

NATIONAL ASSEMBLY

**QUESTION FOR WRITTEN REPLY**

# QUESTION NO. 267

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## INTERNAL QUESTION PAPER 4 OF 2017

**267. Mr M H Hoosen (DA) to ask the Minister of Home Affairs:**

(1) With reference to his reply to question 2649 on 5 December 2016, what specific steps are being taken to address the existing backlog of appeals received by the Refugee Appeals Board;

(2) will the Refugee Appeal Authority, as proposed in the Refugees Amendment Bill [B12-2016], be better equipped to address the specified backlog;

(3) (a) for how long has the specified Board been improperly constituted and (b) what impact has this had on the existing backlog of appeals? NW285E

**REPLY:**

1. The Department of Home Affairs (DHA) has undertaken two backlog projects in 2001 and 2006 with a view of reducing the backlog. While these projects were able to resolve most outstanding claims, they were not able to prevent the re-occurrence of the backlog. The problem is complex and as a result of many interlinked causes.

To address the existing backlog of appeal hearings it is necessary to contextualize the backlog: -

* In terms of section 13 of the Refugee Act (No 130 of 1998), the Refugee Appeal Board (RAB) must consist of a Chairperson and at least two other members. In the past members of the RAB would hear matters individually for each appeal.
* As explained under question 2649 (b) in the *Harerimana v Chairperson of the RAB and others* the honourable Judge Dennis Davis ordered RAB to sit as a quorum of 50 percent of members plus one of the members for each appeal hearing or at least two members.
* Apart from the capacity constraints the subsequent dilemma is if only two members sit to hear an appeal and they disagree they cannot come to a decision. As a consequence, RAB was advised to sit as a quorum consisting of the three members (at this point the Chairperson and two members) which will then be properly constituted. The main rationale appears to be that sitting as a quorum of three facilitates the process of decision-making.
* As at the end of January 2017, RAB consisted of one member based in Cape Town and an acting Chairperson based in Pretoria. This chronic incapacity was as a result, of the end of contract of the previous RAB Chairperson as well as the resignation of three RAB members around the same time in middle 2016.
* The DHA has about 90 Refugee Status Determination Offices (RSDO’s) based at the five Refugee Reception Offices on average these RSDO’s may hear and determine between four and seven applications per day. If the applicant is rejected as unfounded by the RSDO, he or she has a right to appeal to the RAB within 30 days. Most applicants for asylum are rejected as “unfounded” and almost all such rejections are appealed against. This further strains the backlog.

In order to address the immediate challenges of the incapacity, the Minister of Home Affairs appointed a new Chairperson for RAB on 07 February 2017. As a matter of urgency, RAB re-started appeal hearings on 20 February 2017 on the basis that it is now properly constituted. All three current members are conducting these appeal hearings sitting as a quorum.

There is also an imminent appointment of two additional members by the Minister of Home Affairs. These two members are going through the internal interview and vetting processes. The Minister will in this regard also make the appointment after the conclusion of these internal processes. (It must be noted that there is challenges in attracting qualified legal refugee experts to a mandate with such a high backlog and low salary band). As soon as the interview and vetting process is completed, it is planned that the members be based at the Durban and Musina Refugee Reception Centres, respectively. It is also planned, that the Chairperson and another member, as may be required, will travel to these centres to hold appeal hearings as an interim measure in anticipation of the adoption of the new amendments in particular related to the quorum requirements.

According to RAB statistics there are 1287 judicial review cases that were served on RAB to date. This is another capacity constraint.

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| Year -  | No of cases |
| 2013 to 2014  | 132 |
| 2014 to 2015  | 230 |
| 2015 to 2016  | 663 |
| 2016 to 2017  | 262 (to date) |

The reasons for the high number of reviews are the following, firstly, the decisions taken by RAB as an individual member after the *Harerimana* case was decided in November 2011. At the time, the previous Chairperson of RAB failed to apply the judgement and continued with hearings as individual members in some instances. Secondly, reviews are submitted in order for RAB to provide a hearing date. These reviews are mainly to compel the extension of the asylum seekers permit and to order RAB to provide a hearing date.

In this regard, RAB has undertaken an open dialogue with legal representatives of the appellants to prioritise certain cases. These cases include legal challenges to demand a hearing date and cases where a single member in contravention of the quorum requirements took decisions. This process is ongoing and intended to reduce the number of legal proceedings against RAB. RAB also intends to approach organisations such as Lawyers for Human Rights, Wits Law Clinic, UCT Law Clinic and other interested representatives to open this dialogue. (It should be noted, that at this stage there are very few of these reviews based on the merits of the case.)

During July 2015, the United Nations High Commissioner for Refugees (UNHCR) and representatives of South Africa had a high-level bilateral meeting in Geneva. The parties had agreed to develop a backlog project to address the outstanding RAB appeal cases. The project has not taken off due to the incapacity constraints listed above and financial constraints on both sides. The project was to run for three years ending in 2019.

RAB is continuing the dialogue with the UNHCR under the above agreement. RAB has approached the UNHCR and reopened discussion about the backlog project and its implementation. In this regard, the UNHCR was also approached to assist RAB with the development and financing of a comprehensive case management system. This system will be central to the management of any backlog project and will streamline the management of individual cases. The system will also provide a means to undertake a proactive approach to avoid a re-occurring backlog. The discussion is ongoing but promising.

At this stage, RAB is conducting hearings on an average of five to ten cases per day dependent on the complexity of cases. It has an estimated backlog of 258 232 cases with 92 535 active and 165 697 inactive cases. The institutional incapacity in this regard is evident and multifaceted. The institutional incapacity cannot be a problem that the DHA can alleviate on its own. Therefore, we are in discussion with all interested parties. This is in its infant stage.

1. Yes, as discussed above the legislative amendments will play a key role in alleviating the current incapacity and thus assist in management of the backlog. Although the legislative changes is important there is more to be done in order to address the specified backlog and to manage the caseload proactively. For example, another key requirement in proactive management of the backlog is a case management system (discussed above). This will strengthen resource management and can pinpoint how to address institutional incapacity.

(3)(a) Since May 2016, no decision was taken by RAB members due to the resignation of three members and the end of contract of the previous Chairperson. It is unclear in how many appeal hearings RAB was improperly constituted.

(3)(b) The impact is not measurable at this point, however, as a result of the improperly constituted RAB hearings this has opened the RAB decisions to judicial review and these reviews are likely to be successful if submitted to a High Court. As mentioned above the total number of reviews on hand is 1287 cases. A percentage of this number is reviews based on the lack of a quorum. This percentage will have a marginal effect on the backlog, compared with the total backlog, if these matters are referred back to RAB.