



OPERATIONAL GUIDANCE NOTE

SOUTH AFRICA

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1. Introduction

1.1 This document provides UK Border Agency case owners 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. Case owners must refer to the relevant Asylum Instructions for further details of the policy on these areas.

1.2 Case owners 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 case owners 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. Where a claim for asylum or Humanitarian Protection is being considered, case owners must consider any elements of Article

8 of the ECHR in line with the provisions of Appendix FM (Family Life) and paragraphs 276 ADE to 276DH (Private Life) of the Immigration Rules. Where a person is being considered for deportation, case owners must consider any elements of Article 8 of the ECHR in line with the provisions of Part 13 of the Immigration Rules. Case owners must also consider if the applicant qualifies for Discretionary Leave in accordance with the published policy.

- 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 and the prima face evidence is that the current underlying situation in the country remains the same or similar to that considered when the country was first designated. Asylum and human rights claims must be considered on their individual merits. However, if, following consideration, a claim from an applicant who is entitled to reside in South Africa is refused case owners must certify the claim 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.

2. Country assessment

- 2.1** Caseowners should refer the relevant COI Service country of origin information material. 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://fcohdreport.readandcomment.com/read-and-download-the-report/>

2.2 Actors of protection

- 2.2.1** Case owners must refer to section 7 of the Asylum Instruction - [Considering the asylum claim and assessing credibility](#). To qualify for asylum, an individual must have a fear of persecution for a Convention reason and be able to demonstrate that their fear of persecution is well founded and that they are unable, or unwilling because of their fear, to seek protection in their country of origin or habitual residence. Case owners must 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.
- 2.2.2** 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. The Directorate for Priority Crime Investigation, also known as “the Hawks,” coordinates 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.¹

¹ US State Department Human Rights Report 2011; South Africa, 24 May 2012, Section 1 Role of the Police and Security Apparatus, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

- 2.2.3** The South Africa Police Service (SAPS) is under the civilian control of the Department of Safety and Security and is primarily responsible for maintaining internal security and law and order. Despite constitutional prohibitions, there were reports of torture and the use of excessive force by SAPS members during interrogation, arrest, and detention. Recent years have seen an increase in extrajudicial killings by police (and vigilante) of civilians after the Zuma administration granted security forces more latitude to use deadly force against criminals ahead of the 2010 FIFA World Cup.² Amnesty International, reporting on the powers and ability of the Commission of Inquiry into the deaths of 44 people near Lonmin's Marikana mine in August 2012, noted that it considered that the majority had resulted from excessive use of force by police and that "Amnesty International has regularly reported on cases of excessive use of force and torture by the South African police".³
- 2.2.4** South Africa has one of the highest violent-crime rates in the world. In 2011, however, rates of murder (31.9 per 100,000), attempted murder (31 per 100,000), assault (397.3 per 100,000), carjacking (21.3 per 100,000), and various forms of robbery all declined significantly from previous years. At the same time, rape and sexual assault rates increased. The country's high crime rates, along with concerns about police capabilities, have fuelled regular incidents of vigilantism and a burgeoning private-security industry. The government hired and trained an additional 40,000 police officers in advance of the World Cup, most of who remained on the job to bolster the undermanned police force. Civic groups and opposition parties have routinely accused the government of doctoring crime statistics and of failing to release sufficiently up-to-date statistics to the public.⁴
- 2.2.5** SAPS provided annual training in corruption prevention, human rights, and ethics; it also provided officers with access to social workers, psychologists, and chaplains.⁵
- 2.2.6** South Africans may report alleged rights violations by the SAPS to the Independent Complaints Directorate (ICD). Between April 2010 and March 2011, the ICD received 5,869 complaints of abuses, including deaths in police custody (797), criminal offences (2,493), and general misconduct (2,477). Including a backlog of over 2,500 cases from 2009-10, the ICD fully investigated 82 percent of death cases, 83 percent of criminal cases, and 92 percent of misconduct cases, resulting in 30 criminal convictions for deaths in custody and 29 for other criminal cases—all of which represent marked increases over previous years.⁶
- 2.2.7** The police oversight body, the ICD, reported a 7 per cent decline between April 2010 and March 2011 in recorded deaths in custody and resulting from "police action". However, KwaZulu-Natal province continued to have a high rate of such incidents, with more than one third of the recorded national total of 797 deaths.⁷

² Freedom House, Countries at the crossroads 2012; South Africa, 20 September 2012

<http://www.freedomhouse.org/report/countries-crossroads/2012/south-africa-0>

³ Amnesty International, South Africa's Marikana Inquiry must be enabled to operate effectively, 26 September 2012 <http://www.amnesty.org/en/for-media/press-releases/south-africa-marikana-inquiry-must-be-enabled-operate-effectively-2012-09-2>

⁴ Freedom House, Countries at the crossroads 2012; South Africa, 20 September 2012

<http://www.freedomhouse.org/report/countries-crossroads/2012/south-africa-0>

⁵ US State Department Human Rights Report 2011; South Africa, 24 May 2012, Section 1 Role of the Police and Security Apparatus, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

⁶ Freedom House, Countries at the crossroads 2012; South Africa, 20 September 2012

<http://www.freedomhouse.org/report/countries-crossroads/2012/south-africa-0>

⁷ Amnesty International, Annual report 2012; South Africa, 24 May 2012

<http://www.amnesty.org/en/region/south-africa/report-2012>

- 2.2.8** Members of police special units, particularly Organised Crime, were implicated in incidents of suspicious deaths allegedly resulting from torture or extrajudicial executions. Victims' families faced obstacles in accessing justice because of poor official investigations, lack of legal aid funds or intimidation. In December, media exposure of information about alleged assassinations by members of the Cato Manor Organised Crime Unit led the ICD to establish an investigation team to review the evidence.⁸
- 2.2.9** Police are badly underpaid, and corruption in the SAPS is a significant problem. Such corruption is rarely reported: according to Global Integrity, only about 6 percent of criminal complaints to the ICD were related to corruption. Nonetheless, high-level police officials have been successfully prosecuted for corruption and criminal conduct. For example, in July 2010, former police commissioner Jackie Selebi was sentenced to 15 years in prison for accepting a large bribe from an organised crime boss and Ekurhuleni metro Police Chief Robert McBride was sentenced to five years in prison for drunk driving and "defeating the ends of justice" in September 2011.⁹
- 2.2.10** The law provides criminal penalties for official corruption, and the government continued efforts to curb corruption; however, the World Bank's most recent Worldwide Governance Indicators reflected that corruption remained a problem. In August 2010 President Zuma announced the start of an investigation by the Special Investigating Unit (SIU) of five ministries, two provincial departments, and the South African Social Security Agency. The investigation was ongoing at year's end.¹⁰
- 2.2.11** In June 2012, the editor of the Institute for Security Studies Journal 'South African Crime Quarterly' reported that "Over the past few years the South African Police Service (SAPS) has lurched from crisis to crisis. It seems as though each week brings fresh allegations of mismanagement, corruption and political interference in the work of the police. The allegations of poor management practices, weak control and abuse seem particularly prevalent at the highest management levels".¹¹ The International Commission of Jurists (ICJ) submitted to the UN Universal Periodic Review that "police abuses had rarely been investigated and few perpetrators effectively punished, leading to a state of near-impunity. As a result, victims often had little faith in the system".¹²
- 2.2.12** A number of domestic and international human rights groups generally operated without government restriction, investigating and publishing their findings on human rights cases. Government officials were generally cooperative and responsive to their views. The South African Human Rights Commission (SAHRC), which was created by the government but operates independently, is responsible for promoting the observance of fundamental human rights at all levels of government and throughout the general population. The SAHRC also has the authority to conduct

⁸ Amnesty International, Annual report 2012; South Africa, 24 May 2012

<http://www.amnesty.org/en/region/south-africa/report-2012>

⁹ Freedom House, Countries at the crossroads 2012; South Africa, 20 September 2012

<http://www.freedomhouse.org/report/countries-crossroads/2012/south-africa-0>

¹⁰ US State Department Human Rights Report 2011; South Africa, 24 May 2012, Section 4 Official Corruption and Government Transparency

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

¹¹ Institute of Security Studies, South African Crime Quarterly, June 2012, Editorial

<http://www.issafrica.org/uploads/CQno40June12.pdf>

¹² United Nations Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, 12 March 2012, paragraph 48 <http://www.ohchr.org/EN/HRBodies/UPR/Pages/ZASession13.aspx>

investigations, issue subpoenas, and hear testimony under oath. The SAHRC enjoyed support from the government without interference, and the government reacted positively to SAHRC reports. During the year the SAHRC issued reports on child rights and the effects of mining on surrounding communities, as well as a public guide on using the Access to Information Bill.¹³

2.2.13 The constitution and law provide 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 one million of the estimated two million criminal cases reported annually were never resolved. According to the group, a number of problems contributed to the 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. The government operated 63 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.¹⁴

2.2.14 There is an independent and impartial judiciary in civil matters. There also was access to the courts to bring lawsuits seeking damages for, or cessation of, a human rights violation. The African Court on Human and Peoples' Rights, in partnership with the government, conducted a sensitization visit on October 25 to raise public awareness and encourage appeals to or other contact with the court.¹⁵

2.3 Internal relocation.

2.3.1 Case owners must refer to the Asylum Instruction on [Internal Relocation](#) and in the case of a female applicant, the AI on [Gender Issues in the Asylum Claim](#), for guidance on the circumstances in which internal relocation would be a 'reasonable' option, so as to 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. Case owners must refer to the Gender Issues in the asylum claim where this is applicable. The fact that there may be technical obstacles to return, such as re-documentation problems, does not prevent internal relocation from being applied.

2.3.2 Very careful consideration must be given to whether internal relocation would be an

¹³ US State Department Human Rights Report 2011; South Africa, 24 May 2012, Section 5 Governmental Attitude Regarding International and Nongovernmental Investigation of Alleged Violations of Human Rights <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

¹⁴ US State Department Human Rights Report 2011; South Africa, 24 May 2012, Section 1 1 e. Denial of Fair Public Trial <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

¹⁵ US State Department Human Rights Report 2011; South Africa, 24 May 2012, Section 1 Civil Judicial Procedures and Remedies <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

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 unreasonable to expect them to do so, then asylum or humanitarian protection should be refused. Caseowners also need to consider the reasonableness of internal relocation taking full account of the individual circumstances of the claimant, including their age, gender, health, ethnicity, religion and support networks. These factors should be considered alongside the security, human rights and socio-economic conditions in the proposed area of relocation, including livelihood opportunities and the claimant's ability to sustain themselves.

2.3.3 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.¹⁶

2.4 Country guidance caselaw

Supreme Court. RT (Zimbabwe) & others v Secretary of State for the Home Department [2012] UKSC 38 (25 July 2012) The Supreme Court ruled that the rationale of the decision in HJ (Iran) applies to cases concerning imputed political opinion. Under both international and European human rights law, the right to freedom of thought, opinion and expression protects non-believers as well as believers and extends to the freedom not to hold and not to express opinions. Refugee law does not require a person to express false support for an oppressive regime, any more than it requires an agnostic to pretend to be a religious believer in order to avoid persecution. Consequently an individual cannot be expected to modify their political beliefs, deny their opinion (or lack thereof) or feign support for a regime in order to avoid persecution.

Supreme Court. HJ & HT v SSHD [2010] UKSC31 7 July 2010 The Supreme Court hereby established the test which should be applied when assessing a claim based on fear of persecution because of an applicant's sexual orientation which is as follows:

- (i) Is the applicant gay or someone who would be treated as gay by potential persecutors in the country of origin?
- (ii) If yes, would gay people who live openly be liable to persecution in that country of origin?
- (iii) How would the applicant behave on return? If the applicant would live openly and be exposed to a real risk of persecution, he has a well-founded fear of persecution even if he could avoid the risk by living discreetly.
- (iv) If the applicant would live discreetly, why would he live discreetly? If the applicant would live discreetly because he wanted to do so, or because of social pressures (e.g. not wanting to distress his parents or embarrass his friends) then he is not a refugee. But if a material reason for living discreetly would be the fear of persecution that would follow if he lived openly, then he is a refugee. (paragraph 82)

¹⁶ US State Department Human Rights Report 2011; South Africa, 24 May 2012, Section 2, d. Freedom of Movement, Internally Displaced Persons, Protection of Refugees, and Stateless Persons <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

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. All Asylum Instructions can be accessed via the Horizon intranet site. The instructions are also published externally on the Home Office internet site at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/>

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 Instruction '[Considering the asylum claim and assessing credibility](#)').

3.3 For any asylum cases which involve children either as dependents or as the main applicants, case owners must have due regard to Section 55 of the Borders, Citizenship and Immigration Act 2009. The UK Border Agency instruction '[Every Child Matters: Change for Children](#)' sets out the key principles to take into account in all Agency activities.

3.4 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 does not qualify for asylum, or Humanitarian Protection, consideration must be given to any claim as to whether he/she qualifies for leave to remain on the basis of their family or private life. Case owners must also consider if the applicant qualifies for Discretionary Leave, either on the basis of the particular categories detailed in Section 4 or on their individual circumstances.

Consideration of Articles 15(a) and (b) of the Directive/Articles 2 and 3 ECHR.

3.5 An assessment of protection needs under Article 15(c) of the Directive should only be required if an applicant does not qualify for refugee protection, and is ineligible for subsidiary protection under Articles 15(a) and (b) of the Directive (which broadly reflect Articles 2 and 3 of the ECHR). Case owners are reminded that an applicant who fears a return to a situation of generalised violence may be entitled to a grant of asylum where a connection is made to a Refugee Convention reason or to a grant of Humanitarian Protection because the Article 3 threshold has been met.

Other severe humanitarian conditions and general levels of violence

3.6 There may come a point at which the general conditions in the country – for

example, absence of water, food or basic shelter – are unacceptable to the point that return in itself could, in extreme cases, constitute inhuman and degrading treatment. Decision makers need to consider how conditions in the country and locality of return, as evidenced in the available country of origin information, would impact upon the individual if they were returned. Factors to be taken into account would include age, gender, health, effects on children, other family circumstances, and available support structures. It should be noted that if the State is withholding these resources it could constitute persecution for a Convention reason and a breach of Article 3 of the ECHR.

- 3.7** As a result of the [Sufi & Elmi v UK](#) judgment in the European Court of Human Rights (ECtHR), where a humanitarian crisis is predominantly due to the direct and indirect actions of the parties to a conflict, regard should be had to an applicant's ability to provide for his or her most basic needs, such as food, hygiene and shelter and his or her vulnerability to ill-treatment. Applicants meeting either of these tests would qualify for Humanitarian Protection.

Credibility

- 3.8** 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 'Section 4 – Making the Decision in the Asylum Instruction [‘Considering the asylum claim and assessing credibility’](#). Case owners 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 UK Border Agency 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 matches 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.

3.9 Women victims of domestic violence

- 3.9.1** 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.

- 3.9.2 Treatment.** The 2011 US State Department report notes that domestic violence was pervasive and included physical, sexual, emotional, and verbal abuse, as well as harassment and stalking by former partners. The law facilitates the serving of protection orders on abusers, requires the police to take 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.¹⁷

- 3.9.3** According to NGOs, an estimated one in four women was in an abusive relationship, but few reported it. A 2009 report released by the Medical Research Council (MRC) found that more than two-fifths of men interviewed in KwaZulu-Natal and Eastern Cape provinces had been physically violent toward an intimate partner. In a 2011 report conducted by the MRC in Gauteng Province, more than 50.5

¹⁷ US State Department Human Rights Report 2011; South Africa, 24 May 2012, Section 6 Women <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

percent of men admitted to being physically violent towards women during their lifetime. Thuthuzela Care Centre (TCC) counsellors also alleged that doctors, police officers, and judges often treated abused women poorly.¹⁸

- 3.9.4** Domestic violence and rape, both criminal offenses, are serious problems. South Africa has one of the world's highest rates of sexual abuse. The country's high rate of HIV infection, as well as various traditional beliefs that HIV and lesbianism can be "cured" by sexual intercourse (the former via sex with a female virgin), makes incidents of rape particularly worrisome. Despite the government's operation of women's shelters and sexual offenses courts, reporting and investigating of these crimes are hampered by a lack of resources and societal attitudes. The 2007 Sexual Offenses Act extended the act of rape to include the victimization of men and boys and codified the offences of rape and sexual violence. Still, a 2009 study by the Medical Research Council found that one in four South African men admit to raping at least one woman, while a 2010 survey by the South African Medical Research Council found that over 37 percent of men in Gauteng admitted to rape. More than 56,000 women reported having been raped from March 2010 to March 2011, with many more cases going unreported.¹⁹
- 3.9.5** According to a report from the Independent Police Investigative Directorate, based on audits undertaken at selected police stations, the percentage of police stations which are fully compliant with the Domestic Violence Act (DVA) remains low. Of the 263 stations visited during the reporting period [July 2011 to March 2012], only 14 percent were fully compliant with the DVA.²⁰
- 3.9.6** According to the World Health Organisation, 60 000 women and children in South Africa are victims of domestic violence every month. The country has the highest incidence of domestic violence in the world - and those are just the cases that are reported. Lindsay Ziehl, senior supervisor of Yokhuselo Haven in Port Elizabeth, which provides safety and shelter for abused women and their children states that she believes "the statistics could be as high as 100 000 per month, with so many people not reporting domestic violence."²¹
- 3.9.7** In April 2011, the UN Committee on the Elimination of Discrimination against Women expressed serious concern "at the inordinately high prevalence of sexual violence against women and girls, and widespread domestic violence" which persisted in South Africa despite a number of positive policy, legislative and administrative measures having been taken to try and combat violence against women. The Committee concluded that "such violence appears to be socially normalized, legitimized and accompanied by a culture of silence and impunity. It is further concerned at the low levels of prosecution and conviction, and at reports indicating that some police officers fine rape perpetrators in lieu of reporting the cases. The Committee regrets the lack of information on the impact of the measures and programmes in place to reduce incidences of all forms of violence against women and girls. The Committee is also concerned that social support

¹⁸ US State Department Human Rights Report 2011; South Africa, 24 May 2012, Section 6 Women <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

¹⁹ Freedom House, Countries at the crossroads 2012: South Africa, 20 September 2012 <http://www.freedomhouse.org/report/countries-crossroads/2012/south-africa-0>

²⁰ South African Press Association (via All Africa), South Africa: Police Fail Domestic Violence Victims – MPs, 7 August 2012 <http://allafrica.com/stories/201208071003.html>

²¹ Full Stop Communication (via All Africa, South Africa): Racing Against Domestic Violence, 26 March 2012, <http://allafrica.com/stories/201203271076.html>

services, including shelters, are inadequate due to inappropriate budgetary allocations”.²²

- 3.9.8** Human Rights Watch noted that “the lack of success in addressing gender-based violence creates a climate of impunity and inhibits women’s ability to access justice”.²³ Amnesty International reported that “despite South Africa’s normative framework guaranteeing women’s right to equality, discrimination against women and high levels of sexual and gender-based violence persist. Women’s access to justice and to remedies provided for under progressive statutory law continued to be obstructed by lack of capacity and political will.”²⁴
- 3.9.9** Several studies indicate that the failure of the criminal justice system to investigate and punish sexual violence has created a culture of impunity for rape. The rulings of magistrates and judges sometimes trivialize the gravity of rape. Judge Mogoeng Mogoeng’s nomination and subsequent appointment as chief justice by President Jacob Zuma could erode the gains that have been made in addressing violence against women. Many civil society groups have accused Mogoeng of undermining the rights of women and girls by issuing lenient sentences in cases of rape and domestic violence, and invoking in his rulings myths about rape that often blame the victims and excuse perpetrators.²⁵
- 3.9.10** The government financed shelters for abused women, but more were needed, particularly in rural areas. The government continued to conduct domestic violence awareness campaigns. In honour of Women’s Month in August 2011, the government hosted numerous events focused on empowering women in business, government, health, sports, and the arts.²⁶
- 3.9.11** In 2011 South African Government information reported that there were 96 shelters in South Africa to deal with victims of domestic violence.²⁷

See also: [Actors of protection](#) (section 2.2 above)

[Internal relocation](#) (section 2.3 above)

[Caselaw](#) (section 2.4 above)

3.9.12 Conclusion. Domestic violence is widespread in South Africa and the failure of the criminal justice system to investigate and punish sexual violence has created a culture of impunity for gender based violence. Where an applicant is not likely to receive effective protection internal relocation may be an option if, in the particular circumstances of the applicant’s case, it is not considered unduly harsh for them to relocate.

²² United Nations, Concluding observations of the Committee on the Elimination of Discrimination against Women; South Africa, 5 April 2011, paragraph 24 <http://www.unhcr.org/refworld/docid/4eeb5f8e.html>

²³ Human Rights Watch – We’ll Show You You’re A Woman – South Africa, December 2011, Gender-Based Violence <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf>

²⁴ Human Rights Watch – We’ll Show You You’re A Woman – South Africa, December 2011, Gender-Based Violence paragraph 30 <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf>

²⁵ Human Rights Watch, World Report 2012; South Africa, 22 January 2012 <http://www.hrw.org/world-report-2012/world-report-2012-south-africa>

²⁶ US State Department Human Rights Report 2011; South Africa, 24 May 2012, Section 6 Women <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dld=186244>

²⁷ South African Government Information, 16 Days of Activism: did you know?, 5 August 2011 http://www.info.gov.za/events/national/16days_didyouknow.htm

3.10 Lesbians, gay men, bisexual and transgender (LGBT) persons

- 3.10.1** 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.
- 3.10.2 Treatment.** The post-apartheid constitution outlaws discrimination based on sexual orientation. The 2011 U.S. State Department report notes that 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 same-sex sexual activity, with 80 percent of respondents believing sex between two persons of the same gender to be “wrong” and “un-African.”²⁸
- 3.10.3** South Africa has one of the world’s most liberal legal environments for homosexuals. The 2006 Civil Unions Act legalized same-sex marriage, and a 2002 Constitutional Court ruling held that homosexual couples should be allowed to adopt children. Nevertheless, homosexuals are routinely subject to physical attacks, including an increase in instances of so-called “corrective rape,” whereby lesbians are raped by men seeking to “fix” their sexual orientation.²⁹
- 3.10.4** According to the 2011 US State Department report, rights groups reported that the LGBT community was subject to societal abuses including hate crimes, gender-based violence targeting lesbians, and killings. The Triangle Project, the country’s largest lesbian and gay rights organization, reported it received each week in Cape Town on average 10 new cases of lesbians being targeted for “corrective” rape.³⁰
- 3.10.5** A December 2011 HRW report highlighted violence and discrimination faced by lesbians and transgender men. The report documented cases of “secondary victimisation” of lesbian victims, including cases where police harassed, ridiculed, and assaulted victims of homophobic violence when they reported crimes.³¹
- 3.10.6** A 2011 Human Rights Watch report notes that while there have been significant legal advances in recognising the rights of the LGBT community, lesbians, gay men, and transgender people in South Africa continue to face hostility and violence. Social attitudes lag: recent social surveys demonstrate a wide gap between the ideals of the constitution and public attitudes toward such individuals. 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 refusing to date men). And constitutional protections are

²⁸ US State Department Human Rights Report 2011; South Africa, 24 May 2012 Section 6 Societal Abuses, Discrimination, and Acts of Violence Based on Sexual Orientation and Gender Identity
<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

²⁹ Freedom House, Countries at the crossroads 2012; South Africa, 20 September 2012
<http://www.freedomhouse.org/report/countries-crossroads/2012/south-africa-0>

³⁰ US State Department Human Rights Report 2011; South Africa, 24 May 2012 Section 6 Societal Abuses, Discrimination, and Acts of Violence Based on Sexual Orientation and Gender Identity
<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

³¹ US State Department Human Rights Report 2011; South Africa, 24 May 2012 Section 6 Societal Abuses, Discrimination, and Acts of Violence Based on Sexual Orientation and Gender Identity
<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

greatly weakened by the state's failure to adequately enforce them.³²

3.10.7 The same Human Rights Watch report documents that there was 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 is 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.³³ The few who do report abuse and violence often face hostility, and discrimination from police and, sometimes, from other service providers.³⁴ Human Rights Watch further considers that "The impunity with which lesbians and transgender people are attacked indicates a failure of the South African Police Services to prevent violence against the population at large and against women and transgender people in particular".³⁵ Amnesty International submitted to the Universal Periodic Review that LGBT rights "continue to be undermined by prejudice, socially conservative and patriarchal attitudes and discriminatory practices. Similar attitudes and practices on the part of many law enforcement officials create barriers to access to justice for victims and contribute to a climate of impunity for crimes of sexual violence, assault and murder against members of this community."³⁶

3.10.8 The economic and social position of lesbian, gay, bisexual, or transgender people in South Africa has a significant impact on their experience. Those who are able to afford a middleclass lifestyle may not experience the same degree of prejudice and discrimination on the basis of sexual orientation. But for those who are socially and economically vulnerable, the picture is often grim. Lack of access to such things as secure housing and transport options greatly increases people's vulnerability to violence.³⁷

3.10.9 During the 17th UN Human Rights Council session, South Africa successfully pushed through the adoption of the first-ever UN resolution on sexual orientation and gender identity. This action affirmed South Africa's endorsement of the rights of lesbian, gay, bisexual, and transgender (LGBT) people worldwide, but does not address the concerns of the LGBT community at home. A 2011 Human Rights Watch report found that, despite the country's progressive legislation, discrimination on the grounds of sexual orientation and gender identity is widespread in the society and evident in the behaviour of government officials, including the police and

³² Human Rights Watch – We'll Show You You're A Woman – South Africa, December 2011, Summary <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf>

³³ Human Rights Watch – We'll Show You You're A Woman – South Africa, December 2011, Summary and Police Inefficiency and Complicity <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf>

³⁴ Human Rights Watch – We'll Show You You're A Woman – South Africa, December 2011, Summary <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf>

³⁵ Human Rights Watch – We'll Show You You're A Woman – South Africa, December 2011, I. The Role of Police <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf>

³⁶ Amnesty International, South Africa: Key Human Rights Concerns in South Africa: Amnesty International's Submission to the UN Universal Periodic Review, May-June 2012, 7 February 2012

<http://www.amnesty.org/es/library/asset/AFR53/003/2012/en/ad0536a0-b604-489f-8ac2-0dca104348da/af530032012en.pdf>

³⁷ Human Rights Watch – We'll Show You You're A Woman – South Africa, December 2011, Summary <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf>

teachers. Black lesbians and transgender men are especially vulnerable and live under constant threat of verbal, physical, and sexual violence from acquaintances and strangers. Civil society pressure following recent cases of rape, torture, and murder of black lesbians and transgender people has prompted the Department of Justice and Constitutional Development to form a multi-sectoral task team to formulate legal and judicial responses to violence against members of the LGBT community.³⁸

3.10.10 In May 2011 the government formed a task force led by the Department of Justice and Constitutional Development to consult with human rights advocates and LGBT rights activists on how to build the government's capacity to respond to homophobic violence. The task team includes representatives from several government departments as well as civil society organisations. The task force established a number of goals, including awareness training for law enforcement and victim service providers, statistical tracking, and possible new legislation.³⁹ The Task Team was still meeting in November 2011, but without clear results. There was also slow progress in the development of a draft law to prosecute hate crimes.⁴⁰

3.10.11 According to Amnesty International's 2012 report, hate-motivated violence, in particular against lesbian women, caused increasing public concern. In December 2011, a lesbian, gay, bisexual and transgender (LGBT) rights organisation, OUT Well-Being, gave expert evidence about the impact of hate crimes on victims and the wider community during the sentencing phase of a trial in the Germiston magistrate's court. The defendants had been found guilty of assaulting a gay man and the court noted that the accused had been motivated by hatred and disrespect for gay people.⁴¹

3.10.12 Freedom House reports that President Zuma's appointment of Judge Mogoeng Mogoeng as chief justice in September 2011 was opposed by a group of legal advocacy groups and opposition parties, as well by as the Congress of South African Trade Unions.⁴² Mogoeng is an ordained minister who has expressed controversial opinions concerning homosexuality and rape.⁴³

See also: [Actors of protection](#) (section 2.2 above)

[Internal relocation](#) (section 2.3 above)

[Caselaw](#) (section 2.4 above)

3.10.13 Conclusion. While South Africa's constitution outlawed discrimination based on sexual orientation, and same-sex marriages have been legalised, LGBT persons remain vulnerable to societal violence, discrimination and hostility. This can in

³⁸ Human Rights Watch, World report 2012; South Africa, 22 January 2012 <http://www.hrw.org/world-report-2012/world-report-2012-south-africa>

³⁹ US State Department Human Rights Report 2011; South Africa, 24 May 2012 Section 6 Societal Abuses, Discrimination, and Acts of Violence Based on Sexual Orientation and Gender Identity <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

⁴⁰ Amnesty International, Annual Report 2012; South Africa, 24 May 2012 <http://www.amnesty.org/en/region/south-africa/report-2012#section-4-9>

⁴¹ Amnesty International, Annual Report 2012; South Africa, 24 May 2012 <http://www.amnesty.org/en/region/south-africa/report-2012#section-4-9>

⁴² Freedom House, Countries at the crossroads 2012; South Africa, 20 September 2012 <http://www.freedomhouse.org/report/countries-crossroads/2012/south-africa-0>

⁴³ Freedom House, Countries at the crossroads 2012; South Africa, 20 September 2012 <http://www.freedomhouse.org/report/countries-crossroads/2012/south-africa-0>

individual cases amount to persecution and the South African authorities are unlikely to be able to provide gay men, lesbians, bisexuals and transgender persons or those perceived as such with effective protection.

- 3.10.14** Where persons identifying as LGBT 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.
- 3.10.15** 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.
- 3.10.16** 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.
- 3.10.17** 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 live discreetly because of their well founded fear of persecution due to their sexual orientation.

3.11 Prison Conditions

- 3.11.1** 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.
- 3.11.2** 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.
- 3.11.3 Consideration** The majority of the 249 operational prisons did not meet international standards and did not always meet the country's minimum legal requirements. The Judicial Inspectorate of Correctional Services (JICS) received 2,276 complaints of assaults on prisoners by correctional officers for April 2010 through March 2011, including 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 879 prison deaths during the

reporting period. Of these, 831 were from natural causes, including HIV/AIDS; the remaining deaths were the result of suicides, assaults, or accidents.⁴⁴

- 3.11.4** Police torture and physical abuse allegedly occurred during arrest, interrogation, and detention, and sometimes resulted in death.⁴⁵ In 2012, Freedom House reported that “Despite constitutional prohibitions and government countermeasures, there have been many reports of police torture and excessive force during arrest, interrogation, and detention”.⁴⁶ There were reports of prisoners being physically and sexually abused by both fellow prisoners and prison employees”.⁴⁷ It further notes that “excessive pre-trial detention and negligent conditions for pre-trial detainees are major problems: while most prisoners wait an average of 3 months before trial, some must wait up to 2 years”.⁴⁸ Amnesty International also notes that “Members of police special units, particularly Organized Crime, were implicated in incidents of suspicious deaths allegedly resulting from torture or extrajudicial executions.”⁴⁹ The Omega Research Foundation reported to the UN Universal Periodic Review in March 2012 that it was concerned the Government had made provision for the use of electro-shock devices in correctional centres.⁵⁰
- 3.11.5** The JICS reported there were 160,545 prisoners in facilities designed to hold 118,154. In a report to the parliament in October 2010, inspecting judge Deon van Zyl reported that 18 prisons were critically overcrowded, some by as much as 254 percent, while others held less than their capacity. Of the 160,545 prisoners, 3,750 were female and 1 percent were below the age of 18. 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, although this standard was seldom met.⁵¹
- 3.11.6** The government took measures to reduce overcrowding by transferring prisoners to facilities that were not at capacity. The JICS reported the prisoner transfer program resulted in a reduction in the total number of prisons rated as “critically overcrowded” (occupied at more than 200 percent capacity). During the year there were 18 critically overcrowded prisons, down from 45 in 2005.⁵²
- 3.11.7** The JICS reported that the Department of Correctional Services (DCS) improved the quality of its investigations and reporting on the circumstances surrounding the deaths of inmates. The department now requires that reporting forms be fully and

⁴⁴ US State Department Human Rights Report 2011: South Africa, 24 May 2012 Section 1, c Prison and Detention Center Conditions <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

⁴⁵ US State Department Human Rights Report 2011: South Africa, 24 May 2012, Section 1 c. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

⁴⁶ Freedom House, Freedom in the World South Africa, May 2012

<http://www.freedomhouse.org/report/freedom-world/2012/south-africa>

⁴⁷ Freedom House, Countries at the Crossroads 2012 - South Africa, 20 September 2012

<http://www.freedomhouse.org/report/countries-crossroads/2012/south-africa-0>

⁴⁸ Freedom House, Countries at the Crossroads 2012 - South Africa, 20 September 2012

<http://www.freedomhouse.org/report/countries-crossroads/2012/south-africa-0>

⁴⁹ Amnesty International, Annual Report 2012, 24 May 2012 <http://www.amnesty.org/en/region/south-africa/report-2012>

⁵⁰ United Nations Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, 12 March 2012, paragraph 37 <http://www.ohchr.org/EN/HRBodies/UPR/Pages/ZASession13.aspx>

⁵¹ US State Department Human Rights Report 2011: South Africa, 24 May 2012 Section 1, c Prison and Detention Center Conditions <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

⁵² US State Department Human Rights Report 2011: South Africa, 24 May 2012 Section 1, c Prison and Detention Center Conditions <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

properly filled out by medical officers. The JICS stated that these requirements raise the quality of initial reporting done by prison wardens, and lessen the likelihood that a death caused by neglect will be reported as “natural.”⁵³

- 3.11.8** Conditions for female prisoners were not reported to be worse than those for male prisoners.⁵⁴
- 3.11.9** The 2010-11 DCS annual report indicated 19.1 percent of sentenced prisoners who were tested were HIV-positive. There were 21 health centres within prisons dispensing antiretroviral (ARV) therapy to 9 percent of correctional facilities during the year. Correctional facilities without such centres were supposed to utilize public clinics for ARV therapy; however, this seldom occurred. There were no HIV screening programs on intake or discharge of prisoners, but the DCS conducted HIV prevention programs in prisons, including a condom distribution program and awareness sessions. During the year nongovernmental organizations (NGOs) such as The Aurum Institute and New Start supported correctional centres with HIV treatment and prevention services such as HIV testing and ARV therapy. The DCS annual report noted that 6,422 HIV awareness sessions were held in prisons throughout the country during 2011. The JICS reported that the number of complaints filed by inmates regarding health care has gone up 255 percent in recent years. In 2007 there were 11,227 complaints, and in 2010 there were 39,868.⁵⁵
- 3.11.10** All detainees in police cells were provided with felt mattresses and blankets, and most cells had toilets and basins, but there were seldom chairs, and cells often had inadequate light and ventilation.⁵⁶
- 3.11.11** Juvenile detainees were held in separate detention facilities; however, children up to three years old were sometimes held with their mothers. In 2010 the DCS launched the Imbeleko program to provide a home-like environment for children below the age of two and to place children above that age in facilities with sustainable family structures. Pretrial detainees generally were held with convicted prisoners. In 2010 the government took measures mandated in the Child Justice Act of 2008 to lower the number of children held in detention. These measures included diverting incarcerated children to secure care facilities, and increasing access to adequate legal representation. Between May and October 2010, the government reduced the number of children being held in detention from 1,155 to 922. Civil society organisations asserted the government needed to better capture accurate statistics on child rights issues so they could be properly addressed.⁵⁷
- 3.11.12** 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

⁵³ US State Department Human Rights Report 2011: South Africa, 24 May 2012 Section 1, c Prison and Detention Center Conditions <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

⁵⁴ US State Department Human Rights Report 2011: South Africa, 24 May 2012 Section 1, c Prison and Detention Center Conditions <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

⁵⁵ US State Department Human Rights Report 2011: South Africa, 24 May 2012 Section 1, c Prison and Detention Center Conditions <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

⁵⁶ US State Department Human Rights Report 2011: South Africa, 24 May 2012 Section 1, c Prison and Detention Center Conditions <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

⁵⁷ US State Department Human Rights Report 2011: South Africa, 24 May 2012 Section 1, c Prison and Detention Center Conditions <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

documented the results of such investigations in a publicly accessible manner. The government investigated and monitored prison and detention centre conditions.⁵⁸

- 3.11.13** The DCS did not have an ombudsman to consider such matters as alternatives to incarceration for nonviolent offenders to alleviate inhumane overcrowding; addressing the status and circumstances of confinement of juvenile offenders; or improving pretrial detention, bail, and record keeping procedures to ensure prisoners did not serve beyond maximum sentences for charged offenses.⁵⁹
- 3.11.14** The JICS, an independent office under the inspecting judge, appoints an independent visitor for each correctional centre to monitor prison conditions. In 2010 the independent visitors collectively recorded 8,346 visits to the 249 prisons, during which time they conducted private consultations with 78,883 inmates. Visits were recorded 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.⁶⁰
- 3.11.15** The government permitted some independent monitoring of prison conditions, including visits by human rights organizations to some facilities. Human rights organizations were allowed to visit prisoners if they had a registered attorney acting as legal representative for the prisoner; organizations could also request permission to visit prisons to conduct specific research. The government permitted International Committee of the Red Cross visits, but none were conducted during the year.⁶¹
- 3.11.16 Conclusion.** Whilst prison conditions in South Africa are poor, conditions are unlikely to reach the Article 3 threshold in most cases. 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, in light of the severe overcrowding in some facilities, the complaints of physical and sexual violence by both prison officials and prisoners, the incidence of torture, and the excessive pre-trial detention periods, the individual factors of each case should be carefully 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, gender 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 Instruction on [Discretionary Leave](#))
- 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

⁵⁸ US State Department Human Rights Report 2011: South Africa, 24 May 2012 Section 1, c Prison and Detention Center Conditions <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

⁵⁹ US State Department Human Rights Report 2011: South Africa, 24 May 2012 Section 1, c Prison and Detention Center Conditions <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

⁶⁰ US State Department Human Rights Report 2011: South Africa, 24 May 2012 Section 1, c Prison and Detention Center Conditions <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

⁶¹ US State Department Human Rights Report 2011: South Africa, 24 May 2012 Section 1, c Prison and Detention Center Conditions <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186244>

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 Instruction on [Discretionary Leave](#).

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. Case owners should refer to the Agency's guidance on Family Tracing following the Court of Appeal's conclusions in the case of [KA \(Afghanistan\) & Others \[2012\] EWCA civ1014](#). In this case the Court found that Regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005 imposes a duty on the Secretary of State to endeavour to trace the families of Unaccompanied Asylum Seeking Children (UASCs).
- 4.3.2** At present there is insufficient 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** Individuals whose asylum claims have been refused and who seek to remain on the grounds that they require medical treatment which is either unavailable or difficult to access in their countries of origin, will not be removed to those countries if this would be inconsistent with our obligations under the ECHR. Case owners should give due consideration to the individual factors of each case and refer to the latest available country of origin information concerning the availability of medical treatment in the country concerned. If the information is not readily available, an information request should be submitted to the COI Service (COIS).
- 4.4.2** The threshold set by Article 3 ECHR is a high one. It is not simply a question of whether the treatment required is unavailable or not easily accessible in the country of origin. According to the House of Lords' judgment in the case of [N \(FC\) v SSHD \[2005\] UKHL31](#), it is "whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity". That judgment was upheld in May 2008 by the European Court of Human Rights.
- 4.4.3** That standard continues to be followed in the Upper Tribunal (UT) where, in the case of [GS and EO \(Article 3 – health cases\) India \[2012\] UKUT 00397\(IAC\)](#) the UT held that a dramatic shortening of life expectancy by the withdrawal of medical treatment as a result of removal cannot amount to the highly exceptional case that engages the Article 3 duty. But the UT also accepted that there are recognised departures from the high threshold approach in cases concerning children, discriminatory denial of treatment, the absence of resources through civil war or similar human agency.
- 4.4.4** The improvement or stabilisation in an applicant's medical condition resulting from treatment in the UK and the prospect of serious or fatal relapse on expulsion will therefore not in itself render expulsion inhuman treatment contrary to Article 3

ECHR. All cases must be considered individually, in the light of the conditions in the country of origin, but an applicant will normally need to show exceptional circumstances that prevent return, namely that there are compelling humanitarian considerations, such as the applicant being in the final stages of a terminal illness without prospect of medical care or family support on return.

4.4.5 Where a case owner considers that the circumstances of the individual applicant and the situation in the country would make 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. Case owners must refer to the Asylum Instruction on [Discretionary Leave](#) for the appropriate period of leave to grant.

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 Any medical conditions put forward by the person as a reason not to remove them and which have not previously been considered, must be fully investigated against the background of the latest available country of origin information and the specific facts of the case. A decision should then be made as to whether removal remains the correct course of action, in accordance with [chapter 53.8 of the Enforcement Instructions and Guidance](#).

5.4 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.

5.5 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.choices-avr.org.uk.

Country Specific Litigation Team
Operational Policy & Rules Unit
Strategy & Assurance Group
UK Border Agency

March 2013