



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

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Dear Madam,

Expert opinion of UNHCR on issues of the right to work for refugees and asylum-seekers in the case of [South African Somali Association vs Limpopo Department of Economic Development, Environment and Tourism] in the North Gauteng High Court, Pretoria, South Africa

The Office of the United Nations High Commissioner for Refugees (UNHCR) is a global humanitarian and non-political organization. As a subsidiary organ of the United Nations, it has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for refugee situations.¹ Paragraph 8(a) of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees,² which is reiterated in the Preamble of the 1951 Convention relating to the Status of Refugees³ ('1951 Convention'). In turn, Article 35(1) of the 1951 Convention obliges States Parties to cooperate with UNHCR in the exercise of its functions.⁴ A similar obligation for State Parties is set out in Article II(1) of the 1967 Protocol relating to the Status of Refugees ('1967 Protocol')⁵ and Article VIII of the 1969 OAU Convention governing Specific Aspects of Refugee Problems in Africa ('1969 OAU Convention').⁶

UNHCR's supervisory responsibility is exercised in part by issuing guidelines, positions and opinions on the meaning of provisions and terms contained in international refugee instruments, especially where they are unclear or in dispute, with the view to ensuring a consistent and coherent interpretation of international refugee law. UNHCR thus has a direct interest in the issues before the Court in this case, in

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees* ('the Statute'), 14 December 1950, A/RES/428(V), <http://www.unhcr.org/refworld/docid/3b00f0715c.html>.

² According to Article 8(a) of the Statute, 'The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto' [emphasis added].

³ The 1951 Convention relating to the Status of Refugees ('1951 Convention'), 189 U.N.T.S. 137, <http://www.unhcr.org/refworld/docid/3be01b964.html>.

⁴ According to Article 35(1) of the 1951 Convention, 'The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.'

⁵ The 1967 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

⁶ The 1969 OAU Convention governing Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, <http://www.unhcr.org/refworld/docid/3ae6b36018.html>.

particular in respect of the right to work of refugees and asylum-seekers. In this expert opinion, UNHCR is concerned with the interpretation and application of the 1951 Convention, its 1967 Protocol and the OAU Convention in South Africa. South Africa is party to all these instruments and thus accepts its obligations under those instruments without reservations.⁷

South Africa faces particular challenges to its asylum system, not least in light of the fact that over the last few years, it has consistently received the highest number of asylum applications among industrialised countries. The majority of asylum applicants originate from the Democratic Republic of the Congo (DRC), Ethiopia, Somalia and Zimbabwe, each being countries in which conflict, instability or political oppression are commonplace. This volume of applications presents particular challenges to the efficient processing of asylum applications and the management of South Africa's overall asylum and immigration systems, including long delays in the registration and adjudication of asylum applications and the provision of related documentation. Despite these challenges, South Africa has maintained an open door policy and the right to work for asylum-seekers and refugees is recognised in law and practice (see Sections 22 and 24 of the Refugees Act 130 of 1998).

Since 2008, however, the country has confronted persistent phenomena of xenophobia and related intolerance, including incidents of violence against refugees and asylum-seekers and the destruction of their property with the loss of their livelihoods. According to information available to UNHCR and at the heart of these proceedings, refugees and asylum-seekers have been singled out for business closures, and their goods and produce have been confiscated and destroyed, in several municipalities in the Limpopo Province. UNHCR is particularly concerned that this prejudiced climate is negatively impacting on the ability of refugees and asylum-seekers to exercise lawful rights such as those relating to employment, and creates mistrust in the community and fears among refugees and asylum-seekers.

Refugees and asylum-seekers are entitled to seek and to enjoy asylum in South Africa, peaceably and without harassment, intimidation and other forms of arbitrary interference with their rights and safety. The South African government will need to carefully monitor and respond appropriately to all such reported incidents, as well as to put in train policies and programmes geared towards dispelling negative social stereotypes and building social acceptance and cohesion. The legitimate interests of South Africa around security, its own economy and irregular migration need to be managed, while respecting international refugee and human rights law. UNHCR stands ready to support the Governments' efforts in this regard.

The right to work under international refugee law

The ability to engage in decent work is a fundamental human right, integral to human dignity and self-respect. For refugees and asylum-seekers in particular, it can be crucial to their survival and self-sufficiency. But it also allows refugees and asylum-seekers to contribute to their host communities, including the local and national

⁷ South Africa became a party to the 1951 Convention and its 1967 Protocol on 12 January 1996. South Africa ratified the 1969 OAU Convention on 15 December 1995.

economy. As UNHCR and UNHCR's Executive Committee have expressed on multiple occasions, refugees have skills that are valuable to both host countries and to receiving societies.⁸

In fact, the importance of work rights for refugees was duly acknowledged by the drafters of the 1951 Convention, in which they incorporated three specific provisions – Articles 17 (gainful employment), 18 (self-employment) and 19 (liberal professions). Of relevance to this case is the right to self-employment in Article 18. As expressed by the representative of the United States of America at the drafting conference of the 1951 Convention:

*'Without the right to work all other rights are meaningless. Without that right no refugee could ever become assimilated in his (or her) country of residence.'*⁹

Article 18 provides:

'The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.'

Article 18 grants the right to engage in independent economic activities to refugees lawfully in the territory. The right is to be provided on terms 'as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances'. For recognised refugees, access to self-employment opportunities needs to be made available immediately. UNHCR considers that Article 18 requires States parties to positively facilitate self-employment and to lift any restrictions for refugees in particular.¹⁰ Read in conjunction with Article 6 of the 1951 Convention, States may subject refugees to the same requirements as other aliens in respect of the enjoyment of this right. The State authorities are not, however, permitted to impose additional requirements on refugees over and above those of other aliens. In fact, refugees are entitled to exemptions from any of those requirements that they cannot fulfil because of their special situation as refugees. General requirements such as business licences, registration for income tax, filing of accounts, etc. may be imposed on refugees as they are on other aliens as well as nationals, but – depending on the individual case or situation – they may need to be waived in particular circumstances, for example, as refugees may not be in a position to produce the same documentation as others because of the nature of his or her flight, or where they cannot be expected to pay high fees.¹¹ Article 18 applies to all forms of self-employment including in the agriculture, industry, handicrafts and commercial sectors, and specifically allows refugees to establish commercial and

⁸ See Executive Committee Conclusion Nos. 93 (LIII), 2002; 104 (LVI), 2005 and 109 (LXI), 2009.

⁹ Statement of Henkin (USA), Ad Hoc Committee on Refugees and Stateless Persons, UN Doc. E/AC.32/SR.37 (1950), p.12.

¹⁰ UNHCR Bureau for Europe, *Integration Rights and Practices with regard to Recognised Refugees in the Central European Countries*, European Series vo. 5, No. 1 (2000), p. 68.

¹¹ See, A. Edwards, 'Article 18 (Self-Employment/Professions Non Salaries)', in A. Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press, 2011), 973, at p. 979, para. 18.

industrial companies. The right is to be enjoyed without discrimination of any kind (see Article 3, 1951 Convention).

As far as asylum-seekers are concerned, at a minimum, the 1951 Convention provisions that are not linked to lawful stay or residence would apply to asylum-seekers in so far as they relate to humane treatment and respect for basic rights.¹² UNHCR interprets 'lawfully in' as expressed in Article 18 to thus cover both recognised refugees as well as asylum-seekers admitted into national asylum procedures. Although the enjoyment of the right to self-employment for asylum-seekers may be delayed for a limited period of time, for example, to prevent fraud or to ensure the genuineness of an applicant's asylum claim, it cannot be deprived over the long-term because of government delays in the asylum procedures.¹³ Where such delays in the enjoyment of the right to self-employment of asylum-seekers are justified, refugees and asylum-seekers are still entitled to the other rights in the Convention. In particular, the State party will most likely need to respect other basic human rights, including the provision of social assistance. In the absence of financial or other forms of material support, the right to self-employment allows asylum-seekers and refugees to stand on their own feet and become self-reliant and not dependent upon the State or others to sustain their lives.

If refugees and asylum-seekers are unable to work lawfully, they are likely to be forced to seek employment in unregulated, dangerous, degrading and exploitative conditions. This in turn can expose them to other risks including that of sexual and gender based violence or human trafficking, and interfere with a wider range of human rights. The South African Supreme Court of Appeal in *Watchenuka* has acknowledged this inter-relationship, stating that a blanket prohibition on the right to work for asylum-seekers, without providing social benefits, could lead to destitution and amount to a breach of the constitutional right to human dignity, as among those excluded from the workforce would be those who have no other means of survival.¹⁴ This decision is in line with jurisprudence in other jurisdictions, most notably the United Kingdom's House of Lords in *Limbuela, Tesema and Adam*, which stated that denying asylum-seekers social benefits as well as barring them from the employment market could amount to 'degrading treatment' in violation of Article 3 of the European Convention on Human Rights.¹⁵

UNHCR recognises the fact that allowing refugees and asylum-seekers to open their own businesses can seem to create competition and tensions between refugees and asylum-seekers on the one hand, and the local population on the other, but it is rarely

¹² Reception of Asylum Seekers, including standards of treatment, in the context of individual asylum systems, paragraphs 3 and 4, EC/GC/01/17, UNHCR Global Consultations on International Protection, 4 September 2001.

¹³ See, A. Edwards, 'Article 18 (Self-Employment/Professions Non Salaries), in A. Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press, 2011), 973, at p. 978, para. 15.

¹⁴ *Minister of Home Affairs and Others v. Watchenuka and Another*, (010/2003) [2003] ZASCA 142 (28 November 2003), South Africa: Supreme Court of Appeal, 28 November 2003, available at: <http://www.unhcr.org/refworld/docid/47fdff093a7.html>.

¹⁵ *Regina v. Secretary of State for the Home Department (Appellant), ex parte Adam (FC) (Respondent); Regina v. Secretary of State for the Home Department (Appellant), ex parte Limbuela (FC) (Respondent); Regina v. Secretary of State for the Home Department (Appellant), ex parte Tesema (FC) (Respondent) (Conjoined Appeals)*, [2005] UKHL 66, United Kingdom: House of Lords (Judicial Committee), 3 November 2005, available at: <http://www.unhcr.org/refworld/docid/43fc2d1a0.html>.

so straightforward. In fact, refugees who are self-employed create jobs in the local community, while employed refugees are able to contribute directly to the business they work for, as well as to the local community. In countries where refugees and asylum-seekers do not enjoy the right to work, the cost of social security and other material assistance can be very high. For the refugees and asylum-seekers themselves, lack of employment opportunities and dependency on external support can feed feelings of insecurity and lack of confidence and motivation. Psychological depression and other mental health problems can also be exacerbated and hinder long-term integration.

Apart from South Africa's legal obligations, there are thus good policy reasons – both for host communities and for refugees and asylum-seekers themselves – for ensuring that the right to work continues to be respected in South Africa. The problems that have been associated with this right need to be addressed not by restricting the right to self-employment, which would be at variance with South Africa's 1951 Convention obligations, but by developing programmes and policies geared towards social and economic development of the entire community, whereby refugees and asylum-seekers alongside nationals can develop their skills, improve their livelihoods and contribute to the local community, side by side.

The current legal position in Sections 22 and 24 of the Refugees Act 130 of 1998, which specifically provide for the rights to work for refugees and asylum-seekers, and supported by the decision of South Africa's Supreme Court of Appeal in *Watchenuka*, is in conformity with South Africa's international refugee law obligations. The practice of granting these rights is a long-standing one and has created vested benefits for asylum-seekers and refugees, and South Africa as a whole. The enjoyment of these rights thus needs to be safeguarded and must not be interfered with arbitrarily.

Yours sincerely,



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