



Response

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A Welcome Judgement on Asylum Claims

Last week the Acting Judge President of the Western Cape High Court, Judge Patricia Goliath, handed down a far-reaching judgement in which she declared sections 22(12)&(13) of the Refugees Act 130 of 1998, as well as Regulation 9 and Form 3 of the regulations under the Act, to be unconstitutional. She directed that the legislation be amended to rectify the defect.

The sections referred to provide that asylum seekers who have not renewed their visas within one month of the date of expiry are regarded as having abandoned their asylum applications. The Judge pointed out that this took place automatically after the expiry of the one-month period, without any regard for individual extenuating circumstances outside of those listed in the legislation.

It was not disputed that it took on average five years (often longer) for asylum seekers to be recognised as refugees, and therefore that they had to renew their applications somewhere between ten and twenty times. It was also pointed out that these renewals had to take place at the original places where they were first registered, thus making the entire exercise costly and rendering their job security vulnerable due to long absences. The Judge made the critical point that the provisions were clearly arbitrary, because asylum seekers would no longer be deported based on the merits of their case, but rather on external circumstances such as the location of the nearest Refugee Reception Centre, the length of the queue, and the workload of Home Affairs officials

The disputed sections meant that those who failed to renew their visas were after that period automatically deemed to have abandoned their applications and were regarded as undocumented, illegal foreigners without the right to access jobs and social services; they faced detention and deportation despite the fact that they had a valid refugee claim (on which basis they had been granted an asylum visa in the first place). The jurisprudence around this point holds that asylum seekers must be treated as presumptive refugees, with all the rights and protections that this entails, until the merits of their claims have been determined through a proper process. Once the claim is deemed to have been abandoned, the asylum seeker is debarred from continuing with the application. It should be remembered that asylum seekers are permitted to work, study and access social services; without documentation these entitlements fall away.

In paragraph 8 of the judgement, Judge Goliath says: "In summary, any asylum seeker who takes more than a month to renew their visa and cannot present satisfactory reasons to the Standing Committee for Refugee Affairs as to the cause for the delay will be disbarred from pursuing their asylum application, deprived of their visa, treated and classified as an illegal foreigner and eventually deported." Two points are worth noting: satisfactory reasons for a delay include hospitalisation, quarantine, entry into a witness protection programme, or imprisonment without the option of bail. Secondly, once the abandonment has been endorsed by the SCRA mentioned above, there is a nominal prospect for an appeal to be lodged by the asylum seeker, but this is obfuscated by the fact that no relevant procedure is laid down anywhere in the legislation or regulations.

Several dire consequences flowed from these impugned sections. Firstly, as argued by the applicant, the Scalabrini Centre of Cape Town, those who had not met the deadline for renewal were liable to be deported to the countries from which they had come, exposing them to persecution, danger, sexual vio-

lence, and threats of several kinds, thus violating the fundamental refugee law principle of non-refoulement, which prevents a country receiving asylum seekers from sending them back to the place where they would face danger and persecution. In terms of its domestic legislation, and as signatory to international conventions, South Africa has an obligation to ensure that non-refoulement does not occur. The impugned sections clearly undermine this principle and constitute a departure from our domestic and international obligations.

It was also noted that these sections run counter to the protective goals and purposes of domestic and international refugee law, and that this has a serious effect on the children of asylum seekers. The consequences for those who fail to renew their visas – arrest, detention and deportation – extend to any children who are listed as dependents on their asylum applications. Such children are exposed to the consequences of being undocumented, including loss of access to certain social services which require documentation, and to the further risk of refoulement, all due to actions and circumstances beyond their control.

The Minister of Home Affairs acknowledged that the abandonment provisions violated the Constitution, but argued that they were rational and justifiable due to the fact that asylum seekers behaved in a recalcitrant manner and failed to renew their visas in good time. This created backlogs and imposed an administrative burden on the department. But Judge Goliath rejected this argument: “At the heart of the minister’s justification is an unlawful presumption and prejudgement that most asylum seekers have no valid claims and no interest in pursuing these claims. This violates the core principle of refugee law that asylum seekers must be treated as presumptive refugees, with the protection which this entails.”

This judgement provides a firm foundation for a more just and reasonable refugee jurisprudence, and for processes that will safeguard the rights of a very vulnerable group in our society. In a very real way it also follows the contours of Pope Francis’ often cited encouragement to welcome migrants. He emphasises that one of the most important acts of welcome is to make easier the means of entry to a receiving community and to ensure that unnecessary bureaucracy does not stand in the way of mobile communities experiencing a better life. His call emphasises anything that helps create safe and legal processes to welcome people. This judgement is one such step, and it is much to be welcomed.

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