

# **SUBMISSIONS BY THE REFUGEE APPEAL BOARD TO THE PORTFOLIO COMMITTEE OF THE DEPARTMENT OF HOME AFFAIRS REGARDING THE REFUGEES AMENDMENT BILL, 2008.**

## **Introduction**

Honourable Members of the Portfolio Committee, the Refugee Appeal Board has had insight in, and has worked through the proposed Refugees Amendment Bill, 2008. Insofar as the Board is concerned it wishes to comment on sections 8B and 8C of the proposed Amendment Bill. Before the Board, however, makes its comments it is necessary first to explain how the present Refugee Appeal Board functions insofar as its composition and duties are concerned in order to give the Honourable Members a wider picture why some of the amendments are necessary.

## **The Refugee Appeal Board**

Under the present Refugees Act, No.130 of 1998, the following sections of the Act are of importance to the Refugee Appeal Board and I will go through them quickly.

### **Composition of Appeal Board.**

Section 13(1) The Appeal Board must consist of a chairperson and at least two other members, appointed by the Minister with due regard to a person's suitability to serve as a member by virtue of his and her experience, qualifications and expertise and his or her capability to perform the functions of the Appeal Board properly.

- (2) At least one of the members of the Appeal Board must be legally qualified.
- (3) A person may not be appointed as a member of the Appeal Board if he or she –
  - (a) is not a South African citizen;
  - (b) has been sentenced to imprisonment without the option of a fine during the preceding four years.

#### Powers and duties of Appeal Board

Section 14(1) The Appeal Board must –

- (a) hear and determine any question of law referred to it in terms of this Act;
  - (b) hear and determine any appeal lodged in terms of this Act;
  - (c) advise the Minister or Standing Committee regarding any matter which the Minister or Standing Committee refers to the Board.
- (2) The Appeal Board may determine its own practice and make its own rules.
  - (3) Rules made under subsection (2) must be published in the *Gazette*.

#### Meetings of Standing Committee and Appeal Board.

Section 15 In the case of both the Standing Committee and the Appeal Board –

- (a) meetings must be convened by the chairperson;
- (b) the majority of members constitutes a quorum;
- (c) decisions must be taken by a majority of votes, and in the case of an equality of votes, the chairperson has a casting vote.

In terms of section 14(1)(b) mentioned above the basic function of the Refugee Appeal Board is to hear and determine appeals lodged in terms of section 26 of the Act.

Due to the large number of appeals lodged by asylum seekers whose applications for refugee status have been rejected by Refugee Status Determination Officers at the various regional Refugee Reception Offices, namely Pretoria, Johannesburg; Port Elizabeth; Durban and Cape Town, appeals are heard and determined by single members sitting individually as the Board. This is done in an endeavour to cope with the volume of appeals lodged.

Over the past seven years legal representatives, N.G.O.'s and Law Clinics acting for appellants have argued that the Refugee Appeal Board has acted *ultra vires* when appeal hearings have been conducted and decided by single members of the Board. For their argument they have quoted section 15(b) and (c) stating that a quorum of members must hear and determine each appeal. The Appeal Board is not in agreement with this argument as "meetings" mentioned in section 15 are not "hearings" mentioned in section 14(b). Legal argument on this point has resulted in differing views by counsel who have given their opinion on this point. Suffice to state that the Appeal Board has more than once requested that this section of the Refugees Act, 1998, be removed or amended, so as to do away with the uncertainty which it creates.

In passing it may be mentioned that the Appeal Board made its own rules in terms of section 14(2) which were published during 2003. One of the rules was formulated in order to regulate the question of how many members could hear and determine each appeal. Rule 13(3) stipulates that : " The chairperson may designate one or more members of the Appeal Board to hear any appeal lodged." The reason for this rule was to sanction a

single member hearing and determining an appeal. It has been argued that this rule is *ultra vires* in the face of what the Act states in section 15. Unfortunately this point has never been argued fully before a High Court and judges have only made *obiter dictum* remarks in this regard without making a definite finding.

It is clear that section 15 of the present Act needs to be removed from the Act.

#### Proposed amendments to the Refugees Act, 1998,

The Refugee Appeal Board has at various workshops and seminars regarding amendments to the Refugees Act, 1998, requested and proposed that the following amendments be made:

1. That section 13 of the Act be amended to state that all members of the Refugee Appeal Board, which will include the chairperson, to be legally qualified. The reason for this proposal is because the members of the Appeal Board perform quasi-judicial work in making appeal decisions which requires a knowledge of the law of evidence, burden of proof etc. which a layperson does not possess.
2. That section 15 be scrapped in its entirety so as to do away with the uncertainty it creates as mentioned above and to put into its place a section which will give the chairperson the powers to designate one or more members to hear and determine an appeal.

While section 15 of the Refugees Act, 1998, has been removed the drafters of the Refugees Amendment Bill, 2008, have not taken cognizance of the Appeal Board's other proposals.

## Proposed Refugees Amendment Bill, 2008.

The proposed Refugees Amendment Bill, 2008 reads as follows insofar as sections 8B and 8C are concerned :

### Composition of Refugee Appeals Authority

Section 8B (1) The Refugee Appeals Authority consists of –

- (a) a chairperson who is legally qualified;
- (b) such number of other members as the Minister may determine, having regard to the likely volume of work to be performed by the Refugee Appeals Authority.
- (c) The chairperson and other members of the Refugee Appeals Authority are appointed by the Minister with due regard to their experience, qualifications and expertise as well as their ability to perform the functions of the Refugee Appeals Authority properly.

### Comment

It is clear that the Bill does not require the members of the Refugee Appeals Authority to be legally qualified. The Refugee Appeal Board deems it to be vitally important that all members of the Refugee Appeals Authority be legally qualified in view of the quasi-judicial work they perform. Refugee Law is a highly specialized form of law which requires the skills and insight which only a legally qualified person possesses.

### Functions of Refugee Appeals Authority

Section 8C (1) The refugee Appeals Authority must –

- (a) determine any appeal lodged in terms of this Act, and
- (b) advise the Minister regarding any matter which the Minister refers to the Refugee Appeals Authority.

- (2) An appeal contemplated in subsection (1)(a) must be determined by the chairperson and such number of members of the Refugee Appeals Authority as the chairperson may deem necessary.
- (3) The Refugee Appeals Authority may determine its own procedure and make its own rules, which may not be in conflict with the provisions of this Act.
- (4) Rules made under subsection (3) must be published in the *Gazette*.

### Comment

Although the proposed section 8C(1) stipulates that the Refugee Appeals Authority must determine any appeal lodged in terms of this Act, and has left out the word contained in the section 14(1)(a) of the present Act, namely “hear” , it must be accepted that all appeals must be “heard” before they can be determined.

This is accepted worldwide by all refugee appeal bodies such as the New Zealand Refugee Status Appeals Authority, the Australian Refugee Review Tribunal, the Canadian Immigration and Refugee Board, UNHCR and others. **Hathaway, The Law of Refugee Status**, at p83 mentions : “The heart of the refugee determination process is the careful consideration of the claimant’s own evidence, whether provided orally or in documentary form. Both the Convention and the UNHCR guidelines are conspicuously silent on the issue of entitlement to an oral hearing. Since the decision of the Supreme Court of Canada in *Singh et al v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177, however, Canadian law has required that all applications for refugee status receive an opportunity to be heard by the authority responsible for the adjudication of their case.”

It is respectfully submitted that the same applies to appeals and that all appellants be “heard” orally before a determination is made.

Accepting that all appeals lodged in terms of the Act must be “heard” and determined this will mean that the chairperson and

such number of members as he deems necessary, must hear every appeal lodged in terms of the Act before making a determination. This, with the greatest respect, is a practical impossibility.

To illustrate this point. Presently members of the Refugee Appeal Board travel to the various regional Refugee Reception Offices to conduct appeal hearings. For example members travel to Cape Town to conduct appeal hearings. The remaining members not traveling to Cape Town will conduct appeal hearings locally in Pretoria and Johannesburg. If the chairperson has to "hear" every appeal this will mean that he will have to be in Cape Town with the members to hear the appeals while the remaining members in Pretoria and Johannesburg will not be able to conduct any appeal hearings because the chairperson is not with them as required by section 8C(2) of the Bill.

Presently the Refugee Appeal Board conducts an average of 50 appeal hearings per week or 300 per six week period. Appeal hearings are conducted at the regional Refugee Reception Offices at six weekly intervals. This means that every second week selected members travel to the regional offices to conduct appeal hearings. With the chairperson having to hear all the appeals he will be out of his office every second week while the remaining members who are not at the regional offices will not be able to conduct any appeals because the chairperson is not present. Apart from placing a tremendous strain of the chairperson having to be away from home every second week, valuable working time will be wasted while the other members are unable to conduct appeal hearings in Pretoria and Johannesburg.

While the Board cannot state the exact number of pending appeals at present it is a known fact that approximately 80% of all rejected asylum seekers at first instance lodge an appeal in

order to prolong their stay in South Africa. Past figures of appeals received from the various regional offices are reflected in annexure "A" hereto.

It is envisaged that with the proposed amendment to do away with "Manifestly unfounded" decisions which in the past were reviewed by the Standing Committee for Refugee Affairs and which will now all become "unfounded" decisions which will be appealable, the number of appeals lodged in the future will increase substantially.

#### Proposals by the Refugee Appeal Board

The Refugee Appeal Board proposes that the amendments to sections 8B and 8C be formulated as follows.

#### Composition of Refugee Appeals Authority

- 8B (1) The Refugee Appeals Authority must consist of –
- (a) a chairperson who is legally qualified; and
  - (b) such number of **legally qualified** members as the Minister may determine, having regard to the likely volume of work to be performed.
- (2) The chairperson and other members of the Refugee Appeals Authority must be appointed by the Minister with due regard to their experience, qualifications and expertise, as well as their ability to perform the functions of the Refugee Appeals Authority.
- (3) A person may not be appointed as a member of the Refugee Appeals Authority if he or she –
- (a) is not a South African citizen;
  - (b) has been sentenced to imprisonment without the option of a fine during the preceding four years;
  - (c) is, or becomes an unrehabilitated insolvent;
  - (d) is or has been judicially declared of unsound mind;