Strategic Refugee Law Litigation

Introduction

1. ProBono.Org operates a Refugee Law Clinic ("Refugee Clinic") at our offices on a weekly basis. The Refugee Clinic is staffed on a roster basis by different law firms. In a period of eight months excess of 200 refugees (often on behalf of themselves and/or a number of dependents) have sought assistance.

2. South Africa is a constitutional state that is party to many International agreements including but not limited to those involving human rights and refugees. Our experience from the Refugee Clinic is that the Department of Home Affairs ("DHA") is ignoring the country's legal obligations and electing to operate within an environment that is vaguely reminiscent of the apartheid era where rule of law and fundamental rights were of no consequence.

3. These observations are shared by other NGO's and human rights organisations across the country. The DHA's almost xenophobic stance and lack of respect for the law, is sowing fear and division among the refugee communities, the consequence of which is that many do not wish to approach the DHA and would rather opt to stay illegally in the country, which in itself could lead to dire consequences.

Background

4. We accept and understand that not every application to the DHA for refugee status will be successful; however in 2010, according to the DHA annual report, only 9000 of 140 000 applications met with success. The UNHCR statistics indicate a successful application rate of 38% worldwide, excluding those who still have an opportunity to appeal, which would improve

this figure, whilst the South African statistic shows that a mere 6,5%, of applicants were granted refugee status. [NOTE: The global recognition rate includes South Africa's figures]

5. According to the UNHCR annual statistical report for 2010, applications for refugee status by persons from the DRC and Ethiopia have a global recognition rate of 64% and 56% respectively. In comparison the South Africa recognition rate of DRC nationals is 27% and those of Ethiopians is 30%. Whilst this is not conclusive, it must raise a concern that the South African rate is half that of the world average, such average which would be further improved if the South African numbers are removed in order to ascertain a more reflective figure.

6. We also submit that in 2011 these recognition rates would have declined, particularly towards the later stages, and entering into 2012, as the DHA seems to have adopted a view that under no circumstances will refugees be allowed to stay in South Africa and furthermore there seems to be a sustained operation to remove persons to their countries of origin.

Legal challenges required

7. Further to the above, the following is a non-exhaustive list of practices that we believe need to be challenged in our courts in order to bring about fundamental changes in the realms of refugee law.

7.1 Contempt of court

On 5 December 2011, the Western Cape High Court granted an interdict in terms of which the DHA may no longer arrest asylum seekers and deport them with immediate effect once a failed appeal is registered. Despite this, the Durban DHA continues this practice. This is a matter of some urgency.

7.2 "Non – refoulment"

In terms of certain international conventions and protocols to which South Africa is a signatory, including the United Nations High Commissioner for Refugees ("UNHCR") Convention relating to the Status of Refugees of 1951, and the1967 Protocol relating to the Status of Refugees; and section 2 of the Refugees Act,

- a person may not be returned to a country where his or her life, physical safety or freedom would be threatened on account of, inter alia, events seriously disturbing or disrupting public order in either part or the whole of the country.

Despite this, the DHA is deporting persons to the DRC; a country that was volatile before the November 2011 elections and this volatility has been further exasperated by the elections. This is also a matter of some urgency.

7.3 Bias in the status determination process

An April 2010 report released by the Forced Migration Studies Programme (FMSP) at Wits University titled "Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions" identifies serious flaws in South Africa's refugee status determination process:

"*The review of 324 negative status determination decisions from all of the country's permanent Refugee Reception Offices shows that these offices are unable to perform their primary function - investigating the validity of asylum claims and distinguishing those individuals who need protection as refugees from those who do not. The quality of status determination decisions has been severely affected by efforts to process hundreds of asylum applications daily. As a result, individuals with valid asylum claims are being returned to life threatening situations, in violation of South African and international law. In one instance, a woman who fled civil war in the DRC after being kidnapped and brutally raped by rebel forces was told that she suffered no harm."*

We concur with the issues highlighted by the report and we submit by virtue of our experience at the Refugee Clinic that these same flaws are to be found in the Refugee Appeal Board decisions and processes, namely:

a) The interview is cursory in nature and weighted towards the issuing of rejections for reasons not connected to the asylum claim.
b) There is no real intention to seek out facts in order to make correct decisions. The application is determined on a basic application form and few, if any, questions are asked with an inquisitorial intent.
c) Errors of law with particular regard as to the standard of proof, the application of the definitions, and misinterpreting the Act and the requirements thereof.
d) Failure to provide adequate reasons or any reasons at all, particularly with manifestly unfounded claims.
e) Reliance on sparse, immaterial or out-dated country information.
f) Mistakes of fact and selective use of country information.
g) Decisions are often handed down three to four years after the appeal, which then begs the question if such a decision can truly be rational, and properly connected to the proceedings, particularly in the absence of tape recordings.

These issues are further compounded by the lack of access to skilled or trained translators and many attendees at the Refugee Clinic indicate that their story is not translated correctly. This results in credibility issues being raised, which often tarnishes the applicant's claim beyond repair.

7.4 Arbitrary arrests pending deportation

A new practice emerged in November 2011 whereby an applicant who is awaiting the outcome of their appeal, attends at the offices of the DHA to get their permit renewed and is then tricked and co-erced to return two to three days later, only to be arrested and detained with immediate effect on the basis that their appeal has failed. Such detention is pending deportation and the person is not brought before a court. Even when the person informs the DHA and Immigration that they want the warrant confirmed by a court, the officials blatantly ignore this and proceed with the deportation proceedings.

a) This practice does not even give the person a chance to make the necessary arrangements with family, work, home and such forth.
b) Often the appeal decision had been decided three to four months prior to the applicant attending at the offices of the DHA.

c) On most, if not every, occasion the arrested person was still in possession of a valid asylum seeker permit.

7.5 Mass Expulsion – in contravention of international agreements

It has recently come to light that the DHA is revoking the recognised refugee status of persons originating from the DRC. It is unclear, at this stage, on what grounds this is being done, but the information available indicates that there is an "operation" in place. It is quite possible that this practice will, or has already extended to other nations. [Such a practice is against the international instruments and conventions listed supra and the African Charter on Human and Peoples Rights.]

– Such behaviour constitutes mass expulsion and is a further indication of a discriminatory, xenophobic, biased and unfair attitude, not to mention unlawful action.

7.6 Manifestly unfounded applications

It has emerged that increasingly applications are being deemed manifestly unfounded, many of which, to any reasonable person, can never fall into this categorisation. A manifestly unfounded decision goes to an automatic review, whereby the applicant seldom gets to make representation even though such right is expressly afforded to them. This practice seems to be a new strategy, which is centred on the fact that once the automatic review decision is made, the applicant only has judicial review as an option. Few, if any, of the organisations that provide assistance to refugees and asylum seekers, have the resources to approach the High Court in order to seek a review.

a) The 2010 DHA annual report indicates that only 600 decisions of the refugee status determination officer ["RSDO"] were overturned on automatic review.
b) Out of a total of 26 389 that constitutes 2,2%. If one takes cognisance of our points in paragraphs four and five above, it seems highly improbable that the RSDO are achieving such a high success rate of decisions.

Proposed strategic action plan

Against this backdrop ProBono.Org believes that these issues need to be addressed comprehensively via a set of legal strategies. In order to embark on a campaign of such magnitude and ambition, the optimal use of resources, skills and knowledge available is required.

Accordingly ProBono.Org wishes to assemble a team of academics, attorneys and advocates to embark on a strategic and co-ordinated project that will seek to address the issues.

We therefore extend an invitation to you / your firm to participate in the project to the extent possible.

Anthony Sterne
ProBono.Org
Suite 701 – 4 Tower A 7th Floor Salisbury Centre
347 Dr Pixley KaSeme Street (West Street)
Durban 4001
t: (031) 301 6178
f: (031) 301 6941
anthony@probono.org.za