

botshabelo

refugee rights project

sanctuary

a lawyers for human rights publication



Refugees queuing at the DHA's Refugee Reception Office in Braamfontein, Johannesburg

Contents

contents

editorial
page 3

two weeks at the cape town
refugee reception office
page 4

refugees may again apply for
registration as security service
providers
page 7

south african refugee law and
the firm resettlement bar to
asylum in the united states
page 10

asylum seekers can now work
and study
page 11

emergency preparedness in
south africa: lessons from the
zimbabwean elections
page 12

the year in retrospect for the
national consortium for refugee
affairs (ncra)
page 14

rwandese style and traditional
dance
page 16

Human rights lawyer appointed as LHR's new Executive Director

Lawyers for Human Rights is pleased to announce the appointment of Rudolph Jansen (BLC, LLB, LLM) as its new National Director. Advocate Jansen joins LHR after being a founder member of the Pretoria Branch of LHR. Between 1996 and 2002 he has been the Co-ordinator of the LHR Penal Reform Project on a voluntary basis. He was also responsible for preparing the position paper of the NGO Coalition for Criminal Justice for the United Nations Conference on Racism and Xenophobia, Durban, 2001.



Advocate Jansen has had a distinguished career at the Pretoria Bar and is regarded as an expert in criminal justice and penal reform issues. He assisted with some of the research needed by LHR in its *amicus* brief in the *State v Makwanyane*, the first matter that was argued on capital punishment before the Constitutional Court. He has made appearances in the Constitutional Court on the right to legal representation and on the constitutionality of certain provisions of the Sexual Offences Act.

He has made numerous other successful appearances in other public interest matters at the High Court and in proceedings before the Truth and Reconciliation Commission.

The opinions expressed in this edition of Botshabelo are the views of the authors and do not necessarily represent the view of Lawyers for Human Rights. All comments, inquiries and submissions should be forwarded to The Editor: Botshabelo, Lawyers for Human Rights, Kutlwanong Democracy Centre, 357 Visagie Street, Pretoria 0002 or fax +27 (0) 12 320 2949. All contributions are welcomed and encouraged, but the final decision on content rests with the editorial staff.

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Editorial

New Research

The National Consortium for Refugee Affairs recently launched two research reports commissioned to the Wits Refugee Research Programme (RRP) and the UCT Law Clinic. Both reports critically evaluate government's commitment to refugee protection.

In its report, the UCT Law Clinic gives a comprehensive evaluation of the South African refugee status determination system, using the Refugees Act and its regulations as the yardstick. The report uncovered a number of systemic problems within Home Affairs' refugee reception offices, ranging from inconsistent reception procedures to hostile attitudes of officials and corruption. One can only hope that this report will be studied carefully by the DHA as part of its ongoing efforts to improve its vital service to the refugee community. On page 4, Sarah Sterken highlights some of the key findings of their report.

In a previous **botshabelo** we reported on the potential mass influx situation during the Zimbabwean election in March this year. One of our concerns then was the lack of preparedness by the South African authorities and civil society to accommodate a large number of refugees crossing into South Africa. Instead of being prepared for 50 000 refugees, as recommended by the UNHCR and intelligence agencies, the disaster management structures could only accommodate a maximum of 1000 people for three days during that period. In the months following the elections, the Wits RRP evaluated the government's disaster management contingency plans and came up with twenty-four useful recommendations. On page 12, Hernan del Valle and Tara Polzer provide a summary of their report

Copies of both research papers are available on the NCRA website at www.ncra.org.za.

Socio economic rights

Unlike most African countries with refugee camps, South Africa has a policy that promotes local integration, which allows refugees to settle anywhere in the country. As a result, most refugees and asylum

seekers are scattered around various cities. The downside of this policy is that refugees are required to survive without any material assistance from government. To make matters worse, refugees are prohibited from working and studying while awaiting the outcome of their asylum applications, leaving them destitute and with no means to support themselves and their families.

The Legal Resources Centre won an important victory in November when the Cape High Court declared the prohibition for asylum seekers to work and study contained in the Regulations unconstitutional. Disappointingly, Home Affairs has subsequently decided to take the matter on appeal. In the meantime the court granted an interim execution order, leaving the judgment in force pending the appeal judgment. On page 11 of this edition, Donovan Baguley highlights the salient aspects and implications of this judgment.

In a similar fashion, Lawyers for Human Rights lobbied the Security Industry Regulatory Association to allow refugee security officers to register with SIRA. This came after the new Security Industry Regulatory Authority regulations prevented non-nationals from registering as security officers. These two interventions have substantial implications on the livelihood of refugees in South Africa. Without the right to work, refugee families have found themselves destitute and marginalized. South Africa's refugee protection policy will remain flawed until it secures refugees from persecution as well as rendering them the opportunity to sustain themselves independently.

National Consortium on Refugee Affairs

The National Consortium for Refugee Affairs (NCRA), an umbrella body for NGOs and refugee organisations, has become an important platform for debate and interaction on refugee matters in South Africa. During the last year the consortium has extended its influence as well as its membership. On page 14, Joyce Tlou reviews the consortium's activities in 2002.

Jacob van Garderen
Editor

Two weeks at the Cape Town Refugee Reception Office

Over a two-week period in early September, the University of Cape Town Legal Aid Refugee Clinic, in conjunction with the Legal Resources Centre, conducted a study of the Cape Town Refugee Reception Office (RRO). The study came about as a result of the chronic difficulties facing refugees in need of processing by the RRO. The results of the study indicate that the Department of Home Affairs (DHA) is seriously neglecting a large portion of its constituent population. This study forms part of a broader research project undertaken by the UCT Law Clinic on behalf of the NCRA. In this article, **Sarah Jayne Sterken**¹ discusses research findings from the two-week study of the Cape Town Refugee Reception Office.

The Queue

The refugees form two informal queues. Dividing between newcomers and returning refugees, they stand in front of large metal bars that protect the RRO entrance. The queue at the RRO is notorious for its unbearably long lines. It is commonplace for refugees to begin queuing outside the RRO between 18:00 and 21:00 the preceding evening. By the time the RRO opens the following morning, there are usually between three hundred and five hundred refugees outside in the queue.

While waiting for upwards of twelve hours is in itself trying, several conditions exacerbate the situation. First, refugees are often the targets of robbery. They regularly report stolen wallets, watches and jewellery. In addition, the RRO does not provide any outdoor bathroom facilities. As a result, refugees are forced to urinate while waiting in the queue. Food vendors are also almost non-existent because DHA does not permit individuals to sell food near the isolated building. With the exception of a small stand that sells food on a highly irregular basis, food vendors are several kilometres away. Though pre-packing food seems like an obvious solution, most do not have the resources to be that prepared.

The lines are reasonably orderly before the gate is opened in the morning. Each time reception officers open the gate, however, the line immediately turns into a large chaotic crowd. Refugees with no hope of entering race to the door, and attempt to push their way inside the building. Many are so desperate to gain access to the RRO, that they risk being beaten with batons by reception officers.

The various strategies refugees use to enter the

building largely fail. If the queue becomes too disorderly, the reception officers refuse to open the gate at all that day. If refugees do manage to push their way into the building, everyone is ordered back outside. Even when reception officers do admit individuals, it is almost always in insignificant numbers. During the two weeks of the study, it was rare that more than ten percent of those queuing would be admitted and served.

The Relationship between Refugees and Reception Officers

Communication between reception officers and refugees is almost nonexistent. Signs posted outside the RRO are outdated, misleading or incorrect. For example, the allusion to the office schedule is a sign that states the office is closed on Fridays for staff training. Absent is any indication of the RRO's working hours, or a list of services provided.

Though it is generally known that the RRO is to open at 7:30am Monday through Thursday, not infrequently the RRO will open its doors well before or well after the scheduled time. In an office that continually admits individuals throughout the day, an inconsistent start time would not create significant problems. But, the RRO generally opens the door one time each day. After they admit a certain number of refugees, they lock the gate without indicating whether they will admit further refugees that day. As a result, individuals often wait several hours before discovering that the RRO had already opened its gates for the day. Refugees routinely beg reception officers to disclose whether the RRO is accepting further individuals that day. The reception officers' standard response, however, was either a blank stare or a shrug of the shoulders.

Feature

Language barriers exacerbate communication difficulties. Though many refugees have a working knowledge of conversational English, too often their skills do not permit them to accurately fill out complicated asylum-seeker and refugee status forms. Instead of hiring employees fluent in relevant languages such as French and Portuguese, the RRO employs numerous individuals heavily dominant in Afrikaans.

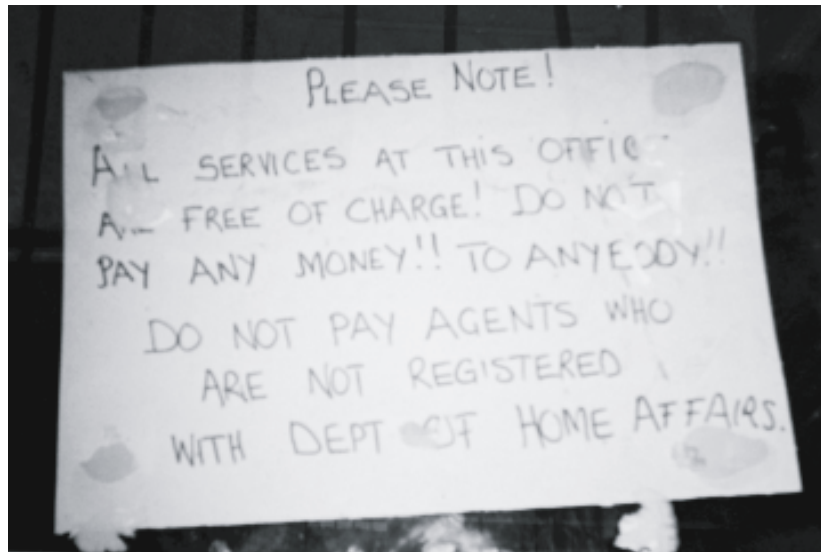
The use of an unfamiliar language, in this case Afrikaans, often creates unnecessary processing mistakes. For example, refugees habitually queried lower-level reception officers on fairly complex issues. Often the reception officers were not qualified to answer the question, and relayed the question to a more experienced colleague. Though the refugee was present when the reception officer conveyed the question, the conversation would often proceed in Afrikaans. Consequently, refugees were unable to ascertain whether the reception officer relayed the proper information to the colleague. As a result, reception officers regularly misunderstood questions and proceeded on incorrect information. To the great detriment of the refugees, names are recorded incorrectly, reapplication letters are not submitted and information concerning their escape is erroneous.

The RRO Configuration

The setup of the RRO does not help. The waiting room is one large square filled with small wooden benches. The absence of a ventilation system or windows guarantees the constant presence of a suffocating stench. With the exception of restrooms adjacent to the waiting room, basic needs are not accessible. Refugees are rarely permitted to leave the premises to purchase food or make telephone calls.

The security system guarantees virtual imprisonment. There are two main entrances to the RRO. Both are locked from the inside and outside. Therefore, anytime an individual needs to enter or exit, he or she must locate an RRO officer with keys. Because there are only two sets of keys, and they are constantly changing location, it can easily take ten minutes before the doors are opened. One set of double doors in the back of the waiting room is designated as the emergency exit. The exit, however, is padlocked. As it stands, the security system is a certain fire hazard.

While some might argue that lack of equipment



impairs the efficiency of the office, actual use of the various machines indicates otherwise. For example, there are four computers with access to the database of refugees. Four officials have authorization to enter the database, though there were never more than two using the computers at one time. There is one digital photographing unit, and one fingerprinting station. The reception officers, however, never took enough photographs or fingerprints to merit additional equipment.

General organization of files, faxes and application letters was substandard. Files were strewn about the office, application letters were crumpled on the floor and reception officers never distributed faxes. Three months was almost never enough time to locate an individual's file. When the RRO did locate a file, the appropriate information was often missing. For example, the biggest reoccurring problem dealt with letters for renewing refugee status. Refugees continually reported that after submitting reapplication letters on several different occasions, the reception officers would still report that the letter was never filed or missing.

Refugee Admission Procedures

The RRO's inconsistent intake procedures contribute to the confusion. The reception officers seldom used the same method to process applicants. As a result, a refugee could never rely on one day's method as a precedent for the next.

Some methods were significantly more successful than others. Collecting expired permits, for example, served the greatest number of refugees. Procedurally, refugees handed their permits to reception officers through the bars of the gate. At 14:00, refugees returned to collect the renewed permit. On the days the reception officers collected permits, almost every returning refugee was assisted.

Feature

Though this system addressed the greatest number of individuals, there were substantial problems. First, collection of permits forced refugees to go undocumented until the 14:00 pick-up time. Collecting permits was also a formula for misplacing documents. The vast majority of permits that refugees hand in are so tattered, that they cannot withstand the strain of being carelessly stacked in large piles. As a result, reception officers often misplace or lose permits.

One decidedly unsuccessful approach consisted of recording all individuals who queued before 24:00 the preceding evening. At 23:00, two officials instructed refugees in the queue to write their names on a list in the order of their arrival. The refugees handed in the list at midnight to the security guard on duty. Those refugees listed then went home and returned the next morning. Expectedly, the morning brought substantial chaos. Any refugees queuing after 24:00 were unaware of the numerous individuals in front of them via the list. The next morning, the remaining refugees became outraged at the use of the list. They suspected corruption, and accused various nationalities of being underhanded and dishonest. The rows between different nationalities made it impossible to enter the RRO. The reception officers responded by not admitting more than twenty people that morning.

Corruption

Refugees may be so ready to accuse each other of corruption because it is apparently widespread in the RRO. Numerous refugees report that reception officers will accept money in exchange for processing documents. Refugees alert legal aid clinics when they have paid the bribe, and then the reception officer does not deliver on his or her promise. Even the RRO admits to the problem. On the entrance door of the RRO is a sign posted that states:

Please note! All services at this office are free of charge! Do not pay any money! To anybody! Do not pay agents who are not registered with Dept. of Home of Affairs.

Ironically, the warning suggests that payment to registered reception officials is still acceptable. Though we did not witness any payments during the course of the study, a few incidents did suggest that corruption remains. On one occasion, a reception officer admitted a Bulgarian refugee and two of his family members for processing. The admittance attracted much attention because the refugee simply called upon arrival, and a reception officer immediately opened the gate for them. At the same time the Bulgarian family entered, the reception officer denied entry to more than twenty refugees who had been waiting since the early morning hours. When questioned on how he had so easily entered the RRO, the refugee explained that he had simply

called the RRO and scheduled an appointment. After expressing surprise at his success, I explained that the UCT Legal Aid Clinic has never successfully made an appointment of the same nature. Once the refugee detected my suspicion, he became rude and impatient. Refusing to answer any further questions, he quickly walked away. At the very least, the highly unusual treatment of the Bulgarian family raises serious questions about the RRO's prioritizing system.

Special Considerations for Admission Procedures

The directive that one must physically be present at the RRO to get proper documentation is without exception. This rule presents particular hardship for certain sectors of the refugee population. Most notably, the inflexible regulation poses a huge burden for children and the disabled. Both groups must endure long nights outside in the often cold, unsanitary and dangerous conditions. Furthermore, children and the disabled are seriously disadvantaged because they do not have the strength and stamina of an able-bodied adult to push through the queue. As a result, numerous refugees remain in South Africa and undocumented for years.

Responses to our Study

Initially, the pressure created by the presence of a third party monitor appeared to positively affect the productivity of reception officers. For the first few days of the study, refugees reported that reception officers had been working "for the first time." Countless refugees profusely thanked us for our presence, stating that they now had hope of being assisted.

The reception officer's productivity, however, quickly subsided. With it, went most of the refugees' support for the study. As processing slowed to a practical halt by the last days of the study, refugees became highly frustrated with our non-interventionist role. Numerous refugees declared that if we were really working for the refugee cause, we would intervene on their behalf. Some demanded that we bring journalists and cameras, while others told us to leave because we were so useless.

Though our presence did not improve conditions, I do believe that the study was a valuable use of time. Observing the admission procedures and processing of refugees provided valuable information on how to better serve the refugee population. From the information gathered, organizations supporting refugees can more concretely ascertain the extent of the difficulties refugees face at the DHA.

¹Sarah Jayne Sterken is a legal intern with the Legal Aid Refugee Clinic based at the University of Cape Town

Refugees may again apply for registration as Security Service Providers

The private security industry in South Africa provides significant employment opportunities for refugees who are otherwise left with limited prospects of entering the formal employment sector. The new Private Security Industry Regulation Act attempts to allow only South African citizens and permanent residents to register as security guards and prohibits refugees from registering. **Fritz Gaerdes**¹ argues that this legislation unfairly discriminates against refugees.

The Private Security Industry Regulation Act, 56 of 2001 ("the Security Act") came into force during February 2002. The Security Act prescribes that any person desirous to engage in employment in the security industry (i.e. security guard, formally appointed car watch guard etcetera) must be registered as a security service provider with the Private Security Industry Regulatory Authority (SIRA) and be in possession of a valid security service provider certificate. If a person does engage in employment in the security sector without being registered with SIRA or being in possession of a valid security service provider certificate, such a person may face criminal conviction.

SIRA replaces the erstwhile Security Officer's Board (SOB) and the security service provider certificates which are issued under the Security Act regime, replaced the old SOB certificates. The Security Act further provides that the Minister of Safety and Security is the ministerial portfolio tasked with overseeing the implementation of the Security Act.

SIRA refused to allow refugee applications

It came to Lawyers for Human Rights' attention some time ago that SIRA had since the Security Act came into force refused to allow refugees to apply for registration as security service providers. Refugees were, according to numerous individual complaints received by LHR, informed by SIRA that the new Act only allows for South African citizens and permanent residents to apply for registration as security service providers. The direct result of SIRA's conduct

was that those refugees, which had not already obtained SOB certificates under the repealed Security Officers Act, were generally, as from February 2002, unable to legally and without risk of prosecution engage in employment in the security industry. This was the case because they were no longer allowed to apply for the necessary registration and as consequence, could not obtain security service provider certificates.

Lawyers for Human Rights held the contention that SIRA's prohibitory interpretation and implementation of the Security Act was not only unlawful in terms of the provisions of the Act itself, but also in conflict with refugees' fundamental rights to equality and dignity, as entrenched in the Constitution of the Republic of South Africa, 108 of 1996.

Apart from these infringements on the fundamental rights of refugees, SIRA's prohibitory conduct also seriously inhibited refugees' ability to sufficiently realize their most basic needs such as food and accommodation, in light thereof that it made legal access to employment in the security industry impossible. This was of particular concern mainly due to the fact that the security industry in the past proved to be one of the few sectors of the employment market, which was relatively understanding of the employment needs of refugees, and as such provided employment and consequently a livelihood for scores of refugees and their families. Lawyers for Human Rights thus viewed it as absolutely necessary to ensure that refugees be allowed to have access to the relevant application procedures of SIRA.

Opinion

“The private security industry in South Africa provides significant employment opportunities for refugees who are otherwise left with limited prospects of entering the formal employment sector.”

LHR appeals to Minister and SIRA

In July 2002, Lawyers for Human Rights addressed the Minister of Safety and Security and the KwaZulu-Natal branch office of SIRA with its legal concerns on the prohibitory conduct of SIRA towards refugees who were desirous to submit applications for registration as security service providers. This action was taken as legal representatives of two individual refugee clients who were refused access to the application procedure by the KwaZulu-Natal branch of SIRA - and on behalf of the Union of Refugee Woman, an organization whose membership solely comprise of female refugees and which has as its main activity the advancement of woman refugees' well-being in South Africa. In this matter, a number of the Union's members wanted to submit applications with SIRA but were not allowed to do so.

Responses to LHR's appeal

In September 2002, in response to our concerns, the Deputy Minister of Safety and Security informed us that SIRA should in fact have received and thereafter considered the applications which our clients attempted to submit with it. The Deputy Minister also confirmed that should our clients wish to still submit their applications then SIRA would indeed receive and consider them. The KwaZulu-Natal Branch of SIRA followed suit when they informed LHR that the Director of SIRA had advised them that any member of the public wishing to apply for registration as security service providers should feel free to come forward and submit such applications with them. 'Any member of the public' of course includes refugees.

Lawyers for Human Rights commend the Ministry of Safety and Security and SIRA for their positive resolve of this matter. Their decisions to now allow refugees to submit applications for registration as security service providers with SIRA, are in our view not only in line with a more correct legal interpretation of the provisions of the Security Act, but more

importantly follows the South African Constitution's injunction to protect, rather than to infringe on fundamental rights.

Further requirements

However, it must be borne in mind that although refugees are now allowed to submit registration applications with SIRA, their applications will still have to be considered, before it can be approved or rejected, by evaluating it against the Security Act and Regulations. The reason for this is that the Security Act sets specific requirements to be registered as and subsequently work as a security service provider. The requirements for registration are contained in Section 23 (1) and (2) of the Security Act and are elaborated on further in the Regulations, which set out the requirements for documentation that must be submitted to SIRA when making the relevant application. Should a person not fulfil one or more of the requirements or not provide any of the required supporting documentation set by law for registration as a security provider, that person's application for registration may possibly be refused. This applies not only to applications by refugees, but also to applications made by South African citizens and permanent residents.

There are, however, certain requirements contained in the Security Act and its Regulations that are particularly of relevance to refugees in that they may to some extent still possibly hinder the actual approval by SIRA of their applications for registration as security service providers. One of the requirements in this regard is contained in section 23 (1) (a) of the Act, which requires that a person should be a South African citizen or permanent resident of South Africa. The regulation further requires that proof that the applicant enjoys either of these resident statuses in South Africa is supplied with his or her application. In LHR's opinion, the exclusion on non-citizens, in particular refugees, infringes on the equality and non-discrimination clause in the Constitution.

Opinion

“In LHR’s opinion, the exclusion on non-citizens, in particular refugees, infringes on the equality and non-discrimination clause in the Constitution.”

Another seemingly hindering requirement to the actual registration of refugees, contained in the Regulations, provides that if an applicant has immigrated to RSA during the 10 year period immediately preceding his or her application for registration or if the applicant has been resident outside of South Africa for an uninterrupted period of at least 1 year during the 10 year period immediately preceding his or her application, such applicant must submit a police clearance certificate on his or her criminal record status from every country outside of South Africa where he or she has been resident within the relevant period.

It goes without saying that an applicant would have to obtain such criminal clearance certificates his or her country of origin’s embassy in South Africa or directly from a government department in their home countries. It is clear that this requirement would be particularly burdensome, if not impossible, to most refugees. This is due to a host of different reasons, one being that it is generally not advisable for refugees to have contact with their home country’s governments due to the legitimate security concerns which it may create. Another is the foreseeable unavailability of proper records from certain countries of origin, due to the destruction caused by conflicts in these countries.

Refugees to apply for waiver

Despite these requirements that seemingly hinder the actual registration of refugees as security providers, it is Lawyers for Human Rights’ contention that the provision of Section 23 (6) of the Security Act allows for the practical and legal bridging of these hindrances. This section reads as follows:

“Despite the provisions of subsections (1) and (2)- (these sections contain the registration requirements)-, the Authority may on good cause shown and on grounds which are not in conflict with the purpose of the Act and the objects of the Authority, register any applicant as a security

service provider.”
(My emphasis and insertion)

This provision enables individual applicants desirous to be registered as security service providers but who cannot fulfil all of the registration requirements set by the Security Act or who cannot submit certain of the documents required of them, to apply to SIRA for a waiver of fulfilling the specific requirement or of providing certain documentation.

SIRA would, in our view, be obliged in terms of law to consider such waiver applications and must if good cause are shown for the reason why the applicant cannot fulfil a requirement or provide a specific document, and such applicant has fulfilled all the other requirements, register such an applicant and issue him or her with a security service provider certificate. Of course should SIRA refuse an application because the applicant does not fulfil a specific requirement or did not provide them with all required accompanying documentation, they must in terms of law provide lawful reasons for such refusal.

Conclusion

In conclusion, Lawyers for Human Rights would encourage refugees who are desirous to work in the security industry to feel free to apply for registration as security service providers. It is their right to do so. Refugees must however, when submitting applications, be sure to enclose the necessary waiver applications to their applications, in order to enable SIRA to consider all the necessary and applicable facts of each application that is submitted to them.

Lawyers for Human Rights invites prospective applicants to approach our legal counsellors’ offices in Pretoria, Port Elizabeth or Durban should further advice be required.

¹B. *Comm. LLB (UP). Admitted Attorney of the High Court of South Africa. Refugee Legal Counsellor in Durban, (LHR).*

SA refugee law and the firm resettlement bar to asylum in the United States



By **Abeda Bhamjee**¹

The firm resettlement of an asylum seeker in a third country has been a bar to a grant of asylum in the U.S. Firm resettlement is defined as "an offer of permanent resident status, citizenship, or some other type of permanent resettlement." The two exceptions to the firm resettlement bar are where the applicant establishes that

(a) entry into the third nation was a necessary consequence of flight from prosecution, he or she remained only as long as necessary, and he/she did not establish significant ties in that nation or (b) the conditions of his or her residence in that nation were so substantially and consciously restricted by the authority of the country that he or she was not in fact resettled. In *Abdille v. Attorney General*, the Third Circuit U.S. Court of Appeals had to interpret the impact of South African Refugee Law on the issue of firm resettlement. *Abdille v. Attorney General*, No. 00-1659

Mohame Abdille was a native of Somalia who had been orphaned at birth and did not know to which Somali clan he belonged. This became a problem after 1991 when militias organized according to clan affiliation. Mr. Abdille was repeatedly detained and assaulted. In 1998 he fled Somalia for South Africa and was granted refugee status in June 1998 for two years. He would then have to contact the Department Of Home Affairs for a review of his status or he would be in the country illegally being subject to potential prosecution. He was issued a passport and travel document allowing him to re-enter South Africa. While in South Africa he was assaulted on two occasions and reported the incidents to the police. He felt the police were not protecting him and fled to the United States.

Mr. Abdille applied for asylum and withholding of removal from Somalia and South Africa upon arriving to the United States. The Immigration and

Naturalization Service (INS) agreed that Abdille satisfied his burden in establishing past persecution or a well-founded fear in Somalia. However, the INS argued that Abdille had been firmly resettled in South Africa before fleeing to the United States. The immigration judge denied the withholding of removal to Somalia, because he had firmly resettled in South Africa. The judge also denied the withholding of removal from South Africa, because he had not proven persecution in South Africa. The Board of Immigration Appeals (BIA) affirmed its decision.

On March 7, 2001 the Third Circuit U.S. Court of Appeals rejected the 'totality of the alien's circumstances' approach. It held firm resettlement is to be determined by evaluating whether the applicant has been offered permanent residence in a third country. Furthermore, if the INS introduces evidence sufficient to indicate that firm resettlement bar would apply the onus is on the applicant to prove that relevant provisions of the law would shift to the applicant. It remanded the case to the BIA for further investigation of South African immigration law and practice, and appropriate resolution of whether Abdille received an offer of some type of permanent resettlement from the South African government.

The firm resettlement bar is not the only obstacle encountered by refugees who have been granted asylum in South Africa and then seek asylum in the U.S. Some refugees who have fled South Africa to the U.S. have been criminally charged for entering the United States with false documentation. Others may have difficulty travelling to the United States, because airlines are taking a greater responsibility in not allowing individuals to enter the U.S. without proper documentation. Finally, if the U.S. rejects an individual's asylum claim, he/she may not be able to return to South Africa. The South African government may criminally charge or revoke refugee status when a refugee uses false documents to leave the country.

Notes

¹The author is based at the Wits Law Clinic, University of the Witwatersrand

Asylum seekers can now work and study

"Work is one of the fundamental aspects of a person's life... An essential component of his or her sense of dignity, self worth and emotional well-being...highly significant in shaping the...psychological, emotional and physical elements of a person's dignity and self respect."¹

By **Donovan Baguley**¹



On the 14th and 15th of August 2002, the constitutionality of the prohibition on work and study for all asylum seekers in South Africa was challenged in the Cape High Court in *Watchen-uka and Another v*

The Minister of Home Affairs and two Others.²

Judge Hennie Erasmus held that the prohibition was unconstitutional and therefore invalid.

Background

The Refugees Act 130 of 1998 ("the Act") came into operation on 1 April 2000. Section 38(e) of the Act empowers the Minister of Home Affairs to make regulations relating to the conditions under which an asylum seeker is allowed to remain in the Republic pending the consideration of their application for refugee status. Section 22(1) of the Act, however, also empowers the Standing Committee for Refugee Affairs (established by section 9 of the Act) to determine the conditions of an asylum seeker's sojourn pending the application for asylum. Empowering both the Minister and the Standing Committee to determine conditions of sojourn gives rise to obvious problems. What if, for example, the parties make conflicting determinations? This problem is at least partially avoided in respect of conditions relating to work and study by section 11(h) of the Act which explicitly provides that the Standing Committee *must* determine these.

This suggests that it is the prerogative of the Standing Committee to determine conditions relating to work and study and that, if the Minister also wishes to make such a determination, he must do so with due regard to any determination already made by the Standing Committee. It follows that the Minister may not make any regula-

tion with regard to the rights of asylum seekers to work and study before the Standing Committee has done so.

On 6 April 2000, the Minister, acting in terms of section 38 of the Act published various regulations that are contained in Government Notice No R366 known as Refugee Regulations (Forms and Procedure) 2000. Regulation 7 contained a prohibition on work and study for all holders of a section 22 permit, i.e. asylum seekers. It is this prohibition on work and study that the applicants in *Watchenuka* sought to be declared unconstitutional.

On 18 September 2002, five months after these Regulations were published, the Standing Committee also determined that asylum seekers were to be prohibited from working and studying pending their applications for asylum.

The Constitutional challenge

The applicants contended that the prohibition on work and study was unconstitutional for three distinct reasons.

Applicants first argued that as the Minister's regulations predated the Standing Committee's decision to prohibit asylum seekers from working and studying by five months, the Minister made the regulations without due regard to the Standing Committee's determination and consequently that the regulations were *ultra vires* and invalid.

Judge Erasmus agreed and held that the prohibition on work and study contained in the regulations to be *ultra vires* and therefore inconsistent with the constitution and invalid.

The second argument was related to the compo-

continued on page 13

Emergency Preparedness in South Africa: Lessons from the Zimbabwean Elections

By **Hernan del Valle** and **Tara Polzer**¹

The March 2002 presidential elections in Zimbabwe were prefaced by conditions which lead stakeholders in the region to acknowledge the possibility of a mass influx of refugees fleeing from a blend of political violence, economic crisis and increasing food shortages. The Government of South Africa, in co-operation with the UNHCR, commenced with emergency preparedness planning. Following a recommendation by the UNHCR, several domestic and international NGOs were invited in February to participate in these contingency planning meetings carried out at a national and provincial level. In spite of the severity of the situation, the final contingency plan had a very limited scope, envisioning assistance to only 1000 people for three days. Moreover, it was presented only one day before the elections, and even then there were still significant gaps, such as how and by whom food, safe water, cooking fuel, electricity, toilets, sanitation, medical care, and fire protection would be provided.

In a recently published report, the Refugee Research Programme² (RRP) of the University of the Witwatersrand has highlighted serious flaws in this emergency preparedness process, including late and mis-targeted contingency planning and implementation, ineffective co-ordination among stakeholders, and lack of political commitment to refugee protection. The report, commissioned by the National Consortium for Refugee Affairs (NCRA) and funded by the European Union Foundation for Human Rights (FHR), draws on RRP's first hand experience as one of the local organisations included in the process, plus additional interviews with South African government officials, international NGOs and UN agencies, and individual testimonies from Zimbabwean asylum seekers.

The factors which limited the effectiveness of the contingency planning process on the government side include lack of experience with

preparedness for a refugee influx, lack of clarity about political and departmental leadership, contradictions between political and operational imperatives, difficulties in co-ordinating national, provincial and local government actors, lack of commitment and clarity concerning preparedness funding, a strong focus on the military, and the perceptions of some officials about refugees. Most of these questions refer back to a lack of agreement on the seriousness of the crisis in Zimbabwe, and therefore the legitimacy of those fleeing from it. Many actors pointed out an underlying lack of political commitment to respond to the crisis. Furthermore, the complementary skills and capacities of non-governmental organisations (international and national) were not sufficiently integrated into government planning. This was in spite of the fact that the participation of NGOs had the potential to be a useful tool for transferring skills and disseminating information on international standards of humanitarian action and emergency response. On the other hand, local NGOs' experience with emergency preparedness also proved to be limited, although they were effective in playing a monitoring role.

Recent reports by international agencies have described the appalling extent and severity of the famine looming in several Southern African countries. Assessments on the ground suggest that some 12.8 million people in the region are at risk of starvation between now and March 2003. Nearly half the at-risk population live in Zimbabwe. Within this context, it is unfortunate and incongruous that the preparedness process in South Africa was broken off a few weeks after the elections. As a leading partner in the SADC region, South Africa should be able to respond to the continuing crisis effectively, including through preparedness on its own ground. The lack of contingency planning for potential famine induced displacement is a serious shortcoming, which should be addressed urgently.

Report

After an in-depth analysis of the factors constraining effective preparedness to date, the report ends with a set of twenty-four policy recommendations for the South African government, international and local NGOs, UNHCR and multilateral agencies, and donor governments.

The report calls for the development of an integrated response based on a joint strategy between the South African government, international actors, and civil society, based on international and regional burden sharing models and principles. A strong emphasis is put on the need to resume the inter-agency co-ordination meetings to monitor the developments in Zimbabwe as they affect possible population flows into South Africa. Continued communication and co-ordination among all stakeholders is currently the most crucial prerequisite for future contingency planning, since it builds trust, establishes comparative advantages and divisions of labour, and allows early warning to lead to effective emergency response in Southern Africa.

The RRP report entitled "Emergency Preparedness in South Africa: Twenty-four Lessons from the Zimbabwean Elections" is available online at RRP website: www.wits.ac.za/rrp and on the NCRA webpage: www.ncra.org.za.

Notes

¹The authors are both from the Refugee Research Programme, based at the University of the Witwatersrand

²The Refugee Research Programme (RRP) is a research and advocacy unit linked to the University of the Witwatersrand. Through its work, the RRP aims to empower migrant, refugee and host communities in South Africa to access political, social and economic rights and to participate in decision-making affecting their lives.

The Refugee Research Programme works with grass-roots communities, advocates with policy makers, and seeks to influence the international academic and policy debate on migration in Southern Africa.

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ASYLUM-SEEKERS CAN NOW WORK AND STUDY

continued from page 11

sition of the Standing Committee. Section 9(2) of the Act requires that the Standing Committee be independent (from the Department of Home Affairs). One of the members of the Standing Committee, Dr Moleboge Machele is employed by the Department as the Deputy Director of Refugee Affairs. Applicants argued that her employment with Department meant that the Standing Committee could not function independently and without bias. Any determination made by the Standing Committee would therefore be *ultra vires* and consequently unconstitutional and invalid.

Judge Erasmus felt it unnecessary to decide this point insofar as he had already found in favour of the applicant's on the first argument.

The third argument was purely constitutional in nature. Applicants argued that the prohibition on work and study infringed asylum seeker's rights to equality, human dignity, life and Just Administrative Action. Again, the court failed to adjudicate this argument on the basis that the prohibition had been set aside on the basis of applicants' first argument.

Conclusion

It is regrettable that the court shied away from deciding on the constitutionality (in the strict sense) of the prohibition. By confining his judgement to the first argument, the court has given the Minister an opportunity to rectify his error by simply re-publishing the prohibition with due regard to the determination of the Standing Committee. A decision to the effect that the prohibition is unconstitutional on one or more of the grounds above would have disposed of the matter.

It is not clear at this stage whether the Department will ask for leave to appeal or simply re-publish the regulations. As of 15 November 2002, however, the prohibition on work and study is unconstitutional and therefore invalid.

Asylum seekers are therefore entitled to work and study.

Notes

¹Re Wilson and Medical services Commission of British Columbia (1988) 53 DLR (4th) 171 (BCCA) quoted in Chaskalson *et al* Constitutional Law of South Africa. Revision Service 2 1998 at 30.

² Case number 1486/02

The year in retrospect for the National Consortium for Refugee Affairs (NCRA)



By **Joyce Tlou**¹

As the year 2002 winds down to a close, we thought it is an opportune time for the National Consortium for Refugee Affairs (NCRA) to reflect on the year in terms of achievements and drawbacks for the organization.

The NCRA is a network of the organizations working on refugee issues in South Africa, committed to the promotion and protection of the rights of refugees. Its mission is to develop and strengthen networking through regular exchange of information, expertise and experience: monitoring policies and laws to promote compliance with minimum international and national constitutional standards. It achieves this through research, advocacy, training, capacity-building and networking. More detailed information on the history and track record of the organization is available on the organization's website at www.ncra.org.za.

Women in the fore-front

For 2002, the United Nations High Commissioner for Refugees (UNHCR) as the inter-governmental agency whose main mandate is refugees, dedicated the year and World Refugee Day² which falls on 20 June each year, to focus on refugee women. Along this vein, the NCRA made a concerted effort to host activities aimed at empowering refugee women so they can move from mere victims to asserting their rightful place as equal members of society in general.

Cape Town had a head start by organizing a consultative workshop in partnership with Tusimame Wana Wake, a grouping of refugee women to identify the needs that are particular to women and chart a plan of action on addressing

these needs. Not to be out done, Pretoria and Durban followed suit in partnership with LHR, in hosting very lively and engaging workshops for women to share information on their rights and obligations in a host country. The workshops were well attended, indicating the interest that prevails on such matters. Pretoria went a step further by arranging a training course on entrepreneurship skills, which culminated in the launch of a pilot project on World Refugee Day.

To its credit, the committed members from East London and Border Refugee Forum marked the international 16 days of Activism campaign by hosting a successful workshop in partnership with Masimanyane Women's Support Centre, focusing on gender based violence within the domestic sphere. As a clear point of departure, there were more men in attendance, with a highly participative audience, which clearly understood the issues and shared information very freely. Such methodology is to be applauded and the NCRA has taken note of this with the aim of further inculcating this into future activities.

The important role played by refugee women within their family structures and the wider community was acutely brought to the fore in 2002 and we believe this is the start of greater things to come. However, lest we somehow mislead you, these were not the only important events for the organization. Therefore we will highlight some of the activities of significance undertaken by the organization.

Research

Each year the NCRA, through its members, commissions research reports on topical issues, which would have been identified as affecting

Review

the majority of the client base. The research is meant to inform and influence policy with practical recommendations for implementation. For 2002, two research reports were published, entitled "Tracking progress: initial experiences with the Refugees Act" and "Emergency preparedness in South Africa, lessons from the 2002 Zimbabwean elections." The reports were formally launched in October 2002 in Pretoria. All other previous reports are also available on the organization's website. The challenge and focus for 2003 is to follow up by monitoring the implementation of the recommendations from the reports through interactive workshops with relevant stakeholders.

Training

Continuing with the efforts from previous years, through the work of Lawyers for Human Rights, training workshops for lawyers and paralegals in the main centres where refugee reception offices are situated was conducted. This training enabled the pool from which clients could seek redress to be widened, especially since Refugee Law is a relatively new area in South African jurisprudence.

The strength in strategic partnerships also got reflected and yielded enormous results with Lawyers for Human Rights, South African Human Rights Commission and the Roll Back Xenophobia campaign running training programmes for the police at ground level in the nine provinces on handling and dealing with non-nationals. The University of Cape Town Law Clinic assisted the Department of Home Affairs by conducting training in the month of November 2002 for nineteen newly appointed officers within the Refugee Affairs Sub-directorate.

Capacity-building

In March the NCRA organized a capacity building workshop for the outreach workers working at grassroots level with the refugee client base, from all the provincial networks that form part of the membership of the organization. With an ever-increasing workload that is coupled with ever decreasing funds, the workshop focused on project management but with a clear emphasis on financial matters such as fundraising and accountability.

Lobbying, advocacy and monitoring on laws and policies

Much of this year's efforts were aimed at the then Immigration Bill and the somewhat negative or ill-defined impact on refugees. A holistic approach was adopted to include all relevant stakeholders with regards to migration concerns such as health, labour, trade etc. To this end, seminars were held on the proposed Immigration Court, a

regional conference hosted on the Bill itself as well as representations made to the Parliamentary Portfolio Committee on Home Affairs. It is with utter disappointment that we regret to report that none of these efforts seemed to have borne fruit as the Bill was passed into law in June without incorporating the NGO recommendations. The only exception to this was the inclusion of minimum international standards for detention.

In line with the decision of a plenary to focus more on socio-economic rights, the year saw members actively engage with service provider government departments on these issues, notably Education and Social Development. A conscious decision was made to focus solely on these two for a concerted effort than trying to address all needs at once.

Congratulations go to the members of the legal sub-committee such as UCT Law Clinic and its associate the Legal Resources Centre, LHR (Pretoria and Durban) and Wits Law Clinic for the successful legal challenges to various policies and practices in the implementation of the Refugee Act. These mainly centred on access to the asylum procedure for Zimbabwean applicants, the interpretation of the safe third country concept and the right to work for asylum applicants.

Networking

The quarterly meetings of the Consortium, the regular meetings of the networks at local level as well as the frequent communication of the Executive Committee have all greatly assisted the organization to share information and provide forums for improved service delivery. The staff has also represented the organization at international forums to showcase not only the work of the organization, but also the country as a whole.

In the light of all the aforementioned, the organization believes it has made a positive contribution to the lives of refugees and asylum seekers as a vulnerable group in need of protection. However, numerous challenges still remain and need to be tackled with a concerted and coordinated effort.

Acknowledgements

The NCRA expresses its gratitude to the Foundation for Human Rights and the United Nations High Commissioner for Refugees for the financial, moral and strategic support rendered.

Notes

¹ Joyce Tlou is the National Coordinator of the NCRA and holds the following qualifications: BL, LLB (Zim) LLM (Wits).

² Part of the details are reported in Nov 2002 vol 5 no 2 issue under RBX campaign

Rwandese style and traditional dance

By **Anne-Marie Dodds**

The month of December was a month of feast, celebration and reunion for a lot of communities in South Africa. A way to do this for the Gihozo Association was to hold a series of concerts on December 19-21 2002 at the Momentum State Theatre in Pretoria central, under the banner "The home where you are born".

The Rwandese Association entertained its public with dances, songs, games and poetry during three one hour long evening concerts. The show is based on family traditions as well as culture related to home education, politeness, greetings, relationships and housework.

Through its activities, the Association aims for the promotion, maintenance, and culture exchange. By recruiting new members and volunteers, it also encourages integration of refugees in South Africa, personal fulfilment and job creation.

Another calendar of activities is currently being prepared allowing concerts to be held in the future in Pretoria, Johannesburg as well as throughout South Africa. The entire South African public is welcomed.

For more information or to support the association, please contact:
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