Agency for Refugee Education, Skills Training & Advocacy
First floor 03 Beverly Road, Athlone 7764
P.O. Box 821, Cape Town 8000, Republic of South Africa
Phone: +27 (0)21 6965764• Fax: +27 (0)86 514 8956 • E-mail: advocacy@aresta.org.za

ARESTA's Submissions to the Portfolio Committee of Home Affairs on the Draft Refugee Amendment Bill.
By Aleck Kuhudzai and Deborah Won.

Introduction

ARESTA has several reservations concerning the Draft Refugee Amendment Bill by the Portfolio Committee of Home Affairs. This submission is a response to the Draft in line with the call for such by the Department. The writer addresses pertinent issues *ad seriatim* and gives recommendations to revise the amendment, followed by a general conclusion at the end.

Subsection (5)(a)

This subsection permits public access to the Refugee Appeals Authority (RAA) hearings if the asylum seeker gives consent. ARESTA recommends this clause be revised to require the asylum seeker's written and informed consent. Left undefined and ambiguous, the term "consent" may be misconstrued to include implied actions or uninformed and thus the consent shall be invalid. As waiving confidentiality may have serious implications for asylum seekers, including risks to life, it is pertinent that consent is given in written form and is given with the asylum seeker's full understanding of the potential repercussions of granting consent and the right to confidentiality of asylum applications. To ensure consent is fully informed, the RAA and the Committee must prioritise taking measures to educate asylum seekers of risks associated with disclosure. This education may include translation services, which the RAA must provide.

Another concern is the scope of this consent. What if the asylum seeker only gives consent for particular members of the public or media to attend the hearing? Does the RAA then have authority to open the hearing to "*any* member of the public or media," or is access limited to those the asylum seeker has consented to? The writer believes the asylum seeker should be given the option to specify which members of the public and media he or she consents to attending the hearing. If members outside of those specified wish to attend the hearing, they must be granted access under section 21(5)(b). What if the asylum seeker further consents to a friend or relative attending the hearing, and then that person publishes the content of the hearing? Will such people be punished; is there a penalty clause for the publishing of confidential information without express consent?

ARESTA is further concerned about the phrasing of the subsection. It reads, "*the Refugee Appeals Authority may, on application and on conditions it deems fit, allow any person or the media to attend or report on its hearing…"* To the best of ARESTA's knowledge, the subsection does not clarify whether a person can only attend the hearing, or may attend and report on the hearing, or if it is only members of the media that can attend the hearings for purposes of reporting. We are therefore of the opinion that this provision is rather vague and ambiguous and should not be left unamended.

Subsection (5)(b)

This subsection deals with RAA discretion to grant public access to its hearings, even without the asylum seeker's consent. This clause is problematic in that it confers broad discretion to the RAA without properly safeguarding asylum-seeker confidentiality. As it is written, this subsection gives the greatest weight to public interest, while other key aspects of the asylum-

seeker's confidentiality, including protection of identity and risk to life, are merely listed as "relevant factors." While we agree that public interest is an important factor to be considered, it cannot trump the necessity of preserving confidentiality as a cornerstone of a just and effective asylum system. Confidentiality must be the norm of the system, and authority to grant access must only be exercised in exceptional circumstances. Thus, safeguards to fetter discretion should be embedded within the amendment.

Furthermore, there are no requirements of notification to the asylum seeker that his or her confidentiality will be breached. Even more troublesome is the lack of an express right to neither appeal nor request review of the decision before the public is given access to his or her hearing by the asylum seeker. As noted by the Constitutional Court in the *Chipu* case, once the public accesses the hearing, the purpose of review is defeated. Thus, a mechanism for review *before* the right of access is exercised is pertinent to a system that respects the purpose of the Act and the integrity of the system. After all, the safety of the applicant should be of utmost importance. In the matter of *Consortium for Refugees and Migrants in South Africa v President of the Republic of South Africa and 11 others*[1] the Court clearly stated that confidentiality was and ought to be peremptory in cases where the applicant qualifies for refugee status[2].

Firstly, the amendment should clarify that the RAA may allow public access only if it finds that it is an *exceptional circumstance* in which public interest *exceeds* the essential aim of the Act to protect the asylum-seeker and the integrity of the system. If, for example, public access to a hearing will endanger the lives of the asylum seeker and family members, despite the existence of public interest, we believe the asylum seeker's interests exceed public interest and the Act must therefore preserve confidentiality to protect those lives. The proposed amendment lacks the emphasis on balancing the interests of the asylum seeker with those of the public, and this inadequacy threatens the integrity of the system.

Secondly, the amendment should include a clause that allows a review process whereby asylum seekers may appeal any decision to grant access without their consent. This review process must come *before* any member of the public accesses the hearing, or else the process is futile. The RAA must be responsible for ensuring that no review proceedings intend to be initiated before access occurs. Or if the asylum seeker wishes the decision be reviewed, the RAA must enact the process in a timely manner.

Thirdly, ARESTA has further noted that the list of factors to be taken into account is a limited list. The drafters have left little room for other factors that may be relevant depending on the circumstances. ARESTA therefore recommends that the clause in (5)(b) be amended to read as *"all relevant factors, including but not limited to--",* be inserted to allow the consideration of other factors that may be relevant but are not listed. We further believe that taking all relevant factors into account, the safety of the asylum seeker is of paramount importance, and

[1] Gauteng High Court, case number 30123/2011

[2] Page 11 of the judgement, paragraph 24.

we therefore implore the committee to amend the section by inserting the words, *"providing that there is no serious possibility that anybody's safety may be jeopardized if the information were to be made public."*

Overall, the writer applauds that several important factors, namely (i) the interests of the asylum seeker, (ii) the integrity of the asylum process, (iii) the identity and dignity of the asylum seeker, (iv) impact on the fairness of proceedings and rights of the asylum seeker, and (vi) credible risk to life or safety are included in the amendment. However, the RAA must ensure that these factors are not taken lightly and are given careful consideration if access is granted. In particular, the potential risks and impact of disclosure must be given heavy consideration, as it may be difficult for the RAA to foresee the implications. By revising the amendment to only allow disclosures in exceptional cases where public interest exceeds the asylum-seeker's interests, the RAA's discretion will be properly applied. The revisions to the amendment recommended above will help protect the asylum seeker and the integrity of the system against overreaching discretion.

Implementation

ARESTA is also concerned with the implementation of the RAA's newfound responsibility to accept and decide upon applications for public access. With the current system burdened by overwhelmed backlogs, the transition from absolute confidentiality to that of discretionary disclosure will require attention and resources from the RAA. It will be important for the RAA to prepare for the additional administrative tasks, increased volume of applications for public access, and the necessary institution of an appeals process that will accompany this transition. This will entail preparing officials to review applications, making applications readily available and understandable to the public, providing interpretive assistance to ensure informed consent, and ensuring any review processes are completed before hearings are accessed.

Conclusion

The goal of the amendment to section 21(5) of the Refugee Act is to confer discretionary authority to the RAA in a manner that best protects confidentiality of asylum-seekers and the integrity of the system, without unreasonably limiting the freedom of expression. While the proposed amendment does confer discretion to the RAA, it fails to ensure this discretion will be exercised properly. Without proper limitations, unfettered discretion may endanger asylum seekers and jeopardize the integrity of the system. ARESTA recommends the amendment be revised to include limitations and guidelines as to when and how the RAA exercises discretion, keeping in mind that confidentiality must remain the norm for all but the few exceptional cases. By raising the standard of disclosure to exceptional circumstances and instituting an appeals process, the RAA can protect the spirit of the Act while allowing flexibility for public access when necessary.