(a). The Section 3(b) provision, by contrast, is distinguished by the fact that eligibility rests solely on the presence of general conditions of instability and does not require an individualized assessment revealing a differential impact. Yet, RSDOs frequently and mistakenly based their rejections on the lack of individual persecution found in section 3(a) of the Act (often on the grounds that the individual was not a member of a political party) without considering whether the individual had a claim based in Section 3(b). Many of these letters specifically stated that the individual was fleeing political instability—the situation envisioned by Section 3(b)—and then proceeded nonetheless to apply Section 3(a)—invoking the fact that the individual did not suffer persecution as the basis for rejection (1J, 1N, 1R, 2S, 2B, 2E, 3H3, 3H7, 3Y, 4F, 6E1, 6K)

Moreover, even where they recognized that a 3(b) claim was being made, RSDOs mistakenly conflated Sections 3(a) and 3(b). Thus, in instances where individuals were fleeing civil war and political instability as required by Section 3(b), the RSDOs incorrectly required that the claimant prove individual persecution. A claimant fleeing unrest in Eastern Congo, for example, was rejected because she was not specifically targeted by the rebels (1VV; See also 1UU). RSDOs consistently failed to recognize the distinct requirements of Sections 3(a) and 3(b):

- An applicant who fled instability in North Kivu, DRC was told: “Your assertions that you became scared because of the war which was taking place kilometers away from where you were staying does not hold water. You did not suffer any form of persecution and your fear of future persecution was based on a supposition which does not suffice for the consideration of asylum in terms of the Act” (1X).
- A claimant fleeing instability in Zimbabwe was told: “You claim that you had fear with regard to the prevailing situation in your country and you made no mention that you were persecuted in terms of race, political opinion, nationality, tribe and

membership of a particular social group as provided section 3(a)(b) of the Refugees Act 130 of 1998” (3P).

- “The political instability in Zimbabwe does not in itself amount to a persecution as contemplated by Section 3(a) or (b) of the Refugees Act” (3W2).

These examples point to a lack of understanding that Section 3(b) is activated by general conditions of instability rather than individualized persecution

Section 3(b) also specifies that the conditions causing flight may be in either a part or the whole of the country. The prospects for internal relocation do not come into play, a view that has been confirmed by UNHCR.²⁸ Some RSDOs, however, rejected applicants on the grounds that they could relocate because they were not specifically targeted, diverging from the generally accepted interpretation and imposing an additional requirement not found in the law (1VV, see also 1UU)

None of the letters reviewed demonstrated a correct application of Section 3(b). In one example, the RSDO employed Section 3(b), and then rejected the claimant on the grounds that her attack could not be linked to the general state of affairs in the Eastern Congo, despite the fact that Section 3(b) does not require a specific instance of persecution. Moreover, the decision ignored that the claimant was in fact targeted because of her father’s association with the opposition. Her entire family was attacked as a result of this association, and her sisters were raped, generating a claim under Section 3(a) as well as 3(b). By conflating the requirements of Sections 3(a) and 3(b), the RSDO misapplied both provisions, determining that “the alleged unrest in the instant case did not target that applicant by reason of any of the grounds listed in Section 3(a) above” (1UU).

In another example, an asylum seeker from the DRC described fleeing after abandoning the rebels with whom he had fought, a situation that could give rise to persecution on

²⁸ See Guidelines on International Protection: ‘Internal Flight or Relocation Alternative’ within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, HCR/GIP/03/04, 23 July 2003, at paragraph 5.

the basis of either political opinion or membership in a social group. Rather than exploring the details of the claimant's situation, however, the RSDO reached the unfounded conclusion that the claim was based on Section 3(b), "as it concerns national security." Ignoring the details of the claim, he then stated:

[T]he alleged unrest in the instant case did not target the applicant by reasons of any of the grounds listed in Section 3(a) above, in which case he could claim persecution. Although the alleged situation appears to relate to political unrest, the applicant did not allege that the acts mentioned above were directed to him by reason of his affiliation or political background. Instead, his concern is the unrest or the circumstances that are prevailing in his country, which amount to disturbance of a particular group or the public at large" (1Q).

Employing contradictory logic, the RSDO first treated the claim as a 3(b) claim, and then confused the requirements of Section 3(a) and Section 3(b), determining that "there is no proof of any well-founded fear on part of the applicant, given the current state of affairs in DRC" (1Q). As discussed, the well-founded fear standard is a requirement only of Section 3(a). Moreover, assessment of this well-founded fear, while informed by the general country conditions, should be based on the claimant's individual circumstances.

These failures to correctly apply the provisions of refugee law result in a seriously flawed status determination process with significant repercussions for asylum seekers. The effect is that RSDOs are denying individuals refugee status not because these individuals do not meet the criteria for asylum, but rather because these criteria are being erroneously applied by the status determination officers. As a result, the system is not fulfilling its protective function.

Wrong claimant

As a result of careless cutting and pasting from one individual's decision letter to another, a number of letters referred to the wrong claimant or referenced information about the claimant in the reasons section that was not mentioned in the description of

the claim. Many of these decisions switched between genders several times—employing one gender in the claim section and another gender, or multiple genders, in the reasons section—indicating that many of the paragraphs were not specific to the particular claimant but were lifted from other claims (1V, 3V, 3V3, 4D).

Accordingly, one claimant was referred to as “Ms.” in the statement of her name, but described as an unmarried adult male in the introduction. The “findings” section then rejected this unmarried adult male on the grounds that her husband was an ordinary member of the CUD²⁹ without a high political profile (1AZ). Another letter described an individual’s claim as stemming from the fact that she owned a shop that sold the type of machetes used to attack Kabila’s supporters, resulting in the authorities coming to the shop. The reasons section, however, discussed the details of a different claimant: “I found that your [sic] do not have the reason to leave the country because if the government soldiers wanted to kill you they could have done it the day they took your husband” (2Q).

Other examples abound:

- The decision switches gender, and refers first to the claimant’s husband and later to the claimant’s boyfriend (3O6).
- A claimant who was making a 3(b) claim based on instability in Zimbabwe was rejected on the grounds that, “There can be no well-founded fear of persecution that he or she did not know how to be a soldier and he could not fight and should have attempted to seek help from his country...” The individual’s claim did not contain any reference to military service. (3M3, 3W).
- Two claimants from Zimbabwe were rejected and told that they could seek the protection of “their country, Malawi” (3M13, 3M16).
- A male claimant who was severely beaten by the rebels and left for dead and whose father and sister were killed, was told: “You indicated that your relatives are there [sic] one that forced you to leave your country because they thought that your husband had left money for you because of his business standing, must be solved by either your family members or by the courts of law in your country” (305).

²⁹ Coalition for Unity and Democracy, a coalition political party formed in Ethiopia.

- In a claim by a Congolese individual who had a leadership role in the University and was a member of the UDPS, a group that was targeted by the governing PPRD³⁰, the rejection contained the random, unrelated statement that “the person who was active was your husband but not you,” which did not reflect the information summarized in the claim section (2P).

A series of letters given to Congolese claimants contained identical language basing the rejection on the fact that the claimant had been a member of the rights violating government. This information was never mentioned in the section describing the individual’s claim in any of the letters. The decisions cited an Amnesty International report describing the fragility of the peace process, but they discounted the relevance of this report on the basis of the fictitious connection to the government:

“Presidential and legislative elections held in July and October offered some hope that the fragile peace might be strengthened, but several armed factions remained suspicious of or openly hostile to the peace process,’ but that does not amount the qualification of determining the status of the refugee in terms on the ACT 130 of 1998 especially since the claimant was part of the co-perpetrators in violation of the human rights when he was working for his government” (3L, 3L2, 3L3, 3L4, 3L5, 3L6, 3L7, 3L8, 3L9, 3L10, 3L11, 3L13, 3L14).

The individuals who were denied on this basis were making claims for a variety of reasons, including persecution on the basis of ethnic and tribal identity or political opinion, and instability from civil war. None of them had described any association with the government.

In the most extreme cases of cutting and pasting, rejection letters for different claimants were identical, or virtually identical with minor differences. A list of these identical letters discovered during the course of the research is provided in the appendix to this report.

³⁰ People’s Party for Reconstruction and Democracy, a Congolese political party led by current president Joseph Kabila.

Failure to Provide Adequate Reasons

Under Section 5 of PAJA, the recipients of administrative decisions are entitled to reasons for the decision. Section 6 states that administrative decisions must be rationally connected to the reasons given (Section 6(f)(ii)(dd)). Rationality requires “that a decision must be supported by the evidence and information before the administrator as well as the reasons given for it” (Hoexter, p. 307). In contrast to these provisions, many rejection letters either contained no reasons at all, or were filled with generalities—often comprised of cut and pasted paragraphs—that did not engage in any manner with the individual claim. By failing to consider the individual’s claim, decisions in the latter category constituted generic letters that could be given to anyone, in the absence of a status determination interview or any individualized decision-making. As such, they could not be said to contain concrete reasons, nor did they engage with the evidence before the administrator as required by the rationality provision (1Z, 3H, 3H3, 3Y, 3Q5, 6I).

No reasons

Some decisions left out the reasons section altogether. One letter, for example, was comprised of a brief description of the claim and a restatement of Section 3 of the Refugees Act (defining who qualifies as a refugee). The RSDO then concluded:

“In regard to aforementioned analysis, I have reached a conclusion that the applicant does [sic] meet the criteria set by the Refugees Act NO 130 of 1998, therefore his application for asylum is hereby rejected as unfounded in terms of Section 24(3) of the said act.” (3T).

No other content was included in the decision. Other letters were equally sparse and merely stated that an individual had not suffered persecution (5A1, 5A2).

Manifestly unfounded decisions were even more problematic. Under the Refugees Act, an asylum claim made for a reason that falls outside of the criteria stated in the Act is deemed to be manifestly unfounded. Manifestly unfounded decisions generally contained no reasons; they simply stated that the application was made on grounds other than those specified in the Act (4G1, 4G2, 4G3, 5F, 5G, 5H, 5I, 5J).

This lack of reasons is particularly troubling given the review process. Manifestly unfounded decisions are automatically reviewed by the Standing Committee. Asylum seekers do not appear personally before the Committee, and often they are not informed of their right to make written submissions. As a result, the Committee's review is usually based on the information provided in the RSDO decisions—decisions that contain scant information regarding the claim and provide no reasons. Nonetheless, the Standing Committee relies on this sparse information to affirm the RSDO decisions in most instances.

Generalized rejections

While numerous decisions did not provide any reasons, many others contained little more than generalizations that had no connection to the individual claimant. These decisions failed to engage with the information provided by the claimant and thus did not display a rational connection to the information placed before the administrator. Instead, they were made up of a collection of unrelated paragraphs from other sources, while failing to mention any elements of the claim. Many simply retraced the history of the country. They made no attempt to link the information to the claim, or to develop an argument based on the cut and pasted paragraphs, which generally did not follow one another in any logical fashion (1AT, 1AO, 1E, 1GG, 1ABC, 1C, 1ABH, 1AA, 1AT, 1AZ, 1L, 1S, 1ABB, 1BB, 1HH, 1NN, 1SS, 1AI, 1AJ, 1AK, 2AA, 2CC, 2Q, 2G, 2H, 2W, 3H3, 3Z, 3B3, 3B4, 3V, 3V2, 4C, 6A1, 6A2, 6M, 6N).

Often, the RSDOs simply restated the definition of persecution or well-founded fear and provided a random assortment of country information (2L, 2O, 2R, 2T, 2V, 3A, 3U, 3U2). Several decisions cited the Hathaway definition of persecution and concluded that the claimant did not meet this standard, without explaining why this was the case (1AY, 2B, 3U3). One decision, for example, included several cut and pasted paragraphs about the conflict in the DRC, quoted Hathaway's definition of persecution, and then asserted:

Therefore, your claim does not reach the threshold required for sustained or systemic violation of basic human rights, it lack [sic] quality of persecution required for a Convention reason (1S).

This reasoning did not include any discussion of the individual claim, which involved political persecution based on the claimant's association with the opposition.

Two almost identical decisions quoted Hathaway and the UNHCR Handbook and, making no reference to the claim, or to country conditions, concluded:

Your claim is not sound and reasonable. The claim is feigned [sic] and overstated. There are [sic] no logic of sequential events supported by objective scenarios. Your country also embraces the right to association in practice. You failed to establish that you were compelled to leave your place of habitual residence owing to fear of persecution as contemplated in Section 3(b) (2X, 2Y) [This language is also used in 2O, 2R]

In addition to providing no reasons, these decisions also misstated the law. As discussed above, Section 3(b) is not based on persecution, but depends on the presence of events seriously disrupting the public order.

Other decisions compiled unrelated paragraphs about the country of origin taken from news accounts and country reports; these decisions contained no discussion of the individual claim, no specific reasons for the rejection, and no analysis linking the copied paragraphs to the claim (1AP, 1AQ, 1AU, 3F-3F4, 4E). Thus, an asylum seeker who claimed to have escaped from rebel forces in the DRC received a decision comprised of

six pages of unattributed news articles and country reports. Without any content aside from the cut and pasted paragraphs, the RSDO concluded: “in the light of the above your application has been rejected as unfounded” (1T).

A Ugandan claimant arrested for criticizing the government, and a Congolese claimant who was raped because of her husband’s political affiliation, both received the same generic reason: “Save for mentioning incidences that normally occur around election times, you did not furnish evidence that brings your claim within the above-mentioned ambit.” (2U, 2K). The activities giving rise to the asylum claims, however, did not take place during elections in either country. Similarly, two claimants from the DRC who fled because of their affiliation with the MLC received identical rejections that declared, after cutting and pasting country information: “Save for mentioning an incident of potential harm which was found to be baseless, you could not furnish evidence which brings your claim within the above-mentioned ambit” (1Y, 1DD).

The following examples illustrate the reliance on generalized rejections. The decision letters summarized below consisted primarily of cut and pasted country information. Many of these decisions also cited Hathaway’s definition of persecution. None of them, however, included any discussion of the claim, or any evidence in support of the conclusions reached by the RSDO. The descriptions below summarize the main content of the decisions:

- A claimant who fled unrest in the DRC after his mother was killed was told: “In fact nothing happened to you in that you were compelled to leave your country nor there are no reason indicating that the state was failing or unwilling to offer protection” (3B).
- After a few definitions of persecution and credibility from Hathaway and others, the RSDO concluded: “Applicant failed to establish that the country of his origin is unable or unwilling to protect him” (3D) [See also 3D2-3D11].
- Quoting one sentence from a UK decision stating that credibility is a factor in determining whether a well-founded fear exists, the RSDO then stated, “I have reached a conclusion that the applicant does not comply with the criteria set by the ACT 130 of 1998” (3L12).

- The RSDO included a few sentences summarizing the UNHCR Handbook and then concluded, “The applicant was not harmed in any way and the circumstances that lead the applicant to flee from his country of origin do not reveal that he would suffer when he goes back to his country” (3M).
- After describing Operation Murambatsvina, or “Clean-Up,” followed by a summary of Hathaway on persecution and the scope of refugee law, the RSDO concluded: “Applicant failed to establish that the government of his country of origin is unable or unwilling to protect him” (3U, 3U2).
- After citing Hathaway’s definition of persecution and including a cut and pasted section on UN forces in the DRC, the RSDO stated: “You failed to establish that the government of your country of origin is unable or unwilling to protect you” (3K-3K5, 3K7, 3K12, 3K16)
- The RSDO provided a definition of persecution and a cut and pasted section on UN forces in the DRC, and then concluded that the claimant was simply caught up in random violence, ignoring details of the claim that indicated otherwise (3K6, 3K8, 3K9).
- The decision stated only that the applicant had failed to discharge the burden of proof; that a well-founded fear of persecution “could not be ascertained”; and that there was no reason why the applicant should not be returned to his country (3CC, 3CC2, 3CC4).
- An applicant who fled after being arrested as a suspected rebel spy in the DRC was told that he did not meet the grounds laid out in the Act. The decision stated: “applicant did not suffer any persecution, he was not harmed in any way.” (3S).
- The RSDO claimed that the applicant failed to show that his government could not protect him, and that he failed to show that he would face persecution (3BB).

The above examples contained random, unlinked cut and pasted paragraphs. They lacked any engagement with the details of the individual claim and failed to provide reasons in support of their conclusions. To fully demonstrate the failure to provide reasons in accordance with the rationality principle, the box below quotes the claim and reasons sections in their entirety in a decision given to a Congolese claimant in March 2009.

Box 1: Example of Rejection Letter to Congolese Claimant, March 2009

CLAIM

The applicant claims that she left D.R.C as a result of political situation. The reason for leaving was to apply for asylum in South Africa because his father was a soldier and he was suspected of giving Nkunda the plans and he was killed. He was at the University during that time and one of his fathers friend came to him and told him they were looking for them. He decided to go to Lubumbashi with his brothers and they were still looking for them. One of the friends adviced them to come to South Africa.

REASON FOR THE DECISION

According to the 2008 August Operational Guidance Note DRC, the presidents of all opposition parties and leaders of the rebel groups accepted their elections defeat after intial appeal to the supreme court. They agreed to participate in a strong republican opposition in the interest of the nation. General Kunda aimed army refused country information, Info please October 2007 it was reported that as there has been an upsurge in politically related violence in Kinshasa and the Bas Congo province and Jean Pierre Bemba's aliens condemned what they describe as arbitrary arrest and intimidation of its members during the clashes of March 2007, but there is no evidence of systematic persecution of opposition party activist by the authorities and since the events in Bas Congo province and Kinshasa political party members are not at risk of persecution because of their membership alone or associate with opposition activist. Parties are represented in the recently elected National Assembly and the senate having stood in D.R.Cs first peace time. There is also no well-founded fear of future persecution in your country of origin as there is about six months of politically [sic] stability after clashes of March 2007 (2J).

Sparse or immaterial country information

Some decisions contained more direct attempts at concrete reasons. Their level of reasoning, however, remained far from sound. A few RSDOs, for example, invoked geography as a basis for denying asylum claims. Ignoring the particulars of the claim, a decision rejecting a Zimbabwean asylum seeker listed the provinces of Zimbabwe and concluded that, in light of Zimbabwean geography, the claimant could have relocated to another province (3CC5). The decision then cited definitions from the *Handbook* and from Hathaway on persecution, credibility, and refugee law in general, and concluded that the applicant failed to meet the burden of proof—all without once discussing the individual claim (3CC5). Similar reasoning was used against a claimant from Ethiopia: “According to Ethiopia country report of November 2006, Ethiopia is a federal republic

with nine ethnically based states and two self-governing administrations and the constitution also establishes a federal and democratic state structure” (1ABK).

On several occasions, status determination officers based their reasoning on scant country information, or relied on the fact that the claimant did not provide background country information—ignoring their own obligation to engage in country research. One decision, for example, quoted a single sentence from the UN news service: “Meanwhile, MONUC³¹ reported today that the situation in both North and South Kivu remained ‘relatively calm’ and UN forces are continuing to follow the withdrawal of CNDP³² troops from all occupied positions since the resumption of the fighting” (1W). The decision then asserted that the claimant did not provide sufficient proof of instability in the DRC under Section 3(b) of the Act (1W). Another letter had a single paragraph noting the persecution of people perceived to be linked to the opposition and then stated: “you did not establish that you were persecuted as you were not a high profile activist and you came to the country before anything happen to you.” (1AN).

In general terms, almost none of the decisions reviewed drew their conclusions directly from the details of the individual claims or contained any independent analysis. As noted above, this practice negates the very foundation of a refugee status determination system that is based on an individualized consideration of persecution. The reliance on a practice that creates general categories of eligibility depending on country of origin fails to adhere to both the letter and the spirit of refugee and administrative law.

Failure to Apply the Mind and Reasonableness

The category of failing to apply the mind encompasses several different elements. One key element is the failure to decide or to consider, which also includes the failure to

³¹ Mission of the United Nations Organisation in the Democratic Republic of Congo, the UN peacekeeping force.

³² National Congress for the Defense of the People, an armed faction led by Laurent Nkunda.

undertake a proper deliberation.³³ Another element, laid out in Section 6(2)(e)(iii) of PAJA, involves the consideration of irrelevant factors or the failure to consider relevant factors. In addition, “if a tribunal were to relegate a factor of obvious and paramount importance to one of insignificance, and give another factor a weight far in excess of its true value, this would amount to a failure to apply the mind properly to the matter.”³⁴ The failure to apply the mind also encompasses action that was taken “arbitrarily or capriciously” as laid out in Section 6(2)(e)(vi) of PAJA. While PAJA does not define these terms, the common law definition encompasses action that was “irrational or senseless, without foundation or apparent purpose.”³⁵

In addition to the PAJA provisions discussed above that form part of the common law standard of the failure to apply the mind, and in addition to the rationality standard, PAJA also establishes the separate category of reasonableness. Section 6(2)(h) describes an unreasonable action as one “that is so unreasonable that no reasonable person could have so exercised the power or performed the function.” Because they are fundamentally about establishing a logical, well-reasoned argument, all of these standards tend to overlap, as revealed in the examples below.

Rationality: Ignore information in claim or relevant country information

Many of the claims that did attempt to engage in some level of logical reason-giving nonetheless fell short by ignoring the details of the claim in their analyses, even though such details were recounted earlier in the decision. These decisions routinely contained blanket statements that the applicant suffered no harm and was not persecuted, while failing to acknowledge information in the claim that suggested otherwise. After recounting an applicant’s statement that he was beaten at the police station, for example, an RSDO claimed that “the applicant was not harmed in any way” (3W2).

³³ Hoexter, p. 281.

³⁴ Hoexter, p. 283 (discussing *Bangtoo Bros v National Transport Commission* 1973 (4) SA 667 (N) at 685A-D).

³⁵ Hoexter, p. 291-2.

Employing language that was repeated verbatim in another letter, one RSDO asserted:

The fact that you stated that you were compelled by political issues to leave your country does not specifically show that you were politically involved with either the opposition party, that might have led to you being victimized by the ruling party. Hence you also failed to show that such political issues did influence you to the extent that life became intolerable for you to continue to stay in your country (3P2, 3P).

This statement failed to acknowledge the fact that the claimant, who distributed party t-shirts at rallies, was arrested by the police for his political activities and further threatened by them (3P2, see also 3BB2).

Frequently, RSDOs concluded that a claimant had been caught up in random violence even when the claim described how the individual had been specifically targeted, and had in some way come to the attention of the authorities. (1AS). RSDOs asserted that there was no “evidence which will set you apart to the extend [sic] that you would be selected for persecution, you were just an ordinary person,” despite details of the claim revealing that this was not the case (1G, see also 2V). In the same manner, RSDOs concluded that a person was not likely to be of interest to the state or the ruling party without accounting for the fact that the individuals had been specifically and repeatedly targeted at their homes (3D6).

Demonstrating an extreme disregard for the facts described earlier in the decision, an RSDO faulted a woman for failing to seek government intervention. The woman was a high profile activist for the MDC. She fled after being targeted and arrested several times by the government. The RSDO was oblivious to the fact that he was requiring her to seek the protection of the very people who were persecuting her (3V3). Ignoring that she had been sought out by the authorities on several occasions, and that the army had raided her house, and after determining that she was credible, the RSDO stated:

Her activities in the MDC did not bring her to the adverse attention of the authorities, she did not give evidence that she had suffered persecution or faced

any special difficulty beyond the problem which everyone else would face as a result of the generalized circumstances in her country. (3V3).

Despite the fact that the applicant was involved in several political activities, including serving as an MDC provincial chairlady, as information secretary for the National Constitutional Assembly, and as a member of Women of Zimbabwe Arise, the RSDO unreasonably concluded that “her activities were of a very low level and that he [sic] could not be of interest to the CIOs³⁶ or Zanu-PF” (3V3). Yet, it was precisely because she was of interest to them that she was arrested and beaten several times. In spite of her political activities, the RSDO declared that a person like the applicant could not be characterized as a political activist [3V3, see also 3AA].

In many comparable instances, RSDO’s ignored or directly contradicted the specifics of the individual’s claim and blindly asserted that the claimant could have sought the protection of his or her country:

- A woman who fled the DRC in fear for her life after refusing to be Kabila’s second wife was told that “you merely refers [sic] to an isolated incident which you could have reported it to relevant authorities” (1II). [See also, 1JJ]. Despite its constituting the basis of the claim, the RSDO did not recognize that there were no relevant authorities to which one could turn when being pursued by the leader in charge of these same authorities.
- A claimant who fled civil war in the DRC after hiding while his family was killed was told that he failed to demonstrate that his country was unable to protect him, notwithstanding that his country had, in fact, proved unable to protect him or his family (3K12).
- A Zimbabwean claimant described how members of the ZANU-PF youth came to his house to harass him because of his MDC membership. The RSDO stated: “You do not qualify for status because you were not the prominent member of MDC. You were not even the member of MDC, there is no reason to be targeted.” (3M15).
- A Congolese claimant was rejected on the grounds that individuals who were fleeing rebels could relocate to other areas where the government could provide

³⁶ Central Intelligence Organisation, Zimbabwe’s national intelligence service.

protection. The claimant, however, was fleeing Kabila—the head of the government. (1II).

- Taking no notice of the fact that the government in the DRC was at war with the rebels and had effectively lost control of certain areas, an RSDO rejected a claimant who escaped from the rebels after being forced to fight: “[H]e did not attempt to seek governmental intervention and therefore it cannot be established that his government was unable to or unwilling to protect him” (3G2).

In some instances, RSDOs put forth contradictory information. One decision stated that the applicant was forced to flee Zimbabwe after being harassed for his MDC membership, and that this information was noted in the eligibility form. The reasons section then stated an opposing proposition: “It is contradictory that you claim in your application form that you left your country because you want to do business in this country while in your RSDO hearing you mentioned the issue of political problem and this discrepancy can discredit your claim” (5D). The RSDO cited other invalid reasons for rejecting the claim as well, including that the applicant left voluntarily and not by force, and that he did not take any measures to solve the issues in his country (5D).

Another claimant made out a persecution claim based on his family’s affiliation with Bemba.³⁷ He fled when government forces came to his house and killed his father. In assessing the claim, the RSDO stated:

The claims you advanced amount to human rights and Humanitarian Protection claim, it doesn’t provide guidance on whether you are likely to face a real risk of persecution, unlawful killing and torture, inhuman or degrading treatment/punishment and systematic violation of your human rights and internal security protection. General conditions prevailing in the applicant’s country of origin and lack of resources doesn’t amount to persecution (2F).

³⁷ Jean-Pierre Bemba, leader of the MLC political party and rebel group in the DRC.

Aside from the fact that it makes no sense, the above statement in no way relates to the situation described by the claimant, which rests on being singled out because of his and his family's political affiliations.

RSDOs often put forth abstract reasons that were completely removed from the information provided by the claimant. A Congolese asylum seeker described how government soldiers destroyed his house and raped his pregnant wife, causing her to miscarry, in retaliation for his work association with Bemba. The decision he received did not discuss these events, and instead cut and pasted news accounts noting the signing of peace agreements the previous year (6E2). The same information was pasted into a decision rejecting the claim of a pastor whose church was attacked by government soldiers on suspicion of harbouring rebels and whose wife was killed in the attack. Again, there was no discussion of the events described by the claimant (6E3).

Cases involving rape were particularly egregious, as RSDOs frequently did not address the rape in their analysis. One decision employed cut and pasted language asserting that the claimant, a Congolese woman, did not state that she was personally targeted because of her political affiliation, while ignoring the fact that she had been kidnapped and raped by rebels. The letter also contained cut and pasted language stating that the claimant only showed a generalised fear of harm, despite the fact that she was brutally raped and had been seriously injured (3H3).

In the case of a woman who was raped because of her husband's political activities, the RSDO did not confront the circumstances of the case. Instead, he concluded:

In this case you failed to prove that you did suffer persecution or to prove that there is a real risk of a future persecution. Mere membership of a particular social or political group will not normally be enough to substantiate a claim to refugee status. Also holding political opinions that are different to those of the government is not in itself a ground for claiming refugee status (2K).

The rote rejection again failed to acknowledge that the claimant had been raped.

A male claimant fled the civil war in the DRC after being raped by soldiers. The RSDO discussed the rape of women, claiming that it was done only by rebels who had since been arrested. The decision failed to address the specific situation of the claimant or to inquire as to the nature of the rape, but merely concluded that he would not be persecuted upon his return without providing any supporting evidence that country conditions had stabilized (6K).

Irrelevant considerations taken into account or relevant considerations not considered

In addition to ignoring the particulars of an individual claim, rejection letters frequently included random information that was not related to the individual's story and in no way assisted in the assessment of the claim. These decisions fall under Section 6(2)(e)(iii) of PAJA, described earlier, which provides for review of administrative action taken "because irrelevant considerations were taken into account or relevant considerations were not considered."

Often, the reasons provided had no direct connection to the issue in question. The rejection of a claimant who alleged discrimination for being HIV positive, for example, consisted of one paragraph of statistics regarding the high numbers of HIV positive individuals in Zimbabwe, and the insufficiency of antiretroviral drugs (1AX). This information was not linked to the question of discrimination.

Many decisions relied on facts that were not particularly useful in assessing the validity of the claim. In advocating internal relocation for a Congolese claimant, one decision noted that DRC law granted refugee status in accordance with the 1951 Convention (3Q-3Q4). Similarly, another RSDO thought it relevant to note the fact that the DRC law provides for the granting of refugee status, and that the country hosts refugees from other countries. This information served as the basis for denying asylum to a woman who had been abducted and raped by rebels (3H3).

Some decisions also pointed to the voluntary repatriation programme run by the UN in 2007 as evidence that the DRC was stable in 2009 (6D1, 6D2). Similarly, other decisions pointed to the IOM reintegration programme in Ethiopia, run out of London in 2001 (1ABB; see also 3D6-8, 3D11, citing 2006 IOM reintegration programme in Zimbabwe).

One claimant was rejected on the grounds that “former rebel groups are now represented in the Transitional National Government and according [sic] members or associates of these groups are not likely to be any longer at risk of persecution by the authorities.” (1BB). This despite the fact that: 1) the transitional national government no longer existed and 2) the claim had nothing to do with the rebels, but was based on the claimant’s role as a journalist.

A series of identical letters presented the following information: a description of the economic crisis in Zimbabwe; quotes from newspaper articles about Zimbabweans in South Africa; and an extract of a news article featuring an irrelevant quote from a member of the Zanu-PF youth militia about his experiences, followed by a section from Hathaway describing the scope of refugee law. This assortment of random facts, which made up the bulk of the decision, in no way engaged with the details in the various claims (3AA, 3AA2, 3AA3, 3AA4, 3AA5, 3AA6, 3AA7, 3AA8).

Ignoring information in front of administrator, no rational connection

Section 6(2)(f)(2) of PAJA requires that administrative decisions have a rational connection to:

- 1) their purpose;
- 2) the purpose of the empowering provision;
- 3) the information before the administrator; and
- 4) the reasons given.

In an overwhelming number of decisions reviewed, the rejection was not rationally connected to either the information before the administrator, or to the reasons given by the administrator. Many decisions reached conclusions that did not follow from the information presented. At times, the conclusions even directly contradicted the information presented.

In some instances, the reasons provided actually supported a claim of persecution:

According to the June 2008 country information on human rights: The governments' human rights record remained relatively poor, as it had been committing numerous abuses. President Mugabe and ZANU-PF have been alleged to have been beating, torturing and intimidating the opposition party members. Allegation of systematic, government sanctioned campaign of violence targeting supporter and perceived supporters of the opposition increased before, during and after the March 2008 elections (2M).

This description of human rights abuses served as the basis of the rejection—demonstrating no rational connection with the information that was provided.

Another letter also contained information tending to support an asylum claim, including the passing of a bill that would exert greater government control over non-governmental organizations, the increased harassment of human rights workers, and elections that were not free and fair. Without providing any counter-evidence, the decision then stated that the country information revealed that it was safe for the individual to go back (2T).

Similarly, one decision cited up to date country information describing that rape was widespread in all areas of the DRC. After noting the pervasiveness of rape in the entire country, the RSDO concluded that the claimant could take advantage of internal relocation, adding she was not likely to be persecuted for her political affiliations. The decision included no information on her actual claim and whether she had in fact been raped as a result of general conditions of instability or whether she was fleeing from political persecution (6G).

Other letters also reached conclusions that did not rationally follow from the information provided. For example, an advisor to a pastor who was being targeted by security forces fled after the church was attacked and the Pastor and several members of the church were assaulted. The decision cited a press report describing how security forces attacked the church, used tear gas, and beat members of the congregation in a “very forceful” action. After including this description of the attacks on the congregation, the RSDO then asserted, “The operation was targeting the pastors only; mere members were not suffering persecution than high profile members [sic]” (3C).

Another letter involving the DRC stated that a peace conference took place, and that clashes followed the signing of the peace accord. The RSDO then rejected the claim, concluding only: “That is an indication of developments in the area” (1H). A decision rejecting a Zimbabwean applicant noted a “dramatic increase in political violence and repression” in 2007. But the decision also cited a UK case from 2005 arguing that those caught in random violence are unlikely to be of continuing interest to the authorities. The decision made no attempt to reconcile this conflicting information, instead relying solely on the earlier country information (3X, 3X2, 3X4, 3W3).

As a result of unthinking cutting and pasting, RSDOS often included information that made no sense in the context of the claim, or diverged from South African law. One such rejection of a Zimbabwean applicant relied on a UK decision. The UK decision, however, considered the applicant’s right to invoke Article 3 of the European Convention on Human Rights—a provision that outlaws torture and inhuman or degrading treatment. As a result, the RSDO based his conclusion on the interpretation of a legal provision that was not dispositive of eligibility for refugee status (3W3).

The extreme use of cutting and pasting, without any analysis or text connecting the paragraphs or explaining their relevance, cloaked the logic of some decisions behind disjointed sentences whose relevance was not entirely clear. On several occasions, it was impossible to discern the main thrust of the RSDO’s argument:

- A Congolese claimant who was being persecuted because of his political party affiliation, and another who fled the civil war, were both told: “In fact nothing like persecution happened to you except that you were a human rights activist” (3B3, 3B4).
- One claimant fled the DRC after government soldiers began attacking MLC supporters and killed his parents. The decision stated: “The objective risk should be a realistic one and not contingent remote or speculative. Save for mentioning an incident of potential harm [unclear what RSDO is referring to] which was found to be baseless, you could not furnish evidence which brings your claim within the above-mentioned ambit” (1Y).

These examples highlight the difficulties in making sense of a rejection based on unclear arguments referencing vague events.

With respect to a claimant making a 3(b) claim based on the civil war in the DRC, the RSDO discussed facts that were not relevant to the general situation of instability. Instead, he asserted that press freedoms improved marginally in 2008, making it “unlikely that such individuals would be able to demonstrate a well founded fear of persecution.” He then concluded that “these discrepancies above affect the credibility of your claim” (2I). The significance of a mild improvement in press freedoms was not immediately clear, given that the applicant’s claim was based on the civil war in the Congo. Nor was it clear what discrepancies existed in the claim, and which individuals were no longer likely to be at risk of persecution.

Some decisions were even more illogical, for example, by referring to different countries. A letter rejecting a Congolese claimant stated: “In 2007 there was Africa meeting which all Africa country were re-presented and they where discussing about the problem of Zimbabwe [sic]. This shows that DRC is a changing” (1A).

In another example, a Zimbabwean asylum seeker was abducted and tortured because of his MDC affiliation, and his parents also were persecuted because of his membership. The decision stated:

After careful consideration of you claimed [sic] it was clear that you were not actively involved in politics, but suffered physical abuse hence out of fear for family’s safe you decided to relocate yourself to a country where you could

seek refuge and even though you and your family members were affected greatly after being intimidated by the ZANU-PF members after accused of affiliating to the opposition party, but the fact that the ZANU-PF members were intimidating and beating people up was nothing evident to that fact from your claim that you suffered. The lack of basic commodities does not form part of the inclusion elements in terms of Section 3 of the Act 130 of 1998.” (3Z, see also 3Z5).

This disjointed paragraph served as the basis of the rejection.

A Congolese woman who fled police harassment was rejected on equally incoherent grounds:

Another issue is that in considering your claim where you are the principal applicant who has dependents family members you let in DRC including your children who are part of your claim, account was taken of the situation of all the dependent family members included in your claim in accordance with the asylum instruction on Article 8 ECHR. Following those consideration your claim is clearly rejected as unfounded because it is without a substance that is bound to fall. There are no reasonable grounds to believe that you were compelled to leave your country because of the reasons stated by this act (6J).

No other reasons were provided—only general statements that the claimant did not establish a well-founded fear of persecution.

An individual who fled from rebel forces in the DRC after they forced him to fight on their side was rejected on misplaced grounds leading to unsound conclusions. The RSDO treated the claimant as though he were fleeing from government conscription:

...in countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether [sic] military service is compulsory or not, desertion is invariably considered a criminal offence. The applicant was compelled to join military service but he refused and run away because he knew that it is a criminal offence and punishable the law of his country. The applicant is clearly not a refugee because his only reason for desertion is his dislike of military service or fear of combat (1E). [See also 3M11, using similar language from the UNHCR handbook regarding draft evasion, for a claimant who fled to avoid being forced to fight with rebels].

Another illogical rejection involved a Bangladeshi asylum seeker:

The fact that you were a supporter of the BNP³⁸ party and the Awamie league³⁹ wanted to kill you after failing to join them cannot be disputed. The fact in issue is how does they wanted to kill you [sic]. In this case, you were just a supporter of the BNP party and not active in politics. You were not a threat to the Awamie league or any other political parties in Bangladesh (5C).

This argument reflects the general misuse of the persecution concept. The RSDO conceded that the applicant was in fact persecuted on political grounds, but this was not the determinative factor. Instead, he rejected the claim because he did not believe this persecution to be justified, as the applicant was not a high profile member of a political party and thus could not effectively threaten a rival party.

Assertion of unsupported facts, illogical conclusions and speculation

In addition to reaching irrational conclusions, RSDOs also frequently engaged in groundless speculation and based their decisions on unsupported conclusions. The following statements were made without any background information or supporting evidence:

- In response to an asylum claim based on the Ethiopian applicant's support for an opposition party, the RSDO stated: "I have found that it is most unlikely that anyone claiming to have been affected by ethnic conflict in your home country, would be of interest to the Ethiopian authorities or be able to demonstrate a well-founded fear of persecution" (1ABB).
- In response to a Congolese claimant who fled to avoid being forced to fight with the rebels, the decision noted that desertion from mandatory military service was a political offence and then concluded: "A fear of persecution is not well-founded on the part of the applicant due to changes and new developments taking place in the political sphere of his country." The letter did not elaborate on these changes and developments (1E).

³⁸ Bangladesh Nationalist Party, the centre-right party in Bangladesh.

³⁹ Centre-left political party in Bangladesh.

- The RSDO contended that there had been no reports of political violence since the signing of the peace treaty in Zimbabwe (2C).
- In making an argument for internal relocation: “Your potential persecutors could have been people who knows [sic] you, whom are based in area” (3CC5).
- A claimant who was beaten and left for dead and whose family members were killed was told: “Your claim further leaves me with doubt that if you did suffer any persecution you would have taken your children with you” (3O5). The RSDO concluded: “[N]o evidence do indicate that serious harm will result” (3O5).
- In response to an Ethiopian asylum seeker who fled after the government sought to arrest him for his support for an opposition party, the RSDO stated: “You left your country because of political instability in your country of origin and you were not an activist and you should have relocated to another village, and there are no events as contemplated in Section 3(b) of the act which are seriously disturbing or disrupting public order in Ethiopia” (1ABK).
- “[T] here is no evidence of persecution in Zimbabwe is stable [sic], there are no evidence which seriously disturb public order in either a part of the whole of country” (3Y).
- In response to a claimant who fled the civil war in the Congo: “You only felt not safe and decided to come to South Africa even though there was nothing which compelled you to abandon your country in order to seek refuge elsewhere” (2R).
- A claimant who was arrested, detained and beaten was told, without reasons, that he was “not on serious adverse attention of the Congolese authorities which could have compelled” him to flee (2O).

RSDOs reached these conclusions without providing any explanations or supporting evidence.

At times, the speculation resulted in conclusions that no reasonable decision maker would be likely to reach:

Submissions put before me indicate that you ran away from your country of origin [Cameroon] after a political fight or wrangle that broke out between the ruling party members and the opposition; that your house was also burnt down. It is expected of people who resort to physical fight to resolve their political differences to incur some form of loss or damage. Therefore one cannot be party to this mayhem and then cry innocence or foul when the scales are tipped heavily against him/her. You were engaged in a fight with your political

opponents – so what did you expect? For every act there are attendant consequences. Moreover, you only chose to leave the country after being advise to so and not of your own accord” (1ABE).

Another claimant reported that his father was murdered for being an MDC activist, and that he fled from Zanu-PF operatives who wanted to kill him for participating in MDC youth activities. In his rejection, the RSDO stated:

There is nothing in your submission to indicate that you were a political activist of any note and thus you enjoyed no political profile at all.... Besides the incident regarding the death of your father happened three years ago and has slipped the minds of those who were after you as well (1AR).

Some of the reasoning put forth was wholly specious. An applicant who was arrested because of his political activities, for example, was denied asylum on the grounds that he could seek the protection of human rights organizations, and that he was not in danger of re-arrest because if he were, he never would have been released. The RSDO ignored the applicant’s political activities and speculated that he must have done something wrong in order to be arrested:

The applicant was arrested and released by the help of lawyers and the intervention of other human rights group. If the applicant was a threat to the Government, he could not have been released. The very fact that he was released its because they did not have a case against him. There is no ways that he cane [sic] be arrested again yet he was released. The applicant has a powerfull [sic] back up of people who understands peopled rights. Therefore those people were going to protect him. His runing [sic] away might be that the applicant has committed an act that deserve for him to be prosecuted. The Refugee Act does not cover people who are runing away from persecution [sic]. The applicant failed to prove persecution on his part, his fear of persecution is therefore not well founded (1C).

The RSDO provided no basis for these assertions.

Other decisions similarly ignored the causes of persecution and speculated, with no supporting evidence, as to alternative reasons. In rejecting the claim of an applicant

who fled for fear of arrest because of his affiliation with the opposition in the DRC, the RSDO conjectured about other possibilities:

There are several instances which might have led to this arrest. The most possible one is that as a radical person, the applicant might have participated in illegal marches and demonstrations and the police officials, acting in performance of their duty, namely that of keeping order, started to arrest any one whom they suspected of causing disorder. It is highly possible, that the police might have been acting within the scope of their duties and functions, when effecting any arrest. If any transgression or contravention of any law or rule was noted, it would not be anomalous for the police to deal with the culprit accordingly. It cannot therefore plainly be said that the applicant's rights were violated when the security forces were arresting any person (1I).

In addition to engaging in sheer speculation, the RSDO's argument rejects the possibility of state persecution.

In considering the claim of a Congolese asylum seeker who fled because soldiers were looking for him on account of his membership in an opposition party, the RSDO responded: "There is no fear of persecution established by the applicant as the UDPS are no threat to the government" (1O). The RSDO relied on a 2005 country report to arrive at this conclusion. Equating human rights monitoring with a lack of persecution, one RSDO stated: "The DRC government has been monitored by international human right [sic], therefore the applicant cannot claim that he has been harassed or threatened by government authorities" (2D).

Many decisions displayed a tendency to characterize any attack as random. An applicant from Eastern Congo made a Section 3(b) claim as a result of the civil war. The RSDO responded:

Although it might be believable that the applicant was attacked, it cannot be simply concluded here that her situation automatically meets the criteria set out in section 3(b) of the Refugees Act. Firstly, the applicant talked about war in her claim, but failed to give details that [sic]. This therefore leaves the claim unproved, while the burden rests on her to prove her allegations. It is not certain here that her attack was politically motivated, nor was it proved that the people who attacked them were rebels. It is more probable that her attack was simply one of criminal activities. It was not also proved here that the attack was

directed to her personally. Probably, she is just a mere victim of random attacks (1VV).

In addition to engaging in specious reasoning, the decision misinterprets the legal requirements of Section 3(b), as well as the obligation on the status determination officer to investigate country conditions, instead placing the burden on the applicant.

The same speculative reasoning was applied to a claimant whose family was attacked, and sisters raped, because of her father's association with the opposition. Again, the RSDO conflated the requirements of Section 3(a) and 3(b). Moreover, the decision ignored the fact that it was the state security forces that attacked the claimant, and, as a result, seeking the protection of the state was not feasible:

Although it might be believable that the applicant was attacked, it cannot be simply concluded here that her situation automatically meets the criteria set out in section 3(b) of the Refugees Act. Rape is a criminal offence which can occur to anyone at any time. It needs a lot for one to prove that it occurred because of any reason emanating from the insecurity state of the country. No allegations were made here that the matter was reported to the police and nothing was done by the state, to assist the applicant or her sister. It is not certain here that her attack was politically motivated, nor was it proved that the people who attacked them were rebels. Looking at the situation in full, it is more probable that her attack was simply one of criminal activities. It was not also proved here that the attack was directed to her personally. Probably, she is just a mere victim of random attacks. The mere fact that she is from the Eastern side of DRC and was attacked cannot avail her, as there is no sufficient prove [sic] here that they were attacked by rebels (1UU).

Other decisions similarly speculated, without providing any support for these assertions—and while ignoring elements of the claim highlighting that the individual was targeted—that the claimants were simply victims of random attacks (1AS). As demonstrated by the examples above, these decisions also generally conflated Sections 3(a) and 3(b) of the Refugees Act.

Several rejection letters contained unfounded conjecture that an individual had come to South Africa for economic or business reasons. In the case of a Zimbabwean teacher who fled because Zanu-PF agents were looking for him, the RSDO cited numerous accounts of political persecution, but concluded that the individual was not subject to this persecution. The RSDO further cited country reports that discussed the particular vulnerability of teachers, but he failed to include this information in the citation or to incorporate it into his assessment. Instead, he concluded that the claimant came to South Africa for business reasons, while failing to provide any basis for this conclusion (1AO).

In fact, RSDOs repeatedly levelled unsupported claims that asylum seekers had come to South Africa for economic reasons:

- In response to an asylum seeker who claimed that his life was in danger because of his association with an opposition party, the RSDO made the following unsubstantiated assertion: “You did not suffer persecution in your country and your emphasis seem to be economic problems rather than political” (1ABH).
- A claimant who was raped because of her husband’s political affiliation was told: “You came to South Africa on your own accord in search for a better life, not because you have a well-founded fear of persecution” (2K).
- A claimant who fled instability in Zimbabwe was told: “I found that the reason that made you to leave your country is not politically motivated because by the time that you left your country no political violence was reported and by the time that you left your country there was no political violence. I found that you left your country because of the economic problems.” (2N)

Mistake of fact/selective use of country information

While some decisions simply put forth baseless assertions, others selectively cited from country reports to give a misleading picture of events. RSDOs often cherry picked information that suggested that country conditions had stabilized, while ignoring information in the same document pointing to continuing problems. If done with deliberate dishonesty, these actions violate the bad faith provision of PAJA (Section

6(2)(e)(v). Alternatively, they constitute a failure to apply the mind and, at the very least, fall under PAJA's catch all provision of action that is "otherwise unlawful or unconstitutional" (Section 6(2)(i)).

One decision, for example, cited a selection from the 2007 UK Operational Guidance Note for Burundi describing the IOM voluntary assistance programme for Burundians who wished to return as proof that country conditions had improved. The decision made no mention of the paragraph immediately preceding the one cited, however, which discussed UNHCR's recommendation that no rejected asylum seekers be returned to Burundi (3A).

Similarly, a DRC applicant was rejected on the grounds that there were new developments in the DRC, following the 2006 elections. To support this contention, the decision quoted a 2007 UK country report noting that democratic elections were held for the first time in 40 years:

"In assessment of facts, evidence of well-founded fear or maltreatment and the events leading one to qualify for asylum or warrant a grant of Humanitarian Protection have since subsided in DRC after the success of the first national democratic elections held in 40 years" (2F).

Yet, the very same report characterized the elections as the only positive sign in a country that it concluded was suffering from serious human right abuses and a lack of government control. The bulk of the report detailed the continuing problems in the DRC. Many decisions repeated this pattern of hailing the elections, as mentioned in the report, while failing to acknowledge that the report was primarily devoted to chronicling continuing serious human rights abuses and a lack of government control (2F) [see also, 2P, 6B].

RSDOs also selectively cited sections of UK Home Office Operational Guidance Notes on Zimbabwe. Although these decisions acknowledged the political violence and persecution described in these reports, the RSDOs prioritized statements in the Guidance Note declaring that those involved in low-level political activities were unlikely to be of interest to the Zimbabwean government. In giving precedence to these

statements, they ignored additional information in the same documents stating that certain individuals might be at greater risk. In particular, they paid no attention to the fact that the Operational Guidance Note included a special section describing the heightened vulnerability of teachers. The Guidance Note emphasized that teachers could not seek the state's protection and they were therefore unable to relocate internally.

Ignoring this information, a decision rejecting a teacher who sought asylum noted an increase in political violence, but inexplicably concluded that the claimant's activities were unlikely to bring him to the attention of the authorities. In spite of the information in the Guidance note highlighting the particular danger to teachers, the rejection letter concluded, without any substantiation, that there was no reason for the claimant not to have sought the protection of his government and to relocate. The RSDO then determined that the claimant came to South Africa for business reasons, although there was no suggestion of such a motivation in the summary of the claim (1AO).

Another rejection letter similarly relied on language from the Operational Guidance Note stating that individuals assaulted in random violence during mass protests were unlikely to be of interest to the authorities. The RSDO not only ignored the fact that the asylum seeker was a teacher, but also failed to acknowledge that she had been beaten and raped by members of the ZANU-PF because of her imputed political beliefs and her position as a teacher (2C). Disregarding the information in the Operational Guidance Note, the RSDO put forth the possibility of internal relocation.

Some RSDOs relied on country reports put out by the country in question to establish that country conditions were stable and that there was no chance of persecution (2T, 3N, 3E, 3E2, 3E3, 3E4, 3R, 3R2). These decisions showed no recognition of the fact that a country is generally unlikely to self-report that it persecutes its own citizens.

Internal relocation without consideration of claim

Other aspects of the status determination process were equally problematic and demonstrated a failure to apply the mind. RSDOs frequently rejected asylum applicants on the grounds that they could have relocated within their country (1G, 1ABL, 1AO, 1UU, 1VV, 1AT, 1AU, 1II, 1AI, 1AJ, 1AK, 1ABD, 1BB, 1W, 1R, 2K, 2L, 2P, 2N, 2D, 3O6, 3G, 3G2, 3CC5, 3Q, 3W2, 3X2, 3BB, 4A, 5C, 6B, 6G, 6H, 6K). RSDOs made these claims without considering the particulars of the individual's situation. Without undertaking this deliberation, RSDOs could not be expected to reach accurate conclusions regarding the prospects for internal relocation.

The use of the internal relocation option was flawed in many aspects. According to Hathaway, the feasibility of internal relocation should not be based on a generalized assessment of country conditions, but should necessarily depend on the particular circumstances of the individual claimant. Hathaway also stresses the importance of procedural fairness in making this determination, asserting that the burden rests on the receiving state to show that the applicant could have safely relocated. Finally, he explains that the internal relocation option should not serve as a substitute for assessing the refugee claim of an asylum seeker, but is more appropriately treated as a basis for exclusion following a determination that an individual has in fact fled persecution. RSDOs failed to adhere to any of these conditions in their treatment of the internal relocation option.

In some instances, the RSDO disregarded the fact that the applicant actually had relocated, and had been persecuted in his new location as well (3CC5). RSDOs regularly concluded that anyone who was not well known or specifically targeted by the authorities could relocate internally, without conducting an investigation of actual circumstances (1MM, 1ABF). On several occasions, they overlooked details of the claim describing how the asylum seeker was specifically targeted, and instead determined that the individual could relocate because he or she had not been targeted. (1UU, 1VV). Thus, RSDOs both inappropriately applied the internal relocation option as a substitute

for assessing the asylum claim, and also ignored details of the individual's claim in order to assert its feasibility even in situations where it was not suitable.

Nor were the arguments regarding internal relocation consistent. While asylum seekers were regularly faulted for failing to relocate or attempting to resolve their situation, those who did make such attempts found that their actions also served as a basis for denying refugee status. A claimant who fled and went into hiding inside his country was rejected because of these actions: "If really you had a problem I [sic] your country I will like to believe that you would have left your country on the spot rather than waiting for a year in a country where your life was in danger" (6L).

In addition to incorrectly utilizing the internal relocation option as a reason for rejecting asylum seekers, many decisions also relied on the fact that asylum seekers could have settled in other countries (6B, 6C). This practice has continued despite a court order clearly stating that asylum seekers are not required to seek asylum in countries they transited before becoming eligible for asylum in South Africa.⁴⁰

Outdated Information

In determining whether it was safe for an individual to return to his or her country of origin, status determination officers frequently relied on country information that was several years old and no longer relevant. Many RSDOs put forth any report of stability, regardless of the time period, as grounds for denying an asylum claim. They routinely failed to take into account subsequent events that nullified this period of stability. Below is a list of some of the instances in which RSDOs based their conclusions on outdated information. All of the decisions were issued in the first half of 2009:

- 1AN (2005), 1ABC (2006), 1ABG (2005), 1C (2005), 1O (2005), 1E (developments in 1999, 2002, 2005), 1Z (2004 UK Country Report), 1GG (2005), 1AZ(2005), 1ABB

⁴⁰ *Lawyers for Human Rights v Minister of Home Affairs*, (TPD) Case no/02.

(2005), 1ABC (2006), 1ABK (2006), 1Y (cites 2007 Amnesty Report discussing elections in 2006);

- 2AA (2005), 2P (2006), 2U (2001), 2T (2005), 2G (2005), 2K (2006), 2CC (2007);
- 3A(2006), 3I (2006), 3G2 (2004), 3J(2005), 3EE (no reports of politically motivated killings in 2007), 3Q (2006);
- 4C (2005).

Many rejection letters portrayed the situation in the DRC as peaceful—citing the fact that there had been six months of stability following violence in March 2007—while failing to take notice of developments in the subsequent year and a half (2J, 2O, 2AA, 2Q, 2R). Even more problematic, one decision relied on the fact that the “treatment of UDPS members was considered to be significantly better in 2006 than it was in 2005,” while failing to consider the current situation, or to acknowledge that the asylum seeker had been raped (2K).

Some RSDOs seemed completely unaware of the fact that renewed violence had broken out in Eastern Congo in 2008, and described how the civil war had ended in 2003. They relied on reports describing country conditions in 2006 to conclude that the situation in the whole of the country was stable (1VV, see also 1UU).

Possibility of return to peace in the future, or rights on paper

The use of outdated information was accompanied by a general failure to engage in a rigorous, thorough exploration of conditions in the asylum seeker’s country of origin. Rather than conduct this investigation, RSDOs instead held out any possible indication that things could stabilize, regardless of how isolated, fleeting, or dated, as definitive proof that an asylum seeker could safely return. Many RSDOs invoked peace talks or agreements as evidence that it was safe for asylum seekers to return to their home countries, without considering events on the ground. For them, the existence of any

sort of peace talks was equivalent to a lack of persecution, and they did not deem it necessary to conduct a more thorough investigation of the successes or failures of these talks.

In many instances, the decisions chronicled events and peace talks that happened several years earlier and that had since been overtaken by other developments (1A, 1GG, 1L, 2G, 2AA, 2H, 3B3, 3B4). With respect to the DRC, several letters pointed to the Transitional National Government, established in 2003 and no longer in existence, as evidence of a return to peace. This no longer existing government served as a basis for concluding that returned asylum seekers would suffer no persecution (1B, 1C, 1M, 1HH, 1N, 1Z, 1BB, 2L, 2S, 2V, 2AA, 2Q, 2V, 2W, 3E, 3G, 3G2, 3I, 3M2, 3N, 3D2, 3D3, 3Q, 3R, 3R2, 4E, 6A1, 6A2, 6G, 6H, 6N).

Most RSDOs viewed the signing of a peace deal as conclusive evidence of a return to stability, even as they cut and pasted information indicating that violence continued (2Q, 2R, 2AA, 2A, 2O, 2L, 2CC, 6D1, 6D2, 6D3, 6E1, 6E2, 6E3). Even the beginning of negotiations with the rebels was generally sufficient to deny the validity of asylum claims, despite the undetermined results of these negotiations (3L).

RSDOs were quick to conclude that country conditions were stable, while failing to consider the proper criteria for determining that there had been durable and lasting change in a country—the generally accepted standard for determining that an asylum seeker could safely return to his or her country of origin. Hathaway has summarized the relevant criteria for identifying a durable and lasting change, basing his summary on UNHCR and judicial decisions:

First, the change must be of substantial political significance, in the sense that the power structure under which persecution was deemed a real possibility no longer exists. The collapse of the persecutory regime, coupled with the holding of genuinely free and democratic elections, the assumption of power by a government committed to human rights, and a guarantee of fair treatment for enemies of the predecessor regime by way of amnesty or otherwise, is the appropriate indicator of a meaningful change of circumstances. It would, in contrast, be premature to consider cessation simply because relative calm has been restored in a country still governed by an oppressive political structure.

Similarly, the mere fact that a democratic and safe local or regional government has been established is insufficient insofar as the national government still poses a risk to the refugee.⁴¹

RSDOs did not consider the nature of the changes they cited and their prospective effectiveness, nor did they acknowledge that “there is often a long distance between the pledging and the doing.”⁴² For them, the pledging was sufficient grounds to determine that there was no risk of future persecution.

Many decisions rejecting Congolese claimants cited outdated information, without acknowledging current conditions and the return of civil war, to show that changes had been durable under Hathaway’s criteria (See, e.g. 3G, 3G2, 3O, 3O2, 3O3, 3O7). Similarly, a claimant from Burundi was rejected because conditions in his country had changed. The change in country conditions was evidenced by the fact that “external goodwill toward Burundi has increased” after a March 2006 agreement with the rebels. The decision, dated March 2009, also noted that economic goals might be achieved by the end of 2006 (1ABC).

RSDOs relied on anecdotal evidence to make wildly speculative assertions regarding the conditions in the country of origin: “I am convinced that the country’s route toward peaceful settlement was firmly laid, taking into account that on the article published by Sowetan newspaper on 21st of January 2008, stated that the talks on the future of the DR Congo are coming to a head, with a peace agreement being signed.” (1P).

RSDOs made similar arguments with respect to the prospects for peace in Zimbabwe, without any consideration of developments on the ground or the nature of the individual’s persecution claim (1AR, 1AT, 1AU). Noting that a power sharing agreement had been signed, one RSDO concluded: “We cannot speculated and it would be difficult make assumption [sic] that MDC members would be persecution [sic] on their return to Zimbabwe” (1AV). Another letter flatly asserted that since the signing of the power

⁴¹ Hathaway, p. 200-1.

⁴² Hathaway, p. 201, citing Ruiz Angel Jesus Gonzales, Immigration Appeal Board Decision T81-9746.

sharing agreement, no one in Zimbabwe had been persecuted, although this claim was not substantiated (1AW).

Some decisions acknowledged that violence continued, but nonetheless concluded that it was safe for the asylum seeker to return. RSDOs relied on inconclusive information such as the following: “According to your country of information [sic], two agreements signed since the end of 2007 offer some hope for an end to more than a decade of violence in eastern Democratic Republic of Congo (DRC), even if fighting has continued and a lasting solution has yet to be found to the presence in the region of Rwandan Hutu rebels, according to analysts” (1KK). The decision acknowledged that violations of the ceasefire continued, but nonetheless reasoned that the country information indicated that the claimant should be returned to his country because there was “some hope” (1KK).

In a similar vein, RSDOs often cited domestic laws or constitutional provisions as evidence of respect for human rights, without investigating whether there was actual adherence to these provisions (1B, 1C, 3G2). After a Congolese asylum seeker fled an attack on his pastor and the congregation, an attack that was described in international press accounts, the RSDO relied on the fact that the Constitution protected freedom of religion to reject the claim (3C). Regarding human rights violations in Ethiopia, an RSDO responded: “The constitution is the supreme law of the land and human rights and freedoms emanating from [sic] the nature of mankind are inviolable and inalienable” (1ABK).

At times, the provision cited was not relevant to the nature of the persecution. A Nigerian claimant fleeing political persecution, for example, was rejected on the grounds that the Constitution guarantees the right to travel (1ABD). Similarly, a decision rejecting a Ugandan claimant who had been detained and tortured because of his association with the rebels noted that there was no legal provision that imposed limits on how much organizations could budget toward lobbying. The decision also discussed the status of NGOs—factors that had no connection to the individual’s claim. It further cited the Constitutional provision prohibiting discrimination, and concluded, “therefore

you can go back because there are developments” (1ABG). The decision took no note of the fact that the claimant was arrested, detained, and tortured for his political activities. (See also 1AZ)

Decision letters invoked the existence of constitutional provisions banning torture and cruel, inhuman and degrading treatment, concluding on this basis that it was safe for an individual to return to his or her home country (3L, 3Z). RSDOs also noted that various constitutions protected the right to life, and provided a means for peaceful changes of government (3Y), or mentioned the constitutional provision guaranteeing freedom of movement (3G, 3G2), or freedom of political expression (6I, 6M). But they failed to consider that these provisions were routinely violated. Other letters simply cited the fact that a new constitution was passed (2Q, 2AA, 3E, 3N). One RSDO relied on the international law principle that states protect their own citizens as a basis for asserting that there was no risk of persecution (1AV).

Conclusion

The status determination process, and the decisions that emerge from this process, do more than just violate refugee and administrative law. They also have a profound effect on bona fide asylum seekers—those who are genuinely fleeing persecution. For these individuals, receiving a decision stating that it is safe for them to return to their country of origin—a decision based on outdated information, an incorrect application of the law, or factors that are in no way related to their experience and which do not take their experience into account—can result in a serious threat to their life and liberty.

A system that fails to protect those most in need of refuge cannot adequately be characterized as a refugee protection framework. By failing to fulfil its core protective purpose, South Africa’s refugee system has become ineffective and sometimes counterproductive. Yet, significant resources continue to be devoted to the status determination process, without any real recognition of its administrative failures. As a result, South Africa is devoting scarce resources to maintaining a refugee system that is,

at best, functioning as a perfunctory immigration control mechanism—without fulfilling any of its protective purposes, and without adhering to the administrative procedures required by law. This erodes respect for the rule of law and affects the democratic character of the state. More troubling for asylum seekers, however, is the fact that South Africa’s refugee system, meant to protect those fleeing persecution, may be sending the very people it was designed to protect back to the persecution from which they fled. That it is doing so under cover of law benefits neither South African citizens nor those seeking asylum.

General Recommendations

As noted in the introduction, reform of the refugee reception system without broader reform of South Africa’s immigration management system is unlikely to be effective. As the immigration framework is reformed, the system of refugee protection must be fundamentally re-shaped to recognise that the refugee system is not an immigration control system; it must stand separate from and parallel to the system of immigration control. The protective purpose of refugee law must be made paramount, in accord with South Africa’s domestic and international legal obligations, so that individuals who are entitled to this protection are able to avail themselves of it.

While such broader reforms are being debated, there is significant scope for immediately addressing the most egregious failings in status determination decisions. Several changes to the system are necessary in order to achieve both greater administrative effectiveness and justice, and to move toward the fundamental reorientation of the refugee framework towards protection:

- Eliminate the targets requiring RSDOs to process a certain number of claims per day. Ensure that RSDOs are given adequate time to interview the asylum seeker, do the necessary country research, and write a well-reasoned decision that includes an individualized assessment of the asylum claim, and reasons for the rejection;

- Provide RSDO with sufficient training and resources to produce administratively fair and individualized decisions based on a proper application of the law;
- Ensure that status determination decisions fulfil the requirements of administrative justice and are properly applying the elements of refugee law;
- Eliminate the current review procedures for positive decisions, and establish a system of random reviews that ensures that decisions are being administered in accordance with PAJA and the Refugees Act;
- Reduce the burden on the Refugee Appeal Board by providing adequate resources and training to enable the first stage of status determination to function properly and efficiently.

APPENDIX

Letters wholly identical, including information on the claimant

100, 1PP (no information on claimant included)
1QQ, 1RR

Letters wholly identical, except for information on claimant in claim section

1Y, 1DD
1AI, 1AJ, 1AK
1WW, 1XX
1AC, 1AD,
- 1AB (one paragraph removed)
1AE, 1AH
- 1AG (one additional paragraph)
- 1AF (one additional paragraph)
1AL, 1AM
1ABI, 1ABJ

2G, 2H, 2CC
- 2BB (some content removed)
2X, 2Y

3B3, 3B4
3F, 3F2
- 3F3 (some cut and pasted paragraphs removed)
- 3F4 (some cut and pasted paragraphs removed)
3H3, 3H4, 3H5, 3H6, 3H7
3I, 3I2, 3I3, 3I4, 3I5, 3I6, 3I7
3K, 3K2, 3K3, 3K4, 3K5, 3K12, 3K16
- 3K10, 3K11, 3K14 (one additional sentence)
- 3K7 (one sentence removed)
3K6, 3K8, 3K9
3L, 3L2, 3L3, 3L4, 3L5, 3L8, 3L10, 3L11, 3L13, 3L14
3L6, 3L7, 3L9
3M7, 3M8
3O, 3O2
- 3O7 (one sentence removed)
3Q, 3Q2, 3Q3, 3Q4

3R, 3R2
3W2, 3W4
- 3W (one additional paragraph)
3X, 3X2
- 3X4 (one additional paragraph)
3Y2, 3Y2, 3Y3, 3Y4, 3Y5, 3Y6, 3Y7, 3Y8
3Z3, 3Z4, 3Z8
- 3Z2 (one paragraph removed)
3Z, 3Z5, 3Z6, 3Z7
3AA, 3AA6, 3AA7, 3AA8
3AA2, 3AA3, 3AA4, 3AA5
3CC, 3CC2

4G1, 4G2, 4G3

5A1, 5A2
- 5A3 (two additional sentences)
6D1, 6D2
- 6D3 (two paragraphs removed)
6E1, 6E2
- 6E3 (one sentence removed)

Substance of letters virtually identical, except for one or two immaterial sentences

1D, 1L
1G, 1ABL
1P, 1SS, 1TT
1HH, 1K
1MM (DRC), 1ABF (Uganda)
1YY, 1ZZ

2C, 2N
2AA, 2Q
- 2O, 2R (additional paragraphs added)

3B (DRC), 3B2 (Zimbabwe)
3D, 3D2, 3D4, 3D9
3D3, 3D10, 3D11
3D6, 3D7, 3D8
3K13, 3K15
3O8, 3O9, 3P3
3O3, 3O4, 3O5, 3O6, 3O10
3P, 3P2
3V, 3V2

3BB, 3BB2, 3BB3, 3BB4, 3BB5

5B1, 5B2

Letters substantively the same or which contain mostly identical language

1UU, 1VV, 1Q, 1I

2V, 2W

3E, 3E2, 3E3, 3E4

3G, 3G2, 3G3

3M, 3M2, 3M4, 3M5, 3M6, 3M9, 3M10, 3M11, 3M12, 3M17, 3M19

3M3, 3M13, 3M14, 3M15, 3M16

3U, 3U2, 3U3

3W3, 3X3



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