

Pro Bono & Human Rights ALERT

10 MARCH 2023



INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Automatic abandonment of asylum application: An analysis of the *Scalabrini Centre of Cape Town v Minister of Home Affairs* judgment

The process of applying for asylum in South Africa is governed by the Refugees Act 130 of 1998 (Refugees Act). Sections 22(12) and 22(13) were introduced into the Refugees Act by the Refugees Amendment Act 11 of 2017, which came into effect on 1 January 2020. These provisions, and their subsequent Regulations, were the subject of litigation launched in the Western Cape High Court.

 FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES

Automatic abandonment of asylum application: An analysis of the *Scalabrini Centre of Cape Town v Minister of Home Affairs* judgment

The process of applying for asylum in South Africa is governed by the Refugees Act 130 of 1998 (Refugees Act). Sections 22(12) and 22(13) were introduced into the Refugees Act by the Refugees Amendment Act 11 of 2017, which came into effect on 1 January 2020. These provisions, and their subsequent Regulations, were the subject of litigation launched in the Western Cape High Court.

The Scalabrini Centre of Cape Town instituted proceedings against the Department of Home Affairs (DHA), challenging the constitutional validity of sections 22(12) and 22(13) and Regulation 9 and Form 3 of the Refugee Regulations. These impugned provisions create an automatic presumption that asylum seekers have abandoned their application if they do not renew their asylum visa within 30 days after its expiry – the effect of this automatic presumption can be far-reaching and may lead to asylum seekers who have genuine claims being deported back to circumstances in which they can face further persecution.

Non-refoulement

At the heart of this matter lies the principle of *non-refoulement*. “The principle of *non-refoulement* is the cornerstone of international refugee protection” – it ensures that an individual is not returned to any place where there lies a possibility that they may face persecution.

South Africa has ratified various international treaties which speak to this principle, and in so doing has bound itself to abide by the tenets of the international covenants. Further, in compliance with its international obligations, South Africa promulgated the Refugees Act, which entrenches the principle of *non-refoulement* in section 2. This demonstrates the commitment South Africa initially had to the protection of forced migrants.

However, over the years, we have seen our commitment to the progressive values underlying the Refugees Act dwindle, and the ability to apply for asylum become more stringent and difficult to access. The provisions in question in this matter are a direct reflection of the times we are in and the arbitrary barriers foreign nationals face in trying to remain documented.



PRO BONO & HUMAN RIGHTS

DEDICATED TO MAKING AN IMPACT

Whilst it's always rewarding to receive recognition, the greatest reward is knowing we are making a difference in the lives of many.

CDH Pro Bono & Human Rights Practice, ProBono.Org Awards 2021 winner of the highest number of pro bono hours in 2020, the Large Firm award for 2020 and a Special Mention for the many years of work on the Jose Brothers case.

From powerful partnerships come powerful results.



ProBono.Org®

The legal partner for your business.

Automatic abandonment of asylum application: An analysis of the *Scalabrini Centre of Cape Town v Minister of Home Affairs* judgment

CONTINUED

The applicants in this matter succinctly placed before the court the consequences of the impugned provisions, which are:

- Asylum applications can automatically be deemed abandoned, without considering the merits of the individual's claim.
- While in theory the individuals can make representations, no clear procedures exist to do so.
- Children are also at risk of being arrested, detained and undocumented.

Regulation 9(3) of the Refugees Act provides that the DHA can only allow for the late renewal of a permit if the asylum seeker has a compelling reason and proof thereof (such as hospitalisation) for the delay. This ultimately means that asylum seekers who simply cannot afford to travel to the Refugee Reception Offices within that month, could be left undocumented and would

then struggle to obtain employment, gain access to healthcare and education – they would, as a result, be dealt with as an illegal foreigner in accordance with section 32 of the Immigration Act 13 of 2002.

The respondent argued that the provisions were necessary to help prevent recalcitrant asylum seekers from abusing the asylum system. Further, it argued this was necessary to aid in dealing with the current backlog of dormant applications and put in place more severe penalty provisions for abusive claims.

However, the applicants argued that the respondent failed to acknowledge and accept what the major contributing factors to the backlog are. These factors include the respondent's decision to close Refugee Reception Offices in certain urban areas, its inefficient adjudication processes, and its lack of capacity to deal with the asylum applications.

The Consortium for Refugees and Migrants in South Africa was admitted as an *amicus curia* in the matter and put forward submissions that these "abandonment" provisions were not in the best interests of children as they would result in children becoming stateless and being at risk of statelessness.

International obligations

In its assessment of the matter, the court confirmed South Africa's responsibility to comply with its international obligations and to establish systems and allocate resources thereto. The impugned provisions constitute a significant limitation on the right to *non-refoulement*, because they had the potential to force an asylum seeker to return a country they previously fled from and face further persecution. A bureaucratic review by the Standing Committee on Refugee Affairs cannot serve as a legitimate constitutional basis for limiting the right to *non-refoulement*.



Automatic abandonment of asylum application: An analysis of the *Scalabrini Centre of Cape Town v Minister of Home Affairs* judgment

CONTINUED

The court therefore held that the “abandonment” provisions were arbitrary as asylum seekers would be deported based on external circumstances, such as failing to renew their permit instead of the merits of their claim. This would result in a violation of the core principles of refugee law, which are to ensure to ensure forced migrants are awarded the full protection of the Constitution, until the merits of their claims have been adjudicated.

It was therefore declared that:

- Sections 22(12) and 22(13) of the Refugees Act are inconsistent with the Constitution and invalid to the extent that they provide that asylum seekers who have not renewed their visas in terms of section 22 of the Refugees Act within one month of the date of expiry, are considered to have abandoned their asylum applications.

- The state is to amend and ameliorate the impugned provisions, in line with the spirit of the Constitution.
- Regulation 9 and Form 3 are inconsistent with the Constitution and invalid and reviewed and set aside.
- The order of invalidity referred to the Constitutional Court for confirmation.

Jacquie Cassette, Elgene Roos and Ayesha-Bibi Karjieker



OUR TEAM

For more information about our Pro Bono & Human Rights practice and services in South Africa and Kenya, please contact:



Jacquie Cassette

Practice Head & Director:
Pro Bono & Human Rights
T +27 (0)11 562 1036
E jacquie.cassette@cdhlegal.com



Brigitta Mangale

Director:
Pro Bono & Human Rights
T +27 (0)21 481 6495
E brigitta.mangale@cdhlegal.com



Gift Xaba

Senior Associate:
Pro Bono & Human Rights
T +27 (0)11 562 1089
E gift.xaba@cdhlegal.com



Clarice Wambua

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E clarice.wambua@cdhlegal.com



Elgene Roos

Senior Associate:
Pro Bono & Human Rights
T +27 (0)11 562 1863
E elgene.roos@cdhlegal.com



Lauriene Maingi

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E lauriene.maingi@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2023 12058/MAR