

A blurred, vertical photograph of a person, likely a refugee, standing in front of a fence or barrier. The image is overlaid with a dark teal gradient.

# All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination

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## Acronyms

<b>ACMS</b>	African Centre for Migration & Society
<b>ANR</b>	National Intelligence Agency (DRC)
<b>CNDD</b>	National Council for the Defence of Democracy (Burundi)
<b>CNDP</b>	National Congress for the Defence of the People (DRC)
<b>DHA</b>	Department of Home Affairs
<b>EPRDF</b>	Ethiopian People's Revolutionary Democratic Front
<b>FDLR</b>	Democratic Forces for the Liberation of Rwanda
<b>FNL</b>	National Forces of Liberation (Burundi)
<b>LRA</b>	Lord's Resistance Army (Uganda)
<b>MDC</b>	Movement for Democratic Change (Zimbabwe)
<b>MLC</b>	Movement for the Liberation of Congo (DRC)
<b>MONUC</b>	United Nations Organisation Mission in the Democratic Republic of the Congo
<b>MPR</b>	Popular Movement of the Revolution (DRC)
<b>NGO</b>	Non-governmental organisation
<b>OAU</b>	Organisation of African Unity
<b>OLF</b>	Oromo Liberation Front
<b>PAJA</b>	Promotion of Administrative Justice Act
<b>PPRD</b>	People's Party for Reconstruction and Democracy (DRC)
<b>RAB</b>	Refugee Appeal Board
<b>RSDO</b>	Refugee Status Determination Officer
<b>SCRA</b>	Standing Committee for Refugee Affairs
<b>SDF</b>	Social Democratic Front (Cameroon)
<b>UDPS</b>	Union for Democracy and Social Progress (DRC)
<b>ULD</b>	Union of Liberals for Democracy (DRC)

<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>ZANU-PF</b>	Zimbabwe African National Union-Patriotic Front
<b>ZDP</b>	Zimbabwe Documentation Process

## **Executive Summary**

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### **Introduction**

Despite recent attempts by the Department of Home Affairs (DHA) to improve service provision, the refugee and asylum system remains rife with problems. As part of a series of reports examining DHA policies, practices, and adherence to the law in the asylum system, this report examines the quality of status determination decisions in accordance with the requirements of international and domestic refugee law, as well as legislation relating to the constitutional right to fair administrative action.

The report reveals a Department that is failing to fulfil its core mandate with respect to the asylum system—identifying individuals in need of protection under refugee law. As a result, many asylum seekers face the risk of *refoulement*: being returned to an area where they face persecution or a threat to life or liberty. The report also highlights a government department that is largely failing to adhere to the standards of administrative justice and to act in accordance with its legal obligations. Beyond compromising the rights of refugees and asylum seekers, the existence of a government department that flouts the legislation which it is obligated to implement has serious implications for the rule of law, good governance, and service delivery.

### **The Status Determination Process**

The Refugees Act (1998) is designed to provide protection to those individuals fleeing persecution or broader threats to their safety and security. Refugee status determination officers (RSDOs) must evaluate an applicant's claim—relying on individual credibility and broader country research—to determine whether an individual qualifies for protection under the criteria established by the Act. They then issue a decision letter explaining the reasoning behind their determination.

Under the constitutional right to just administrative action and the provisions set out in related legislation, the RSDO's decision must adhere to certain requirements:



- The decision-maker must provide clear reasons for the decision;
- The decision must correctly apply the law;
- The decision must be based on relevant considerations;
- The decision must not be based on irrelevant considerations;
- The decision must not be arbitrary; and
- The decision must be rational and reasonable, and demonstrate a logical connection to the information and reasons presented by the decision-maker.

## Findings and Implications

This report is based on an examination of 240 status determination decisions issued in 2011 by refugee status determination officers from all of the country's refugee reception offices. A section specifically focused on the treatment of gender-based claims includes an additional 26 decisions issued in 2007-2010 that were selected on the basis of their subject matter (these additional decisions were not included in the broader study). The appendix, providing a list of duplicate decisions issued to different claimants, also includes decisions from previous years that were not included in the broader study.

The report revisits the findings of a 2010 ACMS report reviewing decisions issued in 2009.<sup>1</sup> At that time, DHA attributed the problems in the status determination process to high demand at the refugee reception offices. The current findings show that little has changed with respect to the quality of decisions, despite the implementation of measures intended to reduce demand at the refugee reception offices. These measures included easier access to work, study, and business permits for Zimbabweans through the Zimbabwe Documentation Process, the adoption of pre-screening measures at the border to turn would be asylum seekers away, and the refusal to accept applications at the refugee reception offices from those individuals who had not obtained an asylum transit permit at the border.

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<sup>1</sup> R Amit, 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions,' Forced Migration Studies Programme Research Report, April 2010.

Despite reduced demand in response to these measures, the report found that the status determination process continues to be marked by scant evidence of individualised, well-reasoned decision-making. The belief within the DHA that the still high demand at the refugee reception offices stems from the abuse of the system by economic migrants has given rise to an anti-asylum seeker bias that is evident in the status determination process. As a result, migration control has displaced protection as the primary goal of the asylum system.

### ***Specific Problems Identified***

ACMS identified the following recurring set of problems:

- Errors of law
  - Misapplying the concepts of persecution, social group and well-founded fear
  - Improper use of the credibility standard
  - Wrong burden of proof
  - Wrong standard of proof
  - Incorrect application of Section 3(b) of the Refugees Act providing protection for those fleeing general conditions of instability
  - Improper use of the manifestly unfounded standard
- Reference to the wrong claimant or country
- Failure to provide adequate reasons
- Failure to apply the mind
- Improper use of the internal relocation standard
- Inaccurate assessment of country conditions
- Failure to provide protection in cases of gender-based persecution.

### ***Significance of the Findings***

The deficiencies identified above raise serious concerns—both for the rights of asylum seekers and for the issues of good governance and service delivery. These concerns include:

***Protection:*** Individuals with bona fide asylum claims may be sent back to the dangers from which they fled. These returns violate the international prohibition against *refoulement*—returning an asylum seeker to a life-threatening situation.

***Administrative Justice:*** The decisions violate individuals' constitutionally guaranteed right to just administrative action, which requires government actions to be fair, transparent, and accountable. Failure to adhere to this principle erodes the rule of law and public confidence that government institutions are accountable to those they serve.

***Financial and Institutional Rationality:*** DHA is failing to fulfil its core mandate in the asylum system—to provide protection to individuals fleeing persecution and broader threats. Significant state resources are being devoted to a system that has ceased to function in accordance with its purpose under the law.

## Recommendations

The South African government, as well as organisations such as UNHCR, should be alarmed by the existence of a government department that systemically fails to live up to its mandate and circumvents the law as a matter of course. This situation has implications not just for asylum seekers, but for governance more generally. Accordingly, the recommendations target a range of actors beyond DHA.

*To the Portfolio Committee on Home Affairs:*

- Establish greater oversight of the refugee system and the status determination process;
- Make individuals within DHA accountable for violations of the law;
- Increase the capacity of the Refugee Appeal Board so that it can exercise greater review over status determination decisions and lessen the risk of *refoulement*; and
- Create an independent oversight body to review the quality of status determination decisions.

*To UNHCR:*

- Recognise that the organisation must provide greater support to South Africa as the top asylum-receiving country;

- Allocate greater resources and technical support to DHA and local service providers who give assistance to asylum seekers and refugees;
- Increase pressure on the South African government to ensure that it is living up to its international commitment toward asylum seekers;
- Lobby DHA to fulfil its mandate with respect to asylum seekers; and
- Call for greater judicial review of status determination decisions to highlight the scope of the problem.

*To DHA:*

These recommendations are aimed at creating both greater administrative effectiveness and administrative justice in the asylum system. They are made from the standpoint that

- The refugee system must stand apart from and parallel to the immigration system;
- The protective purpose of refugee law must be made paramount within the status determination process; and
- Administrative justice cannot be sacrificed for the purpose of efficiency.

In light of these goals, ACMS makes the following general recommendations:

- Communicate information regarding the asylum system more effectively, both to deter those who are not eligible from applying, and to ensure that those who are applying are adequately informed about the process;
- Reorient the focus from producing as many decisions as possible per day to producing good-quality, administratively fair decisions, which will also reduce the burden at the appeals stage;
- Provide RSDOs with sufficient training and resources to produce administratively fair and individualised decisions, rather than measuring performance by quantity;
- Reduce the burden on the Refugee Appeal Board by providing adequate resources and training in order for the first stage of status determination to function properly and produce an adequate record;

- Establish a required set of qualifications for RSDOs so that the individuals making life and death decisions have a relevant set of skills;
- Create a system for reviewing both negative and positive decisions that evaluates the quality of decisions, and is not just geared toward identifying possible corruption; and
- Create further mechanisms to address mixed migration flows, which would allow individuals to regularise their status outside of the asylum system.

With respect to the specific deficiencies identified in the report:

#### *Errors of Law*

- Create a minimum educational requirement for the hiring of RSDOs;
- Ensure that RSDOs are properly trained in all aspects of refugee law;
- Create review procedures that provide for an automatic rehearing of any decision in which there is an error of law; and
- Establish procedures to address the situation of RSDOs whose decisions do not accurately reflect the law, including warnings, greater training, and, if necessary, removal from the RSDO position.

#### *Other decision-making flaws*

- Lower or eliminate the number of daily decisions that an RSDO is required to produce in order to provide adequate time for a well-reasoned decision and to reduce the tendency to cut and paste from previous decisions;
- Provide extensive training on the characteristics that define an administratively fair decision, and create a checklist that RSDOs can use to assess a status determination decision;
- Provide up to date country information and train RSDOs on how to conduct proper investigations based on this country information;
- Provide a resource centre for RSDOs who are unsure about the current situation in a country; and
- Eliminate internal relocation as an accepted basis for rejecting an asylum claim and create controls to ensure that all decisions involve a proper status determination assessment.

*Gender-based claims*

- Provide extensive training on gender-based persecution, including a more in-depth examination of the various forms such persecution can take;
- Ensure through training that RSDOs understand that gender-based persecution is not simply privatised violence, but may have a political dimension;
- Furnish RSDOs with background on the use of rape as a weapon of war and provide country information in cases where the threat of rape continues following the cessation of hostilities;
- Provide special sensitivity training that familiarises RSDOs with the particular barriers faced by rape survivors and also provides them with the skills necessary to deal with individuals who have suffered gender-based violence; and
- Implement a mandatory training programme that incorporates the above and requires RSDOs to pass an exam demonstrating their understanding of gender-based persecution following completion of the programme.

## Introduction

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In recent years, the Department of Home Affairs (DHA) has made various efforts to improve service provision. In the refugee and asylum system, the Department has sought to address enormous backlogs by taking steps to increase efficiency and reduce demand. These steps have had some positive effects on processing speed. A closer look, however, reveals problems in the quality of DHA services that undermine the efficiency gains. These problems not only contravene the laws that govern the refugee and asylum system but also threaten its humanitarian purpose.

Despite general improvements in the Department, the refugee and asylum system remains rife with problems. The African Centre for Migration & Society (ACMS) has produced a number of reports examining the operation of the asylum system and deviations from the law in DHA policies and practices.<sup>2</sup> This report examines the quality of refugee status determination decisions. It reveals a system that is failing to fulfil its primary purpose – identifying those individuals in need of protection. This failure obviously affects the rights of individuals and poses a severe danger that they will be sent back to the dangers from which they fled. More than that, however, it points to a government department that is unable to give effect to its legal obligations – a development that has implications for bureaucratic efficiency and good governance more broadly.

### **Evaluating refugee status determination decisions**

The South African refugee framework is designed to provide protection to those fleeing persecution or broader threats to their safety and security. To assess their protection needs, a refugee status determination officer (RSDO) undertakes a status determination interview with each claimant, during which the claimant explains why he or she left the home country and does not believe he or she can safely return. The RSDO must evaluate individual credibility, investigate the details of the asylum claim

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<sup>2</sup> See. e.g., R. Amit, 'The First Safe Country Principle in Law and Practice,' African Centre for Migration & Society Issue Brief 7, June 2011; R. Amit, 'The Zimbabwean Documentation Process: Lessons Learned,' African Centre for Migration & Society Research Report, January 2011; R. Amit with T. Monson, 'National Survey of the Refugee Reception and Status Determination System in South Africa, Forced Migration Studies Programme Research Report, February 2009.

through country research, and determine whether each individual claimant qualifies for protection as a refugee on the grounds established by South Africa's Refugees Act. After assessing an individual's asylum claim, the RSDO issues a decision letter stating and explaining the decision. If the decision is negative, it may be appealed. However, the decision letter, with its summary of the claim and reasoning in support of the status decision, serves as the basis on which the decision is reviewed.

In an April 2010 report,<sup>3</sup> ACMS<sup>4</sup> evaluated the quality of status determination decisions using the criteria of administrative justice. The evaluation was based on a review of 324 decisions issued in the first quarter of 2009 by the five refugee reception offices in existence at the time. The report identified serious flaws in the decision making process, including errors of law and a general failure to conduct a properly reasoned, individualised assessment of asylum claims.

DHA asserted that structural problems – in particular, the overwhelming demand on the asylum system – prevented it from addressing the systematic deficiencies identified in the report. Since that time, the Department has initiated several changes that have eased some of the pressures at the refugee reception offices. These have included:

***The Zimbabwe Documentation Project (ZDP)*** – a three-month window in 2010 during which DHA relaxed the normal requirements for work, study and business permits and allowed Zimbabweans in possession of a passport to apply. Though short-lived, the ZDP provided a path for regularising the status of undocumented Zimbabweans, providing an alternative to the asylum system for South Africa's largest asylum seeker population and enabling the 275,762 Zimbabwean applicants to potentially exit the asylum system.

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<sup>3</sup> R. Amit, 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions,' Forced Migration Studies Programme Research Report, April 2010, available at <http://www.migration.org.za/report/amit-r-2010-protection-and-pragmatism-addressing-administrative-failures-south-africa-s-refug>.

<sup>4</sup> At that time, the ACMS was known as the Forced Migration Studies Programme (FMSP).



***Pre-screening Measures at the Border*** – In early 2011, DHA officials at the border began turning away would-be asylum seekers who had passed through another country before entering South Africa.<sup>5</sup> While this measure contravened international and domestic refugee provisions,<sup>6</sup> it served to reduced demand on the asylum system.

***Pre-screening Measures at Refugee Reception Offices*** – Also in early 2011, some refugee reception offices began turning away applicants who did not have asylum transit permits – a temporary fourteen-day permit given out at the border to enable an individual to travel to a refugee reception office to launch an asylum claim.<sup>7</sup> This practice, while again serving to reduce demand at the reception offices, contravenes the legal obligation to allow all individuals the opportunity to apply for asylum, regardless of the conditions under which they entered the country.

The above measures, aimed at redirecting demand and creating obstacles to the asylum process, appear to have had the desired effect. DHA reported a sixty-four per cent decrease in the number of asylum applications in the period from April 2010-March 2011. Applications dropped from 341,602<sup>8</sup> in 2009 to 124,336 during this period. This put DHA in a better position to address the weaknesses in the status determination process that were threatening its legally defined purpose of protecting asylum seekers. In addition, DHA opened two additional offices to assist in meeting demand—an office in Musina (August 2008) and a second office in Pretoria (TIRRO, April 2009).

This study assesses whether these changes have had any effect on the quality of status determination decisions. Based on a review of 240 decisions issued in 2011 at

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<sup>5</sup> See 'The First Safe Country Principle in Law and Practice,' ACMS Migration Issue Brief 7, June 2011.

<sup>6</sup> Both international and South African law prohibit the refusal of entry to an individual fleeing from circumstances giving rise to an asylum claim.

<sup>7</sup> Under the amended Immigration Act set to take effect in 2012, the validity of the asylum transit permit has been shortened from 14 to 5 days.

<sup>8</sup> This number, recorded in the 2010/11 Annual Report on Asylum Statistics, is assumed to cover the period from April 2009 to March 2010. The 2009 Annual Report on Asylum Statistics records 223,324 applicants from January to December 2009.

the country's seven (now only five)<sup>9</sup> refugee reception offices, the report re-visits the issues identified in the initial study to determine if the quality of decisions has improved in the subsequent two years. The findings show that, despite reduced demand at the refugee reception offices, status determination decisions have not improved.

### **Flawed decisions – a refugee protection system gone astray?**

Two years on, little has changed with respect to the fairness of the status determination process – none of the problems identified in the initial study have been addressed. The study found the following recurring set of problems:

- Errors of law
  - Misapplying the concepts of persecution, social group and well-founded fear
  - Improper use of the credibility standard
  - Wrong burden of proof
  - Wrong standard of proof
  - Incorrect application of Section 3(b) of the Refugees Act providing protection for those fleeing general conditions of instability
  - Improper use of the manifestly unfounded standard
- Reference to the wrong claimant or country
- Failure to provide adequate reasons
- Failure to apply the mind
- Improper use of the internal relocation standard
- Inaccurate assessment of country conditions
- Failure to provide protection in cases of gender-based persecution.

Refugee status determination officers incorrectly deployed refugee law and failed to consider the details of individual claims as required in a properly administered status determination process. The result is a bureaucracy that mass produces rejection letters without any evidence of a reasoned decision-making process.

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<sup>9</sup> DHA closed two refugee reception offices in 2011, during the course of the research.

The flaws in the decisions rejecting asylum claims are not simply an indictment of the procedural fairness of the status determination process. The decisions are also indicative of the capacity of RSDOs to apply the legal framework that the government constructed to meet the state's international obligations and to implement the domestic will to protect refugees. The Refugees Act was promulgated for the primary purpose of protection. The decision-making reflected in the reviewed letters violates this purpose so consistently that both the Act and South Africa's international legal commitments have become virtually meaningless. The fact that reduced demand has had no apparent effect on the unsubstantiated rejection of asylum seekers suggests that the problems in the asylum system go deeper than just a lack of capacity and may reflect the development of an institutionalised, anti-asylum seeker orientation within the DHA.

### ***Migration management has eclipsed protection***

In its 2010/11 Annual Report, DHA described the main goals of its immigration and asylum policies:

[T]o enable immigration to be managed so as to minimise risks to national security and social stability while maximising economic, social, and cultural benefits.<sup>10</sup>

Although addressing both immigration and asylum policies, the report did not mention the principle of protection that forms the foundation of refugee law. This approach reflects a growing tendency within the DHA to treat asylum seekers as a part of a 'migration management' problem rather than as a separate population in need of humanitarian assistance.

The prioritisation of migration management stems, in part, from the fact that four of the world's top ten refugee-producing countries are found on the African continent.<sup>11</sup>

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<sup>10</sup> Department of Home Affairs Annual Report 2010//11, p. 19.

<sup>11</sup> Somalia, DRC, Sudan and Eritrea – UNHCR Statistical Yearbook 2011, p.27 [online] Available at: <http://www.unhcr.org/4ef9c7849.html>

South Africa borders what is currently the world's foremost asylum-seeker producing country, Zimbabwe. As a result, South Africa receives the highest numbers of asylum applicants globally.<sup>12</sup> DHA, which categorises Zimbabweans as economic migrants, insists that the high numbers of asylum applications indicate 'abuse' of the system by 'economic migrants.'<sup>13</sup> This attitude has resulted in a bias against all asylum seekers that assumes, without investigation, that only a very small minority of claims are bona fide.

DHA's paramount concern with abuse of the asylum system has created a focus on targeting perceived abusers. This shifted focus has come at the expense of identifying those with genuine asylum claims who are in need of protection. Accordingly, DHA has implemented a system where positive decisions are automatically reviewed to ensure that no corruption has taken place. Unfortunately, there is no similar concern over the quality of negative decisions. This state of affairs has given RSDOs an institutional incentive to issue rejections to avoid added scrutiny.

Comparative recognition rates lend support to the notion of a strong anti-refugee bias within the status determination process. While there are not sufficient statistics to conduct a country by country breakdown, some useful indicators do exist. Although rates varied widely by state, UNHCR and state asylum procedures combined had a thirty per cent refugee recognition rate. When other forms of protection were included, this rate rose to thirty-nine per cent. South Africa, by contrast, reported a six per cent recognition rate in 2009/10, and a five per cent recognition rate in 2010/11.<sup>14</sup>

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<sup>12</sup> UNHCR Statistical Yearbook 2010, p. 43 [online] Available at: <http://www.unhcr.org/4ef9c8139.html>

<sup>13</sup> In a 2010 briefing to the Portfolio Committee on Home Affairs, for example, DHA's director general defined asylum seekers as equivalent to economic migrants and described the main challenge facing the system as abuse by economic migrants. In November 2011, the DG repeated this message in addressing proposed reforms of the asylum system: 'People by default are going through the asylum seeker process in order to be able to work, but the majority are economic migrants using a back door.'

<sup>14</sup> These percentages are based on information given to the Portfolio Committee recording the number of approved claims relative to the total number of applicants. It is unclear from the information provided whether the remaining claims were rejected or still pending. Written Reply from the Minister of Home Affairs to Annette Lovemore, Question 837/NW910E, 11 March 2011.

The statistical breakdown by country of origin is also informative. According to UNHCR, sixty-one per cent of asylum seekers from the DRC and fifty-six per cent from Ethiopia gain refugee recognition. In South Africa, these numbers are fifteen and twenty per cent, respectively. For Zimbabweans, the approval rating within South Africa was one per cent.

These factors point to an asylum system whose primary motivation is not to identify individuals in need of protection – the purpose for which it was established. Instead, the main goal has shifted to one of identifying and removing so-called ‘economic migrants’ deemed to be illegitimately in the country. Accordingly, the DHA’s 2009/10 Annual Report emphasised improvements in operational efficiency and the benefits of its ‘Law Enforcement Strategy’ in identifying transgressors in the refugee framework.<sup>15</sup> The impact of these achievements on the asylum system’s first priority – protection of refugees – went unmentioned, despite the lengthy report on status determination flaws<sup>16</sup> presented to DHA in the year under review.

### ***Implications***

The deficiencies in the status determination process raise serious concerns, implicating both the legal right to escape persecution and seek safe haven and the ability of DHA to carry out its obligations in accordance with its own legislation, the Constitution, and international law. The displacement of protection goals by migration control efforts has negative consequences in multiple spheres:

***Protection:*** Genuine asylum seekers – those the refugee system was designed to protect – may be returned to the dangers from which they fled as a result of the deficiencies in the decision-making process. Such returns violate the international law prohibition against *refoulement* – returning an asylum seeker to a life-threatening situation.

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<sup>15</sup> Department of Home Affairs Annual Report 2009/10, p. 30.

<sup>16</sup> ‘Protection and Pragmatism,’ supra note 3.

**Administrative justice:** The Bill of Rights guarantees the principle of administrative justice. This principle regulates the interactions between state institutions and individuals, requiring that such interactions be transparent, fairly administered and accountable. Failure to adhere to this principle erodes the rule of law and public confidence that government institutions are accountable to those they serve.

**Financial and institutional rationality:** The practice of issuing rote rejections without an individualised status determination means that the refugee system has effectively ceased to function. Poor quality status determination decisions in the first instance result in an enormous backlog of appeals,<sup>17</sup> and any efficiency gains are made meaningless by the need to consider claims anew when these unsubstantiated rejection decisions are reviewed.<sup>18</sup> As a result, significant state resources are being spent on a failed system that is not fulfilling its core function – protection.

## Structure of the report

This introduction is followed by a brief discussion of the research design for the study. The report then provides a description of refugee and administrative law and the status determination process in South Africa. The third and fourth sections explore in detail the ways in which status determination decisions violate the Promotion of Administrative Justice Act (PAJA), the Refugees Act, and the Refugee Convention. These include a discussion of various errors of law as well as other recurring problems in RSDO decision-making. A separate section explores the treatment of gender-based claims, particularly those involving rape, as an embodiment of the dysfunctionality in status determination. This is followed by a discussion of the rights implications of the problems in the status determination process, and a conclusion offering recommendations. The appendix provides a list of duplicate decisions encountered during the research.

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<sup>17</sup> Some refugee clinic clients have experienced waiting times for an appeal date stretching over a year.

<sup>18</sup> In *Tantoush*, the high court rejected as an error of law the RAB's practice of hearing appeals *de novo* (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.

## Methods

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This report is based on a review of 240 rejection letters collected from South Africa's seven refugee reception offices. Letters were obtained from refugee clinics operating in cities where the refugee reception offices were located. During the course of the research, DHA closed two of these refugee reception offices.<sup>19</sup> The research aimed to review a minimum of 25 decisions issued in 2011 from each office, but data collection was hampered by the closure of the offices, and by the fact that Port Elizabeth remained an under-served area. Where more than the target number of decisions were available, these were included in the sample.

The section on gender-based violence included decisions issued prior to 2011 in order to expand the sample size and obtain a broader range of claims for analysis of this specific issue. However, these decisions were not included in the overall analysis. Decisions prior to 2011 are also included in the appendix (but excluded from the larger study), which details duplicate decision letters. These earlier decisions are included in order to highlight the severity of the problem and the reliance on outdated information copied from older decisions.

### General sampling

The closure of the Crown Mines and Port Elizabeth refugee reception offices during the course of the research hindered data collection from these offices, but the decisions that were obtained were consistent with the general findings. The table below shows the totals collected from each office:

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<sup>19</sup> Following a nuisance lawsuit brought by the surrounding businesses, DHA shut down the Crown Mines office in Johannesburg. This closure took effect on 31 May, 2011, making the collection of additional decisions from this office impossible. DHA closed its Port Elizabeth office to new applicants on 21 October, 2011 and to all applicants on 30 November 2011.

OFFICE	Code	2011 DECISIONS
Crown Mines	1	22
TIRRO	2	34
Marabastad	3	61
Cape Town	4	29
Durban	5	52
Port Elizabeth	6	10
Musina	7	32

*2011 decision letters reviewed by refugee reception office*

ACMS labelled the decision letters with a numeric code reflecting which office they came from, and an alphabetical label that was used to identify individual decisions. These codes are referenced in the report to indicate the scale and breadth of identified problems within the sample of decisions. Where examples are particularly numerous, the letter codes are cited in footnotes.

**Sampling of gender-based claims**

ACMS reviewed thirty-eight gender-based claims, which included twenty-six additional decisions selected specifically because of their subject matter, and covering the years 2007-2010. ACMS decided to include a specific section on gender-based claims because during both the current and the 2009 review, it observed that the treatment of these claims was particularly egregious. Given the high numbers of asylum seekers fleeing sexual and gender-based violence, ACMS decided it was necessary to highlight the treatment of these claims. Because the number of gender-based claims from the general sample was not sufficient, additional claims were sought from service providers. These claims generally involved open files with pending appeals. As a result, most of the initial decisions had been issued in the previous two years.



## Limitations

All of the letters were obtained through legal advice centres that assist asylum seekers and refugees. These centres were asked to make copies of decisions as claimants approached them for assistance. Accordingly, the sample is representative of decisions given to those seeking assistance at these centres, and the type of assistance sought in most cases was help with an appeal request or appeal hearing. The decisions reviewed are thus representative of the issues that lead individuals to appeal.

While a random selection of decisions obtained directly from DHA offices might produce a more representative sample, this option was not sought for two reasons. First, DHA has become increasingly uncooperative towards ACMS research projects, and has denied recent research requests. Second, DHA has sought to block other independent research projects on the grounds that ACMS cannot collect information about the Department without its approval and participation in the research. Accordingly, ACMS was concerned that obtaining the sample at DHA offices would lead the Department to try to influence the research and its outcomes, and ACMS concluded that obtaining the sample through legal advice centres would lead to greater research independence and neutrality.

There are strong indications that the decisions sampled are generally representative of the severe structural problems within the status determination system:

- None of the 240 decisions reviewed complied with the standard of administrative fairness. This means that 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 displaying the same flaws;
- Similar problems are present in letters from all of the different refugee reception offices; and
- The high overall rejection rate suggests that these decisions are broadly representative.

## The Legal Framework

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This section sets out the legal basis on which refugee status determination in South Africa is supposed to take place, including the key elements of administrative justice. This legal framework gives effect to the function and purpose of South Africa's asylum system and the standard of accountability to which it is bound. Improvements targeting the efficiency of the asylum system cannot be considered in isolation, but must be measured against the quality of performance in relation to these criteria.

### The laws that shape the asylum system

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

**International Law:** Sections 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 United Nations' 1951 Convention and 1967 Protocol Relating to the Status of Refugees, making them binding law in the country. The Convention and Protocol define refugees as individuals fleeing persecution, and set out the obligations of states with respect to refugees, including the imperative not to return refugees to the dangers from which they fled (*non-refoulement*). South Africa is also a signatory to the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), which expands the refugee definition to include those fleeing from threats stemming from general instability in a country.

**South African 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. Section 24(2) of the Refugees Act upholds the guarantee of procedural fairness found in Section 33 of the Constitution.

**Promotion of Administrative Justice Act (PAJA) (Act 3 of 2000):** PAJA lays out the requirements needed to give effect to the Constitutional guarantee of administrative justice found in Section 33. It entitles individuals to clear reasons for decisions affecting them, and establishes grounds for review of administrative decisions. PAJA's procedural guarantees insist on government accountability and place individual rights at the heart of administrative decisions.

## **Grounds for refugee status under domestic and international law**

Under the international refugee framework, individuals subjected to specified forms of persecution in their home country are entitled to seek the protection of another country. International law, in the form of the UN Convention and Protocol, establishes who is eligible for protection by setting out the particular forms of persecution that give rise to refugee status. The OAU Convention, ratified by African nations, adds general conditions of instability in a person's country of origin as a basis for refugee status. By definition, the act of recognising someone as a refugee acknowledges the fact 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 for status laid out in the law.

South Africa's Refugees Act lays out who qualifies for refugee status in the country. 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 or her 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 group<sup>20</sup> 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.<sup>21</sup>

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* (Handbook),<sup>22</sup> and by scholars of refugee law, most notably James Hathaway. These sources are accepted as valid interpretations by the Department of Home Affairs and are used regularly in RSDO decisions. Moreover, as a well-published and extensively cited refugee law scholar, Hathaway's interpretations may have persuasive status under international law.<sup>23</sup>

## The status determination process

To establish whether an individual asylum seeker falls into one of the above categories, he or she must undergo a brief status determination interview with a 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

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<sup>20</sup> 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.'

<sup>21</sup> Service providers report that many asylum seekers who are dependents of recognised refugees have faced challenges in enforcing this provision to gain refugee status.

<sup>22</sup> UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status', UN doc. HCR/IP/4/Eng/REV.3, December 2011.

<sup>23</sup> According to Article 38 of the statute of the International Court of Justice, which deals with inter-state disputes based on international law, 'the teachings of the most highly qualified publicists' constitute a 'subsidiary means for the determination of rules of law.' In the area of refugee law, Hathaway arguably qualifies as one of the most highly qualified publicists, and he is cited regularly and authoritatively in RSDO decisions.

thereafter. These letters are the main focus of this report. The decision letters reviewed here 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;<sup>24</sup>
- 5) *Credibility*: a statement indicating whether the claimant is credible;
- 6) *Reasons/findings*: the reasons for the decision; and
- 7) *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 are rejected as unfounded. Asylum seekers who are rejected on this basis may lodge an appeal and appear before the Refugee Appeal Board; or
- 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 (usually economic reasons) 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.

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<sup>24</sup> Most decisions included an incomplete restatement that misrepresented the UNHCR instruction.

## **Administrative justice in status determination**

In addition to the Refugees Act, the refugee status determination process also is bounded by the Promotion of Administrative Justice Act (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 characterised 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.

The review of decision letters identified a variety of ways in which status determination decisions violate the legal framework that forms the foundation of South Africa's asylum regime. Many of the examples considered in this report also violate multiple and overlapping provisions of PAJA. They are discussed within distinct categories for the sake of clarity to the reader. In the following three-chapters of the report, flaws in RSDO decision-making are presented on the basis of the relevant elements of refugee law and of just administrative action as defined by PAJA.

## Misapplying Legal Concepts in RSDO Decision-Making

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This section discusses errors of law identified in the review of RSDO decision letters. These involve both ignoring and misapplying legal concepts, including:

- Failing to correctly apply the core concepts of persecution, social group, well-founded fear, and credibility;
- Misconstruing the burden of proof;
- Relying on the wrong standard of proof as established by law;
- Failing to correctly apply Section 3(b) of the Refugees Act; and
- Misusing the 'manifestly unfounded' standard.

These errors of law were routinely present in the status determination decisions reviewed in 2009 and remain prevalent in the 2011 sample.

### The concept of persecution

Persecution is the core concept in many asylum claims. The concept can be unpacked into several component parts that the RSDO may consider:

- past persecution,
- sustained persecution,
- persecution of others,
- persecution targeting large groups, and
- persecution by non-state actors.<sup>25</sup>

The decision letters reviewed indicate a systematic failure to recognise the range of components that constitute persecution.

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<sup>25</sup> UNHCR has recognised persecution by non-state actors as a basis for refugee status where the authorities prove unable or unwilling to 'offer effective protection,' Handbook, para. 65.

RSDOs not only failed to understand the defining features of persecution; they also failed to incorporate the various grounds of persecution that qualify for asylum protection. The Refugees Act establishes six grounds for persecution that create an entitlement to refugee status: race, tribe, religion, nationality, political opinion, and social group. RSDOs largely avoided consideration of those grounds of persecution outside of the political, and limited that concept to the persecution of high-ranking political party members. The decisions displayed a widespread failure to extend the definition of persecution to the various grounds provided in the Refugees Act. While this failure generally involved ignoring these grounds altogether, RSDOs also erred more specifically in misconstruing the concept of social group as a basis for obtaining asylum.

### ***Timing, nature and duration of persecution***

Sara,\* a Congolese female, lived in Lubumbashi. Her brother-in-law, a UDPS<sup>26</sup> member, worked at the airport. One day there was a shooting there and he became a suspect because of his political affiliation. Sara's sister was arrested together with her children as a result. As she was making her way home from church, Sara's neighbours told her not to return home because the soldiers were looking for her and had already arrested her sister. The RSDO rejected her claim, which was based on imputed political belief, on the grounds that 'nothing happened' to her (5U).

Refugee law is forward-looking, aimed at protecting individuals from future persecution. Past persecution may be a relevant factor in assessing the risk of future persecution, but it is not a necessary element in establishing this risk.<sup>27</sup> Nonetheless, RSDOs remained focused on this element, often requiring asylum seekers to show actual harm in order to qualify for refugee status (4N, 2P, 4J, 4S). RSDOs rejected claims on the grounds that individuals suffered no persecution before fleeing, without considering the risk of future persecution (2D, 5P, 5U). Accordingly, in the above example, the RSDO did not consider whether Sara's circumstances meant that she might be persecuted in the future. Instead, he based his determination on the fact that she had not suffered any past persecution.

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\* Not her real name.

<sup>26</sup> Union for Democracy and Social Progress, a Congolese opposition party led by Etienne Tshisekedi.

<sup>27</sup> See Handbook, para. 45: 'the word "fear" refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.'



Although the Convention does not define persecution, UNHCR's interpretation of the Convention standard includes a threat to life or freedom, as well as other serious human rights violations.<sup>28</sup> RSDOs, however, often equated persecution solely with physical harm or death. For example, an asylum seeker who had been taken captive by rebels and made to serve them for two months was rejected as he had not 'suffered harm' (5H). Others, including an individual whose house was destroyed and three family members killed (7C), were rejected when they could not establish 'a reasonable possibility that [they] may be killed' if returned to the country of origin (7B). Similarly, an opposition journalist who was harassed by the ruling party and fled after members of the party burned down his house was rejected because he did not face a threat to his life (2V). In other cases the RSDO applied an indeterminate threshold of physical harm, rejecting claims because the applicants had not been beaten or tortured, for instance (2K, 2N, 5F).

RSDOs also tended to see *cumulative* past harm as an essential component in establishing persecution, despite the lack of a legal basis for this view. In numerous cases where asylum seekers experienced harm, they were rejected because they fled after a single incident. In such cases, decision letters almost unanimously stated that 'an isolated incident of denial or violation of human rights does not meet the requirements for asylum',<sup>29</sup> again intrinsically ignoring future risk. While cumulative past harm may be indicative of future risk, it is not determinative. In practice, however, the focus on cumulative past harm has displaced the forward-looking well-founded fear assessment, so that persecution itself has come to replace the well-founded fear standard expressed in the law.

Where decisions did consider future risk in relation to a well-founded fear of persecution, it was often to deny that there was any such risk. These denials of future risk tended to refer to overly general assessments of country conditions, even where these were irrelevant to the individual circumstances of the asylum seeker's case:

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<sup>28</sup> Handbook, para. 51. See also James Hathaway, *The Law of Refugee Status*. Toronto: Butterworths (1991), Chapter 4.

<sup>29</sup> 2E, 2H, 2N, 2P, 2T, 2W, 2DD, 2EE, 2FF, 3II.

John\* was an active supporter of the Bundu Dia Kongo, a political and religious opposition group in the DRC. He fled after learning that government soldiers wanted to kill him as a result of his opposition activities. Relying only on general country conditions, the RSDO determined that ‘there is no future fear of persecution in your country,’ without considering John’s particular circumstances (3F).

David,\* a UDPS member, participated in mobilisations against elections in the DRC. The government began looking for individuals who were participating in these mobilisations and some members of his group were arrested. Soldiers came to his house while he was out, and after hearing that they had come looking for him, he ran away. In making a determination, the RSDO did not consider the situation of UDPS members in the DRC. Instead, he relied on a news article describing the arrest of Laurent Nkunda, leader of the National Congress for the Defence of the People (CNDP), an armed faction operating in North Kivu, as the basis for determining there was no well-founded fear of persecution (4F).

Other examples similarly relied on general country conditions that were irrelevant to the particular situation of the claimant (3B, 3G).

Grace\* lived in Kinshasa with her husband. Both her husband and her father were MLC<sup>30</sup> supporters. Following the 2006 elections in the DRC, members of the PPRD<sup>31</sup> began looking for Grace’s father. He ran away. She never heard from him again, but she did hear a rumour that he was intercepted by PPRD soldiers on his way to the border and was killed. Fearing for his life, her husband also fled in 2006 and she has not heard from him since. In 2007, PPRD soldiers came to her house looking for her husband. They beat Grace and took her to a house where she saw clothing and blood on the floor. The soldiers raped her repeatedly and did not give her any food or water. After two days, one of the soldiers helped her escape, telling her that they were going to kill her. The RSDO rejected Grace’s asylum claim, stating: ‘nothing happened to yourself [sic] and your [sic] were not even involved in politics’ (2KK).

Alice\* was not active in politics, but her husband was a UDPS member. A group of soldiers came to arrest her husband, and seven of them raped her. The RSDO rejected her asylum claim, noting that she was not involved in any organisation (5A).

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<sup>30</sup> Movement for the Liberation of Congo, formerly a rebel group and now an opposition party in the DRC, led by Jean-Pierre Bemba.

<sup>31</sup> The People’s Party for Reconstruction and Democracy, the ruling party of President Joseph Kabila.

### ***Persecution for beliefs of others***

Persecution based on imputed political belief – the perception that one holds particular views because similar individuals such as family members or others in the community hold them – is a recognised basis for making an asylum claim.<sup>32</sup> RSDOs, however, did not acknowledge this concept. Numerous decisions overlooked the fact that individuals are often targeted as a result of the political beliefs or actions of family members,<sup>33</sup> or of those they live or interact with. Again, RSDOs relied on the lack of past persecution, rather than on the prospect of future persecution, to deny these claims. Or, as in the above examples where actual harm did take place, they limited the scope of political persecution to apply only in situations stemming from membership in a political organisation.

Nor did RSDOs consider the persecution of similarly-situated individuals, including family members or others, as a factor in assessing an individual's well-founded fear (4I).

Daniel\* was an MLC supporter who lived in Lubumbashi, where he participated in MLC meetings, protests, and rallies. He began organising protests against the government around its failure to pay civil servants. He staged a coordinated series of public protests where participants burned the President's picture. The police began looking for the participants and went to Daniel's home. He was not there, but they arrested his brother, as well as other friends of his who participated. Daniel has not heard from them since. As the leader of the group, he feared that the police would return and he fled. Despite the government's targeting of his friends and family for participating in the protests he organised, the RSDO determined that Daniel did not have a well-founded fear of persecution (2DD).

Where individuals are persecuted as a result of particular activities or beliefs, this persecution may serve as a basis to assume that others who engage in the same activities or hold the same beliefs—those who are similarly situated—may also face such persecution and thus have a well-founded fear.<sup>34</sup> RSDOs, however, failed to consider the situation of similarly situated individuals in assessing well-founded fear.

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<sup>32</sup> Handbook, para. 43.

<sup>33</sup> 1K, 1O, 2KK, 3O, 3V, 3HHH, 5A, 5C, 5M, 5O, 5U, 5U1, 6A

<sup>34</sup> See UNHCR Handbook, para. 43.

The importance RSDOs gave to the persecution of family members appeared to vary according to what best served the rejection of a claim. Accordingly, RSDOs did not accept the persecution of family members as a possible basis for *granting* asylum, but they did reject claims if family members left behind in the country of origin were *not* being persecuted (3L, 3N, 3R, 3JJ, 3MM, 6A). This inconsistency reinforces the notion that an anti-asylum seeker bias has taken root within the DHA.

George\* was a supporter of the MDC<sup>35</sup> in Zimbabwe. In 2009, ZANU-PF<sup>36</sup> soldiers tortured him because of his political affiliation. The following year, these soldiers came to his house while he was out. His father told him not to come home because he was worried the soldiers would kill him. The RSDO rejected his claim on the basis that there was 'no evidence that you have suffered any persecution or faced any special difficulty beyond the problems you would face in consequence of the generalized circumstances existing in your country' (7U).

### ***Persecution targeting large groups***

In a further narrowing of the persecution concept, RSDOs continued to wrongfully deny asylum on the grounds that the persecution was suffered not just by the individual, but by large groups within the country. Where the scope of abuse was wide, RSDOs portrayed these abuses as stemming from generalised circumstances in the country that negated individual claims of persecution. For example, numerous claims were rejected on the basis that '[m]any MDC activists and even non-MDC people have been subjected to restrictions on their freedom of expression, political intimidation, assault, arbitrary arrest and detention, imprisonment, torture, kidnapping, rape and murder.'<sup>37</sup> But there is no legal basis for refusing claims on grounds that the abuse is widespread. As Hathaway explains, where the persecution standard is met, an asylum claim exists regardless of how many others may also suffer the same harm.<sup>38</sup>

Amelia\* fled Kenya to avoid forced circumcision, a practice imposed by the Mungiki tribe of which she was a member. The US, the UK, and the Australian governments have all issued country reports describing the practice as a continuing human rights problem in Kenya. Citing the UK Operational Guidance Note on Kenya, the Australian government declared in its Country Advice report that Mungiki women threatened with the practice lacked sufficient

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<sup>35</sup> Movement for Democratic Change, the main opposition party in Zimbabwe.

<sup>36</sup> Zimbabwe African National Union- Patriotic Front, Zimbabwe's ruling party led by Robert Mugabe since the country's independence in 1980.

<sup>37</sup> 7G, 7S, 7U, 7V, 7W, 7X, 7R, 7Y, 7Z, 7AA, 7BB, 7DD.

<sup>38</sup> *The Law of Refugee Status*, p. 94.

protection and had no internal relocation option. It also cited the UK Immigration Appeal Tribunal, which found that ‘the law against FGM in Kenya is not being enforced and that radical members of the Mungiki movement are purposely implementing the practice to challenge Kenya’s laws and to exercise power and control over Kikuyu women.’<sup>39</sup> Despite the documented threat, the RSDO stated that Amelia could have sought protection from state authorities (4PP).

### ***Persecution by non-state actors***

Refugee law protects against persecution from both state and non-state actors. Where non-state actors are the persecutors, the granting of asylum is based on the inability of the state to provide protection. Status determination officers, however, have generally limited their view of persecution to acts committed by state actors, treating the state as an automatic salve against any persecution by non-state actors. Where persecution by non-state actors is involved, they have assumed that the individual could have sought the protection of the state, without investigating whether the state was in fact able to provide such protection (2S, 4PP). In some instances, they overlooked the state’s involvement in the persecution and faulted the individual for failing to seek state protection (3AA, 5A, 5O, 5U). RSDOs routinely failed to contemplate situations where the state was either unwilling or unable to provide protection.

### ***Failure to recognise non-political grounds of persecution***

The international refugee convention provides refugee status to individuals who have suffered persecution on the basis of any one of five grounds: race, religion, nationality, political opinion, or membership in a particular social group. South Africa’s Refugees Act adds a sixth ground: tribe. RSDOs failed to recognise these multiple grounds for persecution, and generally limited their application of the persecution concept to political persecution. Accordingly, they denied asylum claims on the grounds that the persecution the individuals suffered did not stem from their political opinions. For instance:

A human rights activist kidnapped for speaking out in support of the Tutsis in the DRC was rejected because, according to the RSDO, he was targeted as a human rights activist and not as a member of a political organisation (3W).

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<sup>39</sup> Australian Government Refugee Review Tribunal, Country Advice Kenya, KEN 37004, 27 July 2010.

An applicant who was targeted by the police for exposing mineral trafficking was told that the claim did not fall under the Refugees Act because he was not active in any political organisation (3DD).

Not only did RSDOs limit persecution to political grounds, they also often narrowed the concept of political persecution to encompass only high-ranking members of political parties.<sup>40</sup> Thus, regardless of the details of the claim, several asylum seekers were rejected on the basis that these individuals were not ‘political activist[s] or threat[s] to the ruling party’ (2C) or were not well-known or prominent party members (1D, 4V, 5C). RSDOs further narrowed the concept of political persecution by equating it with being beaten or tortured as a result of political opinions (2K, 2N).

## The concept of social group

One of the non-political grounds of persecution included in the Refugees Act centres on membership in a particular social group. The Refugees Act defines social group as ‘a group of persons of a particular gender, sexual orientation, disability, class or caste.’<sup>41</sup> RSDO’s, however, consistently failed to recognise these factors as eligible grounds for asylum. Two examples are described below:

A Ugandan man fled after being persecuted for being a homosexual. Despite the fact that the Act specifically includes sexual orientation in the definition of social group, the RSDO deliberated over whether homosexuality qualified the applicant for the social group criteria. This deliberation included cut and pasted portions of US and UK case law. The decision ended with a quote from the UK decision confirming that homosexuality would constitute a particular social group. Nonetheless, the claim was rejected (1C).

In considering the claim of a woman fleeing forced circumcision in Kenya, an RSDO determined that her reasons for fleeing were not related to the grounds of asylum laid out in the Refugees Act (4PP). The RSDO did not acknowledge gender as constituting a social group or link the claimant’s persecution as a female member of a particular tribe to persecution stemming from membership in a particular social group.

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<sup>40</sup> 3B, 3C, 3F, 3J, 3U, 3AA, 3EE, 3FF.

<sup>41</sup> Section 1(1)(xxi).

As a result of these deficiencies, social group, together with the other non-political grounds of persecution, has effectively dropped out of the refugee definition as applied by RSDOs.

## **The concept of well-founded fear**

As described above, the granting of asylum hinges on the determination that an individual has a well-founded fear of future persecution. According to the Handbook, the well-founded fear determination includes both a subjective and an objective element. While the determination rests primarily on the applicant's state of mind (the subjective element), this state of mind must have some link to the external reality of his or her situation (the objective element). Both elements must be present to establish a well-founded fear, 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.'<sup>42</sup>

Status determination officers universally failed to operationalise this distinction and the accompanying principle that the individual's state of mind—the subjective element—should serve as the primary determinative factor. Instead, RSDOs relied on a bare assessment of country conditions to determine both the subjective and the objective elements, as demonstrated in the following examples:

Several Zimbabwean claimants who fled persecution because of their MDC activities, or their refusal to join ZANU-PF, were rejected after the RSDO relied on general country conditions to determine subjective fear: 'Considering the country information and various reports about Zimbabwe, subjective elements of persecution could not be established' (7G, 7S, 7U, 7V, 7W, 7X, 7R, 7Y, 7Z, 7AA, 7BB, 7DD).

A Ugandan claimant feared persecution as a result of her father's political activities following his arrest. The RSDO did not consider the subjective element of her fear, and rejected her on the basis of general country information: 'Sporadic incidents of bomb blasts had been

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<sup>42</sup> Handbook, para. 37.

reported in some parts of your country, but does not amount to well founded [sic] fear of persecution' (2D).

A Somali claimant fled after being forcibly recruited by the Al-Shabaab terrorist group. In assessing the subjective element, the RSDO relied on general country information—information that in fact supported an objective fear. The claim was nonetheless rejected (7Q).

In addition to relying on general country conditions to assess the subjective element, RSDOs also relied on the prospect of internal relocation – without assessing the individual's circumstances – to counter the well-founded fear argument (2I). Decisions rested on this argument even in cases where relocation was not feasible because the government was the agent of persecution (2D, 2F).

## **The concept of credibility**

Asylum seekers are often forced to flee in response to immediate threats. These unplanned departures mean that individuals may arrive without any documentation to substantiate their fear of persecution or harm. Under these circumstances, RSDOs must assess a claimant's credibility as a central component in evaluating the asylum claim. The assessment of credibility rests on 'everything that may serve to indicate that the predominant motive for [the] application is fear.'<sup>43</sup> Relevant factors may include the claimant's

- personal and family background,
- membership of a particular racial, religious, national, social or political group,
- own interpretation of his situation, and
- personal experiences.<sup>44</sup>

Credibility is ultimately a subjective judgement on the part of the decision-maker. But factors that may call the claimant's credibility into question can include:

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<sup>43</sup> Handbook, para. 41.

<sup>44</sup> Handbook, para. 41.



- Inability to provide a detailed account of the individual's personal experience,
- An account with significant inconsistencies that the claimant is unable to explain, or
- An account that is not consistent with general country conditions and whose deviations the claimant cannot explain.

While many decisions included a separate section on credibility, RSDOs did not demonstrate a reasoned consideration of the factors cited above. Instead, they questioned the credibility of claimants based on their personal opinions of a claimant's experiences, or on the claimant's failure to mention every detail of his or her story on the original asylum application form. Often, RSDOs provided no substantiation for questioning the claimant's credibility.

### ***Personal opinion as credibility test***

RSDO's questioned claimants' credibility based on their personal assessment of the 'likelihood' of claimants' experiences or personal expectations of what the claimant ought to have done under the circumstances. The case below illustrates this point:

A Congolese applicant described being tortured in prison as a result of her religious and political beliefs. While being transferred by soldiers, the truck in which she was travelling crashed. The claimant lost consciousness as a result of the accident, and a villager took her to Lubumbashi, from where she managed to flee the country. The RSDO rejected the claim on the following basis:

It is beyond comprehension that you managed to leave your country in the event of a lorry accident. I saw this as a fabrication of a claim. It is unlikely to survive a lorry accident and run away (2K).

The RSDO's credibility concern, based on his opinion that one is not likely to survive a lorry accident, was not linked to the claimant's personal credibility. In other cases, RSDOs questioned credibility based on their personal expectation that the claimant should have sought state assistance (2I), or relocated rather than fleeing (3U). Here again, the standard was not individual credibility but the RSDO's own opinion, often unsubstantiated.

### ***Unsubstantiated credibility concerns***

In several instances, RSDOs questioned the claimant's credibility without providing any explanation (3D, 3V, 5Q, 5J1, 7B, 7C, 7D, 7CC, 7Q, 3AA). For example:

A Congolese human rights activist released a report detailing human rights abuses by soldiers, particularly sexual and gender-based violence and abuses against children. He was kidnapped, detained and beaten by government soldiers. Following his release, he received information that the state intelligence services were looking for him, and that his colleagues had already been arrested, so he fled. The RSDO responded: 'the applicant just generalise the case and it is doubtful and contradictory and that made the benefit doubt not to be issued.' The RSDO did not elaborate on these claims, or explain how he reached this conclusion (3AAA).

Without any substantiation, a number of decisions described the relevant claim as 'feigned [sic] and overstated,' adding that 'there are no logic of sequential events supported by objective scenarios' (2D, 2H, 2T, 2W, 2DD, 2EE, 2FF, 3II).

### ***Additional details as a credibility concern***

RSDOs also relied heavily on the fact that some individuals revealed information in the status determination or second interview that they had not mentioned in their BI-590 asylum application form, which RSDOs sometimes misleadingly refer to as 'the first interview.' The BI-590 form does not provide space for full or detailed explanations, and it is filled out without assistance at the very beginning of the application process, when the majority (68%) of applicants receive no explanation of the asylum process.<sup>45</sup> Applicants are therefore unlikely to comprehend exactly what information is required of them at the time that they complete the form. Many are also not sufficiently fluent in English to record the full details of their asylum claim in writing at this early stage. Finally, having in many instances just fled government persecution, applicants may be reluctant to reveal all of the relevant information to government authorities without a full understanding of the process.<sup>46</sup>

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<sup>45</sup> 'National Survey of the refugee reception and status determination system in South Africa,' FMSP research report, p. 35.

<sup>46</sup> See *Handbook*, para. 198-199.

RSDOs did not consider any of these factors. Instead, they used the failure to disclose information on the initial application form as cause for questioning the claimant's credibility, even where the applicant provided no contradictory information. In the case of the asylum seeker who escaped after a lorry accident, the RSDO stated: 'There is no credibility in your claim. You gave testimony during the second interview which was lacking during the first interview. This amounts to fabrication of a claim' (2K). The information that was lacking in this instance was the fact that the claimant described above had included details of the lorry accident in her application form, but had not described how a villager then helped her to escape by taking her to Lubumbashi.

Moreover, general and often outdated country information was used to discount credibility without considering the basis of the individual's claim. This general information, which often included a prospective return to peace and stability rather than its actual return, was treated as a discrepancy in the individual's claim (2P, 2CC, 3Z). For instance, an RSDO cited credibility concerns in rejecting a Congolese man who feared for his life after his parents and siblings were killed 'because there is a government in D.R.C. that could as mush [sic] protect you' (3Z). The RSDO added that the claimant could have sought the protection of MONUC.<sup>47</sup> In such cases, RSDOs relied on reports of peace talks and requests for the withdrawal of troops without considering whether the peace talks were successful, or whether the troops *had* in fact withdrawn.

In short, RSDOs demonstrated no understanding of the credibility concept and how to apply it.

## **Burden of proof**

The burden of proof defines who has the duty to prove or disprove a set of facts. With respect to asylum claims, the Handbook acknowledges that, in general, the burden of proof lies on the individual making a claim. It qualifies this principle, however, by noting that most applicants will not possess documentary evidence to

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<sup>47</sup> United Nations Organisation Mission in the Democratic Republic of the Congo.

substantiate their claims. Accordingly, the Handbook provides the following guidelines for status determination:

[W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.<sup>48</sup>

RSDOs almost universally failed to apply these guidelines, instead employing an incomplete view of the UN instructions that greatly disadvantaged the asylum seeker. With only a handful of exceptions, every decision reviewed contained an incomplete version of the above guidelines, selectively citing only the first sentence from the relevant paragraph in the Handbook: 'It is a general legal principle that the burden of proof lies on the person submitting a claim.'<sup>49</sup> None, however, took into account the remaining elements of this paragraph, cited above.

This misrepresentation served to distort the status determination process, weighing heavily against the applicant by creating an almost insurmountable evidentiary barrier:

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<sup>48</sup> *Handbook*, para. 196

<sup>49</sup> *Ibid*, found in 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1J, 1K, 1L, 1M, 1N, 1O, 1P, 1Q, 1R, 1S, 1T, 1U, 1V, 2A, 2B, 2C, 2D, 2E, 2F, 2G, 2H, 2I, 2J, 2K, 2L, 2M, 2N, 2O, 2P, 2Q, 2R, 2S, 2T, 2U, 2V, 2W, 2X, 2Y, 2CC, 2DD, 2EE, 2FF, 2GG, 2HH, 2II, 2JJ, 2KK, 3A, 3B, 3C, 3D, 3E, 3F, 3G, 3H, 3I, 3J, 3K, 3L, 3M, 3N, 3O, 3P, 3Q, 3R, 3S, 3T, 3U, 3V, 3W, 3X, 3Y, 3Z, 3AA, 3BB, 3CC, 3DD, 3EE, 3FF, 3GG, 3HH, 3II, 3JJ, 3KK, 3LL, 3MM, 3NN, 3OO, 3PP, 3QQ, 3RR, 3SS, 3TT, 3UU, 3VV, 3WW, 3XX, 3YY, 3ZZ, 3AAA, 3BBB, 3CCC, 3DDD, 3EEE, 3FFF, 3GGG, 3HHH, 3III, 4A, 4B, 4C, 4D, 4E, 4F, 4G, 4H, 4J, 4K, 4L, 4M, 4N, 4O, 4Q, 4R, 4S, 4T, 4U, 4V, 4W, 4X, 4Y, 4Z, 4A1, 4C1, 4PP, 5A, 5B, 5C, 5D, 5E, 5F, 5G, 5H, 5I, 5J, 5K, 5L, 5M, 5N, 5O, 5P, 5Q, 5S, 5T, 5U, 5V, 5W, 5X, 5Y, 5Z, 5A1, 5B1, 5C1, 5D1, 5E1, 5F1, 5G1, 5H1, 5I1, 5J1, 5K1, 5L1, 5M1, 5N1, 5O1, 5P1, 5Q1, 5R1, 5S1, 5T1, 5U1, 5V1, 5W1, 5Z1, 6A, 6B, 6C, 6D, 6E, 6F, 6G, 6H, 6I, 6J, 6AA, 6BB, 6CC, 6DD, 7P, 7H, 7I, 7L, 7J, 7K, 7M, 7F, 7EE, 7G, 7S, 7U, 7V, 7W, 7X, 7R, 7Y, 7Z, 7AA, 7BB, 7DD, 7FF, 7T, 7Q.

The son of a Congolese journalist who was sought by the intelligence services fled for fear that the government would detain the entire family in retaliation for the father's reporting activities. Rather than investigating the validity of the story, and the situation of journalists in the DRC, the RSDO shifted the entire burden to the claimant: 'Save to mention the incidences or assumptions of fear you did not furnish evidence that bring your claim within the above-mentioned ambit' (2P).

## Standard of proof

In addition to placing the full burden of proof on the claimant, many decisions also either relied on the wrong standard of proof, or did not properly operationalise the correct standard. While the burden of proof defines who must provide the information to substantiate an asylum claim, the standard of proof lays out the level of certainty that must be established through this information in order to grant an asylum claim. According to the UNHCR Handbook and South African case law, the appropriate standard of proof is one of 'real risk' based on 'a reasonable possibility of persecution.'<sup>50</sup> Several decisions, however, incorrectly cited the more demanding balance of probabilities standard,<sup>51</sup> despite a court ruling that the use of this standard constituted an error of law.<sup>52</sup> Under the latter standard, an asylum seeker must go beyond demonstrating a reasonable possibility of persecution and must instead show that it was more likely than not that he or she would be persecuted if returned to the country of origin.

Although most decisions cited one of the above standards, it is clear that RSDOs merely cut and pasted these phrases as a matter of rote procedure without understanding what they meant in practice. RSDOs did not actively engage with or apply these standards in order to assess the information presented in the asylum claim. As further evidence that RSDOs failed to understand these concepts, the decisions listed above cited both the balance of probabilities standard (in the reasons section) and the real risk standard (in the burden of proof section). The use of both standards indicates that many RSDOs use these phrases without any real

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<sup>50</sup> *Tantoush*, para 97.

<sup>51</sup> 3B, 3F, 3J, 3T, 3U, 3AA, 3EE, 3FF, 3PP, 5F, 5G, 5I, 7P, 7H, 7J, 7K, 7M, 7F, 7EE, 7G, 7S, 7U, 7V, 7W, 7X, 7R, 7Y, 7Z, 7AA, 7BB, 7DD, 7I, 7L, 7A, 7E, 7N, 7O, 7T, 7Q.

<sup>52</sup> *Tantoush*, para. 99.

understanding of what they mean, precluding any genuine attempt to apply these standards to the details of the individual claim.

### **Section 3(b): Conditions of instability as grounds for status**

A Congolese man who fled the civil war and sought asylum under Section 3(b) of the Refugees Act, which grants asylum on the basis of general conditions of instability, received the following rejection: ‘You left your country because war [sic]. You failed to demonstrate how were you [sic] affected by that war. A general civil war situation is not in itself sufficient grounds for granting asylum’ (5F1).

Section 3(b) of South Africa’s Refugees Act incorporates Article 1(2) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. This provision grants refugee status to an individual who has been compelled to leave his or her place of habitual residence ‘owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either a part or the whole of his country.’ Individuals fleeing general conditions of civil war fall under this provision, whether the unrest is in part or all of the country. Accordingly, internal relocation is not a requirement for seeking refugee status under Section 3(b).<sup>53</sup> Moreover, this provision provides protection from general conditions of instability; individual harm or persecution is not a necessary component.

The 3(b) provision has been largely absent from South Africa’s status determination process, as RSDOs consistently failed to understand and apply it properly. Instead, they incorrectly relied on British case law, where no such legal provision exists. The excerpted decision below relies on a section cut and pasted from a British ruling:

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

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<sup>53</sup> See UNHCR Guidelines on International Protection No. 4: “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 para. 5.

show a differential impact. In other words, he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare (1F).

This interpretation is based on the individual persecution requirement of the 1951 UN Convention – found in section 3(a) of South Africa’s Refugees Act. Section 3(b), by contrast, is based on general conditions of instability and does not require differential impact. By relying on the above understanding, RSDOs have blindly applied case law interpreting another country’s legislation—legislation that conflicts with South Africa’s Refugees Act—and have effectively negated Section 3(b) of the Act. As a result, individuals who may have qualified for asylum under section 3(b) – having fled civil war in the DRC,<sup>54</sup> Somalia (1F, 4H, 7Q) and Burundi (4Q) – were rejected on the grounds that they did not suffer persecution.

This outcome reveals a lack of familiarity with the South African legislation and its requirements. The fact that RSDOs are blindly cutting and pasting information that may be irrelevant within the South African context—such as citations from case law based on conflicting legislative provisions—is further evidence that RSDOs are not conducting reasoned status determination considerations.

The conflation of Sections 3(a) and 3(b) has resulted in the flawed use of both provisions. RSDOs have both incorrectly added a persecution requirement to individuals with a 3(b) claim based on general conditions of instability, and have in some cases concluded that instability does not rise to the level of a 3(b) claim while ignoring details of individual persecution sufficient for a 3(a) claim.

### **The ‘manifestly unfounded’ standard**

Under the law, claims made on the basis of the reasons specified in the Refugees Act but found to be lacking in one of the required elements for establishing asylum, such as a failure to demonstrate a well-founded fear, or a lack of credibility, will be

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<sup>54</sup> 2II, 3B, 3C, 3J, 4J, 4S, 5R, 5W, 5A1, 5F1, 5G1, 5H1, 5V1.

rejected as ‘unfounded.’ By contrast, claims made for reasons other than those specified in the Act – such as claims based only on economic hardship – will be rejected as ‘manifestly unfounded.’

The determination of whether a claim is ‘unfounded’ or ‘manifestly unfounded’ is significant because the two categories of rejections are treated differently in the appeals process. A claimant with an ‘unfounded’ claim has 30 days to appeal to the Refugee Appeal Board and currently has the right to appear before this Board, with legal assistance, to prove his or her case. By contrast, a claim rejected as ‘manifestly unfounded’ is automatically referred to the Standing Committee for Refugee Affairs (SCRA). Claimants have only 14 days to make written submissions before the Committee, with no right of appearance. The experiences of legal clinics indicate that many claimants are unaware of the proper procedure for challenging manifestly unfounded decisions and are unable to obtain the necessary assistance in the required fourteen days.

Because claimants who are rejected as ‘manifestly unfounded’ are disadvantaged in terms of the appeals procedure, it is crucial that RSDOs correctly apply this distinction. Yet, RSDOs sometimes relied on the wrong basis for deeming a claim to be manifestly unfounded. Moreover, manifestly unfounded decisions often included no reasons; they offered only a one or two-sentence rejection stating that the claim was made for reasons other than those specified in the Act (6H). The issuance of decisions with such sparse and inadequate content raises questions regarding the ability of the SCRA to conduct a proper and fair review.

## **Summary and Recommendations**

This section has highlighted that RSDOs routinely misapply the fundamental legal concepts of asylum law in their status determination decisions. These failures include:

- Misapplying the core concepts of persecution, social group, well-founded fear, and credibility in order to deny asylum claims;



- Creating an overly-demanding burden of proof that diverges from the international standard and creates an insurmountable burden;
- Employing a more demanding standard of proof in violation of the legal standard as upheld by the courts;
- Relying on foreign case law based on legislation that diverges from South African refugee law in order to negate Section 3(b) of the Refugees Act;
- Failing to properly distinguish between unfounded and manifestly unfounded decisions, with implications for the review and appeal process.

While a lack of training may be partly responsible for these errors in law, they also may be attributable to a general anti-asylum seeker bias that excludes the majority of all claims.

As a result, no recommendations can be effective without addressing this anti-asylum seeker bias. Recommendations to this end will be included in the conclusion.

With respect to the errors of law themselves, ACMS recommends that DHA take the following steps:

- Create a minimum educational requirement for the hiring of RSDOs;
- Ensure that RSDOs are properly trained in all aspects of refugee law;
- Create review procedures that provide for an automatic rehearing of any decision in which there is an error of law; and
- Establish procedures to address the situation of RSDOs whose decisions do not accurately reflect the law, including warnings, greater training, and, if necessary, removal from the RSDO position.

## Other Recurring Flaws in Decision-Making

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Beyond errors of law, the overall quality of RSDO decision letters is undermined by rote decisions displaying no due diligence or reasoned deliberation as demanded by a fair administrative process. This section considers some of these recurrent flaws, which include:

- Cutting and pasting information on the wrong claimant or country;
- Failing to provide adequate reasons for a rejection decision;
- Engaging in careless decision-making that does not apply standards of reasonableness or rationality and reaches unfounded conclusions (failure to apply the mind);
- Making unjustified assumptions about the viability of internal relocation as a flight option; and
- Failing to thoroughly investigate country conditions, including reliance on prospective peace or legislative provisions alone to assess the risk of return.

The prevalence of these kinds of flaws suggests that, due to carelessness, haste, or lack of proper training, RSDOs are relying on basic letter templates from which they ‘cut and paste’ wording in various combinations—the scope of which is illustrated by the numerous duplicate decisions listed in the appendix. The pervasiveness of these flaws reveals a passive and thoughtless process of letter production rather than the rational decision-making process called for by asylum law and by the constitutional guarantee of fair administrative action.

### Wrong claimant or country

The most compelling evidence of a ‘cut-and-paste’ mode of letter construction, as opposed to a meaningful decision-making process, is the fact that several decisions referred to either the wrong claimant, or the wrong country (1E, 2DD, 5T). It is hard to conceive of an alternative explanation for the incongruous reasoning found in decisions, including:

- A Congolese woman fleeing civil war was rejected on the basis of facts about flight from Eritrean military service (2U).

- A Burundian man fleeing tribal conflict was rejected on the basis that the Indian constitution provides a right to freedom of religion (6EE).

### **Failure to provide adequate reasons**

Just administrative action requires rational reasons for any administrative decision that adversely affects an individual's rights.<sup>55</sup> Accordingly, any decision must be supported by both the evidence presented *and* the reasons provided by the decision-maker.<sup>56</sup>

Given the general failure to produce well-reasoned, individualised decisions on asylum applications, it is not surprising that the majority of decisions reviewed were not supported by adequate reasons. Some contained no reasons whatsoever, while others were based on highly generalised statements that could be given to any claimant, regardless of the nature of his or her claim. In either case, the decision-makers failed to follow the requirements for just administrative action. The discussion that follows identifies various shortfalls in the provision of adequate reasons.

### ***No reasons***

Many decisions lacked any account of the basis on which the RSDO made a negative status determination. Often, these decisions did not even include a statement indicating that the claim was rejected and many consisted only of cut and pasted paragraphs taken from news reports, NGO reports, or country reports produced by the US and UK governments, with no attempt to explain their relevance or link them to the details of the claim.<sup>57</sup> These letters are of particular concern because they provide no trace of a decision-making process. The content of these decisions suggests that the RSDOs produced the letters without undertaking an actual process of refugee status determination. For instance:

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<sup>55</sup> See PAJA, Section 5; PAJA, Section 6(f)(ii)(dd).

<sup>56</sup> Cora Hoexter, *Administrative Law in South Africa*, Cape Town: Juta (2007), p. 307.

<sup>57</sup> 1A, 1G, 1S, 1T, 1V, 2A, 2L, 2M, 2R, 2HH, 2JJ, 3A, 3G, 3S, 3GG, 3UU, 3ZZ, 3DDD, 3GGG, 3III, 4L, 4M, 4R, 5B, 5Q, 6BB.

A Zimbabwean asylum seeker persecuted for his MDC activities was rejected with no reasons other than the RSDO's assertion that '[t]he applicant's claim has been thoroughly assessed and due regard has been given to the objective background information on the applicant's country of origin. The applicant's claim does not fall within the ambit of Section 3 (a) of the Refugees Act, No 130 of 1998. In light of the above information the application for asylum has been Rejected as Unfounded in terms of section 24 (3) (c) of Refugees Act 130 of 1998' (6BB).

### ***Indeterminate rejections***

Refugee status determination is an individualised deliberation that considers the risk of persecution an individual faces based on his or her particular set of circumstances. Many decisions, however, were so general in nature that they could have been issued to anyone, with no particular link to individual circumstances. Such rote decisions violate the tenets of just administrative action and provide insufficient information for an appeal body to consider the correctness of the decision.

Many decisions contained only generalised 'cut-and-pasted' statements reciting the various elements of refugee law – persecution, well-founded fear, future risk, etc. – accompanied by a general negative statement providing no justification in terms of the specific details of the claim.<sup>58</sup> The decision rejecting a student activist with the MLC who fled persecution following the elections, for example, rested on the following reasons, recounted below in their entirety:

There is no well-founded fear of persecution. There is no reasonable threats [sic] to your life. You couldn't demonstrate reasonable fear of persecution. You are not entitled to international protection because your government can grant you (40).

Some decisions included nothing more than cut and pasted country information, followed by either a general statement that the claimant failed to prove persecution or a lack of government protection,<sup>59</sup> or by some additional cut and pasted

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<sup>58</sup> 1E, 1R, 2H, 2I, 2N, 2T, 2W, 2DD, 2EE, 2FF, 3F, 3U, 3FF, 3II, 3QQ, 3CCC, 4E, 4S, 4U, 4W, 5S, 5T, 5Z, 5A1, 5B1, 5D1, 5I1, 5K1, 5L1, 5M1, 5N1, 5R1, 5Z1, 6DD.

<sup>59</sup> IH, 2Y, 3E, 3O, 3Q, 3VV, 3L, 3N, 3R, 3JJ, 3MM, 3OO, 3VV.

definitions of key elements such as persecution.<sup>60</sup> Some lacked country information altogether and consisted of only one (4I), two (4H), or three (6D, 6I) very general sentences as evidence of a well-reasoned decision.

The sheer volume of these examples further underscores the point that RSDOs are not performing individual status determination. The fact that these negative decisions are not based on concrete reasons or on the details of the individual claim calls into question the Department's portrayal of the high proportion of failed asylum seekers as reflective of abuse of the asylum system.

### **Failure to apply the mind**

The Promotion of Administrative Justice Act (PAJA) lays out a minimum standard of fair decision-making. Flaws in decision-making that indicate the failure of an administrator to apply his or her mind are given as grounds for judicial review.<sup>61</sup> They include:

- 1) the failure to decide or consider,<sup>62</sup> including the failure to consider the matter properly;
- 2) the consideration of irrelevant factors, or the failure to consider relevant factors,<sup>63</sup> including giving too much or too little weight to particular factors; and
- 3) arbitrary and capricious decision-making,<sup>64</sup> which includes a decision that is irrational or without basis.

PAJA adds additional grounds for review that insist on the rationality and reasonableness of decision-making. A decision must be rationally connected to:

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<sup>60</sup> 1J, 1L, 1N, 1W, 2C, 2E, 2J, 2Q, 2CC, 2GG, 3B, 3D, 3F, 3J, 3P, 3T, 3U, 3AA, 3EE, 3PP, 3TT, 3VV, 3AAA, 3DDD, 3FFF, 4F, 5D, 5E, 5J, 5G1, 5H1, 5O1, 5P1, 5Q1, 5S1, 5X1, 5Y1, 7P, 7CC, 7H, 7I, 7L, 7J, 7K, 7M, 7F, 7EE, 7B, 7C, 7D, 7G, 7S, 7U, 7V, 7W, 7X, 7R, 7Y, 7Z, 7AA, 7BB, 7DD.

<sup>61</sup> Section 6 of PAJA lays out the elements of flawed decision-making that comprised what had previously been known as failure to apply the mind in common law.

<sup>62</sup> Section 6(2)(g).

<sup>63</sup> Section 6(2)(e)(iii).

<sup>64</sup> Section 6(2)(e)(vi).

- 1) the purpose for which it was taken;
- 2) the purpose of the legal provision that gives the administrator the power to decide;
- 3) the information before the administrator; and
- 4) the reasons given for it by the administrator.<sup>65</sup>

In addition, the court may review a decision that ‘is so unreasonable that no reasonable person could have so exercised the power or performed the function.’<sup>66</sup>

The majority of decisions reviewed in this study failed to meet these criteria for rationality, reasonableness, and applying the mind. The sections below outline the main areas of weakness in applying the mind in reaching a status determination decision. They include:

- Ignoring relevant information;
- Giving priority to irrelevant information;
- Making arbitrary status determination decisions;
- Giving decisive weight to unsupported facts, fallacies and speculation; and
- Giving decisive weight to inaccurate facts, incomplete or selective country information, or outdated country information.

The report considers each of these in more detail below.

### ***Ignoring relevant information***

In many of the decisions reviewed, RSDOs ignored relevant details of the individual claim, or relevant country information, even when they had recounted this information elsewhere in the decision letter.

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<sup>65</sup> Section 6(2)(f)(ii).

<sup>66</sup> Section 6(2)(h).

Adam\* received a decision describing how he ran away after his parents were killed in connection with his father’s association with opposition leader Jean-Pierre Bemba. Without discussing these events, the RSDO concluded that Adam ‘failed to furnish any details which could bring his claim within the ambit of above definition [sic]’ (2F).

Numerous RSDOs also made contradictory claims that ignored the case details they themselves had set forth earlier in the letter. Some examples are presented in the table below.

LETTER RECOUNTS THAT:	NEGATIVE DECISION CLAIMS THAT:
<b>A Zimbabwean man was abducted by ZANU-PF elements because of his perceived affiliation with the MDC.</b>	...claimant was unable to show that he was known to authorities (4Y).
<b>The claimant was detained by authorities in the DRC after writing stories about the activities of the rebels and the government soldiers.</b>	‘...you failed to aduce [sic] evidence of a well, founded [sic] fear of persecution never approached the authorities about the threats’ (2H).
<b>The claimant, a Congolese journalist, was targeted by the government for his reporting. His house was burned down as a result.</b>	... the claimant is ‘not at the serious adverse attention of the Congolese authorities or any of its agents’ (2V).
<b>A Congolese claimant was imprisoned and beaten for alleged involvement with rebel forces.</b>	... the claimant recounted no harmful experiences (5D1).
<b>The claimant fled persecution in Ethiopia due to his activities with the opposition OLF.<sup>67</sup></b>	... the claimant asserted ‘non-involvement in political activities’ (1J).
<b>The claimant fled Zimbabwe after her family was targeted by the police and their house razed because of their political associations.</b>	... the claimant failed to demonstrate ill-treatment or persecution (6A).
<b>The claimant was tortured in prison in the DRC as a result of her religious and political beliefs.</b>	‘You were never beaten or tortured due to your political opinion’ (2K).
<b>The claimant fled Somalia after being told by a relative member of the Al-Shabaab terrorist</b>	... the claimant provided no reasonable explanation for why he left Somalia (7Q).

<sup>67</sup> Oromo Liberation Front, an organisation that supports self-determination for the Oromo people in Ethiopia.

<b>group that he was wanted by this group.</b>	
<b>The claimant fled the DRC as a result of threats stemming from tribal rivalries.</b>	...the claimant fled political unrest and instability that has since stabilised (4G).
<b>The claimant was kidnapped by government soldiers for speaking out against the persecution of Tutsis in Rwanda.</b>	... the claimant suffered no persecution (3W).
<b>The claimant fled the DRC after being kidnapped and beaten by government soldiers for issuing a report on their human rights violations.</b>	... the claimant failed to demonstrate a fear of persecution (3AA).

The contradiction of significant elements of the claim details in these decisions suggests an institutionalised bias towards the rejection of asylum claims. RSDOs reached negative status determination decisions in the claims described above by systematically ignoring relevant grounds for persecution.

Similar rejections ignored the discriminatory elements of the claim (4T, 4P) or the gender basis (4PP), particularly in instances of rape (2O, 3H, 3O). The treatment of these gender-based claims will be discussed in greater detail in the next chapter.

*Giving priority to irrelevant information*

RSDOs also frequently prioritised irrelevant information – treating facts unrelated to an individual’s claim for refugee status as determinative, while overlooking relevant country conditions. For instance:

- A claimant who fled the civil war in Somalia – rejected on the basis of the availability of food and medical care in the country (1F).
- A claimant who fled Rwanda after being targeted by the intelligence service – rejected based on the fact that she chose South Africa as a destination because it is a developed country (5F).
- A claimant persecuted by the authorities because of his opposition party membership – rejected based on the arrest of the leader of an unrelated armed faction in the DRC (4F).



- A Burundian claimant persecuted because of his opposition party membership – rejected on the basis of the demobilisation of an unrelated rebel group (5Z).
- A claimant who fled political persecution in Sierra Leone—rejected on the basis of the country’s economic recovery (1N).
- A claimant fleeing persecution for her work as a journalist – rejected based on the existence of a training programme for journalists in Goma (2X).
- A claimant who fled tribal clashes—rejected based on a UN commitment to reduce troops in the DRC and rename the mission (2E).

RSDOs often seemed unaware of what qualifies as relevant and adequate evidence. For instance:

- Letters dealing with persecution claims in Zimbabwe contained many irrelevant observations about the Zimbabwean economy.<sup>68</sup>
- There were numerous irrelevant references to an IOM programme for voluntary return in the absence of any discussion of the relevant conditions of persecution.<sup>69</sup>
- There were several descriptions of the formal organisational structure of the police and security forces in Bangladesh, with no discussion of their actual activities, to assert that there was sufficient protection for supporters of the opposition.<sup>70</sup>
- In a persecution claim based on tribal conflict in the DRC, the RSDO relied on information describing the efforts of a South African NGO to provide education on tribalism in Africa (3CC).
- A Congolese student who was tortured following a television interview in which he was critical of the government’s human rights record was rejected because ‘[y]our country embraces the right to association in practice’ (2EE). The identical phrase was used to reject several other claims having nothing to do with this right (2H, 2T, 2W, 2DD, 2FF, 3II).

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<sup>68</sup> 7G, 7S, 7U, 7V, 7W, 7X, 7R, 7Y, 7Z, 7AA, 7BB, 7DD, 7Q.

<sup>69</sup> 3DD, 7F, 7EE, 7H, 7I, 7L, 7J, 7K, 7M, 7G, 7S, 7U, 7V, 7W, 7X, 7R, 7Y, 7Z, 7AA, 7BB, 7DD, 7A, 7E, 7N, 7O, 7T.

<sup>70</sup> 7H, 7J, 7K, 7M, 7I, 7L.

Irrelevant information often entered into decision letters as a result of copying and pasting from other decisions. Hence, the observation that ‘bomb blasts...does [sic] not amount to well found fear of persecution’ (2D) in a persecution claim with no relation to any bombing. Similarly, reference to a UNHCR programme to avoid property disputes was provided in response to a claimant who fled because of her husband’s work as a journalist in Goma (3SS).

As further evidence of inappropriate cutting and pasting, numerous letters included identical sentences that were irrelevant to the claim. For example:

- The sentence ‘it is sad what happened to your property’ was included in decisions with respect to claims that did not involve loss or damage to property (4A, 4B, 4C, 4D).
- Claimants fleeing for a variety of reasons received the following general statement: ‘you do not have a political profile which will make the authorities of your country to have an interest on you or which will attract their attention if you return to your country’ (3B, 3C, 3F, 3J, 3U, 3AA, 3EE, 3FF).

### ***Arbitrary status determination decisions***

A large number of decisions also contained information that had no rational connection to the conclusion reached by the RSDO, often as a result of unthinking cutting and pasting. In many instances, information in the decision substantiated an asylum seeker’s claim, but the RSDO reached a contradictory status determination decision without providing any information or reasoning to explain the contradictory decision. Examples include the following:

- A decision heavily citing Human Rights Watch on political violence between members of the FNL<sup>71</sup> and the CNDD<sup>72</sup> in Burundi—then deemed ‘unlikely’ the applicant’s claim of being targeted because of his membership in the FNL (1H, similar flaws in 1K, 1S).

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<sup>71</sup> National Forces of Liberation, a Hutu rebel group in Burundi.

<sup>72</sup> National Council for the Defence of Democracy, Burundi’s ruling party since 2005.

- A decision citing a UK Operational Guidance Note on Cameroon describing the harassment of SDF<sup>73</sup> members—then rejected a woman who was tortured as a result of her SDF activities because her fear was not well-founded (1B).
- A decision affirming the credibility of a Congolese human rights activist’s claim of being persecuted—then stated the contrary conclusion that there was no threat of persecution (2FF).
- Decisions affirming increased violence against civilians or continued human rights violations in the DRC—then denied refugee status to the claimants (1U, 1W, 5Q, 5H1, 5X1, 5Y1, 2A, 2R, 2Y, 3Y, 3ZZ, 3DDD).
- Decisions describing instability in Somalia—then arrived at negative decisions in the face of this information (7Q, 1G).

In other cases, the contradictions appeared to stem from the careless cutting and pasting of the same country information for every claimant from a particular country of origin, or of the same generic rebuttals to the same categories of claim. In both cases, the RSDO did not apply his or her mind to the particular situation of the claimant. For example:

- A member of the Zimbabwean army who fled because he was forced in his military role to act outside of the law and to beat MDC members was rejected based on the (erroneous) fact that he was an MDC supporter, and that MDC supporters were no longer being harassed by Zanu-PF (4X).
- A Congolese claimant who was specifically targeted as an alleged accomplice to an attack on the Presidential residence was rejected because ‘members of political parties are not at risk of persecution on the basis of membership alone’ – a factor that was not relevant in the context of the claim (3HHH).

More extreme examples of this type of cutting and pasting are included in the appendix, which lists duplicate claims received by different claimants.

### ***Assertion of unsupported facts, fallacies and speculation***

RSDOs displayed further lapses in applying their minds by basing their decisions on fallacies (flawed reasoning), unsupported assertions and speculation.

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<sup>73</sup> Social Democratic Front, the main opposition party in Cameroon.

### **Fallacies – flawed reasoning**

The failure of RSDOs to recognise the fragility of state structures in many refugee producing countries, or to acknowledge the gap between law and practice in these countries, resulted in several instances of flawed reasoning. Examples include:

- The fact that state governments are seldom in control of the entire state territory, with rebel groups having effective control over certain regions.
- The fact that state governments are often populated by members of the ruling party such that individuals persecuted by party members have no recourse to impartial government assistance.
- The fact that state officials such as police or army officers often represent the ruling party and act in party rather than public interests. Because of the position of power the ruling party occupies, these officials are able to act outside of the law.
- The fact that there is no single ‘silver bullet’ to eliminate the complex and systemic problems underlying instability and rights abuses in refugee-producing countries. Persecution and instability may linger for many years despite progress toward improved political systems and civil security.

One recurring example of flawed reasoning involved the statement that the government in question could provide the claimant with protection. RSDOs did not assess whether this was in fact possible, nor did they consider that the government had already failed to provide such protection and may not have been in control of certain areas of the country (3Z, 5H, 5S, 5W, 5B1, 5D1, 5V1). In one particularly absurd example, a Congolese man who was kidnapped by rebels was told: ‘During the time of you being taken by the Etoko rebels, you did not ask for the government intervention to help you to deal your [sic] problem’ (5E1).

The same logic was used in cases where it was the government itself that was the persecutor. Accordingly, an Ethiopian man who was threatened by the EPRDF<sup>74</sup> was rejected for failing to seek the protection of the authorities. The RSDO was

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<sup>74</sup> Ethiopian People’s Revolutionary Democratic Front, a coalition of political parties currently in power.

apparently unaware of the fact that the EPRDF – as the ruling party in Ethiopia – *was* the authority (6B, 6C). Similarly, a woman who was raped by government soldiers received a decision stating that she ‘failed to establish that the government... is unable or unwilling to protect’ her (2KK; similar flaws in 5A, 5T1).

There were also numerous examples of naive ‘silver-bullet’ reasoning, where RSDO’s took an overly optimistic view of political developments – equating peace treaties with actual peace, treating political collaboration as evidence of real reconciliation, or presuming that peace projects or recommendations inevitably and immediately led to stability. Some examples of such flawed reasoning and ‘silver-bullet’ assumptions are provided in the box below.

EXAMPLES OF FLAWED REASONING
Citing only a news story reporting the arrest of rebel faction leader Laurent Nkunda, an RSDO concluded that all fighting between the rebels and government soldiers in the DRC and all attacks on civilians had ceased (3B).
In response to a persecution claim based on opposition party membership, the RSDO concluded that ‘the fact that there are political parties in DRC is a proof that political parties in DRC enjoys [sic] autonomy (3V).
Providing no evidence, an RSDO asserted that all harassment of MDC supporters in Zimbabwe had stopped under the national unity government, ignoring the continued contestation of power in the country (4K).
Denying refugee status to an MDC supporter whose family was harassed and whose brother was killed, an RSDO claimed without evidence that any risk of political conflict or persecution had ceased in the wake of the 2008 elections in Zimbabwe, asserting that violence only erupted just before elections (1P).
RSDOs presumed the legality of any police action, regardless of whether these actions violated fundamental freedoms, such as freedom of expression and assembly (5X). Government crackdowns on opposition gatherings were portrayed as upholding the law and legitimately ‘arresting the illegal [sic] gatherings’ (5K).
Several decisions considered Human Rights Watch recommendations for increased accountability for human rights violations as evidence of peace (2J, 20, 2Q, 3E, 3O, 3Q, 3S, 3VV, 3AAA), despite the fact that these came at the end of a report recounting extensive and brutal human rights violations against civilians.

### **Speculation and Unsupported Facts**

RSDOs also frequently relied on unsupported facts and speculation as the rationale for refusing refugee status. Some examples include:

- The RSDO refused to believe that an opposition party claimant had been denied his seat in a legislature within his country of origin – despite a court ruling in his favour – on the basis of the RSDO’s speculation that ‘no one will refuse to declare to the party a seat if you won, meaning that you did not won [sic], you were forcing yourself to be in parliament’ (2B).
- A Congolese claimant who fled persecution on the basis of his human rights activities was told: ‘The fact that you were a Human rights activists [sic] cannot put you in a situation where you will face persecution.’ The decision contained the further unsupported assertion that ‘there is stability in your country’ (2G).
- Two Zimbabwean claimants were rejected after the RSDO concluded that the Zimbabwean Human Rights Forum’s decision to suspend its political violence reporting in order to reconcile current and past cases meant that political violence had declined (7B, 7C).
- A claimant who was arrested and tortured in the late 1990s for involvement with Cameroon’s opposition SDF party was rejected. The rejection stemmed from the RSDO’s unsupported speculation that there was ‘no way that the authority can be able to keep [the claimant’s] records until now’ (1B)—an assertion that did not consider the fact that the same party and president have been in power since 1982.
- A Congolese man was arrested on suspicion of conspiring against the president because of his former association with the opposition party. The RSDO speculated that the detention was not related to his political activities and was simply a criminal matter (3I).

RSDOs commonly failed to support the assertions put forth in decisions—as in the case of an RSDO who declared changes in the claimant’s country of origin to be ‘durable, truly effective and of substantial political significance’ without providing any information to support this claim (4S).

Another revealing example involves the Cameroonian opposition party member described above, rejected after the RSDO concluded that the ruling party would no longer have any record of the claimant. The decision letter went on to cite the UK

Operational Guidance Note detailing the harassment suffered by SDF members, and the Note's prescription that the nature of political activity should be 'thoroughly investigated as the grant of asylum may be appropriate in some case.' The RSDO apparently failed to realise that this investigation responsibility fell to him or her. Instead, the RSDO concluded without any investigation—or any information to counter the picture presented by the Guidance Note—that there was no risk of persecution (1B).

In contrast to the requirements of PAJA, these examples demonstrate that RSDOs reached conclusions that did not stem logically from the reasons they gave, or that did not follow from the information on which they relied. The widespread use of speculation and unsupported facts to justify a denial of refugee status also suggests a failure by RSDOs to either:

- Recognise their role as investigators of claims; or
- Comprehend or apply the due process involved in such investigation.

### ***Incorrect country information***

Several decisions were based on incorrect country information. These uninformed and misleading decisions reveal two key problems in RSDO decision-making:

- First, RSDOs are often severely uninformed about country conditions in even the most well-known refugee-producing countries.
- Second, the decision-making process is oriented towards finding reasons to reject a claim, regardless of the claim's merits. As a result, RSDOs weave together an account that justifies rejection of the claim through the selective reliance on facts supporting rejection and the exclusion of ample information supporting the claim.

Many decision letters revealed the extent to which RSDOs were uninformed or seriously misinformed about conditions in the claimants' countries of origin. In

numerous cases, RSDOs relied on outdated information that no longer represented the situation on the ground.<sup>75</sup>

Some illustrative examples of uninformed decision-making are listed below:

REJECTED CLAIMANT:	ERRONEOUS BASIS OF REJECTION:
<b>The Hutu son of a Tutsi mother who fled ethnic persecution in Burundi.</b>	The RSDO understood Hutu and Tutsi (ethnic groups) to be religious groups and stated that membership in a religious community was not sufficient to substantiate an asylum claim (6EE).
<b>Congolese claimants who fled to avoid being forced to fight with the rebels.</b>	The RSDO failed to distinguish between state and non-state actors and characterised the flight as military desertion (5H, 3T).
<b>A Congolese claimant who fled fearing persecution based on her mother’s membership in the Union of Liberals for Democracy (ULD), an opposition party in the DRC.</b>	The RSDO incorrectly claimed there was ‘no political party such as ULD party in DRC, which proves your claim to be baseless and improbable’ (3V).
<b>A Ugandan claimant who fled persecution on the basis of sexual orientation.</b>	The RSDO claimed there was no Ugandan legislation criminalising homosexuality, and no persecution of homosexuals (4Z). Country information confirmed the persecution of homosexuals, and the fact that the state was considering a Bill proposing the death penalty for homosexuality.

It is not clear whether the uninformed decision-making described above is the result of inexperience, poor training, lack of access to up-to-date country information, or simply insufficient skills to conduct research into country conditions.

At the same time, some decisions appeared to have purposefully cited selected portions of country reports, while ignoring other sections, in order to give a

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<sup>75</sup> 1A, 1L, 1M,2A, 2B, 2J, 2O, 2P, 2Q, 2CC, 2II, 3Y , 3HH, 3OO, 3RR, 3AAA, 3III, 4F, 4M, 4Y, 7A, 7E, 7N, 7O, 5J, 5Y.



misleading picture of country conditions. For instance, several decision letters denying status to Congolese claimants cited a Human Rights Watch report as proof of a return to stability in the eastern Congo (5N, 5G1, 5W1). The decisions cited only the fact that ‘Congolese president Joseph Kabila and Rwanda President Paul Kagame struck a deal to rid each other of their enemies’ in January 2009.<sup>76</sup> The decisions omit significant additional facts stated in the report – most notably the unequivocal assertion that that ‘violence and brutal human rights abuses increased in the Democratic Republic of Congo throughout 2009’ and that military operations against the rebels were ‘disastrous for the rights of civilians.’ A similar decision letter cites as evidence of peace an offensive by the national army against the FDLR<sup>77</sup> in South Kivu, excluding the subsequent statement in the same report that the operation was ‘catastrophic’ for human rights<sup>78</sup> (5W).

These decisions also cited as evidence of stability a US State Department report describing the joint DRC-Rwanda military operations (5N, 5G1, 5W1). Again, they omitted the unequivocal evidence of instability described in the preceding paragraphs of the report, which stated that the human rights record throughout the country ‘remained poor,’ adding that:

... [S]ecurity forces continued to act with impunity throughout the year, committing many serious abuses, including unlawful killings, disappearances, torture, and rape. Security forces also engaged in arbitrary arrests and detention. Severe and life-threatening conditions in prison and detention facilities, prolonged pre-trial detention, lack of an independent and effective judiciary... also remained serious problems. Security forces retained and recruited child soldiers and compelled forced labor by civilians. Members of the security forces also continued to abuse and threaten journalists... [and] beat or threatened local

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<sup>76</sup> Human Rights Watch, World Report 2010- Democratic Republic of Congo (DRC), 20 January 2010, available at <http://www.unhcr.org/refworld/docid/4b586cf5c.html>.

<sup>77</sup> Democratic Forces for the Liberation of Rwanda.

<sup>78</sup> Democratic Republic of the Congo- Amnesty International Report 2010, available at <https://www.amnesty.org/en/region/democratic-republic-congo/report-2010>.

human rights advocates and obstructed or threatened UN human rights investigators.<sup>79</sup>

The decisions also ignored information on abuses committed by non-state actors:

Armed groups continued to commit numerous, serious abuses – some of which may have constituted war crimes – including unlawful killings, disappearances, and torture. They also recruited and retained child soldiers, compelled forced labor, and committed widespread crimes of sexual violence.<sup>80</sup>

Other examples showing selective use of the same source documents are detailed in the box below.

RSDO includes	RSDO excludes
<b>Citing UN Office for the Coordination of Humanitarian Affairs (OCHA)</b>	
<b>Description of humanitarian efforts by the UN and a ‘relative period of calm’ in the Congo (5J1).</b>	The fact that the period of calm was disrupted by new clashes, and these clashes specifically targeted Mbandaka, the claimant’s village. <sup>81</sup>
<b>Citing Human Rights Watch</b>	
<b>Mention of Human Rights Watch recommendations for increased accountability for human rights violations (2J, 2O, 2Q, 3E, 3O, 3Q, 3S, 3VV, 3AAA).</b>	These recommendations came at the end of a nearly 200 page report recounting extensive and brutal human rights violations against civilians. <sup>82</sup>
<b>Citing Integrated Regional Information Networks (IRIN)</b>	
<b>Description of the Regional Initiative for</b>	The assessment of this process recounted in

<sup>79</sup> 2009 US Department of State Report: Democratic Republic of Congo, 11 March 2010, available at <http://www.state.gov/j/drl/rls/hrrpt/2009/af/135947.htm>

<sup>80</sup> Ibid.

<sup>81</sup> Un Office for the Coordination of Humanitarian Affairs, ‘DRC: Humanitarian Situation in Equateur Province Snapshot Report,’ 6 October 2010, available at <http://reliefweb.int/node/371207>.

<sup>82</sup> Human Rights Watch, ‘Your will be punished: Attacks on civilians in Eastern Congo,’ December 2009, available at <http://www.hrw.org/sites/default/files/reports/drc1209webwcover2.pdf>

<b>Burundi, intended to broker peace between the government and the FNL rebel group (5Z).</b>	the same document: ‘The disarmament programme has not yet yielded significant results; acts of violence and abuses continue to occur as several arms remain in circulation in the hands of civilians.’ <sup>83</sup>
<b>Describes the fact that ‘the first hundred days of Zimbabwe’s unity government were given the seal of approval by the Southern African Development Community, which dismissed any notion that the fledgling government was facing difficulties.’<sup>84</sup></b>	The fact that this was ‘a view not shared by Western donors’ and the rest of the UN source report described continued human rights abuses. <sup>85</sup>

### Unjustified assumptions about internal relocation as a flight option

Some RSDOs maintained that an asylum seeker ‘must exhaust all the internal remedies before fleeing his/her country’ (4PP), including the option of relocation to a more stable part of the country. This view directly contradicts UNHCR guidelines, which state:

*International law does not require threatened individuals to exhaust all options within their own country first before seeking asylum.*<sup>86</sup>

Many asylum claims were nonetheless rejected on this basis.

While internal relocation may be appropriate in some instances, the determination rests on the reasonableness standard, and the assessment must be based on individual circumstances. According to the Guidelines, it is reasonable for an individual to relocate rather than flee if the alternative location ‘provides a

<sup>83</sup> Integrated Regional Information Networks, ‘Burundi: New peace structure to bolster stability,’ 29 May 2009.

<sup>84</sup> 7B, 7C, 7G, 7S, 7U, 7V, 7W, 7X, 7F, 7EE, 7D, 7CC, 7R, 7Y, 7Z, 7AA, 7BB, 7DD.

<sup>85</sup> Integrated Regional Information Networks, ‘Zimbabwe: the unity government’s 100 days in the doldrums,’ 21 May 2009.

<sup>86</sup> UNHCR Guidelines on International Protection No 4, para. 4.

meaningful alternative in the future.<sup>87</sup> In addition, the internal relocation consideration must come after, not instead of, a proper status determination.

UNHCR's Guidelines necessitate consideration of both the relevance and the reasonableness of relocation as an alternative to flight. Whether or not relocation is a relevant option depends on the following:

- 1) Is it practical, safe and legal for the individual to relocate to a particular area?
- 2) Who is responsible for the persecution? State employees (such as army or police officers) are found throughout the country; therefore, relocation is not a viable escape option if they are the persecutors.
- 3) Is there is a risk of persecution or serious harm after relocation?

The reasonableness standard rests on the following question: Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship in an alternative location?<sup>88</sup>

In answering this question, the reasonableness standard requires consideration of all personal circumstances, including 'age, sex, health, disability, family situations and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities, and any past persecution and its psychological effects.'<sup>89</sup> The Guidelines add that it is not reasonable for an individual to relocate to an area where subsistence (the ability to obtain the basic means of survival, such as food, water and shelter) may be threatened.<sup>90</sup>

In short, the feasibility of internal relocation requires a complex and detailed assessment of the particular circumstances of the individual claimant and cannot be

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<sup>87</sup> Ibid, para. 8,

<sup>88</sup> Ibid., para. 7(II).

<sup>89</sup> Ibid., para. 25.

<sup>90</sup> Ibid., para. 29.

based on a generalised assessment of country conditions.<sup>91</sup> The burden rests on the RSDO to show both that the internal relocation assessment is relevant, and to point to the existence of a reasonable area for relocation.<sup>92</sup> Moreover, the option of relocation may not be proposed without first conducting a full status determination.<sup>93</sup>

In contrast to these guidelines, many RSDOs employed the mere possibility of internal relocation as a substitute for a full status determination process, rejecting claimants on that basis alone. None of these decisions considered the relevance and reasonableness of internal relocation as an alternative to seeking asylum. RSDOs simply assumed that relocation was feasible without any assessment of the factors described above, or any substantiation indicating that such relocation was in fact possible. In refusing refugee status because of the possibility of internal relocation, RSDOs either,

- made no feasibility assessment,<sup>94</sup> or
- relied on the fact that the country provided for freedom of movement (2D, 4V), treating the statutory guarantee as providing an automatic escape route from persecution.

Those claimants who did relocate prior to fleeing, on the other hand, were treated as if exercising freedom of movement precluded a well-founded fear of persecution.<sup>95</sup> As a result, asylum seekers were left in a catch-22 situation, rejected both for failing to relocate and for attempting to relocate. The use of both roads as basis for rejection further suggests the presence of a systemic anti-asylum seeker bias.

In addition, one claimant was rejected for failing to seek asylum in a neighbouring country before coming to South Africa (6J). While this is consistent with DHA's

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<sup>91</sup> See James Hathaway & Michelle Foster, 'Internal protection/relocation/flight alternative as an aspect of refugee status determination,' in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, edited by E. Feller et al., 357-417. Cambridge: Cambridge Univ. Press (2003), p. 411-12.

<sup>92</sup> UNHCR Guidelines on International Protection No 4, paras. 34, 36.

<sup>93</sup> *Ibid.*, para. 36.

<sup>94</sup> 1O, 1R, 2I, 3K, 3L, 3N, 3R, 3JJ, 3KK, 3MM, 3VV, 3GGG, 4L, 6I.

<sup>95</sup> 3BB, 3YY, 7P.

adoption of the first safe country principle to turn away asylum seekers at the border, these practices contravene a 2002 court order declaring that asylum seekers are not required to seek asylum in countries they transit before becoming eligible for asylum in South Africa.<sup>96</sup>

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

It is a violation of international law, as well as South Africa's Refugees Act, to return (*'refouled'*) an asylum seeker to conditions of danger. In line with this, diligent analysis of whether there has been durable and lasting change in the country is required before a decision is made to return an asylum seeker to a country previously deemed unsafe. Hathaway has described the relevant criteria for making this determination:

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.<sup>97</sup>

The decision letters reviewed in this study make it clear that many RSDOs are unfamiliar with the concept of *refoulement*, or at least of its gravity. In rejecting claimants from countries previously deemed unsafe, they did not engage in any reasoned consideration based on the above criteria. Instead, RSDOs asserted the following:

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<sup>96</sup> *Lawyers for Human Rights v Minister of Home Affairs* (TPD) unreported case no. 10783/2001 (9 May 2001).

<sup>97</sup> Hathaway, pp 200-1.

- That there had been a change that was ‘durable, truly effective and of substantial political significance’ without any country information to support this claim (4S),
- That stability existed in practice because certain rights were expressed in legislation,<sup>98</sup> or because of the existence of legislation creating a human rights body (5I), or
- That the existence of a ceasefire, power-sharing, or peace agreement would necessarily lead to future stability,<sup>99</sup> resulting in the rejection of the claim despite the implicit affirmation of present instability.

The examples below highlight the dubious evidence upon which RSDOs based their predictions of a return to peace:

- A vow by Belgium to prioritise the situation in the DRC when it assumed the six month presidency of the European Union (2A).
- Recommendations from Human Rights Watch made to the DRC government.<sup>100</sup>
- A ceasefire agreement in the DRC (2G, 3Y, 3BB).
- A request by the Ugandan government for the LRA to renounce violence (in a claim not connected to the LRA) (5V).
- The signing of a peace agreement with armed groups in the DRC (3C).
- Peace talks between the government and the rebels in Uganda (6F).
- A UN proposal aimed at restoring peace and stability in the DRC (3HHH).
- The passage of a law guaranteeing freedom of information, expression, assembly and fair access to the media in the DRC (3P).

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<sup>98</sup> 1J, 3F, 2H, 2T, 2W, 2DD, 2EE, 2FF, 3II, 3P, 3T, 6DD.

<sup>99</sup> 5N, 5R, 5Q1, 5S1, 5W1, 5W, 2II, 3D, 3FFF, 4A, 4B, 4C, 4D, 4K, 4P, 4Y, 4B1, 7B, 7C, 7F, 7EE, 7D, 7CC, 7G, 7S, 7U, 7V, 7W, 7X, 7R, 7Y, 7Z, 7AA, 7BB, 7DD, 7FF.

<sup>100</sup> 2J, 2O, 2Q, 3E, 3O, 3Q, 3S, 3VV, 3AAA.

## Summary and Recommendations

This section has highlighted several recurring flaws found in status determination procedures. The decisions demonstrate a general lack of individualised, well-reasoned and evidence-based decision-making, in contravention of the requirements of just administrative action. Status determination decisions were characterised by rote, generalised, and arbitrary decisions. The recurring flaws included the following:

- The construction of decisions through cutting and pasting from previous decisions, resulting in references to the wrong claimant or the wrong country, as well as duplicate decisions;
- The failure to provide rational or adequate reasons to justify a rejection decision, and the reliance on overly general, indeterminate rejections;
- A general failure to apply the mind to produce decisions that meet the standards of rationality and reasonableness, through the following deficiencies:
  - Ignoring relevant information,
  - Giving priority to irrelevant information,
  - Issuing arbitrary decisions based on information that has no rational connection to the conclusion reached by the RSDO,
  - Reliance on unsupported facts, fallacies and speculation, and
  - Decisions based on incorrect country information as a result of inaccurate facts, incomplete or selective use of country information, and outdated country information;
- A failure to properly assess the viability of internal relocation in line with UNHCR guidelines, and the reliance on an abstract possibility of relocation in lieu of a proper status determination; and
- The giving of determinative weight to legislative provisions or a prospective return to peace without thoroughly investigating country conditions.

As in the previous section, these flaws stem from a combination of inadequate training and qualifications, and a general anti-asylum seeker bias that has taken root as a result of the merging of the asylum and immigration control system. While this bias must be addressed through broader immigration policy, ACMS makes the following recommendations for DHA:



- Lower or eliminate the number of daily decisions that an RSDO is required to produce in order to provide adequate time for a well-reasoned decision and to reduce the tendency to cut and paste from previous decisions;
- Provide extensive training on the characteristics that define an administratively fair decision, and create a checklist that RSDOs can use to assess a status determination decision;
- Provide up to date country information and train RSDOs on how to conduct proper investigations based on this country information;
- Provide a resource centre for RSDOs who are unsure about the current situation in a country; and
- Eliminate internal relocation as an accepted basis for rejecting an asylum claim and create controls to ensure that all decisions involve a proper status determination assessment.

## All Roads Lead to Rejection: The Case of Gender-Based Persecution

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Esther\* was an active member of the MDC in Zimbabwe. Between 2005 and 2007, she was repeatedly arrested, detained, kidnapped, beaten and raped by Zanu-PF members as a result of her opposition activities. After going into hiding, she returned for her brother's funeral. Zanu-PF members then arrived at her house, beating and repeatedly raping her in front of her children. Following the attack, they threw her into a deep pit, where she remained overnight until she was assisted by a passerby. Esther went to the police, but they refused to assist her, claiming it was a political matter. She continued to suffer harassment, arrests, and beatings before fleeing. A trauma clinic assessment concluded that she was repeatedly tortured with batons, electric shocks, falanga and sexual assaults. The assessment determined that she suffers from depression and post-traumatic stress disorder.

Esther's status determination decision did not discuss any of these details and attributed her troubles to a dispute with her brother over a house, notwithstanding the fact that her brother was dead. The RSDO ignored Esther's political activities and the prolonged pattern of persecution, determining that she was 'not on the serious adverse attention of the Zimbabwean authorities.' Explaining that not all MDC supporters were persecuted by Zanu-PF, the RSDO discounted Esther's claim as a personal conflict between her and her brother (Claim 7).

Gender-based persecution can take a variety of forms, including sexual violence, and may also arise from 'having transgressed the social mores of the society.'<sup>101</sup> The latter can involve, for example, leaving home to escape physical abuse in a society where women are barred from leaving without male permission. Both UNHCR and the Parliamentary Assembly of the European Council have called on states to recognise the gender dimension of asylum claims.<sup>102</sup> South Africa's Refugees Act gives effect to this view by including gender in the definition of social group, allowing gender-based persecution to serve as a basis for seeking asylum.<sup>103</sup>

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<sup>101</sup> UNHCR, 'Refugee Women and International Protection,' No. 39 (XXXVI), 18 October 1985 (1985), para K, available at <http://www.unhcr.org/refworld/docid/3ae68c43a8.html>.

<sup>102</sup> UNHCR, Guidelines on International Protection No. 1: 'Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,' HCR/GIP/02/01, 7 May 2002; European Council, Parliamentary Assembly, 'Gender-related claims for asylum,' Doc. 12350, 26 July 2010.

<sup>103</sup> Refugees Act, Section 1(xxi).

As part of this study, ACMS collected an additional sample of claims related to gender-based violence to assess the extent to which the gender dimension of claims is recognised within the South African refugee reception system. The findings exposed in the starkest manner the comprehensive pathologies of status determination in South Africa.

The findings included 40 claims: 14 from the original study and 26 additional claims from 2007-2010. The breakdown of claims is as follows:

YEAR	Number of Claims
2007	2
2008	1
2009	15
2010	8
2011	14

Most (30) of the gender-based claims, particularly those involving rape, originated in the DRC.

Decisions with respect to claims involving gender-based violence provide possibly the most compelling evidence of the failure of South Africa’s refugee reception system to provide the protection it was designed to offer. This section outlines in detail the decision-making trends that, barring a successful appeal, raise the prospect of the systematic *refoulement* of asylum seekers with even the strongest cases of persecution.<sup>104</sup> These patterns of decision-making illustrate not only a widespread

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<sup>104</sup> It is not clear that recognition of gender-based claims is any better at the appeals stage. The study included one RAB decision. The decision failed to recognise the gender-based dimensions of the claim. Without further

failure to recognise gender-based persecution as a ground for refugee status, but also reveal more general deficiencies:

- A lack of knowledge essential for decision-making, including knowledge of refugee protection law – both domestic and international – and knowledge of country conditions.
- A severe absence of analytical ability such that even the clearest patterns of persecution went unnoticed.
- An unacceptable lack of either literacy or care, leading to decision letters with little or no bearing on the actual content of claims.

These factors—producing a hollow core in so-called ‘refugee protection’ in South Africa—point to significant weaknesses in the system. But it may also be the case that these apparent weaknesses are deliberate strategies that serve a fundamental anti-asylum-seeker bias within the DHA.

### **Ignorance of the law: ignoring gender-based claims and rape as a grounds for status**

As mentioned, gender-based violence can take a variety of forms. In the majority of the claims reviewed, the gender-based persecution involved rape. But other forms of gender-based persecution were similarly overlooked. For instance, a Kenyan woman fleeing female genital mutilation imposed on her as a member of a particular tribe was rejected based on the RSDO’s claim that the threat of genital mutilation ‘has nothing to do with the reasons alluded to on the Refugees Act, OAU Convention, 1951 Convention and other related legal instruments’ (4PP). The RSDO did not consider that she was being subjected to the practice as a female member of the tribe, and that, as such, she was being persecuted as a member of a particular social group. In fact, none of the decisions reviewed acknowledged that South Africa’s Refugees Act explicitly recognised gender as an element of the social group category creating a basis for asylum.

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research, it is not possible to say whether this decision is representative of the RAB’s approach, or whether it is an aberration.

RSDOs failed to register a range of abuses targeting women as persecution within the status determination process. By far the most widespread of these abuses involved rape and sexual assault—both as a means of individual persecution, and as a weapon of war.

### ***Legal framework for rape as a ground for refugee status***

There can be no doubt that when rape or other forms of sexual violence committed for reasons of race, religion, nationality, political opinion or membership of a particular social group is condoned by the authorities, it may be considered persecution under the definition of the term ‘refugee’ in the 1951 Convention relating to the Status of Refugees (Article 1(a)(2)). A well-founded fear of rape in such circumstances can thus provide the basis for a claim to refugee status.<sup>105</sup>

As this statement from UNHCR makes clear, rape qualifies as a form of physical harm falling under the rubric of persecution. Moreover, the explicit inclusion of gender in the definition of social group in South Africa’s Refugees Act provides an even clearer basis for identifying rape as persecution under the established grounds for asylum.

The above definition focuses on rape as an instrument of individual persecution based on a Convention ground. At the same time, rape has increasingly been used as a weapon of war. In a resolution affirming that rape and other forms of sexual violence may constitute war crimes, crimes against humanity, or acts of genocide,<sup>106</sup> the Security Council noted that sexual violence is often used ‘as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate’ civilians, and a culture of rape may persist even after the cessation of hostilities.<sup>107</sup>

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<sup>105</sup> UNHCR, ‘Note on certain aspects of sexual violence against refugee women,’ A/AC.96/822, 12 October 1993, para. 29.

<sup>106</sup> United Nations Security Council Resolution 1820 (2008), ‘Women and Peace and Security,’ S/RES/1820. 19 June 2008, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/391/44/PDF/N0839144.pdf?OpenElement> [UN Security Council Resolution], Para 4.

<sup>107</sup> United Nations Security Council Resolution 1820 (2008), Women and Peace and Security, S/RES/1820. 19 June 2008, available at [http://daccess-dds-](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/391/44/PDF/N0839144.pdf?OpenElement)

UNHCR has similarly observed that sexual violence has been ‘used by armed forces, including insurgent groups ... as a means of intimidating a civilian population perceived to be in political opposition to the armed forces in question.’ Consequently, rape, or fear of rape, ‘by members of military forces... is one of the factors contributing to the flight of women and their families from many situations of armed conflict.’<sup>108</sup> Such sexual assaults are often a feature of the general conditions of instability qualifying for protection under Section 3(b) of South Africa’s Refugees Act.

In establishing legal protections under these circumstances, four factors are important to point out. First, UNHCR has stated that the prevalence of rape in armed conflict may give rise to a ‘realistic fear of rape’ causing flight.<sup>109</sup> Thus, women may have a well-founded fear of being raped entitling them to asylum. Second, the cultural stigma attached to rape in certain societies may result in the re-victimisation of rape survivors, a factor that may support the granting of refugee status.<sup>110</sup> Third, the normalisation of rape in armed conflicts may create a continuing ‘culture of rape’ even after hostilities have ceased.<sup>111</sup> As a result, an RSDO cannot simply assume that there is no longer a threat of sexual violence merely because armed conflict has ended, and must thoroughly investigate country conditions. Finally, the experience of rape and sexual violence, and the continuing trauma, may constitute a ‘compelling reason’ not to withdraw refugee status even when the country conditions giving rise to flight have changed.<sup>112</sup>

Many asylum seekers in South Africa – both male and female – experienced sexual violence stemming from broader civil and political conflicts.

Individuals fleeing politically motivated rape qualify for refugee status under both Section 3(a) of the Refugees Act, which offers protection from persecution, and 3(b),

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[ny.un.org/doc/UNDOC/GEN/N08/391/44/PDF/N0839144.pdf?OpenElement](http://ny.un.org/doc/UNDOC/GEN/N08/391/44/PDF/N0839144.pdf?OpenElement) [UN Security Council Resolution], preamble.

<sup>108</sup> ‘Note on certain aspects of sexual violence against refugee women’, para 12.

<sup>109</sup> Ibid.

<sup>110</sup> UNHCR, ‘Sexual Violence Against Refugees—Guidelines on Prevention and Response,’ 1995, Chapter 4.3a.

<sup>111</sup> United Nations Security Council Resolution 1820 (2008), *supra* note 107.

<sup>112</sup> ‘Note on certain aspects of sexual violence against refugee women,’ para. 29; UNHCR, *Sexual Violence Against Refugees—Guidelines on Prevention and Response*, 1995, Chapter 4.3a.

which offers refuge from the effects of armed conflicts and other instability. However, a review of gender-based claims reveals that RSDOs consistently failed to acknowledge this reality, specifically:

- gender-based persecution as a ground for refugee status,
- the political dimensions of rape, and
- the prevalence of rape in armed conflicts.

### ***Ignoring rape as persecution***

RSDOs routinely failed to recognise rape as grounds for establishing persecution. The clearest examples were those decision letters that did not mention a claimant's rape(s) at all.<sup>113</sup> Consider the discrepancy between the RSDO descriptions and the actual claims below:

#### **Claim 3, Crown Mines (excerpt from decision letter)**

Applicant claims that her husband was working at MPR<sup>114</sup> telling the truth about Kabila was not congolese after that one of her husband colleague take all sectet to Joseph kabila party (PPRD) [sic]. She mentioned that they realise that her husband was the one reaviling [sic] the secret then they kindnapped [sic] him and the son.

The RSDO recounts the details inaccurately and excludes the elements relevant to the claimant's persecution. In fact, the claimant's husband was a leader in the UDPS. Initially, he was arrested and detained overnight. After he was released, the couple fled to relatives, where they were arrested together with four of their children. The claimant was detained naked in a cell without food or water, and was beaten and raped repeatedly by prison officials. A prison guard informed her that her husband and son had been killed and that she was going to be killed as well. She escaped with the help of the guard, who had been friends with her husband. Medical reports indicate that as a result of the abuse she experienced during her detention, the claimant suffers memory loss and confusion, is blind in one eye, and has trouble walking. She also has severe hypertension and depression and is receiving trauma counselling.

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<sup>113</sup> 2O, 2JJ, 2KK, 3CCC, 3TT, Claims 1, 2, 3, 4, 7, 9, 10, 11, 15, 16, 17, 20.

<sup>114</sup> Popular Movement of the Revolution, the ruling party under former President Mobutu.

**Claim 17: Crown Mines (excerpt from decision letter)**

[Y]our husband was a soldier during the reign of Mobutu and when Kabila came to evade [sic] the country her husband fled because many people were killed and the rebels came to the house every time so she was afraid and came in RSA as a dependent to her husband.

The actual facts of the claim are that her husband was an army nurse in the DRC. He deserted the army after seeing the abuses of the civil war, and disappeared. Army soldiers beat, stabbed, and raped the claimant to get information about her husband. She eventually fled following a continued pattern of persecution. The decision did not acknowledge the rape or engage with the details of the claim in any way. It stated the claimant felt her life was in danger but failed to prove it or to ‘show that he [sic] had suffered any persecution.’ Despite the consistent pattern of persecution (and the fact that the rape and abuse by soldiers was clearly an effect of war admissible under Section 3(b) – see Ignorance of Country Conditions), the woman was refused denied status.

In contrast to the above examples, some decision letters did refer to the rape in describing the claim, but they failed to acknowledge or engage with it in their reasoning.<sup>115</sup> The example below describes claim details as recounted by the claimant, although not detailed in the decision.

**Claim 12: TIRRO**

The claimant belonged to the Bundu dia Kongo, a political and religious association targeted by the state. She was stopped by soldiers who asked to see her identification. When they found her Bundu dia Kongo membership card, they began assaulting her. She was raped and stabbed, and stayed in the hospital for four months while recovering from her injuries. She then fled, fearing further persecution because of her Bundu dia Kongo membership.

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<sup>115</sup> 2FF, 3H, 3PP, 3UU, 3VV, 3WW, 3AAA, 4ZZ, Claims 5, 8, 12, 13,14, 19.



The RSDO acknowledged the rape in the description of the claim, but he did not discuss it further in the decision. The RSDO concluded that there was no risk of persecution if the claimant returned, supporting this with the argument that it occurred during a general war in which no one was being targeted. Thus, the decision both ignored the fact that the claimant was targeted because of her political beliefs, and failed to recognise the targeting of women for gender-based crimes during war as an effect of instability that can be considered grounds for refugee status under the Refugees Act.

Other examples of the same trend are listed below.

<b>EXAMPLES IGNORING RAPE AS PERSECUTION</b>
<b>A Congolese woman was tortured and raped as a result of her father’s political affiliation. The RSDO recounted these details, but refused her status on the grounds that, based on her claim, there was no chance that she would be persecuted (3O).</b>
<b>A Zimbabwean woman described being raped, beaten, and tortured by Zanu-PF. These details were included in the description of the claim, but the decision stated that she did not suffer any persecution. The reasons section did not acknowledge the rape and torture, instead speculating that she left for ‘personal economic considerations’ because she had no well-founded fear of persecution, on the grounds that ‘there was no cogent compelling reasons which reasonably amounted to the well founded fear of being subjected to persecution’ (1Q).</b>
<b>A Cameroonian woman fled after four men raped her and killed her father at her house as a result of his support for the opposition. The RSDO did not acknowledge the political dimension of the claim, and found ‘insufficient evidence of proof of persecution’ (4KK12). He also failed to consider the barriers rape victims face in Cameroon – where women are stigmatised and cases are rarely prosecuted.</b>

The Refugee Appeal Board has similarly failed to fully consider the nature of gender-based claims. For example, a Congolese woman who was a member of the UDPS feared experiencing the fate of similarly situated individuals – female members of the UDPS – who were being arrested and raped (Claim 18). After a close friend of hers was arrested and raped, she decided to leave the country, having a well-founded fear that she too would be subjected to this treatment. The RAB relied on country information describing the treatment of low level members of the UDPS, suggesting a minimal risk of persecution. It framed the persecution as stemming from her political

identity as a UDPS member, while ignoring the gender-based dimension of the persecution. As a result, the decision did not consider the element of rape in the persecution, or the fact that the prevalence of rape in the DRC in general, and the situation of similarly situated individuals in particular, lent support to an objective, as well as a subjective well-founded fear. In fact, it was the specific fear of rape that caused the claimant to flee. The RAB, however, failed to engage with this with particular fear—despite the UNHCR’s statement that a well-founded fear of rape could provide the basis for a refugee claim<sup>116</sup>— and remained focused on the non-gendered political dimension.

### **Ignorance of country conditions: ignoring rape as an effect of instability**

While the politicised use of rape is not limited to any particular part of the world, the problem has been particularly pronounced in the DRC, as evidenced by the representation of Congolese claimants in the sample of gender-based claims. A 2008 UNHCR press release on the Security Council resolution identifying rape as a weapon of war called the DRC ‘arguably the epicentre of sexual violence against women today.’<sup>117</sup> A 2009 Human Rights Watch Report characterised the DRC as ‘the worst place on earth to be a woman,’ based on its interviews with workers and victims in the area.<sup>118</sup> The report noted that government soldiers were among the main perpetrators of sexual violence.<sup>119</sup> Similarly, the 2009 US State Department country report estimated that 200,000 Congolese women and girls have become victims of sexual violence since 1998, with 15,996 new cases in 2008 alone. The report pointed to a normalisation of violence against women, noting that the perpetrators included armed actors and civilians, and that this normalisation extended beyond conflict zones.<sup>120</sup> A study released in May 2011 found that more than 1,100 women were

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<sup>116</sup> ‘Note on certain aspects of sexual violence against refugee women,’ para. 29.

<sup>117</sup> UNHCR, ‘Rape: Weapon of War,’ available at

<http://www.ohchr.org/en/newsevents/pages/rapeweaponwar.aspx>

<sup>118</sup> Human Rights Watch, ‘Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo,’ 16 July 2009, p. 15, quoting Helene Cooper, ‘Waiting for Their Moment in the Worst Place on Earth to be a Woman,’ *New York Times*, November 16, 2005.

<sup>119</sup> Human Rights Watch, ‘Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo,’ 16 July 2009.

<sup>120</sup> US Dept of State, 2009 Country Reports on Human Rights Practices—Democratic Republic of Congo, 11 March 2010, available at <http://www.state.gov/j/drl/rls/hrrpt/2009/af/135947.htm>.

raped every day in the DRC, characterising this as a conservative estimate.<sup>121</sup> According to Human Rights Watch, sexual violence there doubled between 2008 and 2009.<sup>122</sup> This sexual violence has gone virtually unpunished.<sup>123</sup>

Males also are not immune to the epidemic of rape in the DRC. A 2009 Human Rights Watch report observed an increase in the rape of men, though many cases went unreported because of the shame felt by the victims.<sup>124</sup> A news article on the increase in male rape described a sexual violence legal clinic in Goma run by the American Bar Association that reported that more than 10 per cent of its cases in June 2009 involved men.<sup>125</sup> It also noted that many cases likely went unreported.

Many asylum applicants from the DRC – both male and female – have been victims of sexual assault. While the prevalence of sexual violence in the country is well-documented, South Africa’s status determination officers appear wholly unaware of the situation in the DRC and of the use of rape as a continued method of intimidation and war. Ignoring the wealth of documentation, most decisions (erroneously) described stable country conditions and displayed no awareness of the continued threat of sexual violence in the country.

A nurse, for example, was raped by a soldier who accused her of providing medical treatment to the enemy (4ZZ). She was disowned by her in-laws as a result of the rape and fled the country. The RSDO rejected her claim on the grounds that she only left because her in-laws had deserted her, and argued that she could have relocated to another (unspecified) area where nothing happened to her. The decision ignored the political dimension of her claim, the fact that the perpetrator was a government agent, and the high prevalence of rape in the DRC, which affected the prospects for

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<sup>121</sup> Study published in American Journal of Public Health, reported by ABC news, ‘More than 1,100 rapes daily in Congo: study,’ available at <http://www.abc.net.au/news/2011-05-11/more-than-1100-rapes-daily-in-congo-study/2713346>

<sup>122</sup> Ibid.

<sup>123</sup> UN News Service, *UN Refugee Agency Dismayed by Impunity for Endemic Rape in Democratic Republic of Congo*, 23 April 2010, available at <http://www.un.org/apps/news/story.asp?NewsID=34458>

<sup>124</sup> HRW, ‘You will be Punished: Attacks on Civilians in Eastern Congo,’ 13 December 2009, p. 92.

<sup>125</sup> Jeffrey Gettleman, ‘Symbol of Unhealed Congo: Male Rape Victims,’ *New York Times*, 4 August 2009, available at <http://www.nytimes.com/2009/08/05/world/africa/05congo.html>.

internal relocation (see the prior section **Unjustified assumptions about internal relocation as a flight option**).

Below are further examples that illustrate the general failure of RSDOs to recognise rape as a weapon of war:

**2FF: TIRRO**

The claimant worked with a women's rights NGO. After participating in a protest against the actions of soldiers in Eastern Congo, she was arrested. She was tortured and raped in detention for three weeks, before managing to escape. Although the RSDO acknowledged these events in the description of the claim, he concluded that she did not establish a fear of persecution. He did not engage with the possibility that the torture and rape were elements of persecution or, alternatively, weapons of war admissible under Section 3(b) of the Refugees Act.

**Claim 11: TIRRO**

The claimant was repeatedly gang raped by a rebel group over an extended period, and eventually fled in 2009 as violence from the civil war increased. She was raped again during her escape. The decision did not mention these rapes, and claimed only that she left because of war in her area. The decision letter said country information indicated that there was no well-founded fear of persecution. It did not consider whether the claimant's experience was a product of war admissible under Section 3(b).

**Claim 14: TIRRO**

The claimant was working as a cleaner for the Goma municipality when some men arrived and asked her for the political affiliation of other employees. She did not have this information, and two men raped her. The RSDO mentioned the rape in summarising the claim, but denied the claimant refugee status based on the UN peacekeeping mission in the DRC. Again, the RSDO discounted the use of rape as a weapon of war, and the likelihood of a continued culture of rape even after open hostilities cease.

**Claim 6: Crown Mines**

Soldiers from a nearby army base came to the claimant's house and took turns violently raping her in front of her husband, who was severely beaten when he tried to stop them. The soldiers returned a few of months later and again violently gang raped her and stabbed her repeatedly,

causing her to lose consciousness and leaving her scarred from a deep stab to her eye. She fled as soldiers continued their visits to homes in the area to rape the women. The decision did not mention the rape at all, referred to the claimant as male and asserted that the claimant 'suffered no persecution or any prospective future persecution.' It also missed the crucial fact that it was government soldiers who were committing the rapes, maintaining that anyone who experienced persecution by the rebels could relocate to a government controlled area.

Male victims of rape did not fare any better in the status determination process, as RSDOs still failed to recognise sexual assault as a form of persecution, or as a weapon of war:

Simon\* lived on a farm in the DRC. Three soldiers sodomised him when they came to his farm to take food. His brother was killed while trying to fight off the sexual assault. When the soldiers returned, Simon attacked one of them and then fled. Neighbours told Simon that the farm was under surveillance, and that when the soldiers returned to the farm to look for him, they killed another of his brothers who was there (3WW).

Although the RSDO acknowledged the sexual assault when describing Simon's claim, he ignored it in his reasoning. Instead, he relied on a paragraph copied from a 2008 UK Operational Guidance Note describing the 2006 elections, even though Simon's attack occurred in 2009. The RSDO suggested that the claimant could have relocated to Lubumbashi, without considering that it was government soldiers who committed the persecution, which meant relocation was not a viable option.

## **Lack of analytical capacity in decision-making**

The decisions on claims involving rape reveal that RSDOs lack the analytical capacity necessary to identify patterns of persecution or to assess whether or not fear of rape or persecution is well-founded. Alternatively, RSDOs may be deliberately ignoring patterns of persecution in order to refuse refugee status to the majority of claimants, an outcome that is not surprising given that RSDOs face greater scrutiny of decisions granting refugee status.

Consider the profound analytical poverty that led RSDOs in each of the following cases to deny a well-founded fear of persecution:

- A Zimbabwean claimant was severely beaten and raped when she failed to produce a Zanu-PF card. Her mother was also severely beaten and subsequently died of her injuries. The RSDO failed to even mention these aspects of the claim and simply stated that she suffered no persecution (Claim 1).
- A Zimbabwean woman faced repeated harassment and intimidation from Zanu-PF supporters after her brother, an MDC activist, was tortured into confessing to the murder of a Zanu-PF member. The claimant and her family were forced to leave home, but Zanu-PF supporters found them and the claimant was assaulted and gang raped. The assailants threatened to hurt her, her family and her detained brother if she reported the incident. When her mother went to the police, they refused to investigate. She tried to relocate again but was again discovered and sexually assaulted by Zanu-PF operatives who warned her not to report it. When she attempted to report the incident, the police verbally abused her. The claimant suffered psychological problems and had to be hospitalised. After several attempts to relocate, she remained unable to escape Zanu-PF surveillance and persecution and she fled. The RSDO rejected her on the grounds that she stayed in Zimbabwe for a period following her brother's arrest. He did not acknowledge her continuing persecution during this period (Claim 13).
- A male claimant was arrested by soldiers working for Kabila because of his support for the MPR, the party of former president Mobutu. The soldiers threatened him and forced him to have sex with his mother, and then took him to the forest to perform hard labour for the next nine months, during which time they told him he would be killed. He eventually escaped. The RSDO referred to the details of the claimant's rape and forced labour, but asserted that he did not suffer persecution (Claim 19).

Some additional examples are presented below, highlighting specific points of analytical weakness.

**A Congolese woman was targeted by government soldiers because they blamed her father, a government official, for their lack of remuneration. They killed her parents and one of her sisters and raped her repeatedly. They told her she would never be safe as long as she was in the DRC (3PP).**

- The RSDO claimed internal relocation was an alternative for the claimant, ignoring the fact that soldiers operate throughout the DRC, and failing to propose a viable safe location for the claimant.
- The RSDO asserted that the government would protect the claimant if she relocated internally. This overlooked the fact that it was government soldiers who had committed the persecution and threatened that she would never be safe in the country. It also overlooked the fact that rape has become normalised in the DRC, and the government cannot in fact prevent the thousands of rapes that take place there each year.<sup>126</sup>

**The claimant was kidnapped by rebel soldiers and held as a sex slave, where she was repeatedly gang raped. During this time, she witnessed girls as young as eleven dying as a result of being brutally raped, and remains traumatised by what she saw. She was eventually released when a new group of women were brought to the rebel base. (Claim 5)**

- The RSDO suggested that because the claimant was not an activist, she could return to the DRC. This argument rests on the fallacy that persecution is only ever politically motivated and does not apply to members of particular social groups, such as women, where rape is used as a means of persecution, or as a weapon of war. It also relies on the fallacy that only individual persecution can form the basis for refugee status, failing to apply Section 3(b) of the Refugees Act.
- The RSDO asserted that the woman could relocate to a different village. He did not propose a viable location for this. He ignored the ubiquity of rape as a weapon of war in the DRC as well as the fact that the rebel soldiers operate broadly across the villages of the Eastern DRC.
- Finally, the RSDO claimed that there were no events ‘seriously disturbing or disrupting public order in the DRC,’ contradicting general information he himself had cited on continuing hostilities in the country.

**A male claimant and his mother were arrested and taken to the same prison where his father had died after he was beaten and tortured on suspicion of housing rebels at his guesthouse. The claimant also suffered beatings and torture and learned that his mother had been raped and had died while in detention. The claimant was gang raped on a daily basis, and suffered severe injuries. He eventually managed to escape after being**

<sup>126</sup> US Dept of State, 2009 Country Reports on Human Rights Practices—Democratic Republic of Congo, 11 March 2010.

driven to a forest where he was raped again. He suffers from trauma as a result of the torture and rape, as well as physical pain from the abuse (Claim 10).

- The RSDO did not mention the torture and rape the claimant suffered in the decision letter, and concluded that the claimant did not suffer any persecution.
- The RSDO maintained that individuals could seek the protection of state authorities, despite it having been state authorities who had carried out the claimant’s persecution.
- Finally, the RSDO concluded that country conditions had stabilised in the DRC and there was no longer a risk of persecution, despite country reports indicating continued sexual violence.

### Lack of care in decision-making

Decision letters relating to claims featuring rape provide some of the most disturbing examples of carelessly mass-produced decisions, constructed not by an actual decision-making process but through unthinking cutting and pasting of decision components. This provides the only feasible explanation for the extreme disconnect between many claims and the decision letters that relate to them, as witnessed in the claims below:

**Claim 8: Marabastad**

Rebels attacked the claimant’s home, killing her parents and brutally raping her. She fled after the attack and remains traumatised by the assault and by witnessing the murder of her parents. Hearing about similar attacks throughout the country, she fled the DRC for fear that she would not be safe.

The description of the claim included her statement that she had been raped by the rebels, but the rest of the decision was based on the template of an unrelated claim. It described the Mungiki criminal group in Kenya, concluding that the claimant had not been persecuted. The discussion of a country and criminal group with no relation to the actual claim indicates both that the rejection decision was reproduced from a



previous, unrelated decision letter and that the claim was rejected without being assessed.

**Claim 20: Crown Mines**

The claimant's husband worked as a contractor for the government under Pascal Lissouba in Congo-Brazzaville. After Denis Sassou Nguesso ousted President Lissouba, the claimant's husband was targeted because he was perceived to have been allied with President Lissouba. Her husband fled after armed men came looking for him. They continued to harass the claimant, demanding that she tell them her husband's location. The last time they came, the men brutally beat and raped her, stabbing her in the stomach. She then fled.

The decision mentioned neither the rape, nor any details of the claim. It referred to the wrong gender (male) and the wrong country (DRC) before concluding that the claim 'do[es] not amount to persecution.' Again, it can only be assumed that the rejection decision was not the result of a measured decision-making process but of unthinking cutting and pasting from a previous letter.

Although not all decision letters contained the flagrant errors of fact seen in the examples above, many nevertheless appeared to be the product of a blanket decision strategy by the RSDO rather than the product of an individualised status determination process. The two examples below illustrate the way in which certain RSDOs appeared to be applying a single set of country-based assumptions to all cases, regardless of whether this was appropriate to the individual claim.

**Claim 15: Crown Mines**

The claimant's husband was an active member of the UDPS. Security forces, together with the police, came to arrest him for allegedly sabotaging the President's speech by causing a power outage. They beat him and killed a friend who was also at the house. The husband managed to escape and three of the men raped the claimant. They continued to return to her house, beating and raping her, sometimes at her house and sometimes at the police station. They threatened to kill her and her family if she did not tell them where her husband was, and she fled.

The RSDO omitted the details of the claim, stating that she left because ‘the rebels Mai –Mai were killing people.’ He added that the claimant ‘was not assaulted or any human rights violated’ – a statement indicating either a deliberate misrepresentation to justify a rejection, or an unthinking and careless reliance on a standard decision template for claimants from the DRC. Although the claimant had been persecuted by the government rather than the rebels, the RSDO concluded that she could return without fear of persecution from the rebels due to their inclusion in the 2002 Transitional National Government. This misdirected conclusion again reveals cutting and pasting from either a previous decision letter or an existing letter template. What it does not reveal, however, is the existence of any sort of decision-making process.

**Claim 16: TIRRO**

In the 2007-2009 period, members of the DRC’s National Intelligence Agency (ANR) came to the claimant’s house to arrest her husband, who was an active member of the UDPS. He managed to escape and fled to South Africa, but the ANR continued coming to the claimant’s house, arresting and beating her on several occasions. During one such detention, five men took turns violently raping her. When she reported the rape to the police, they told her there was nothing they could do against the ANR. After continued harassment, which included recruitment of her neighbours to report on her activities, the claimant fled to join her husband in South Africa.

The decision withheld all the details of the claim, superimposing the generality that the claimant came only to join her husband, who had fled as a result of his UDPS membership. Relying on outdated country information, the decision stated:

General conditions prevailing in country of origin does not amount to persecution. Therefore, I realise that nothing happened to you and your husband which could have compelled you to abandoned home country [sic] in search of refuge elsewhere.

This view again represents either an outright misrepresentation or a result of cutting and pasting from a generic response template for claims from the DRC. The RSDO relied on outdated information, refusing refugee status to the claimant on the basis of facts from 2006. Ignoring the politically-motivated sexual violence suffered by the

claimant, the RSDO concluded that country conditions were stable and there was no threat of persecution, and that neither the claimant nor her husband had a well-founded fear of persecution.

### **Sensitivity during the status determination interview**

UNHCR has cautioned that victims of sexual violence may be unlikely to recount their sexual abuse during a status determination interview. It may take years, or support through therapy before a victim will feel able to disclose his or her experience.<sup>127</sup> Recognising that this reluctance to disclose sexual abuse may have negative credibility implications, UNHCR has recommended that ‘asylum-seekers who may have suffered sexual violence be treated with particular sensitivity’ during the status determination process.<sup>128</sup> It also calls on states to develop training programmes to sensitise status determination officers to issues of gender and culture.

DHA has not implemented any measures to deal with the unique needs of rape survivors. The trauma of sexual assault and the lack of sensitivity toward rape survivors in the status determination process have inhibited some asylum seekers from disclosing their rape during the status determination process. Many survivors are reluctant to share this sensitive information with strangers, particularly males. But rape survivors in South Africa are often interviewed by male RSDOs with no training on how to deal with a rape survivor’s situation and the related trauma that they may be suffering.

In addition to the trauma of the rape itself, many cultures attach a stigma to rape that leads to blaming and/or re-victimising the survivor. The survivor may be abandoned by family and ostracised by the community (4ZZ, Claim 2, 22). Male rape survivors face added stigma and shame because their identities are often linked to power. Rape by another male is viewed as emasculating and raises the spectre of

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<sup>127</sup> UNHCR, ‘Sexual Violence Against Refugees—Guidelines on Prevention and Response,’ 1995, Chapter 4.3a, available at <http://www.unhcr.org/refworld/docid/3ae6b33e0.html>; see also, UNHCR Guidelines on International Protection No. 1, paras. 35-6, UNHCR ‘Note on certain aspects of sexual violence against refugee women,’ paras. 21-2.

<sup>128</sup> UNHCR, ‘Refugee Protection and Sexual Violence,’ No. 73 (XLIV), 8 October 1993, para. (g), available at <http://www.unhcr.org/refworld/docid/3ae68c6810.html>.

homosexuality—and the shame of being characterised as a ‘bush wife’—in a culture where it is often taboo.<sup>129</sup> These factors may further inhibit disclosure.

UNHCR has acknowledged that the continuing difficulties rape survivors face in certain societies may support the granting of refugee status.<sup>130</sup> But RSDOs failed to consider the barriers rape survivors encounter—both within the community and in the formal legal system—as relevant factors in assessing the asylum claim. In the case of a Cameroonian woman raped because of her father’s opposition activities, the RSDO did not consider that rape survivors there are stigmatised and cases rarely prosecuted.<sup>131</sup> He stated that the claimant could have relocated or sought government protection (4KK12). A Kenyan woman was similarly rejected (4YY1) without any acknowledgment of the stigma or barriers facing rape survivors there.<sup>132</sup>

RSDOs displayed little sensitivity to the difficulties encountered by rape survivors. Nor did they recognise that these difficulties may have affected their willingness to disclose the rape. This problem is compounded by the fact that the asylum process is not fully explained to applicants, and many are unaware of how their failure to disclose this information can negatively impact their claim. This was the case for the claimant below:

**Claim 4: Crown Mines**

While fleeing from the rebels, the claimant was kidnapped and gang raped by approximately seventeen rebel soldiers. She was then taken to their camp and held as a sex slave. She escaped following an attack by government soldiers and sought refuge at a church. A week later, two policemen came to the church to arrest her. She was interrogated by an officer of the DRC’s national intelligence agency, who accused her of being a rebel spy and stated that, as a Tutsi,

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<sup>129</sup> See, e.g., Jeffrey Gettleman, ‘Symbol of Unhealed Congo: Male Rape Victims,’ *New York Times*, 5 August 2009, available at [http://www.nytimes.com/2009/08/05/world/africa/05congo.html?\\_r=1&scp=1&sq=symbol%20of%20unhealed%20congo&st=cse](http://www.nytimes.com/2009/08/05/world/africa/05congo.html?_r=1&scp=1&sq=symbol%20of%20unhealed%20congo&st=cse)

<sup>130</sup> UNHCR, ‘Sexual Violence Against Refugees—Guidelines on Prevention and Response,’ Chapter 4.3a.

<sup>131</sup> See, e.g., Patience Siri Akenhji, ‘Constraints in Seeking Justice for Rape Victims in Cameroon, German-Cameroon Health/Aids Programme and the German Technical Cooperation for Development,’ August 2009.

<sup>132</sup> During the passage of 2006 legislation dealing with sexual offences, lawmakers commented that women meant ‘yes’ when they said ‘no.’ Elizabeth Kennedy, ‘In Kenya, Stopping Rapes is a Challenge,’ *The Washington Post*, 22 June 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/22/AR2006062200590.html>

she had no place in the DRC. He then raped her. She managed to escape after the officer took her to his house.

The claimant did not disclose her kidnapping and rape during her status determination interview because she was highly traumatised by the incident and ashamed to disclose it. In addition, she did not understand that the rape, which was linked both to the general civil war and to her ethnicity as a Tutsi, was relevant information that should have been disclosed during the status determination process. The fact that the claimant did not understand what information was relevant to her asylum claim suggests that the RSDO did not properly explain the asylum process to the claimant—a breach of the requirements of a fair administrative process.

In addition, survivors of rape are often forced to rely on non-professional interpreters chosen randomly from the crowd of asylum seekers at the office on any given day, which places them in the position of having to disclose the rape to another stranger – often male – with whom they have no relationship or basis for trust. This was the case in the claim below.

**Claim 2: Crown Mines**

The claimant's father was a prominent member of the Mobutu government who was kidnapped by Kabila's forces, and she believes he was killed. The Kabila government also began detaining, questioning, and threatening the claimant as a result of her family's political position. The claimant participated in a public march organised by the UDPS. That evening, four government soldiers came to her house with a photo of her in the march. Three of the soldiers raped her in front of her brother and a friend, while her daughter heard from another room. Her husband abandoned her as a result of the rape, and she fled the country.

The claimant was interviewed by a status determination officer with interpretation assistance from a male asylum seeker from the DRC whom she had met that day at the refugee reception office. According to the claimant, she did not acknowledge the rape on her eligibility form or during her status determination interview because she felt a great deal of shame, particularly in front of the interpreter, who was male and a stranger. She continues to suffer trauma as a result of her attack, and has been referred to a trauma clinic for counselling and psychological treatment.

## Summary and recommendations

South Africa's asylum system has overwhelmingly failed to provide protection to victims of gender-based violence. The status determination process is characterised by a marked lack of recognition of rape and other forms of gender-based persecution as a basis for asylum status. The key deficiencies include:

- Ignoring the political dimension of gender-based claims;
- Refusing to acknowledge rape as a form of physical harm constituting persecution;
- Failing to recognise the use of rape as a weapon of war and ignoring the continued prevalence of rape in areas where hostilities have ceased;
- Lacking the necessary analytical capacity to identify patterns of persecution involving gender-based claims; and
- Displaying no sensitivity to the particular barriers faced by rape survivors, and the potential re-victimisation stemming from the stigma attached to rape in some societies.

In light of these deficiencies, ACMS makes the following recommendations:

- Provide extensive training on gender-based persecution, including a more in-depth examination of the various forms such persecution can take;
- Ensure through training that RSDOs understand that gender-based persecution is not simply privatised violence, but may have a political dimension;
- Furnish RSDOs with background on the use of rape as a weapon of war and provide country information in cases where the threat of rape continues following the cessation of hostilities;
- Provide special sensitivity training that familiarises RSDOs with the particular barriers faced by rape survivors and also provides them with the skills necessary to deal with individuals who have suffered gender-based violence; and
- Implement a mandatory training programme that incorporates the above and requires RSDOs to pass an exam demonstrating their understanding of gender-based persecution following completion of the programme.

## Implications for the Rights of Applicants

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The decisions described above highlight the various deficiencies found in status determination decisions. Briefly, these deficiencies include the following: errors of law; decisions based on inaccuracies such as the wrong claimant or country; failure to provide reasons; various failures to apply the mind to produce a rational, well-reasoned decision; speculation about internal relocation as a substitute for status determination; unjustified assumptions about peace, stability and human rights observance in a country; and a general failure to recognise gender-based claims as a basis for asylum.

These deficiencies violate the constitutional right to just administrative action, with severe implications for the rights of asylum seekers in need of protection. The right to just administrative action entitles an individual to a fair, reasonable, transparent, and accountable process that includes a clear explanation of the administrative decision. The decisions detailed above do not meet this standard, increasing the risk of *refoulement*—returning an individual to a place where he or she faces persecution or a threat to life or liberty.

For an asylum seeker whose rights have been violated in the status determination process, the appeal and review procedures offer a potential remedy to overcome the initial flaws. The scope and breadth of the deficiencies at the initial decision-making level, however, limit the ability of these procedures to correct the systemic flaws without fully taking over the role of the RSDO—a role for which the appeal and review bodies are neither authorised nor have sufficient capacity.

As a result, the appeal and review process offers an insufficient basis to address the deficiencies of the status determination process. Moreover, the inaccuracies reflected in the written record of the claim, as detailed above, raise concerns over the procedural fairness of an appeal and review process based on this written record—posing a risk that the initial deficiencies will simply be replicated.

### The appeals process as corrective?

Depending on the basis on which a claim is rejected, individuals have access to two different paths to challenge the initial status determination decision—either through appeal to the Refugee Appeal Board, or through review by the Standing Committee on Refugee Affairs. Claims that are rejected as manifestly unfounded are automatically referred to the SCRA, but individuals in this category are not entitled to appear before this committee. Individuals whose claims are rejected as unfounded have until now had the right to appear before the RAB during their appeal hearing. DHA, however, has indicated an intention to remove the right of appearance and to institute hearings on the basis of the papers alone. At the same time, new appeal board rules require applicants to submit detailed written appeals, a requirement that most asylum seekers are unable to meet without assistance from a legal service provider.<sup>133</sup>

The proposed removal of the right of appearance will have serious rights implications, given the poor quality of decisions and the fact that the written record often fails to reflect the details of the claim as conveyed by the applicant. The table below compares individual claims as reflected in NGO files with the written record of the decision letter.

Actual claim	Written record
<p><b>A well-known musician was arrested in the middle of a show for performing anti-government songs. He was detained for one month before managing to escape.</b></p>	<p>The decision did not reflect these details and stated. ‘Nothing did ever happened [sic] to you personally and you were not a public figure’ (3KK)</p>
<p><b>A claimant was arrested following a television interview where he expressed his opposition to the government. He was tortured and whipped in detention, and fled the country after managing to escape.</b></p>	<p>The decision did not reflect these details and stated that he suffered no persecution (2EE)</p>

<sup>133</sup> The new rules took effect in August 2011. At the time of writing, the RAB had begun requiring the more demanding appeal requests, but had not yet removed the right of appearance.



<p><b>A Burundian claimant fled after being kidnapped and beaten by the FNL in an attempt to forcibly recruit him.</b></p>	<p>The decision letter stated that the claimant fled because the FNL was forcing people to join them following the 2010 elections. It further stated that nothing happened to him ‘personally before you came here’ (5K1).</p>
<p><b>A Congolese teacher refused to join the Mai Mai rebel group when they came to recruit him and other teachers. The rebels beat him, raped some of the women teachers and killed five of the eight teachers. He ran away with the remaining two teachers.</b></p>	<p>The decision letter did not reflect these details and refused the claimant status based on the arrest of Laurent Nkunda, a figure unrelated to the Mai Mai rebels (5N).</p>
<p><b>A Congolese teacher was assaulted by rebel soldiers after he refused to reveal the children of government soldiers at his school. The rebels kidnapped him, together with women and children who were raped by the rebels. The claimant and other male prisoners were also forced to rape the women and children. He eventually escaped, but was captured by another group of rebels who raped, tortured, and held him captive for four months before he escaped.</b></p>	<p>The decision letter stated that the claimant had hidden at a church after witnessing rebels killing civilians, and had then been assisted by the pastor to leave the country. It omitted all the other details of the political motivation for the claimant’s persecution, as well as the claimant’s captivity, rape and torture (3TT).</p>
<p><b>A claimant was held as a sex slave by a major in the army after her father refused to allow him to marry her. Her father and brother were killed for this refusal. The claimant was repeatedly raped and underwent many abortions before her escape.</b></p>	<p>The decision letter omitted these details and stated instead that the claimant’s family was threatened after soldiers killed her father during the war. The RSDO rejected her claim, saying she could have sought government assistance, when in fact it has been a government agent who had held her captive and abused her (3BBB).</p>

Many relevant details recounted by the above claimants were omitted from the written decisions. This means that they also may not have been part of the record given to the RAB or the SCRA, and may have resulted in the flawed decisions being upheld on the basis of the RSDO’s misrepresentation. The fact that many claimants are unable to provide written submissions without legal assistance further disadvantages them and creates a risk that individuals with a genuine fear of persecution will be sent back as a result of these procedurally unfair practices.

Given the high rejection rates and the poor quality of decisions in the first instance, the review of decisions takes on added importance. Yet, reviews conducted on the papers alone create the risk of replicating the same problems found in RSDO decisions. The record of the SCRA, which conducts reviews solely on the papers, is telling. According to the 2009/10 DHA Annual Report, the Standing Committee upheld ninety-eight per cent of cases referred to it, setting aside only 600 of the 26,389 cases it reviewed.<sup>134</sup> It made its determinations on the basis of decisions containing the errors described in the preceding sections, often with no additional information.<sup>135</sup> Given the paucity of information contained in most decisions and their accompanying files (which contain the application form and the RSDO interview notes) and the numerous flaws described, the administrative fairness of these decisions and the ability of the Committee to reach well-reasoned conclusions are doubtful. The proposed removal of the right of appearance before the RAB poses a similar danger.

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<sup>134</sup> No statistics were provided in DHA'S 2010/11 annual report.

<sup>135</sup> Claimants are often unaware of the right to make written submissions, and many reviews take place without these submissions.

## Conclusion

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This review of refugee status determination decisions reveals an asylum system that is failing to fulfil its constitutive functions under the Refugees Act, as well as its obligations under the UN's 1951 Convention. Decision letters indicate that, rather than determining a claimant's status through a reasoned decision-making procedure, RSDOs are simply producing and reproducing arbitrary rejections that do not consider individual claims. Many of the decisive elements of RSDO letters are cut-and-pasted from existing letter templates or other decisions that bear no relation to the specific claim under consideration.

The review of decisions suggests that South Africa's asylum system exists only to refuse access to the country and makes no attempt to realise the goal of refugee protection. Accordingly, it is an asylum system in name only, while in reality it functions solely as an instrument of immigration control. The mass production of rejection letters creates an almost automatic process of deportation through *refoulement* – the internationally and domestically prohibited act of returning asylum seekers to the dangers from which they fled.

How has this situation come about? DHA comments suggest that the Department has lost sight of the purpose behind any asylum system – to provide protection to those fleeing persecution or general conditions of instability. In response to the overwhelming numbers of individuals entering the system, and the suspicion that a large proportion of these are not bona fide applicants, the DHA has adopted a misplaced focus on immigration control within the asylum system itself. In doing so, it has created a bureaucracy that transgresses not only international law but also the very domestic laws that constitute it. The legislature created two parallel pieces of legislation – the Immigration Act and the Refugees Act – precisely to keep the goals of immigration control and refugee protection separate. Their merging in the asylum system undermines South Africa's commitment to protecting the human rights of people fleeing persecution and war.

Beyond the fundamental issue of protection, the dysfunction of the asylum system also has other negative consequences. From an administrative efficiency perspective, the government is devoting significant resources to an ineffective system that is fundamentally failing to conduct proper status determinations. The effect may also be counterproductive to the government's goals, as the long delays for appeals generated by the existing system encourage those economic migrants looking for a temporary means to regularise their status to enter the asylum system. More broadly, the asylum system was not designed, nor can it be expected to function as an effective immigration control system. Efforts to manage the large numbers of economic migrants entering South Africa can only be effective if they are conducted outside of the asylum framework.

At the same time, the South African government, as well as organisations such as UNHCR, should not be complacent about the existence of a government department that fails to live up to its mandate and circumvents the law as a matter of course. This situation has implications not just for asylum seekers, but for governance more generally.

## Recommendations

*To the Portfolio Committee on Home Affairs:*

- Establish greater oversight of the refugee system and the status determination process;
- Make individuals within DHA accountable for violations of the law;
- Increase the capacity of the Refugee Appeal Board so that it can exercise greater review over status determination decisions and lessen the risk of *refoulement*; and
- Create an independent oversight body to review the quality of status determination decisions.

*To UNHCR:*

- Recognise that the organisation must provide greater support to South Africa as the top asylum-receiving country;
- Allocate greater resources and technical support to DHA and local service providers who give assistance to asylum seekers and refugees;
- Increase pressure on the South African government to ensure that it is living up to its international commitment toward asylum seekers;
- Lobby DHA to fulfil its mandate with respect to asylum seekers; and
- Call for greater judicial review of status determination decisions to highlight the scope of the problem.

*To DHA:*

These recommendations are aimed at creating both greater administrative effectiveness and administrative justice in the asylum system. They are made from the standpoint that

- The refugee system must stand apart from and parallel to the immigration system;
- The protective purpose of refugee law must be made paramount within the status determination process; and
- Administrative justice cannot be sacrificed for the purpose of efficiency.

In light of these goals, ACMS makes the following general recommendations:

- Communicate information regarding the asylum system more effectively, both to deter those who are not eligible from applying, and to ensure that those who are applying are adequately informed about the process;
- Reorient the focus from producing as many decisions as possible per day to producing good-quality, administratively fair decisions, which will also reduce the burden at the appeals stage;
- Provide RSDOs with sufficient training and resources to produce administratively fair and individualised decisions, rather than measuring performance by quantity;

- Reduce the burden on the Refugee Appeal Board by providing adequate resources and training so that the first stage of status determination functions properly and produces an adequate record;
- Establish a required set of qualifications for RSDOs so that the individuals making life and death decisions have a relevant set of skills;
- Create a system for reviewing both negative and positive decisions that evaluates the quality of decisions, and not just the possibility of corruption; and
- Create further mechanisms to address mixed migration flows that allows individuals to regularise their status outside of the asylum system.

With respect to the specific deficiencies identified in the report:

#### *Errors of Law*

- Create a minimum educational requirement for the hiring of RSDOs;
- Ensure that RSDOs are properly trained in all aspects of refugee law;
- Create review procedures that provide for an automatic rehearing of any decision in which there is an error of law; and
- Establish procedures to address the situation of RSDOs whose decisions do not accurately reflect the law, including warnings, greater training, and, if necessary, removal from the RSDO position.

#### *Other decision-making flaws*

- Lower or eliminate the number of daily decisions that an RSDO is required to produce in order to provide adequate time for a well-reasoned decision and to reduce the tendency to cut and paste from previous decisions;
- Provide extensive training on the characteristics that define an administratively fair decision, and create a checklist that RSDOs can use to assess a status determination decision;
- Provide up to date country information and train RSDOs on how to conduct proper investigations based on this country information;
- Provide a resource centre for RSDOs who are unsure about the current situation in a country; and

- Eliminate internal relocation as an accepted basis for rejecting an asylum claim and create controls to ensure that all decisions involve a proper status determination assessment.

*Gender-based claims*

- Provide extensive training on gender-based persecution, including a more in-depth examination of the various forms such persecution can take;
- Ensure through training that RSDOs understand that gender-based persecution is not simply privatised violence, but may have a political dimension;
- Furnish RSDOs with background on the use of rape as a weapon of war and provide country information in cases where the threat of rape continues following the cessation of hostilities;
- Provide special sensitivity training that familiarises RSDOs with the particular barriers faced by rape survivors and also provides them with the skills necessary to deal with individuals who have suffered gender-based violence; and
- Implement a mandatory training programme that incorporates the above and requires RSDOs to pass an exam demonstrating their understanding of gender-based persecution following completion of the programme.

## APPENDIX: DUPLICATE LETTERS

<b>Letters wholly identical, including information on the claimant</b>	6B, 6C
	7H, 7J, 7K, 7M ( <i>Identical except for dates of birth and dates of entry</i> ) <ul style="list-style-type: none"> <li>- 7I (one sentence removed from description of claim)</li> <li>- 7L (one sentence removed from description of claim)</li> </ul>
	7V, 7W, 7X
	7BB, 7DD <ul style="list-style-type: none"> <li>- 7AA: claim different, but reasons wholly identical</li> </ul>
	7R, 7Y, 7Z
<b>Reasons identical</b>	2H, 2U
	2T, 2EE, 2FF <ul style="list-style-type: none"> <li>- 2DD: one additional sentence</li> <li>- 3II: two additional sentences</li> </ul>
	3K, 3M
	3L, 3N, 3R, 3JJ, 3MM
	3LL, 3RR
	4A, 4B, 4C, 4D
	4P, 4B1
	4U, 4W
	4X, 4A1
	4AA, 4EE, 4EE2, 4EE3, 4EE4, 4NN
	4BBB, 4CCC <ul style="list-style-type: none"> <li>- 4KK4: 3 additional sentences</li> </ul>
	5D, 5E
	5N, 5G1 <ul style="list-style-type: none"> <li>- 5W1: 2 additional sentences</li> </ul>
	5X1, 5Y1 <ul style="list-style-type: none"> <li>- 5H1: 1 additional sentence</li> </ul>
	5O1, 5P1
	7A, 7E, 7N, 7O
	7D, 7CC
	7G, 7S, 7U, 7AA, 7BB, 7DD: reasons identical to 7R, 7Y, 7Z, 7V, 7W, 7X
	2H, 2T



Reasons substantively the same/ contain mostly identical language	2T, 2W
	3B, 3F, 3J, 3T, 3U, 3FF, 3PP, 3AA, 3EE
	3O, 3Q
	3E, 3VV
	4PP, 4YY1
	4BB, 4CC, 4YY, 4ZZ
	5K, 5L
	5L1, 5M1, 5N1 - 5Z1: same paragraph cut and pasted 3 times in the reasons section
	7B, 7C
	1AB, 1AC
	4FF, 4SS, 4SS2, 4SS3, 4SS4
	4KK, 4KK2, 4KK3, 4KK5, 4KK6, 4KK7, 4KK8, 4KK9, 4KK10, 4KK11,
	4KK12, 4KK13
	7F, 7P, 7EE, 7FF

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