LGBTQI+ Refugees and the Gap Between Refugee Protection Law and Reality

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Situating the Discussion within the Refugee Convention

The UN Refugee Convention has stood as the cornerstone of international refugee law since its adaptation on the 28th of July 1951. It defines who qualifies as a refugee, outlines their rights, and sets out the protections they are entitled to from host States. While the Convention establishes a common legal framework, States implement these obligations through their domestic legislation and asylum systems, resulting in differences in how refugee protection is realised in practice. South Africa is the only country on the continent that has kept the Convention's wording and also explicitly included 'sexual orientation and gender identity' in its definition of a 'particular social group'. This explicit legal recognition makes South Africa an important destination for queer and trans asylum seekers and refugees. Even for queer and trans migrants and tourists.

The Convention was negotiated with the primary objective of protecting people fleeing persecution and establishing a legal framework through which states would share responsibility for refugee protection However, 75 years later, research observes that the global focus has shifted significantly, with many nations prioritising migration control, border securitisation and the deterrence of irregular movement instead of the Convention's protection centered approach. There are growing calls to build walls, illegal detentions and deportations are increasing, and parliamentary decisions are leaning towards the establishment of deportation and repatriation centres to remove "unwanted" people from European countries. In my view, the dominant narrative suggests that economic migrants are masquerading as refugees. While this concern is frequently used to justify stricter controls, the measures designed to filter out 'fraudulent' claims are applied to everyone. In practice, this places immense pressure on genuine queer and trans refugees, who are forced to navigate the same barriers, suspicion, and exclusion.

South Africa is failing in this regard and is complicit in what could be termed serious human rights violations in the way queer and trans refugees are living in the country. Xenophobic attacks, (now named Afrophobia due to the targeting of black African migrants)) targeting black African asylum seekers, and refugees have occurred regularly, throughout the years. Despite being a signatory to the Refugee Convention, South Africa has largely failed to protect refugees from violence and exclusion. Instead of reinforcing its constitutional commitment that "South Africa belongs to all who live in it, united in our diversity," the state has signalled a shift in its approach. The Department of Home Affairs' White Paper on Immigration, Citizenship and Refugee Protection released by the Minister of Home Affairs on the 10th of November 2023 includes proposals to adopt the "first safe country" principle and to reconsider

aspects of the non-refoulement principle. These developments raise serious concerns about the country's commitment to protect queer and trans refugees, because what constitutes a safe country and who gets to determine that.

This article focuses on LGBTQ+ displaced individuals seeking asylum and refugees (hereafter referred to as queer and trans refugees) within the context of South Africa. The country is often positioned globally as a safe haven for queer and trans people due to its progressive Constitution and legal recognition of LGBTQI+ rights (Dill et al., 2016), and therefore, it has become a key destination for those fleeing SOGIESC-based persecution across the continent. However, despite these legal protections, queer and trans refugees continue to face social exclusion, bureaucratic barriers, and limited access to essential services (Hucke, 2022; Marnell, Oliveira & Khan, 2021). My analysis is informed by both lived and professional experience. I spent 15 years seeking protection in South Africa and have dedicated the past 10 years to founding and leading an organisation that provides support and advocates for the rights of queer and trans refugees in the country.

Lived Realities of Queer and Trans Refugees in South Africa

Across much of the African continent, homosexuality and transness are framed as "unAfrican" and as going against family, religious, and cultural values (Marnell 2021). In countries such as Uganda, parts of Nigeria, Somalia, and Mauritania (under Sharia law), same-sex relations can be punishable by death or life imprisonment. In others, including Tanzania, Senegal, Cameroon, and Kenya, same-sex relations are criminalised and carry prison sentences.

Out of 54 African countries, 31 continue to criminalise consensual same-sex relationships. Of the remaining 23, only South Africa, Botswana, Angola, Mozambique, Lesotho and Seychelles have decriminalised, while Namibia has recently taken steps towards decriminalisation. (ILGA World, 2024). In the remaining countries, the absence of criminalisation does not necessarily mean safety; other laws are used to target queer and trans folks, such as those relating to morality, indecency, vagrancy, loitering, public order or disguise/impersonation (Chiam et al., 2020; Mendos, 2020). Queer and trans people continue to face widespread stigma, discrimination, and violence.

The *Vulnerability Amplified* report, produced by the African Centre for Migration & Society in collaboration with The Fruit Basket and others, highlights the presence of queer and trans refugees in South Africa from across the continent, and documents the conditions that forced them to flee, as well as their experiences upon arrival. A significant gap exists between the protections guaranteed in law and the realities experienced on the ground. High levels of xenophobia, combined with a dysfunctional asylum system, mean that many individuals are unable to access the rights and protections that are promised (Beetar, 2020; Cheung et al., 2023).

For many, these challenges begin long before arrival. Fleeing is rarely planned. People often leave without passports, resources, or the ability to travel through formal channels. As a result, many rely on irregular routes, moving across multiple countries under dangerous conditions (Marnell, 2021). Along the way, they are exposed to exploitation, extortion, violence, and abuse. By the time they reach South Africa, they are often exhausted, traumatised, and without any material support.

International refugee law recognises these realities and does not require individuals to enter a country through formal ports of entry in order to seek asylum. However, this principle is not consistently upheld in practice. Individuals entering through irregular routes are often criminalised, and access to asylum is frequently tied to documentation such as a Section 23 transit visa, which is meant to be issued when one states their intention to claim asylum at a port of entry. There are stipulated processes that can be followed by those that entered through irregular channels, but implementation and theory never really align in these contexts.

For those that enter through official channels, access to asylum procedures is inconsistent. In our experience as an organisation, some individuals we supported have from our advice expressed their intention to claim asylum at immigration upon arrival, but were instructed to enter the country under the conditions of the temporary/tourist visas that they had. Immigration officials seem to lack the knowledge, capacity, or willingness to process asylum claims at the entry points, they neglect to inform people of their rights as well as to recognise SOGI claims, this pushes people into irregularity from the start. These experiences also circulate within communities, discouraging others from declaring their intention to seek asylum at entry points, enter as tourists, and then try and access RROs once they have somewhat settled.

Research analysing refugee status determinations in South Africa shows that many queer and trans asylum claims are rejected not because the risk of persecution is absent, but because decision-makers question the credibility of applicants (Mudarikwa et al., 2021). Claims are frequently dismissed on the basis of "lack of credibility" or "disbelief of sexual orientation," often shaped by stereotypes and narrow expectations of what it means to be queer or trans. Applicants are required to present identities that are "legible" to officials, who may rely on outdated or Westernised understandings of sexuality and gender. This creates a system where protection is not determined by risk, but by whether one can perform their identity in ways that satisfy institutional expectations.

Once inside the country, the barriers continue. South Africa does not operate a refugee camp system and provides little to no direct support to asylum seekers. Instead, individuals are expected to secure their own housing, food, and basic needs, often without documentation, income, or support networks (Koko, Monro and Smith, 2018).

This "local integration and self-sufficiency" model assumes that diaspora communities will provide support in place of the state. However, for queer and trans refugees, these networks are often inaccessible due to stigma, discrimination, and exclusion (Marnell, 2026). As a result,

many are left without both state and/or community support. At the same time, administrative backlogs and limited access to Refugee Reception Offices leave many unable to formally apply for asylum, trapping them in prolonged legal limbo (Camminga, 2023).

As noted by the Scalabrini Centre of Cape Town, *"*South Africa does not provide direct financial assistance or housing support to asylum seekers*,"* while the African Centre for Migration and Society highlights how systemic inefficiencies leave many undocumented for extended periods. For queer and trans refugees, these structural barriers are compounded by discrimination and social exclusion both from the host community and national/ethnic community.

As a result, the responsibility of supporting the community often falls on small, under-resourced organisations often led by inexperienced people, that started organisations or projects because there was an urgent need, but they themselves don't have experience doing such work. This is a challenge that I faced, with no knowledge of how to write a funding proposal or even manage a project budget, but there was a gap, and someone needed to do something about it. Myself and other leaders learned these skills on the job, without receiving much support or training, setting us up for failure. This is a huge challenge, one that many LGBTQ movement leaders struggle with. These queer and trans refugee-led organisations and groups support the community, they provide housing, informal education, healthcare support, and assistance with asylum processes.

From our experience what we see is running housing programmes comes with real legal and operational challenges. They require permits and liability insurance. Also, many migrant/refugee-led organisations aren't able to register, adding an additional barrier[3]. In many cases, organisations are forced to operate informal or unregistered safe houses because formal systems require community members to have legal status to qualify for intake into any registered establishment. This will then exclude those most in need of emergency accommodation, because of lack of this basic requirement. This places organisations in a difficult position, trying to meet urgent humanitarian needs within systems that do not accommodate the realities on the ground. The safe house model – as it is currently envisaged and operationalised – has not proven effective anywhere in the world. As much as it does address immediate material needs, it can never be a long-term solution to systemic or structural issues, another very visible gap between law and reality.

Furthermore, for many queer and trans refugees, survival in South Africa often comes at a cost. Transgender women in particular are pushed into survival sex work, not as a choice, but as a means to stay alive in a system that offers no alternatives (Bhagat, 2018). Without documentation, access to formal employment is nearly impossible, and discrimination further limits opportunities. This exposes them to significant risks. Many face abuse from men posing as clients, who refuse to pay, become violent, or exploit them and threaten them into silence. They are also exploited and extorted by police.

These experiences are not abstract. There is a group of trans-refugee-women who refer to themselves as the "Mountain Girls" (because they live and work on some mountain, with a cave like opening that they turned into their home) that we support, they rely on sex work to survive and have shared repeated cases of violence, non-payment, and assault. Law enforcement, which should offer protection, often becomes another source of harm. A press statement published by Section 27 states that "The enforcement of laws criminalising sex work disproportionately targets poor, black, female, transgender, and gender-diverse individuals. These populations are not only over-represented in sex work due to structural exclusions from the formal economy but are also more likely to face violence, harassment, and extortion from law enforcement officials"

Access to healthcare is another major gap. Many queer and trans refugees struggle to access even basic primary healthcare due to lack of documentation, discrimination, or fear of being reported and deported (Letsike et al., 2019). For transgender individuals, access to hormonal therapy is extremely limited, inconsistent, or completely unavailable in the public system.

HIV/AIDS remains a critical issue within the community, yet access to testing, treatment, and prevention services has become even more strained. Clinics that many queer and trans refugees relied on have been significantly affected by the withdrawal and freezing of funding from programmes such as PEPFAR and USAID, which have historically supported HIV services and LGBTQI+-focused healthcare across the region.

This has had a broader impact beyond South Africa. In many countries across the continent, these funding cuts are weakening already fragile healthcare systems for LGBTQI+ people, reducing access to life-saving services and support. In this context, the erosion of healthcare access is not only a crisis in itself, but is also likely to become a driver of displacement, as individuals are forced to move in search of basic care and survival (Marnell et al., 2026). As a result, people who are already at high risk are left with even fewer options to care for their health, both in the countries they leave and in the countries they arrive in.

Beyond physical health, there is a significant lack of mental health and psychosocial support. The trauma of fleeing persecution, combined with the violence experienced from home countries, during transit, as well as the instability faced upon arrival, creates deep and ongoing mental health challenges (Munyarukumbuzi et al., 2022). Yet there are very few accessible services, and even fewer that are equipped to respond to the specific needs of queer and trans refugees (Alessi et al, 2020). Many are left to navigate this trauma alone.

At the same time, the broader environment continues to grow more hostile. Anti-migrant vigilante groups such as Operation Dudula, Action SA, and March for March have contributed to normalising xenophobic attitudes, often targeting black African asylum seekers, refugees, and migrants in particular. This xenophobia is not just about 'foreigners' but economic frustration and state failure, our communities become the scapegoats (Mlilo 2025). Seen as

competitors and outsiders. Our specific community is then targeted twice: first as foreigners and second as queer and trans people.

Government-led enforcement actions, including Operation Shanela and Operation New Broom, have intensified policing and immigration crackdowns, further increasing fear within asylum seeker, refugee and migrant communities. What we see is that, while framed as law enforcement, these operations often result in profiling, harassment, and the targeting of undocumented individuals, many of whom are in the process of trying to regularise their stay or have stated their intention to seek asylum. Another example of victim blaming, shaming, and punishing.

We run a project in partnership with COSPE and Gender Dynamix that focuses on documenting human rights violations experienced by LGBTQI+ people, particularly refugees. The intention is not only to record these experiences but also to use this data for advocacy and evidence-based policy change. The cases we have documented so far paint a consistent picture: individuals denied access to healthcare because they do not have documentation, people turned away from shelters, and repeated incidents of police extortion at traffic stops where undocumented individuals are forced to pay bribes to avoid arrest or detention.

These experiences are also reflected in broader research and reporting. Organisations like the Scalabrini and ACMS have consistently highlighted the structural barriers within the asylum system and the lack of access to services. Reporting by Human Rights Watch and legal advocacy groups has also pointed to patterns of abuse, discrimination, and systemic failure in protecting refugees and migrants in South Africa. What these reports confirm is what communities are already living, that protection exists on paper, but not in practice.

UNHCR and Structural Limitations

The mandate of the United Nations High Commissioner for Refugees (UNHCR) in South Africa differs from its role in many other contexts. While UNHCR has historically taken on more direct operational roles in some countries, including camp management, this has, however, shifted over time. In most contexts today, including South Africa, states retain primary responsibility for implementing and overseeing their own asylum systems. Even in countries where UNHCR is present in camps, it often operates on behalf of, or in support of, the government rather than independently determining refugee starefugee status.

In South Africa, UNHCR's role is largely advisory. However, in a context where the asylum system is widely regarded as ineffective and unable to consistently document those seeking protection, this creates significant limitations. Many individuals struggle to access UNHCR support because they do not have recognised legal status within the system. This situation is not simply the result of isolated inefficiencies. Long-standing resource constraints have played a role, with the Department of Home Affairs acknowledging both extreme understaffing and

an urgent need for capacity-building. Scholars, humanitarian agencies and civil society organisations have long bemoaned the entrenched corruption, systemic inefficiencies and lack of adequately trained Refugee Status Determination Officers within the department (Maple, Vanyoro & Vearey, 2023; Ncube et al., 2020; Amnesty International 2019).

However, for those experiencing this system, the effect is the same: cases do not move, decisions are not made, and people remain stuck. Without a decision, there is no rejection, and without rejection, there is no appeal. This leaves individuals without protection, without recourse and without a clear path forward (Camminga 2020).

Resettlement, relocation, and so-called 'voluntary' repatriation have become the last remaining hopes that queer and trans refugees hold onto. Not because they are accessible or realistic, but because there are so few alternatives left. In reality, all three are largely out of reach. Resettlement systems are overwhelmed and under-resourced globally, with recent funding cuts, particularly from the United States, further weakening already strained programmes. Moreover, resettlement from South Africa is near impossible as the UNHCR does not manage the country's refugee system. Relocation depends on access to passports and visas, documents that many refugees will never have the opportunity to obtain. And even for those who manage to secure a passport, meeting visa requirements for so-called 'safer' countries remains nearly impossible. These are the same countries that are increasingly vocal about limiting refugee intake, tightening borders, and making access more difficult, especially for those from the African continent.

What remains is the so-called "voluntary" repatriation. But returning to the very conditions people fled from cannot meaningfully be described as voluntary. It is not a choice made freely, but one shaped by exclusion, exhaustion, and the absence of any real alternatives. Queer and trans refugees are particularly affected by this. While some queer and trans refugees have accepted 'voluntary' repatriation, many do not qualify for or cannot safely consider this option. Access to the UNHCR's Voluntary Repatriation programme in particular requires legal status or a formal outcome on an asylum claim.

So the question becomes unavoidable, who protects queer and trans refugees, and where are they expected to go when every pathway to safety is effectively closed? At the same time, global political and economic forces continue to contribute to instability and displacement, including for queer and trans people. Yet when people move in search of safety, they are met with closed borders, restrictive systems, and shrinking support. What remains is not protection, but abandonment.

I am writing this not just as someone analysing the system, but as someone who lived within it. As a trans refugee, as a community organiser, as someone running safe houses for people who have nowhere else to go, what I see every day is not simply a failure of law. South Africa has one of the most progressive legal frameworks on the continent. The problem is not the absence of protection on paper, but the absence of access to it in practice. With regard to the

role of UNHCR, the UNHCR has provided huge financial support to South Africa's Department of Home Affairs to clear the backlog in the asylum system by 2024, which was called a "landmark agreement" between the government and UNHCR in 2021.[2] However, it is questionable that the usage of the fund was not well monitored and the beneficiary of the financial support was mainly heterogenous refugees.

What I see is a system that people struggle to enter, struggle to navigate, and struggle to exit. A system where protection is delayed, deferred, or denied through inaction. A system where vulnerability is not reduced, but prolonged, and in that space, between what is promised and what is possible, people are left to survive on their own. If South Africa is to position itself as a place of refuge, then the measure cannot be its laws alone. It must be whether those laws are accessible, functional, and responsive to the realities of those who rely on them. Until then, the gap between protection in theory and protection in practice will remain. And it is within that gap that queer and trans refugees continue to live, organise, and fight to survive.

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Endnotes

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[2] See details here: UNHCR and the Government pledge to clear the asylum backlog by 2024. Available from https://southafrica.un.org/en/136315-unhcr-and-government-pledge-clear-asylum-backlog-2024, accessed on 03 September 2026.