

AN ASYLUM SEEKERS LONG WALK TO FREEDOM – FROM ASYLUM SEEKER, REFUGEE TO RESIDENT OF SOUTH AFRICA

With the formal disintegration of apartheid in 1994, South Africa acceded to a number of far-reaching international legal and human rights instruments like the 1951 and 1967 Convention and Protocol for Status of Refugees and the 1948 Universal Declaration of Human Rights.

South Africa therefore took upon itself the legal obligation to receive and treat asylum seekers and refugees in accordance with the internal standards and principles espoused in such instruments. Significantly, these international norms found their way into the creation of the Refugees Act 130 of 1998, which presented a highly progressive piece of legislation.

The main grounds of refugee determination focused on granting the rights to persons facing a well-founded fear of persecution or war in their home countries and the need to seek protection of refuge other than their country of nationality or habitual residence.

Despite all its progressive intent, at the onset of said Act, which took effect in 2000, the authorities failed to grant unconditional rights to asylum seekers to work or study unless specifically authorised in certain cases and such rights were endorsed in the asylum seeker permits. Moreover, if these conditions were contravened by conducting unauthorised work or study, that asylum seeker faced immediate detention, deportation and even criminal prosecution and a sentence of up to 5 years imprisonment.

Whilst the Refugees Act failed to allow asylum seekers the right to work or study, on the face of it, may have been palatable since the Refugee Regulations legislated an effective 3 month period to finalise and regularise their status from asylum seeker to refugee and this process would have been acceptable to most.

For asylum seekers the right to work or study was more an exception than the rule and would be granted on application to the Standing Committee after the expiry of the contemplated 3-month adjudication period. As refugees they could work or study without exception.

As is often the case the most vulnerable fall victim to bureaucracies and genuine asylum seekers were no different as they were left without the right to work or study whilst their status was not being adjudicated in the stipulated 3 month adjudication period. The Department was consistently flouting Regulation 3(3) by refusing to consistently grant the right to work or study after the legislated 3 month period.

Refugee status determinations would take anything from 6 to 12 months, if not longer currently, to adjudicate, coupled with further time delays in the appeals process it potentially left asylum seekers without any means of income for the duration of this period. In many cases asylum seekers for obvious reasons would leave their countries with their families which with left their situation even more desperate.

Right to renew asylum seeker permits and appeals to Refugee Appeal Board

There is a disturbing trend within the Department of Home Affairs to reject a significant number of asylum seekers applications as 'unfounded' in terms of section 24(3)(b) of the Refugees Act.

will be heard before the Refugee Appeal Board on a date determined by them which can take anything up to 12 months or more.

The practical implications are that the final determination of a refugee application may take another 6 to 18 months to adjudicate and in this interim phase his or her section 22 asylum seeker permit is automatically renewed normally for 6 month periods at a time.

Whilst we are not sociologists we would submit that in this phase of extreme time delays in determining a status, any asylum seeker, as a human being, would begin to engender feelings of normalisation and a strong desire to realign or identify with a new habitat.

In light of the above, especially when the need to leave his or her home country was so strong, an asylum seeker would desperately need to secure a livelihood just to survive and hence the right to work becomes paramount.

The walk to freedom begins - The Watchenuka Decision and the right to work or study

In the case of **Watchenuka and Another versus Minister of Home Affairs and Others (1486/02) ZAWC 64 (15 November 2002)** the Court found technical administrative grounds to declare the prohibition of work or study contained in the Regulations made by the Minister of Home Affairs to be unconstitutional.

The significance of this finding provided the asylum seeker with the right to work or study whilst awaiting his or her final determination of refugee status and it is widely lauded for its practical effects in affording an asylum seeker with an opportunity to become economically active especially pursuant to the regularisation of their status that may take a 12 months or more.

The walk gets better – The Dabone decision and the right to apply for temporary and permanent residency permits under the Immigration Act

Asylum seekers were completely let out in the 'cold' when it came to the immigration stream, having no rights to apply for a residency status under the Immigration Act despite legitimately qualifying as any other foreign applicant from abroad.

Moreover, any documentation under the Aliens Control Act (now the Immigration Act) was specifically prohibited and had to be handed in to the Department of Home Affairs for cancellation under section 22 of the Refugees Act.

The only avenue open to an asylum seeker to enter the immigration stream was as a de facto refugee after successfully being granted asylum and obtaining the Standing Committee's approval of such status under section 27(c) of the Refugees Act after 5 continuous years residence read with section 27(d) of the Immigration Act. Of course had the asylum seeker not been granted asylum or the application for asylum was still pending - this route was not an option.

In a landmark ruling in the matter of **Dabone and others versus the Minister of Home Affairs and another (case number 7526/03)** the High Court issued a court order compelling the Minister of Home Affairs to allow asylum seeker permit holders and refugees to apply for temporary and/or permanent residence in terms of the Immigration Act.

Contrary to the current provision in section 22 of the Refugees Act it was ordered by the court in the Dabone matter that asylum seeker permit holders and refugees are no longer required to give up their asylum seeking or refugee status in order to apply for a residency status in terms of the Immigration Act.

In line with this rationale it was further held that possession of a passport is no longer a prerequisite for processing residency applications of asylum seekers or refugees.

Prior to this development, one of the general requirements for the issuance of any residence permit was the submission of the applicant's passport. Now the Department of Home Affairs has issued a directive to all its personnel to endorse the asylum seeker or refugee permits under section 22 and 24 respectively where any temporary or permanent residence status has been acquired under the Immigration Act.

The long walk is over and freedom is in sight – The practical effects of Dabone

Now that the relevant directives have been circulated and all stakeholders are properly informed of this significant development, it is perhaps important to consider the practical effects of this judgment on especially asylum seekers and how their current plight under the asylum and refugee stream may finally be overcome.

With the above in mind it is necessary that key stakeholders embark on a programme of inclusivity and undergo a 'paradigm' shift away from all the negative connotations associated with asylum seekers and look to the positive impact that asylum seekers and refugees can make to South Africa and its economic prosperity – a stated intention under the Immigration Act.

Ironically, it could be argued that the failings of the entire asylum adjudication process within the Department of Home Affairs has had the resultant effect of necessitating a series of legal interventions that now provide very attractive options to asylum seekers and refugees to procure a residency status in South Africa under the Immigration Act

Of course such asylum seekers and refugees need to 'qualify' in their own right and fulfill the requirements set out under the Immigration Act and Regulations as any other 'foreigner'.

Asylum seeker becomes a foreign "spouse" in terms of the Immigration Act

Many asylum seekers and refugees marry or become partners as the "spouse" of a South African citizen or permanent resident and in that case are afforded the right to apply to have their residency as a foreign spouse recognised under the Immigration Act.

It cannot be argued that it is always a case of 'convenience' since the very stages of adjudication that take an inordinate amount of time provide many asylum seekers and refugees with the social environment to become party to serious relationships as any other human being would experience going to any other country for such long periods of time.

In light of the judgment in **Makinana**, foreign spouses are now 'armed' with the right to apply for a change of status by procuring a visitor's permit to reside with their South African partner or spouse, which may be further endorsed to accommodate the additional right to work, study or start an own business without the onerous requirements that non foreign spouses have to satisfy or prove.

It is important to ensure that the formal requirements are satisfied in being recognised as a “spouse” or partner and it is recommended that an immigration attorney be contacted to ascertain whether the legal formalities for immigration purposes are complied with.

Asylum seeker applies for rights to work, study or start own business

For asylum seekers or refugees who remain unattached, they will enjoy the rights under the Immigration Act as any other foreigner, whether to work, study or start an own business. It must be borne in mind that these requirements must be satisfied in full to successfully acquire such residency rights applied for as any other prospective immigrant foreigner.

Many of the temporary residence grounds will through the passing of time evolve into legitimate permanent residency rights and potentially qualify as naturalised citizens of South Africa.

We would recommend that any asylum seekers or refugees who find themselves in need of acquiring a residency status under the immigration stream contact an immigration attorney to explore their options.