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17 September 2018

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Tanzania: Treatment of sexual minorities by society and the authorities, including legislation, state protection available and support services; the laws criminalizing same-sex unions in Zanzibar, including whether there is any confusion among the authorities regarding the applicable legislative provisions (2016-August 2018)
Research Directorate, Immigration and Refugee Board of Canada, Ottawa

1. Legislation

Sources indicate that consensual sexual relations between adult men are illegal in Tanzania and that, in addition, lesbianism is prohibited in the semi-autonomous archipelago of Zanzibar (US 20 Apr. 2018, 26; Human Rights Watch 23 June 2017).

1.1 Tanzania

The Tanzanian Penal Code provides the following:

138A. Any person who, in public or private commits, or is party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, commits an offence and is liable on conviction to imprisonment for a term of not less than one year and not exceeding five years or to a fine not less than one hundred thousand shillings and not exceeding three hundred thousand shillings; save that where the offence is committed by a person of eighteen years of age or more in respect of any person under eighteen years of age, a pupil of a primary school or a student of a secondary school the offender shall be liable on conviction to imprisonment for a term not less than ten years, with corporal punishment, and shall also be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for any injuries caused to that person.

...

154.-(1) Any person who—

- a. has carnal knowledge of any person against the order of nature; or
- b. has carnal knowledge of an animal; or
- c. permits a male person to have carnal knowledge of him or her against the order of nature,

commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

(2) Where the offence under subsection (1) of this section is committed to a child under the age of ten years the offender shall be sentenced to life imprisonment.

155. Any person who attempts to commit any of the offences specified under section 154 commits an offence and shall on conviction be sentenced to imprisonment for a term of not less than twenty years.

...

157. Any male person who, whether in public or private, commits any act of gross indecency with another male person or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such

act by any male person, with himself or with another male person, whether in public or private, commits an offence and is liable to imprisonment for five years. (Tanzania 1945)

1.2 Zanzibar

Penal Act No. 6/2018 of Zanzibar, titled “An Act to Repeal the Penal Act No. 6 of 2004 and to Enact the New Penal Act, to Provide for the Better Provisions and Other Matters Connected Therewith,” and assented by the President of Zanzibar on 16 March 2018, provides the following:

133. A person who:

- a. has carnal knowledge of a person against the order of nature;
- b. has carnal knowledge of an animal or has carnal knowledge by animal; or
- c. permits a male person to have carnal knowledge of him or her against the order of nature,

is guilty of an offence, and is liable to imprisonment for a term of thirty years.

134. A person who attempts to commit unnatural offences is guilty of an offence, and is liable to imprisonment for a term of not exceeding ten years.

...

136. A woman or a girl who commits an act of lesbianism with another woman or girl, whether taking an active or passive role, is guilty of an offence and is liable on conviction to imprisonment for a term of not less than five years but not exceeding ten years.

137. (1) A person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by a person of, any act of gross indecency with another person, is guilty of an offence and is liable to imprisonment for a term of not less than three years but not exceeding five years or to a fine of not less than Three Million Shillings but not exceeding Five Million Shillings.

(2) Where the offence is committed by a person of eighteen years of age or more in respect of a person under eighteen years of age, the offender is liable to imprisonment for a term not less than five years but not exceeding ten years, and

shall also be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for any injuries physical or psychological caused to that person.

...

140. A person who:

- a. enters or arranges a union whether amounting to marriage or not of the person of the same sex;
- b. celebrates a union with another person of the same sex whether amounting to marriage or not; or
- c. lives as husband and wife with another person of the same sex.
(Zanzibar 2018)

1.2.1 Laws Criminalizing Same-Sex Unions in Zanzibar Prior to 2018 and Whether There Is Any Confusion Among the Authorities About the Applicable Laws

The Penal Decree (Amendment) Act, 2004 of Zanzibar is published on the website of the Zanzibar House of Representatives (www.zanzibarassembly.go.tz) and on the website of the Judiciary of Zanzibar (www.judiciaryzanzibar.go.tz). This law, which states that it was enacted by the House of Representatives on 13 April 2004 and assented by the President of Zanzibar on 16 August 2004, provides the following with regard to same-sex unions:

145D. Any person who:

- a. enters or arranges a union whether amounting to marriage or not of the person of the same sex;
- b. celebrates a union with another person of the same sex whether amounting to marriage or not;
- c. lives as husband and wife with another person of the same sex;

shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding seven years. (Zanzibar 2004a)

However, a document titled *Penal Decree Act No. 6 of 2004*, with the notation "PDF by George Kazi, 2004" and available on the website of the United Nations Office on Drugs and Crime (UNODC), as well as in the children's rights database of

the African Child Policy Forum (ACPF) [1], where it is indicated that it was enacted by the House of Representatives on 13 April 2004 and assented by the President on 16 August 2004, provides the following with regard to same-sex unions:

158. Any person who:

- a. enter[s] or arrange[s] a union whether amounting to marriage or not of the person of the same sex;
- b. celebrate[s] a union with another person of the same sex whether amounting to marriage or not;
- c. lives as husband and wife another person of the same sex;

shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding seven years. (Zanzibar 2004b)

Some sources mention article 158 when referring to the legal provisions of Zanzibar on same-sex unions (*The Citizen* 13 Aug. 2017; UHAI-EASHRI 2015, 21; Human Rights Watch 18 June 2013, 17). Another source refers to article 157 (Maoulidi 2009, 9).

No further reference to article 145D could be found among the sources consulted by the Research Directorate within the time constraints of this Response. However, in correspondence with the Research Directorate, a lawyer from the High Court of Zanzibar stated that, in her opinion, article 145D of the *Penal Decree Act (Amendment) of 2004*, which is available on the website of the House of Representatives of Zanzibar, is the correct reference to the article of law prohibiting same-sex marriages in Zanzibar and that there has never been any confusion in the archipelago over the article number of the act (Lawyer 2 Aug. 2018). According to her, the source of the act is the House of Representatives of Zanzibar and the version of the *Penal Decree Act* published in the form of a PDF document created by Georges Kazi [the version available on the websites of the ACPF and the UNODC] is an unofficial source that has not been enacted by the House of Representatives (Lawyer 2 Aug. 2018). A specialist in public health and AIDS in sub-Saharan Africa indicated in correspondence with the Research Directorate that article 158 of the *Penal Decree Act No. 6 of 2004* was that which defined same-sex unions as an offence punishable by a maximum term of imprisonment of seven years (Specialist 31 July 2018).

2. Treatment of Sexual Minorities by the Authorities

Sources report that government representatives have stated that homosexual practices are contrary to the law and culture norms of Tanzanian society (US 20 Apr. 2018, 27; AFP 21 Oct. 2017). Several sources note the Tanzanian government's hostile rhetoric toward civil society groups, including those working to protect the rights of LGBT people (Human Rights Watch 6 July 2017; *Le Monde* 18 Sept. 2017). According to the daily newspaper *Le Monde*, Tanzanian Deputy Health Minister told parliament in 2017 that Tanzania is fighting against homosexuality (*Le Monde* 18 Sept. 2017). Sources indicate that the government threatened to deregister organizations working closely with homosexuals (US 20 Apr. 2018, 27-28; IBTimes 8 Aug. 2016; AFP 26 June 2017). According to sources, in June 2017, the Home Affairs Minister threatened to prosecute or arrest Tanzanians and expel foreigners who campaign for gay rights (New York City Bar 6 Apr. 2018; Amnesty International 22 Feb. 2018; AFP 26 June 2017).

Sources report cuts in services available to sexual minorities in Tanzania:

- in July 2016, the government banned NGOs from distributing lubricant gels, alleging that they encourage homosexual practices and spread disease (AFP 26 June 2017; BuzzFeed News 8 Apr. 2017);
- in October 2016, the authorities temporarily shut down AIDS outreach and protection programs (*The Guardian* 26 Oct. 2017; Human Rights Watch 6 July 2017) aimed at gay men (*The Guardian* 26 Oct. 2017);
- in February 2017, the government closed health centres, accusing them of promoting homosexuality (Amnesty International 22 Feb. 2018, 441; PassBlue 12 Dec. 2017; AFP 21 Oct. 2017). Sources also state that those health centres specialized in the fight against AIDS (PassBlue 12 Dec. 2017; AFP 21 Oct. 2017).

2.1 Arrests

Human Rights Watch reported in June 2017 that the laws that punish same-sex relations are rarely applied in Tanzania and that the police and the authorities use them as a pretext to extort, abuse and marginalize LGBT people (Human Rights Watch 23 June 2017). An article from BuzzFeed News [2] indicated in April 2017 that, despite the serious crackdown on homosexual relations in Tanzania, there is no record of anyone serving serious time for it (BuzzFeed News 8 Apr. 2017). An article

from October 2017 in the *Tanzania Daily News* also mentions that in Zanzibar “no prosecution [for homosexuality] has so far been made in any court of law” (*Tanzania Daily News* 18 Oct. 2017).

Nevertheless, a number sources use the word “crackdown” to describe the treatment of sexual minorities and their defenders by the authorities in Tanzania since 2016 and 2017 (Human Rights Watch Jan. 2018; Freedom House 2018, sec. B4; *The Guardian* 26 Oct. 2017). Human Rights Watch reports that “[i]n an unprecedented crackdown, Tanzanian authorities are arresting and prosecuting people on homosexuality-related charges” (Human Rights Watch 6 July 2017). BuzzFeed News reports a “witch hunt” launched by Tanzania in July 2016 against anything it branded as “promoting gayism” (BuzzFeed News 8 Apr. 2018).

Sources report the following arrests:

- in March 2017, a young man was arrested in Dar es Salaam, suspected of homosexuality based on his Instagram posts (Human Rights Watch Jan. 2018);
- in October 2017, a group of activists and human rights defenders, including two South Africans and one Ugandan, were arrested during a meeting on health services for LGBTI people (Amnesty International 22 Feb. 2018, 411; PassBlue 12 Dec. 2017), in Dar es Salaam (PassBlue 12 Dec. 2017);
- in December 2017, police arrested a woman following the publication of a video showing her kissing another woman (Mambaonline 4 Dec. 2017; Reuters 2 Dec. 2017);
- in December 2016, at least nine young men were arrested and detained in Zanzibar (Human Rights Watch 23 June 2017; BuzzFeed News 8 Apr. 2017) and charged with “homosexual conduct” (Human Rights Watch 23 June 2017);
- In September 2017, 12 women and 8 men participating in a workshop on AIDS in Zanzibar were arrested (Amnesty International 22 Feb. 2018, 411; Stop Homophobie 18 Sept. 2017) and charged with promoting the rights of LGBTI people (Amnesty International 22 Feb. 2018, 411).

2.2 Police

Sources indicate that police mistreat or harass sexual minorities (US 20 Apr. 2018, 27; Freedom House 2018, Sec. F4). Several sources report that homosexuals under arrest are subjected to forced anal examinations (US

20 Apr. 2018, 27; Freedom House 2018, Sec. F4; BuzzFeed News 8 Apr. 2017). Observers note that such examinations constitute a form of torture (New York City Bar 6 Apr. 2018; Human Rights Watch Jan. 2018).

3. Treatment of Sexual Minorities by Society

Sources indicate that sexual minorities face discrimination in Tanzania (US 20 Apr. 2018, 27; Freedom House 2018, Sec. F4). According to *Country Reports on Human Rights Practices for 2017*, published by the US Department of State, such discrimination is found in the areas of health care, housing and employment (US 20 Apr. 2018, 27). According to Freedom House, because of this discrimination, members of the LGBT community tend to “hide their identities” (Freedom House 2018, Sec. F4).

BuzzFeed News notes a change in the social situation of sexual minorities with the government’s change in attitude toward them: “LGBT Tanzanians have always been able to quietly go about their lives, despite stigma and discrimination. But now the Tanzanian government is getting aggressive” (BuzzFeed News 8 Apr. 2017). The same source states the following regarding Zanzibar:

A “don’t ask, don’t tell” attitude has prevailed in Zanzibar long enough that a generation of young gay guys have become accustomed to being able to live openly. They might get harassed on the streets and face family pressure, but they also know that at certain restaurants and taarab bars they can behave however they choose, and be fine. The crackdown ... has shaken that confidence. These days, the taarab bars put on performances to smaller crowds. Many of their regulars are staying home, convinced this is a time to duck into the shadows. (BuzzFeed News 8 Apr. 2017)

Corroborating information could not be found among the sources consulted by the Research Directorate within the time constraints of this Response.

4. State Protection and Support Services

US *Country Reports 2017* indicates the following:

During the year government officials publicly stated opposition to improved safeguards for the rights of LGBTI persons. ... LGBTI persons were often afraid to report violence and other crimes, including those committed by state agents, due to fear of arrest. ... There were no known government efforts to combat such discrimination. (US 20 Apr. 2018, 27)

Amnesty International also states that [Amnesty International English Version] “the authorities ... failed to address discrimination on grounds of gender and sexual orientation” (Amnesty International 22 Feb. 2018, 411).

US *Country Reports 2017* indicates that threats from the Tanzanian government caused several NGOs advocating for the rights of sexual minorities to suspend services to this community, but also reports, without providing further details, that in April 2017, community-based services were reinstated following revised guidelines (US 20 Apr. 2018, 28).

James Wandera Ouma, a Tanzanian LGBT activist who has been arrested several times, indicates in an article of the British daily *The Guardian* that it is difficult to find lawyers in Tanzania who will defend sexual minorities because they are afraid of being associated with homosexuality (*The Guardian* 26 Oct. 2017). In an article on the deportation of three South African lawyers from Tanzania in October 2017, the British online newspaper Pink News also reports government pressures against defenders of the rights of sexual minorities in Tanzania (Pink News 28 Oct. 2017).

This Response was prepared after researching publicly accessible information currently available to the Research Directorate within time constraints. This Response is not, and does not purport to be, conclusive as to the merit of any particular claim for refugee protection. Please find below the list of sources consulted in researching this Information Request.

Notes

[1] The African Child Policy Forum (ACPF) is an independent, non-profit, panAfrican institute of policy research and dialogue on the African child (ACPF 25 Aug. 2009).

[2] BuzzFeed News has grown from a small social news upstart into an international news organization with 250 reporters and editors in several countries (BuzzFeed News 17 July 2018).

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Additional Sources Consulted

Oral sources: Amka Empowerment; assistant professor at a diplomacy and international relations school; Global Forum on MSM and HIV; The Legal and Human Rights Centre; LGBT Voice; professor in a Department of Political Science and International Studies; Zanzibar – House of Representatives, Judiciary Zanzibar.

Internet sites, including: BBC; eoi.net; Factiva; International Crisis Group; International Lesbian, Gay, Bisexual, Trans and Intersex Association; Radio France internationale; UN – Refworld; Zanzibar – Judiciary Zanzibar, Ministry of Justice and Constitutional Affairs; Zanzibar Legal Services Centre.

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