



# OPERATIONAL GUIDANCE NOTE

## SOUTH AFRICA

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#### **1. Introduction**

- 1.1** This document provides UK Border Agency caseowners with guidance on the nature and handling of the most common types of claims received from nationals/residents of South Africa, including whether claims are or are not likely to justify the granting of asylum, Humanitarian Protection or Discretionary Leave. Caseowners must refer to the relevant Asylum Instructions for further details of the policy on these areas.
- 1.2** Caseowners *must not* base decisions on the country of origin information in this guidance; it is included to provide context only and does not purport to be comprehensive. The conclusions in this guidance are based on the totality of the available evidence, not just the brief extracts contained herein, and caseowners must likewise take into account all available evidence. It is therefore essential that this guidance is read in conjunction with the relevant COI Service country of origin information and any other relevant information.

COI Service information is published on Horizon and on the internet at:

<http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/coi/>

- 1.3** Claims should be considered on an individual basis, but taking full account of the guidance contained in this document. In considering claims where the main applicant has dependent family members who are a part of his/her claim, account must be taken of the situation of all the dependent family members included in the claim in accordance with the Asylum Instruction on Article 8 ECHR. If, following consideration, a claim is to be refused, case owners should consider whether it can be certified as clearly unfounded under the case by case certification power in section 94(2) of the Nationality Immigration and Asylum Act 2002. A claim will be clearly unfounded if it is so clearly without substance that it is bound to fail.
- 1.4** With effect from 23 July 2003 South Africa is a country listed in section 94 of the Nationality, Immigration and Asylum Act 2002. Asylum and human rights claims must be considered on their individual merits. If, following consideration, a claim made on or after 23

July 2003 by someone who is entitled to reside in South Africa is refused, caseowners must certify it as clearly unfounded unless satisfied that it is not. A claim will be clearly unfounded if it is so clearly without substance that it is bound to fail. Guidance on whether certain types of claim are likely to be clearly unfounded is set out below.

## **2. Country assessment**

**2.1** Caseowners should refer the relevant COI Service country of origin information material. An overview of the country situation including headline facts and figures about the population, capital city, currency as well as geography, recent history and current politics can also be found in the relevant FCO country profile at:

<http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/sub-saharan-africa/south-africa>

**2.2** An overview of the human rights situation in certain countries can also be found in the FCO Annual Report on Human Rights which examines developments in countries where human rights issues are of greatest concern:

<http://centralcontent.fco.gov.uk/resources/en/pdf/human-rights-reports/accessible-hrd-report-2010>

## **2.3 Actors of protection**

**2.3.1** Case owners must refer to the Asylum Policy Instruction on considering the protection (asylum) claim and assessing credibility. To qualify for asylum, an individual not only needs to have a fear of persecution for a Convention reason, they must also be able to demonstrate that their fear of persecution is well founded and that they are unable, or unwilling because of their fear, to avail themselves of the protection of their home country. Case owners should also take into account whether or not the applicant has sought the protection of the authorities or the organisation controlling all or a substantial part of the State, any outcome of doing so or the reason for not doing so. Effective protection is generally provided when the authorities (or other organisation controlling all or a substantial part of the State) take reasonable steps to prevent the persecution or suffering of serious harm by for example operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

**2.3.2** The South African Police Service (SAPS), under the Department of Police, has primary responsibility for internal security. The South African National Defence Force (SANDF), under the Department of Defence, is responsible for external security but also has domestic security responsibilities such as patrolling the borders.<sup>1</sup> The Directorate of Priority Crime Investigation (DPCI) co-ordinates efforts against organised crime and official corruption. Despite continued efforts to professionalise, SAPS remained understaffed, ill equipped, and poorly trained. Law enforcement activities remained focused on wealthy residential and business areas.<sup>2</sup>

**2.3.3** In April 1997 the Government of South Africa set up the Independent Complaints Directorate (ICD). The ICD website notes that it is responsible for investigating complaints of brutality, criminality and misconduct against members of the SAPS and the Municipal Police Service (MPS). The ICD operates independently from the SAPS in the effective and efficient investigation of alleged misconduct and criminality by SAPS members.<sup>3</sup> The USSD 2010 noted that the ICD investigated numerous complaints against the police service, including allegations of unlawful killing, assaults, torture and other misconduct. The report noted that investigations resulted in police officers being convicted of sentences ranging

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<sup>1</sup> US Department of State (USSD) Human Rights Report 2010 South Africa – Section 1  
<http://www.state.gov/documents/organization/160145.pdf>

<sup>2</sup> USSD 2010 – Section 1 <http://www.state.gov/documents/organization/160145.pdf>

<sup>3</sup> Independent Complaints Directorate – Republic of South Africa <http://www.icd.gov.za/about%20us/legislation.asp>

from verbal and written warnings to fines and dismissal from the service. The report did not stipulate how many officers were convicted.<sup>4</sup>

- 2.3.4** During 2010 the ICD received 6,377 complaints against the police, including allegations of killings, assaults and other misconduct, compared to 6,119 complaints in the previous year, according to the ICD 2009 -10 Report. Of the 6,377 complaints, Minister of Police Nathi Mthethwa noted 48 convictions of police officers for criminal conduct, including 25 convictions for deaths in police custody or as a result of police action and 23 convictions for other criminal offences. Additionally, the ICD made 526 recommendations to the Director of Public Prosecutions (DPP) in criminal matters and 1,666 recommendations to SAPS management with regard to various misconduct offences, such as abuse of a state vehicle, leaking information or dereliction of duty. SAPS offered annual training in corruption prevention, human rights and ethics and supplied officers with access to social workers, psychologists, and chaplains.<sup>5</sup>
- 2.3.5** The constitution and law provides for an independent judiciary and the government generally respected judicial independence in practice. However, the judiciary was understaffed and underfunded and there were reports that legal documents used in trials were lost. According to the presidentially mandated criminal justice system working group, made up of ministers and deputy ministers, more than a million of the two million criminal cases reported annually were never resolved. According to the group, a number of problems contributed to the country's low 10.3 percent conviction rate in criminal cases, including inadequate collection of evidence at crime scenes, insufficient investigation of crimes, long trials and ineffective court processes. During 2010 the government operated 58 justice centres that provided legal assistance to the poor to speed the administration of justice, reduce the court rolls and alleviate overcrowding in prisons. However, serious delays continued to be a problem.<sup>6</sup>
- 2.3.6** The constitution and law prohibit such practices as torture and other cruel, inhuman or degrading treatment or punishment. However, police officers reportedly tortured, beat, raped and otherwise abused suspects.<sup>7</sup> According to the May 2011 Amnesty International report, corroborated methods of torture included severe beatings, the use of electric shock and suffocation whilst the person was shackled or hooded and death threats.<sup>8</sup> Police torture and physical abuse allegedly occurred during interrogation, arrest, detention, and house searches and sometimes resulted in death.<sup>9</sup>

## **2.4 Internal relocation.**

- 2.4.1** Caseowners must refer to the Asylum Policy Instructions on both internal relocation and gender issues in the asylum claim and apply the test set out in paragraph 339O of the Immigration Rules. It is important to note that internal relocation can be relevant in both cases of state and non-state agents of persecution, but in the main it is likely to be most relevant in the context of acts of persecution by localised non-state agents. If there is a part of the country of return where the person would not have a well founded fear of being persecuted and the person can reasonably be expected to stay there, then they will not be eligible for a grant of asylum. Similarly, if there is a part of the country of return where the person would not face a real risk of suffering serious harm and they can reasonably be expected to stay there, then they will not be eligible for humanitarian protection. Both the general circumstances prevailing in that part of the country and the personal circumstances of the person concerned including any gender issues should be taken into account, but the fact that there may be technical obstacles to return, such as re-documentation problems,

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<sup>4</sup> USSD 2010 – Section 1 <http://www.state.gov/documents/organization/160145.pdf>

<sup>5</sup> USSD 2010 – Section 1 <http://www.state.gov/documents/organization/160145.pdf>

<sup>6</sup> USSD 2010 – Section 1 <http://www.state.gov/documents/organization/160145.pdf>

<sup>7</sup> USSD 2010 – Section 1 <http://www.state.gov/documents/organization/160145.pdf>

<sup>8</sup> USSD 2010 – Section 1 <http://www.state.gov/documents/organization/160145.pdf>

<sup>9</sup> Amnesty International Annual Report 2011 – South Africa – May 2011

<http://www.unhcr.org/refworld/country,...ZAF,,4dce153ec.0.html>

does not prevent internal relocation from being applied.

- 2.4.2** Very careful consideration must be given to whether internal relocation would be an effective way to avoid a real risk of ill-treatment/persecution at the hands of, tolerated by, or with the connivance of, state agents. If an applicant who faces a real risk of ill-treatment/persecution in their home area would be able to relocate to a part of the country where they would not be at real risk, whether from state or non-state actors, and it would not be unduly harsh to expect them to do so, then asylum or humanitarian protection should be refused.
- 2.4.3** South Africa covers a total area of 470,693 sq miles<sup>10</sup> and had a population in 2011 of 50.59 million.<sup>11</sup> It has the ninth-largest territory in Africa and the second largest country on the Southern African subcontinent. To the north, from west to east, the country borders on Namibia, Botswana, Zimbabwe, Mozambique and Swaziland. Lesotho, to the south-east, is totally enclosed by South African territory. The longest border is with Botswana, stretching 1,840 km.<sup>12</sup>
- 2.4.4** South Africa has three capitals which are Cape Town, Bloemfontein and Pretoria. The Western Cape city of Cape Town, where the country's Parliament is found, is the legislative capital. In the Free State, Bloemfontein is the judicial capital and home to the Supreme Court of Appeal. In Gauteng province, Pretoria, where the Union Buildings and a large proportion of the civil service are found, is the administrative capital and the ultimate capital of the country. The largest and most important city is Johannesburg, the economic heartland of the country. Other important centres include Durban and Pietermaritzburg in KwaZulu-Natal and Port Elizabeth in the Eastern Cape.<sup>13</sup>
- 2.4.5** The constitution and law provide for freedom of movement within the country, foreign travel, emigration, and repatriation, and the government generally respected these rights in practice. The government partially cooperated with the Office of the UN High Commissioner for Refugees (UNHCR) and other humanitarian organizations in providing protection and assistance to internally displaced persons, refugees, returning refugees, asylum seekers, stateless persons, and other persons of concern. The law does not prohibit forced exile; however, the government did not use it.<sup>14</sup>
- 2.4.6** It may be practical for applicants in some categories who may have a well-founded fear of persecution in one area to relocate to other parts of South Africa where they would not have a well founded fear and, taking into account their personal circumstances, it would not be unduly harsh to expect them to do so.

### **3. Main categories of claims**

- 3.1** This Section sets out the main types of asylum claim, humanitarian protection claim and discretionary leave claim on human rights grounds (whether explicit or implied) made by those entitled to reside in South Africa. Where appropriate it provides guidance on whether or not an individual making a claim is likely to face a real risk of persecution, unlawful killing or torture or inhuman or degrading treatment/ punishment. It also provides guidance on whether or not sufficiency of protection is available in cases where the threat comes from a non-state actor; and whether or not internal relocation is an option. The law and policies on persecution, Humanitarian Protection, sufficiency of protection and internal relocation are set out in the relevant Asylum Instructions, but how these affect particular categories of claim are set out in the instructions below.

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<sup>10</sup> BBC Country Profile – South Africa –December 2011 <http://www.bbc.co.uk/news/world-africa-14094835>

<sup>11</sup> USSD Background Note: South Africa - Last Revised 3 October 2011 <http://www.state.gov/r/pa/ei/bgn/2898.htm>

<sup>12</sup> Central Intelligence Agency - The World Fact Book – South Africa  
<https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html>

<sup>13</sup> South Africa Info - South Africa's Geography <http://www.southafrica.info/about/geography/geography.htm>

<sup>14</sup> USSD 2010 – Section 1 <http://www.state.gov/documents/organization/160145.pdf>

- 3.2** Each claim should be assessed to determine whether there are reasonable grounds for believing that the applicant would, if returned, face persecution for a Convention reason - i.e. due to their race, religion, nationality, membership of a particular social group or political opinion. The approach set out in Karanakaran should be followed when deciding how much weight to be given to the material provided in support of the claim (see the Asylum Policy Instruction on considering the protection (asylum) claim and assessing credibility).
- 3.3** If the applicant does not qualify for asylum, consideration should be given as to whether a grant of Humanitarian Protection is appropriate. If the applicant qualifies for neither asylum nor Humanitarian Protection, consideration should be given as to whether he/she qualifies for Discretionary Leave, either on the basis of the particular categories detailed in Section 4 or on their individual circumstances.
- 3.4** All Asylum Instructions can be accessed via the on the Horizon intranet site. The instructions are also published externally on the Home Office internet site at:

<http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/coi/>

### **3.5 Credibility**

- 3.5.1** This guidance is not designed to cover issues of credibility. Case owners will need to consider credibility issues based on all the information available to them. For guidance on credibility see the Asylum Policy Instruction on considering the protection (asylum) claim and assessing credibility. Caseowners must also ensure that each asylum application has been checked against previous UK visa applications. Where an asylum application has been biometrically matched to a previous visa application, details should already be in the Home Office file. In all other cases, the case owner should satisfy themselves through CRS database checks that there is no match to a non-biometric visa. Asylum applications matched to visas should be investigated prior to the asylum interview, including obtaining the Visa Application Form (VAF) from the visa post that processed the application.

### **3.6 Women victims of domestic violence**

- 3.6.1** Some female applicants may apply for asylum or make a human rights claim based on the grounds that they are the victims of domestic violence and are unable to seek protection from the authorities.
- 3.6.2** **Treatment.** Domestic violence is pervasive and incorporates physical, sexual, emotional, verbal abuse, as well as harassment and stalking by former partners. The law facilitates victims to a place of safety and allows police to seize firearms at the scene and to arrest abusers without a warrant. Violating a protection order is punishable by a prison sentence of up to five years or 20 years if additional criminal charges are brought. Penalties for domestic violence include fines and sentences of between two and five years' imprisonment. According to non-governmental organisations (NGOs), about one in four women were in an abusive relationship, but few reported it. A June 2009 report released by the Medical Research Council found that more than two-fifths of men interviewed in KwaZulu-Natal and Eastern Cape provinces had been physically violent toward an intimate partner. Thuthuzela Care Centre counsellors also alleged that doctors, police officers, and judges often treated abused women inadequately.<sup>15</sup>
- 3.6.3** According to Amnesty International Annual Report 2011 high levels of violence against women and girls continued to be reported and to cause national concern. Over 63,500 cases of sexual offences, including rape, against women and children were reported to the police between April 2009 and March 2010. The report of a parliamentary committee, tabled in Parliament in February 2010, recommended substantial changes to the Domestic Violence Act (DVA) and in policies and practices used by police, justice and social support agencies. The recommendations followed wide-ranging hearings with civil society

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<sup>15</sup> USSD 2010 South Africa – Section 6 <http://www.state.gov/documents/organization/160145.pdf>



organisations on failures in implementation which left many victims without access to effective remedies. The ICD reported to Parliament in November 2010 that only a quarter of the 522 police stations they inspected in the previous year were fully compliant with their obligations under the DVA. Police lack of understanding of the requirements of the law, a reluctance to discipline members who did not implement the law and failure to arrest violent abusers were the main problems reported by the ICD.<sup>16</sup>

**3.6.4** The government invested in 39 shelters for abused women, but more were required, particularly in rural areas. The government continued to conduct domestic violence awareness campaigns and in honour of Women's Month, the government hosted numerous events focused on empowering women in business, government, health, sports and the arts.<sup>17</sup>

**3.6.5** A number of sources, including Amnesty International, local NGOs and government, noted the existence of domestic violence shelters across each province of South Africa. The shelters provides a range of assistance from short to longer-term accommodation and some shelters also offered counselling services, free legal advice and empowerment programmes. However, the Centre for the Study of Violence and Reconciliation complained in one report of 25 November 2008 and another published in 2007, that many shelters restricted occupancy to periods of six months or less and that there were too few shelters in rural areas. Amnesty International reported on 27 March 2008 that the government failed to publicise what assistance (including shelter accommodation) was available to victims of domestic violence.<sup>18</sup>

**See also:** [Actors of protection \(section 2.3 above\)](#)

[Internal relocation \(section 2.4 above\)](#)

**3.6.6 Conclusion** Domestic violence is widespread in South Africa but there is in general sufficient protection and internal relocation is also an option where in the particular circumstances of the applicant's case it is not considered unduly harsh for them to relocate. The grant of asylum or Humanitarian Protection is unlikely therefore to be appropriate and unless there are specific reasons why sufficient protection would not be available to the individual applicant and why it would be unduly harsh to expect them to relocate internally, such claims may be certified as clearly unfounded.

### **3.7 Lesbians, gay men, bisexual and transgender (LGBT) persons**

**3.7.1** Some applicants may make an asylum and/or human rights claim based on ill-treatment amounting to persecution as gay men, lesbians, bisexual or transgender persons in South Africa.

**3.7.2 Treatment.** The constitution and law prohibit discrimination on the grounds of race, disability, ethnic or social origin, colour, age, culture, language, sex, pregnancy, sexual orientation or marital status. However, entrenched attitudes and practices often resulted in the denial of these rights in practice.<sup>19</sup> The post-apartheid constitution outlawed discrimination based on sexual orientation and in 2006 the country legalised same-sex marriages. There were no reports of official mistreatment or discrimination. However, in its annual Social Attitudes Survey released in 2008, the Human Sciences Research Council found widespread public intolerance of homosexual activity.<sup>20</sup> While South Africa's constitution outlawed discrimination based on sexual orientation and same-sex marriages

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<sup>16</sup> Amnesty International Annual Report 2011

<http://www.amnesty.org/en/region/south-africa/report-2011#section-130-5>

<sup>17</sup> USSD 2010 <http://www.state.gov/documents/organization/160145.pdf>

<sup>18</sup> COIS Report – South Africa – July 2010 – Section 21 [http://www.ukba.homeoffice.gov.uk/policy\\_andlaw/guidance/coi](http://www.ukba.homeoffice.gov.uk/policy_andlaw/guidance/coi)

<sup>19</sup> USSD 2010– South Africa – Section 6 <http://www.state.gov/documents/organization/160145.pdf>

<sup>20</sup> USSD 2010 – South Africa – Section 6 <http://www.state.gov/documents/organization/160145.pdf>

had been legalised, gay and lesbian people remained vulnerable to violence. The South African Human Rights Commission and other NGOs have suggested that the criminal justice system needs to take determined action to deal with hate crimes in the country, something that the government has yet to do.<sup>21</sup>

- 3.7.3** A report published by the International Lesbian and Gay Association entitled *State Sponsored Homophobia*, published in May 2010, noted that all sections of the country's LGBT community faced homophobic abuse. South Africa was ranked the 4th country in the world with the highest rate of crimes and every year, there were numerous cases of hate crimes towards LGBT people. The report went on to note that the abuse was escalating.<sup>22</sup>
- 3.7.4** While there were significant advances, LGBT persons in South Africa continue to face hostility and violence. Negative public attitudes towards homosexuality go hand in hand with a broader pattern of discrimination, violence, hatred and extreme prejudice against people known or assumed to be lesbian, gay and transgender or those who violate gender and sexual norms in appearance or conduct, such as women playing soccer, dressing in a masculine manner and/or refusing to date men. Constitutional protections were greatly weakened by the state's failure to adequately enforce them.<sup>23</sup>
- 3.7.5** The Human Rights Watch report – *We'll Show You You're A Woman* – states that there were discrimination and abuse against lesbians, transgender men and individuals who, while born female, did not conform to feminine gender norms and expectations. These individuals and groups experienced discrimination, harassment and violence at the hands of private individuals and sometimes state agents. They may be thrown out of home; ridiculed and abused at school; harassed, insulted and beaten on the streets, in church, at work and threatened by neighbours and strangers. The abuse they face may be verbal, physical or sexual and may even result in murder. This was far from the promise of equality and non-discrimination on the basis of sexual orientation contained in the constitution. Police response to lesbians and transgender men was also sometimes marked by inefficiency, corruption, inaction and even complicity with perpetrators.<sup>24</sup>
- 3.7.6** The economic and social position of LGBT people in South Africa has a significant impact on their experience. Those who were able to afford a middle-class lifestyle may not experience the same degree of prejudice and discrimination on the basis of sexual orientation but for those who were socially and economically vulnerable, the picture was often bleak. Lack of access to such things as secure housing and transport options greatly increased vulnerability to violence.<sup>25</sup>
- 3.7.7** The Triangle Project, the country's largest lesbian and gay rights organisation, reported it received each week in Cape Town 10 new cases of lesbian women being targeted for 'corrective rape', in which men raped lesbians to punish them for being lesbian and to change their sexual orientation.<sup>26</sup>
- 3.7.8** Lesbian South Africans are living in fear as rape and murder becomes a daily threat in the townships they call home. Noxolo Nkosana, 23, was the latest victim of a series of violent attacks against lesbians. She was stabbed in Cape Town, as she returned from work. In April 2011, Noxolo Nogwaza was raped by eight men and murdered in KwaThema township near Johannesburg. Her face and head were disfigured and she was stabbed several times with broken glass. The attack was thought to have begun as a case of

<sup>21</sup> COIS Report – South Africa – July 2010 – Section 19 [http://www.ukba.homeoffice.gov.uk/policy\\_andlaw/guidance/coi](http://www.ukba.homeoffice.gov.uk/policy_andlaw/guidance/coi)

<sup>22</sup> COIS Report – South Africa – July 2010 – Section 19 [http://www.ukba.homeoffice.gov.uk/policy\\_andlaw/guidance/coi](http://www.ukba.homeoffice.gov.uk/policy_andlaw/guidance/coi)

<sup>23</sup> Human Rights Watch – *We'll Show You You're A Woman* – South Africa December 2011 <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf>

<sup>24</sup> Human Rights Watch – *We'll Show You You're A Woman* – South Africa December 2011 <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf>

<sup>25</sup> Human Rights Watch – *We'll Show You You're A Woman* – South Africa December 2011 <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf>

<sup>26</sup> USSD 2010 – South Africa – Section 6 <http://www.state.gov/documents/organization/160145.pdf>

'corrective rape'. The practice appears to be on the increase in South Africa. More than 10 lesbians each week were raped or gang-raped in Cape Town alone, according to Luleki Sizwe, a charity which assists women who have been raped in the Western Cape. Many of the cases were not reported because the victims were afraid that the police will laugh at them or that their attackers would come after them, says Ndumie Funda, founder of Luleki Sizwe.<sup>27</sup>

**3.7.9** Traditional African society has not accepted homosexuality, especially amongst women. African societies were still very patriarchal and women were taught that they should marry men and anything outside of that is viewed as wrong, says Lesego Tlhwale from African gay rights group Behind the Mask. South Africa was the only African country to have legalised homosexual marriage and one of only ten in the world. The constitution specifically forbids discrimination on the grounds of sexual orientation but prejudice remains common. Very few cases of rape against lesbians have resulted in convictions but after the murder of Ms Nogwaza, a petition was signed by 170,000 people around the world calling for an end to 'corrective rape'. The Justice Department has begun to listen and was in the process of setting up a team to develop a strategy for tackling hate crimes against gay people and was considering introducing heavier sentences for offences where the victim's sexual orientation was a factor in the crime.<sup>28</sup>

**See also:** [Actors of protection \(section 2.3 above\)](#)

[Internal relocation \(section 2.4 above\)](#)

**3.7.10 Conclusion** While South Africa's constitution outlawed discrimination based on sexual orientation and same-sex marriages had been legalised, LGBT persons remained vulnerable to violence. This can in individual cases amount to persecution and the South African authorities may not be able to provide gay men, lesbians and bisexuals or those perceived as such with effective protection.

**3.7.11** Where gay men and lesbians do encounter social hostility they may be able to avoid this by moving elsewhere in South Africa. There are however likely to be difficulties in finding safety through internal relocation given that homophobic attitudes are prevalent across the country. The Supreme Court in the case of HJ (Iran) made the point that internal relocation is not the answer if it depends on the person concealing their sexual orientation in the proposed new location for fear of persecution.

**3.7.12** Each case must however be examined on its own merits. Where caseowners conclude that a claimant is at real risk of persecution in South Africa on account of their sexual orientation then they should be granted asylum because gay men, lesbians and bisexuals in South Africa may be considered to be members of a particular social group.

**3.7.13** If an individual chooses to live discreetly because he/she wants to avoid embarrassment or distress to her or his family and friends he/she will not be deemed to have a well founded fear of persecution and will not qualify for asylum. This is because he/she has adopted a lifestyle to cope with social pressures and not because he/she fears persecution due to her or his sexual orientation.

**3.7.14** If an individual chooses to live discreetly because he/she fears persecution if he/she were to live as openly gay, lesbian or bisexual then he/she will have a well founded fear and should be granted asylum. It is important that gay, lesbian and bisexual people enjoy the right to live openly without fear of persecution. They should not be asked or be expected to

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<sup>27</sup> BBC News – South Africa's Lesbian Fear 'Corrective Rape' – June 2011 <http://www.bbc.co.uk/news/world-africa-13908662>

<sup>28</sup> BBC News – South Africa's Lesbian Fear 'Corrective Rape' – June 2011 <http://www.bbc.co.uk/news/world-africa-13908662>



live discreetly because of their well founded fear of persecution due to their sexual orientation.

### 3.8 Prison conditions

- 3.8.1** Applicants may claim that they cannot return to South Africa due to the fact that there is a serious risk that they will be imprisoned on return and that prison conditions in South Africa are so poor as to amount to torture or inhuman treatment or punishment.
- 3.8.2** The guidance in this section is concerned solely with whether prison conditions are such that they breach Article 3 of ECHR and warrant a grant of Humanitarian Protection. If imprisonment would be for a Refugee Convention reason or in cases where for a Convention reason a prison sentence is extended above the norm, the asylum claim should be considered first before going on to consider whether prison conditions breach Article 3 if the asylum claim is refused.
- 3.8.3** **Consideration.** The majority of the 249 operational prisons did not meet international standards and prison conditions did not always meet the country's minimum legal requirements. According to the JICS (Judicial Inspectorate of Correctional Services) report released during 2010, there were 163,312 prisoners in facilities designed to hold 118,159. In a report to Parliament on 27 October 2010, Inspecting Judge Deon van Zyl reported that 19 prisons were critically overcrowded, such as King William's Town Prison, while others held less than their capacity, such as Barkley West. Unlike in previous years, no statistics were made available on the number of female and juvenile inmates. Due to severe overcrowding, many prisoners had less than 13 square feet in which to eat, sleep and spend 23 hours a day. The nominal allotment of floor space per prisoner was approximately 36 square feet for communal space and 60 square feet for single cells, however this standard was seldom met.<sup>29</sup>
- 3.8.4** In its September 2010 report Monitoring Immigration Detention in South Africa, the local NGO, Lawyers for Human Rights (LHR), indicated that the main abuses perpetrated in the Lindela Repatriation Centre, the country's largest detention facility for undocumented immigrants, which comprised of physical and verbal abuse, corruption and bribery, insufficient food, lack of reading and writing materials, lack of access to recreational facilities or telephones, lack of access to and quality of medical care, indefinite detention without judicial review, detention of asylum seekers and lack of procedural safeguards such as legal guidelines governing long-term detention.<sup>30</sup>
- 3.8.5** The Judicial Inspectorate of Correctional Services (JICS) received 2,189 complaints of assaults against prisoners by correctional officers for the reporting period from April 2009 until March 2010. There were several reports of physical and sexual abuse by both prison officials and prisoners. Some detainees awaiting trial reportedly contracted HIV/AIDS through rape. According to the JICS report, there were 1,047 prison deaths during 2010. Of these, 992 were from natural causes, including HIV/AIDS. The remaining deaths were the result of suicides, assaults, or accidents.<sup>31</sup>
- 3.8.6** Prisoners and detainees had reasonable access to visitors and were permitted religious observances. Authorities permitted prisoners and detainees to submit complaints to judicial authorities without censorship and to request investigation of credible allegations of inhumane conditions. Authorities investigated and acknowledged the results of such investigations in a publicly accessible manner. The government investigated and monitored prison and detention centres conditions. However, the Department of Correctional Services did not have an ombudsman to consider such matters as alternatives to incarceration for nonviolent offenders to alleviate inhumane overcrowding, addressing the status and

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<sup>29</sup> USSD 2010 – South Africa – Section 1 <http://www.state.gov/documents/organization/160145.pdf>

<sup>30</sup> USSD 2010 – South Africa – Section 1 <http://www.state.gov/documents/organization/160145.pdf>

<sup>31</sup> USSD 2010 – South Africa – Section 1 <http://www.state.gov/documents/organization/160145.pdf>

circumstances of confinement of juvenile offenders or improving pre-trial detention, bail and recordkeeping procedures to ensure prisoners did not serve beyond maximum sentences for charged offences.<sup>32</sup>

- 3.8.7** The JICS, an independent office under the Inspecting Judge, appointed an Independent Visitor for each correctional centre to monitor prison conditions. In 2009 the Independent Visitors collectively recorded 8,346 visits to the 239 prisons in South Africa, during which time they carried out private consultations with 78,883 inmates. Visits were registered in official registers kept at all correctional centres and were verified on a monthly basis. Independent Visitors submitted monthly reports to the Inspecting Judge, listing the number and duration of visits, the number of inmates interviewed and the number and nature of inmate complaints received. The government permitted some independent monitoring of prison conditions, including visits by human rights organisations to some facilities. Human rights organisations were allowed to visit prisoners if they had a registered attorney acting as legal representative for the prisoner. Organisations could also request permission to visit prisons to conduct specific research. The government permitted the International Committee of the Red Cross visits but none were conducted during 2010.<sup>33</sup>
- 3.8.8** Corruption remained a problem within prisons, although most correctional officials were either suspended or fired following an investigation. According to the JICS report released during 2010, there were 691 complaints of corruption during the annual reporting period. The Special Investigating Unit identified irregularities in 23 contracts and recommended that 433 officials be penalised. It also charged 26 doctors and 10 officials with criminal offences with an additional 433 officials being disciplined. There were no further developments in the 2008 investigation of malfeasance in prison tendering contracts.
- 3.8.9 *Conclusion*** Whilst prison conditions in South Africa are poor, conditions are unlikely to reach the Article 3 threshold. Therefore, even where applicants can demonstrate a real risk of imprisonment on return to South Africa a grant of Humanitarian Protection will not generally be appropriate. However, the individual factors of each case should be considered to determine whether detention will cause a particular individual in his particular circumstances to suffer treatment contrary to Article 3, relevant factors being the likely length of detention the likely type of detention facility and the individual's age and state of health. Where in an individual case treatment does reach the Article 3 threshold a grant of Humanitarian Protection will be appropriate.

#### **4. Discretionary Leave**

- 4.1** Where an application for asylum and Humanitarian Protection falls to be refused there may be compelling reasons for granting Discretionary Leave (DL) to the individual concerned. (See Asylum Instructions on Discretionary Leave) Where the claim includes dependent family members consideration must also be given to the particular situation of those dependants in accordance with the Asylum Instructions on Article 8 ECHR. .
- 4.2** With particular reference to South Africa the types of claim which may raise the issue of whether or not it will be appropriate to grant DL are likely to fall within the following categories. Each case must be considered on its individual merits and membership of one of these groups should *not* imply an automatic grant of DL. There may be other specific circumstances related to the applicant, or dependent family members who are part of the claim, not covered by the categories below which warrant a grant of DL - see the Asylum Instructions on Discretionary Leave and the Asylum Instructions on Article 8 ECHR.

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<sup>32</sup> USSD 2010 – South Africa – Section 1 <http://www.state.gov/documents/organization/160145.pdf>

<sup>33</sup> USSD 2010 – South Africa – Section 1 <http://www.state.gov/documents/organization/160145.pdf>

### **4.3 Minors claiming in their own right**

**4.3.1** Minors claiming in their own right who have not been granted asylum or HP can only be returned where (a) they have family to return to; or (b) there are adequate reception and care arrangements. At the moment we do not have sufficient information to be satisfied that there are adequate reception, support and care arrangements in place for minors with no family in South Africa. Those who cannot be returned should, if they do not qualify for leave on any more favourable grounds, be granted Discretionary Leave for a period as set out in the relevant Asylum Instructions.

### **4.4 Medical treatment**

**4.4.1** Applicants may claim they cannot return to South Africa due to a lack of specific medical treatment. See the IDI on Medical Treatment which sets out in detail the requirements for Article 3 and/or 8 to be engaged

**4.4.2** According to SouthAfrica.info, accessed on the 25 January 2012, South Africa's health system consisted of a large public sector and a smaller but fast growing private sector. Healthcare in South Africa varied from the most basic primary health care, offered free by the state, to highly specialised hi-tech health services available in the private sector for those who could afford it. The public sector was under-resourced and over-used, whilst the private sector, ran largely on commercial lines, catering to the middle and high-income earners who were usually members of medical schemes and to foreigners who were looking for top-quality surgical procedures at relatively affordable prices. The private sector also attracted most of the country's health professionals.<sup>34</sup>

**4.4.3** The state contributed about 40 percent of all expenditure on health but the public health sector was under pressure to deliver services to about 80 percent of the population. Despite this, most resources were concentrated in the private health sector which saw to the health needs of the remaining 20 percent of the population. The government's public health budget was allocated and spent by the nine provinces. How these resources were allocated and the standard of health care delivered varied from province to province.<sup>35</sup>

**4.4.4** According to the Just Landed website, accessed on the 27 January 2012, the public hospitals and clinics in South Africa were usually reasonably well equipped and staffed but were often filled to capacity and most patients using the public health care system were required to make some payment for services received. These variable charges were based on the individual's circumstances, such as earnings and the number of dependants. However, the government were trying to guide patients away from hospitals to its public clinics and community care centres, where free primary health care services were available. The public health care system offered a wide range of specialist treatments but waiting lists were often very long, depending on the problem or medical procedure required.<sup>36</sup>

**4.4.5** Amnesty International in their report, Hidden from View 2011, stated their concern that both physical and economic barriers to accessing the health services continue to affect poor, rural households. An important aspect of the problem was the apparent lack of improvement in transport systems and road infrastructure in rural communities. Amnesty International's own research and information from wider consultations indicated that access was still affected by the cost of transport for households reliant on welfare grants or precarious informal sector income. The conditions of subsidiary roads impassable to

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<sup>34</sup> South Africa Info. Healthcare in South Africa – Accessed 25 January 2012

<http://www.southafrica.info/about/health/health.htm>

<sup>35</sup> South Africa Info. Healthcare in South Africa – Accessed 25 January 2012

<http://www.southafrica.info/about/health/health.htm>

<sup>36</sup> Just Landed - Public Healthcare in South Africa – Accessed 25 January 2012

<http://www.justlanded.com/english/South-Africa/South-Africa-Guide/Health/Public-Healthcare>

South Africa Info. Healthcare in South Africa – Accessed 25 January 2012

<http://www.southafrica.info/about/health/health.htm>

emergency vehicles or group taxi vehicles and the infrequency and unreliability of public transport appeared to affect decision-making by poor households/individuals regarding seeking or keeping medical appointments, including for referrals to more distant facilities. They continued to require the borrowing of money for transport costs where repayment was often unfeasible. Access to or adherence to treatment also remained affected by the lack of availability of food for poor rural households, along with arbitrary processes and decision-making regarding eligibility for disability grants.<sup>37</sup>

- 4.4.6** The standard of private healthcare was considered the best on the African continent, particularly in the urban and coastal areas. The country had a number of private and public hospitals, nursing homes and clinics. The hospital facilities in Johannesburg were notably impressive. The medical facilities were of high quality, especially those in private hospitals and the general practitioners, the nurses and the medical staff were trained at top medical schools in the country. Some of the specialists obtained their medical degrees and underwent training in western countries like the US and the UK.<sup>38</sup>
- 4.4.7** Over the past two decades the HIV epidemic has had devastating effects on the health and well-being of communities in South Africa. However in the last several years, access to life-saving antiretroviral treatment (ART) and care through state and non-governmental programmes has expanded remarkably. By 2011 some 1, 500,000 people had been initiated on ART. Both the improved ability of people living with HIV to maintain their health and stronger government leadership have facilitated a decrease in social discrimination.<sup>39</sup>
- 4.4.8** However, challenges remained. People living in rural areas were still struggling to gain access to the food and services they required to maintain their health because of poverty and living in remote areas. In addition, women's ability to protect their health continued to be affected by discriminatory practices, economic marginalisation and violence. According to Amnesty International, the South African government had an obligation to ensure that there were no discrimination in access to health services as part of making the right to health a reality.<sup>40</sup>
- 4.4.9** During 2010 the government revised its eligibility criteria to extend ART to women, infants and persons also infected with TB who were not previously covered. Based on the new guidelines, eligible individuals could receive ARV treatment at all government clinics and hospitals. HIV-positive women who had not been eligible for ART under the previous guidelines received Prevention of Mother to Child Transmission regimens at 14 weeks of pregnancy and an annual smear test. HIV/AIDS activists, physicians, and opposition parties who had criticised the previous administration's denial of the causes and existence of HIV/AIDS, praised President Zuma's commitment to lead the fight against the deadly disease. To reduce maternal and infant mortality rates and HIV transmission from mother to newborn to a stated goal of less than 5 percent by 2011, the government worked with experts and the World Health Organisation to revise the 2008 Prevention of Mother to Child Transmission guidelines to provide enhanced regimens of ART therapy to pregnant women, as well as postnatal prophylaxis and early treatment at-risk or HIV-infected infants.<sup>41</sup>
- 4.4.10** A national mental health authority existed in South Africa which gave advice to the government on mental health policies and legislation, namely the national Directorate: Mental Health and Substance Abuse. All health services and budgets were decentralised to

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<sup>37</sup> Amnesty International 2011 - Hidden from View

<http://www.amnesty.org/en/library/asset/AFR53/005/2011/en/1b724400-aa85-4a9d-b460-72ce2cb72ec7/afr530052011en.pdf>

<sup>38</sup> COIS Report – South Africa – Section 24 [http://www.ukba.homeoffice.gov.uk/policy\\_andlaw/guidance/coi](http://www.ukba.homeoffice.gov.uk/policy_andlaw/guidance/coi)

<sup>39</sup> Amnesty International 2011 - Hidden from View

<http://www.amnesty.org/en/library/asset/AFR53/005/2011/en/1b724400-aa85-4a9d-b460-72ce2cb72ec7/afr530052011en.pdf>

<sup>40</sup> Amnesty International 2011 - Hidden from View

<http://www.amnesty.org/en/library/asset/AFR53/005/2011/en/1b724400-aa85-4a9d-b460-72ce2cb72ec7/afr530052011en.pdf>

<sup>41</sup> USSD 2010 – Section 6 <http://www.state.gov/documents/organization/160145.pdf>

the 9 provinces. There were wide variations between provinces in the budget and resources available for mental health care in South Africa and mental health services were organised in terms of catchment areas in all provinces. There were 3,460 outpatient mental health facilities; 80 day treatment facilities; 41 psychiatric inpatient units located in general hospitals with a total of 2.8 beds per 100,000 population; 63 community residential facilities with a total of 3.6 beds per 100,000 population and 23 mental hospitals providing a total of 18 beds per 100,000 population.<sup>42</sup>

- 4.4.11** Most provincial services endorsed the importance of integrating mental health into Primary Health Care (PHC) and some training initiatives had been undertaken for PHC nurses. A small percentage of the training for medical doctors was devoted to mental health and 21 per cent of undergraduate nursing were devoted to mental health. There was wide variability between provinces in the availability of assessment and treatment procedures for main mental health conditions. Primary health care nurses were allowed to prescribe but with restrictions (e.g. they were not allowed to initiate prescription but were allowed to continue prescription). PHC doctors were allowed to prescribe all medications on the essential medicines list. There was a wide variation in the availability of psychotropic medicine at PHC level.<sup>43</sup>
- 4.4.12** The Article 3 threshold will not be reached in the majority of medical cases and a grant of Discretionary Leave will not usually be appropriate. Where a case owner considers that the circumstances of the individual applicant and the situation in the country reach the threshold detailed in the IDI on Medical Treatment making removal contrary to Article 3 or 8 a grant of Discretionary Leave to remain will be appropriate. Such cases should always be referred to a Senior Caseworker for consideration prior to a grant of Discretionary Leave.

## **5. Returns**

- 5.1** There is no policy which precludes the enforced return to South Africa of failed asylum seekers who have no legal basis of stay in the United Kingdom.
- 5.2** Factors that affect the practicality of return such as the difficulty or otherwise of obtaining a travel document should not be taken into account when considering the merits of an asylum or human rights claim. Where the claim includes dependent family members their situation on return should however be considered in line with the Immigration Rules.
- 5.3** South African nationals may return voluntarily to any region of South Africa at any time in one of three ways: (a) leaving the UK by themselves, where the applicant makes their own arrangements to leave the UK, (b) leaving the UK through the voluntary departure procedure, arranged through the UK Immigration service, or (c) leaving the UK under one of the Assisted Voluntary Return (AVR) schemes.
- 5.4** The AVR scheme is implemented on behalf of the UK Border Agency by Refugee Action which will provide advice and help with obtaining any travel documents and booking flights, as well as organising reintegration assistance in South Africa. The programme was established in 1999, and is open to those awaiting an asylum decision or the outcome of an appeal, as well as failed asylum seekers. South African nationals wishing to avail themselves of this opportunity for assisted return to South Africa should be put in contact with Refugee Action Details can be found on Refugee Action's web site at:

[www.refugee-action.org/ourwork/assistedvoluntaryreturn.aspx](http://www.refugee-action.org/ourwork/assistedvoluntaryreturn.aspx)

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<sup>42</sup> World Health Organisation – Aims Report on Mental Health System in South Africa September 2007  
[http://www.who.int/mental\\_health/evidence/south\\_africa\\_who\\_aims\\_report.pdf](http://www.who.int/mental_health/evidence/south_africa_who_aims_report.pdf)

<sup>43</sup> World Health Organisation – Aims Report on Mental Health System in South Africa September 2007  
[http://www.who.int/mental\\_health/evidence/south\\_africa\\_who\\_aims\\_report.pdf](http://www.who.int/mental_health/evidence/south_africa_who_aims_report.pdf)



Country Specific Litigation Team  
Immigration Group  
UK Border Agency  
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