

COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA  
ON THE FIRST DRAFT AMENDMENT OF THE REFUGEES REGULATIONS  
(FORMS AND PROCEDURE), 2000

The Immigration and Refugee Law Committee (the Committee) of the Law Society of South Africa (LSSA) considered the First Draft Amendment of the Refugees Regulations (Forms and Procedure), 2000 issued in terms of the Refugees Act, 130 of 1998.

The Committee also had an opportunity to consider the representations that have been submitted by the Legal Resources Centre (LRC). We are indebted to our colleagues at the LRC for its carefully researched and considered submissions.

We support much of what is contained in the LRC submissions, but in certain respects we find ourselves approaching one or other issue from a slightly different perspective or possibly with a different emphasis. The relevant issues are identified below.

1. PRELIMINARY ADVISORIES

- 1.1 The Committee submits that it would make the task of all concerned a little easier if the application form itself was prefaced by-
  - 1.1.1 a brief synopsis of the requirements of sections 3(a), (b) and (c) of the Refugees Act (the Act); and
  - 1.1.2 an advisory as to some of the key provisions relating to applications, including the relevant rights and duties of asylum seekers.
- 1.2 The Committee notes that quite a few of the revised "inquiries" contained in the draft application form as published for comment, reflect current practice in a number of other jurisdictions.

- 1.2.1 However, the Committee submits that, unlike those forms we have viewed, the published draft does not provide the kind of advisory that is both logical and part of international best practice and is consistent with the ethos of our constitutional dispensation.
- 1.2.2 The Committee further submits that, providing such an advisory may help address some of the abuses committed as part of the application process by representatives and others, however well-intentioned, and some instances of applications found to be manifestly unfounded.
- 1.2.3 A draft submission in this regard is attached hereto, marked "**Annexure A**".

## 2. "DATE STAMP (AT POE)"

Unless the Department plans that, in the not too distant future, there will not be any asylum applications submitted inside the country, it is suggested that this should instead read "date stamp (at POE / RRO)".

## 3. APPLICATION FORM – ITEM AI

The term "number of wives" could be offensive to some. It should rather read "number of spouses".

## 4. ITEMS A2.1, A2.2, A2.3

- 4.1 The Form requires that applicants present their identity documents and passports, should they have them, ". . . *for verification of your personal particulars*".
- 4.2 Mindful of section 21(5) of the Act, the Committee urges that the following 'cautionary' be added at the start of both sections:

*"The Department will not contact the authorities in your country of origin."*

4.3 The term "*permit*" should read "*visa*", as per the changes provided for in the Immigration Amendment Act, 2011.

5. ITEM A3.2

5.1 It should be clarified as to whether the inquiry about employment refer to the applicant's employment in South Africa or elsewhere.

5.2 If the Form seeks employment details "elsewhere", we are concerned that, whereas the logic for seeking this information is not immediately clear or stated in the Form, applicants may be concerned that the Department may try to contact a foreign employer, which could disclose that the employee has left the country – and indicate where he / she has fled to.

5.3 In that event, and mindful of the Department's obligations in terms of section 21(5) of the Act, we would urge that the Form records expressly that foreign employers will not be contacted.

6. ITEM A4: CRIMINAL RECORD/S

6.1 The Committee submits that we must not lose sight of the fact that there is an important distinction between being the subject of an "*arrest*" - which requires that a person is being arrested on a charge and will appear in court on that charge - and, on the other hand, being "*detained*".

6.2 Many undemocratic regimes (and even some supposedly democratic ones too) give their security authorities the power to detain their opponents, real or perceived, without there being any checks or balances on that power. As was the case in this country not too long ago, these persons can be held in secret, without trial - for years even - and without the right of access to family or lawyers.

- 6.3 Where the section refers to “*arrest*” it should please be altered to read “*arrested or detained*”.
7. ITEMS A5.1, A5.2
- 7.1 A5 addresses the applicant’s involvement in the armed forces.
- 7.2 Neither A5.1, nor A5.2 seeks to elicit the now-notorious and all-too-common situation in conflicts where people, including minors, are kidnapped and forced to join one or other side - statutory or non-statutory - under pain of death of themselves or their families.
- 7.3 A5 must allow the applicant to address that scenario.
8. ITEM A7: TRAVELLING TO SOUTH AFRICA
- 8.1 The Committee is concerned about the lawfulness of the questions relating to whether a person applied for asylum in a third country - and if not, why not.
- 8.2 Section 2 of the Act clearly provides that, if a person seeks status and can set out a *prima facie* case for persecution, the Republic cannot return him / her to that condition - even if via a third country – and that person’s application must be assessed here.
- 8.3 Posing such a question in the form, without explaining why it is asked, may ‘invite’ the refugee to invent reasons which may impact negatively on his / her credibility. We have to guard strictly against the false comfort of “armchair logic”; we need to understand the situations that many people have in fact fled from.
- 8.4 The question is also posed whether the applicant notified “*the refugee commissioner*”.

8.5 There are, we submit, very few people in South Africa who could actually indicate who the *"refugee commissioner"* in South Africa is, much less how and where they may be found.

8.6 It is submitted that, if the question was revised to refer to the *"refugee authorities"* in the third country, the question might perhaps elicit the information it actually seeks to secure.

## 9. ITEM B3

9.1 The Committee endorses the LRC's concern here.

9.2 Mindful that asylum seekers and refugees retain their rights to their dignity and privacy, it is far from clear, based on the Form, how this information can conceivably assist the RSDO with a determination inquiry and/or impact on the outcome of the application.

9.3 In the interest of transparency and securing the "buy-in" of the asylum applicant whom, we must remember, the courts have noted is generally speaking the classic "stranger in a strange land", we recommend that the Department explain in an introductory note to the section, why this information is sought.

## 10. ITEM E

10.1 There is no provision in the Form for the Commissioner of Oaths to commission the oath / record the affirmation.

10.2 The Committee is moreover concerned as to where these commissioners of oaths will be found. There would have to be serious questions about another Home Affairs' official - especially one within the same office / directorate - commissioning such oaths or affirmations (and whether the commissioner of oaths would know the difference). There is extensive case law on the requirements in this regard.

## 11. ITEM F

The Committee suggests that Item F be amended to require that the interpreter attach a copy of his / her qualification to the application form.

## CONCLUSIONS

The Committee would like to express its deepest gratitude to the Department for having been granted this extended opportunity to make these submissions.

The COMMITTEE would also like to record its willingness to put at the disposal of the Department, the skills and expertise of its members in this field, a number of whom are in fact recognised internationally as being experts in the field.

## **ANNEXURE A**

### **THE REFUGEES ACT – A BRIEF GUIDE TO APPLYING FOR ASYLUM**

Refugees are persons who have fled from their country of origin – and cannot return home – for three possible reasons.

1. You genuinely face persecution if you return home, because of your-
  - a. RACE OR ETHNIC OR TRIBAL BACKGROUND;
  - b. POLITICAL OPNIONS or RELIGIOUS BELIEFS (which includes the right not to have any political or religious beliefs);
  - c. NATIONALITY (WHICH COUNTRY YOU ARE FROM); or
  - d. MEMBERSHIP OF A PARTICULAR SOCIAL GROUP (which includes women fleeing spousal abuse or female genital mutilation and persons who are being persecuted because of their sexual orientation).
2. You have fled from your home because of war or similar such 'disruption' occurring in all or a part of your country.
3. Anyone who is your dependant if you are confirmed to be a refugee for a reason given above.

A person who says that he or she is a refugee must show the authorities in the application for asylum, that:

1. He or she really believes that they face serious harm if they return home; and
2. There is some proof that what he or she is saying is actually happening.

It is important that the person applying for asylum tells their whole story and truthfully. The refugee authorities in South Africa are not allowed to contact the authorities in your country of origin to see if you are telling the truth. What you tell the refugee authorities is kept secret.

If you have any documents or any family or friends in South Africa that confirm any part of your application, it is important that you tell that to the refugee authorities.