On the record

Sally Gandar and Popo Mfubu

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On 19 June 2019, one day before World Refugee Day, the Western Cape High Court handed down judgment in a case brought by the University of Cape Town's Refugee Rights Unit on behalf of the Scalabrini Centre of Cape Town, which sought to improve the lives of thousands of asylum-seeking families across South Africa. The order, which was made after successful negotiations with the Department of Home Affairs (DHA/The Department) means that wives, husbands, children and other dependents of asylum-seekers and refugees are now able to document themselves in South Africa as 'dependents' of the principle asylum applicant in a process commonly known as 'family-joining'. This aspect of the Refugee Act – outlined at section 3(c) – means that refugee families can be documented together, ensuring their rights to family unity and dignity in South Africa.

The order confirms a set of Standard Operating Procedures (SOPs) that had been agreed on by the applicants and DHA. The SOPs allow for refugees to apply to be documented (either through family joining or on their own grounds) upon provision of certain documents, where possible, such as a marriage certificate or birth certificate or affidavit (in the absence of such documents) – regardless of where the marriage or birth took place. Family joining can now also be completed regardless of whether the dependents in question were included in the applicant's original asylum application or not. The SOPs also provide for DNA testing as a measure of last resort to confirm the validity of parents' claim over their child. These changes mean that asylum-seeking and refugee families can now fulfil their right to access documentation in South Africa. Kelley Moult spoke to Sally Gandar, the Head of Advocacy and Legal Advisor for the Scalabrini Centre, and Popo Mfubu, an attorney at the Refugee Rights Unit, about the ground-breaking case.

Kelley Moult (KM): How does a case like this come about and how do your organisations decide to use the courts to try to shift implementation in this way?

Sally Gandar (SG): Clients approach an organisation like the Scalabrini Centre, or UCT's Refugee Rights Clinic, with a barrier that they are experiencing at the Department of Home Affairs. I am talking about a barrier that is not there in law, but exists in practice. In this case, it was that section 3(c) of the Refugees Act[1] wasn't being applied correctly. Once we get a number of people coming in with the same experience, and we have written letters and gone through the process of trying to overcome that barrier on an individual basis for the person concerned, we will engage with the Department. We will take the next step and write a much

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more formal letter of demand that tries to resolve the problem by referring to what the law says, and how it should be implemented. In other words, we ask the Department to either implement the law properly, or to provide reasons as to why it is not being implemented in that way.

Popo Mfubu (PM): When we launched the case, we were initially concerned that the problem of not allowing dependents to be joined onto a main applicant's asylum-seeker refugee status document, which is often referred to as family joining, may be a problem that is just isolated to the Cape Town refugee reception office. There was a lot of litigation around the future of the Cape Town office … it was meant to be closed to new asylum applicants in 2012, and that decision was challenged, and went all the way up to the Supreme Court of Appeal.[2] And then the office reopened but made the decision to close again in January 2014. We initially therefore thought that the problem may be a result of the fact that the Cape Town refugee office was in a winding down process. We then wrote to colleagues across the country, like the Nelson Mandela University Refugee Rights Clinic in Port Elizabeth, and to colleagues in Durban at Lawyers for Human Rights, and to colleagues in Johannesburg at the Legal Resources Centre, and they all confirmed that the same barrier exists – that people who were dependents or spouses of asylum seekers or refugees were not being documented. And then we realised that the problem was much, much bigger than we had anticipated. We then approached the Department and asked them to rectify the issue and when they did not, we approached the Western Cape High Court for relief.

KM: Can you outline for us what the barrier in practice is then, what happens to the clients?

PM: For many of the rights that people try to access across the country, there is an enormous disjuncture between the written law and how it is implemented. And the fortunate thing is that we have such an amazing framework where refugee protection is concerned in that the rights that it contains are very liberal, and even the way that refugees are meant to be treated is very liberal in the legislation itself. However, the actual implementation is what is the problem. Section 3(c) of the Act says that a person who comes to South Africa and seeks asylum on the basis of their status as a dependent should be granted refugee status and documented with an asylum seeker permit of refugee status document. So for example, if a father flees his country because he is being persecuted because of his political opinions, and has to leave his wife and his children behind, they may be joined to his file as dependents once they join him here in South Africa. Practically what that means is that he should take them to Home Affairs, and they should be issued with an asylum seeker permit or a refugee status document (depending on which document the main applicant has). That document is very important because without it – in other words, without being documented – dependents can't go to school, refugees can't go to the clinics to access health care, spouses can't lawfully work or study or open a bank account. Their whole life comes to a standstill if they are undocumented. So, when we noticed that many people who were bringing their dependents to Home Affairs were being turned away, we took on the case to try to ensure that dependents of asylum seekers or refugees are joined to the original application as provided for in terms of section 3(c) of the Act.

SG: Dependents are also currently widely defined under the law as it stands – there is a Refugees Amendment Act, not yet in force, that redefines dependent and limits the definition considerably. A dependent isn't just a child

or a spouse, but can be a same sex partner (which would fall under a spouse in South Africa), or could also be an aged parent or a destitute member of the family. South Africa's law recognises the multiple iterations of family that exist in our context. The issue, though, also applies to children of refugees who are born here, under our law – someone should be able to get a birth certificate through the Births and Deaths Registration Act[3] – but this also wasn't happening across the board. The child's birth certificate then allows a person to go to the refugee reception office to get the appropriate documentation for the child.

PM: Part of the problem was the manner in which the officials at the Department of Home Affairs were interpreting who falls into the category of 'dependent' and who does not. They were taking a very narrow approach, while our law takes a very liberal approach to what a family nucleus looks like (especially within the context of refugee protection). This is important because if you look at the ways in which people flee their countries, they often don't have time to pack their bags, collect all their children from school and get ready to leave as normal travellers would. People just have to run, and often they have to take children that don't even belong to them, for example a niece or a nephew who flees with them because these children's parents have been killed during times of war or have disappeared completely. In many cases Home Affairs was refusing to join those dependents to the main applicant's files.

SG: There is a process that refugee children go through as unaccompanied or separated minors through which they approach the Children's Court and get documentation. But there are more barriers in that process too, and one of the red flags from Home Affairs' side is that this is a potential danger of trafficking. There is no empirical data to back up this fear that children are being trafficked through the asylum process, but Home Affairs was refusing these applications, nonetheless.

KM: Can you talk a little about what the consequences of not being joined as a dependent are for the refugees concerned?

SG: It is important to distinguish between refugee status and an asylum-seeker permit. An asylum-seeker permit is issued in terms of section 22 of the Act, and is renewed periodically, sometimes even as often as every month. The length of the period for renewal depends largely on the official dealing with your case, although we have seen a trend in Cape Town where more people are getting month-to-month renewals of their permits. If you don't have that asylum-seekers permit, you are essentially undocumented. That means that you can't access social services as easily, and you also don't have the right to work or study, on paper. The Watchenuka case, which was decided by the Supreme Court of Appeal in 2003, held that the right to work and study and be a productive member of society and sustain oneself is linked to the right to dignity. As long as someone has an asylum seeker permit, they ought to be allowed to work and study based on that document.[4] In practical terms, that right is written on that piece of paper. Where people are undocumented, they experience barriers in things like accessing health care. We have also seen through our own empirical research that there is not only a lack of access to health care and services like that, but that it means an inability to access services like the police. If a crime is committed against an asylum-seeker or refugee, they are more likely not to report that crime if they are undocumented. We have seen, for example, a client of ours who was raped, and who knew the perpetrators, but who has not gone to the police, and will not go to the police, because she is undocumented and fears that if she did she would be at risk of being arrested herself for being undocumented.

Refugee status documents, which are issued in terms of section 24 of the Act, are usually valid for four years (although sometimes less) and provide access, in addition to social services, to social grants. A dependent cannot apply for these benefits if they are not joined as a dependent. This includes the child grant, which means that if a refugee's children are not joined onto the original application, those benefits are not available to them.

PM: Being undocumented causes people to have to live in the shadows. Not being able to access the police is obviously a big part of that because in terms of section 41 of our Immigration Act[5] any police officer or immigration official can stop anyone and ask them for identification. And if they don't have identification they can be detained. If they are found to not have any status – in other words, not having applied for an immigration permit or an asylum-seeker permit – they can be detained in terms of section 34 of the Immigration Act for deportation.[6] And we have heard through our own clients and our colleagues that there are many people who deserve asylum, who wanted or tried to apply for asylum but couldn't, or who tried to join their dependents but couldn't and who have been taken to Lindela, which is South Africa's repatriation centre.[7] The unfortunate thing is that refugees can be detained for a period of up to 120 days before they are deported. And if the Department does not deport you before 120 days have passed, they must release you, after which they wait outside the Centre and simply detain you again. So there is this lingering fear that if a dependent is undocumented and are on the taxi or on the train, when they are trying to find some low-skilled employment or taking their kids to the clinic … there is the lingering fear that they can be stopped by the police and can be detained, and deported.

SG: One of the other things to mention is that it may be the case that your family member was one of the people who applied at the Cape Town refugee reception office, when it was still open to new applicants. And then you have arrived later, and you are not able to apply in Cape Town because it no longer accepts applications from newcomers. In such a case, the only pathway to documentation you have, other than family joining, is to travel to one of the other refugee reception offices, in other words, Musina, Port Elizabeth, Pretoria or Durban. So that involves a massive financial commitment, never mind the fact that you can't book a bus ticket on many of our bus lines without documentation. Travel on the kinds of services that don't require documentation (such as hitch hiking or long distance taxis) is often risky and takes a couple of days (even if you're only going to Port Elizabeth). Applicants are only accepted at the refugee reception offices on certain days, and people are often required to wait for a long while before they are able to get a section 22 permit. That means that, if for example you are a pregnant woman, you would have to travel while pregnant. Some women have to do this with newly born babies. They often have to wait outside the office from very early in the morning, or sleep outside overnight, just to try and be the first person in the queue. And then you are not even guaranteed service. Even once you have that permit, you likely have to travel back and forth to renew it. You may be able to renew in Cape Town, but people are being either refused service at the Cape Town office or are given month-to-month renewal. This kind of travel is precarious, and means that refugees are less likely to be able to stay in permanent employment because who is going to give you time off – often at least a week or more – every couple of months, to renew a document that many employers don't know much about. Kids are also more likely to stay out of school under these conditions. All because we haven't been able to join families together.

KM: Tell us about the case itself. Who were the clients on whose behalf you brought the application?

SG: Scalabrini is the institutional applicant, because we have the experience reported by many of our clients who have approached us with this problem. UCT's Refugee Rights Clinic had also seen a number of clients who were in the same position. We selected a set of clients who were representative of the different situations or barriers that people were experiencing. For example, one of the clients who we listed, and who provided a confirmatory affidavit, had undergone a DNA test to show that they were, in fact, a dependent. There is nothing in the law that requires that refugees prove dependency in this way, but we knew that our clients were being required to show that the relationship existed in genetics. This client in fact had the DNA test results, but had still not been able to have the family's files linked together as they should have been. We had an example of a case of a husband and wife who were married through customary law in their country of origin. He had refugee status, but when he arrived and was applying for refugee status, he had declared his spouse using one surname, but when she arrived her surname was listed under her maiden or unmarried name. Home Affairs were arguing that she was not the person who had been declared on the original documentation. She therefore remained undocumented, and they subsequently had a child, who was also undocumented. This creates countless barriers for those people. The lady concerned tried to get documentation in her own right by applying herself for asylum, but it makes much more sense for a family to be documented together, particularly if one family member has refugee status already. It makes sense from Home Affairs' perspective too, as it is much less work for them to deal with members of a family together. We had another client who had a child born in South Africa, and who had a South African birth certificate, but Home Affairs questioned the legitimacy of the birth certificate, which was issued by themselves.

PM: What is interesting is that having an institutional applicant allows the issue at the centre of the case to be addressed, without getting too stuck in the small details of facts of the individual stories that Home Affairs is trying to pick apart. When we approach the Department with problems like these, Home Affairs can sometimes just go and remedy the issue by bringing in the individual clients, documenting them, and then the case goes away. But it doesn't solve the wider problem. Having Scalabrini as the institutional client negated some of those issues. The Scalabrini Centre has a long track record of working with refugees, and so the court was happy to accept their experiences of what the challenges are for asylum-seekers and their dependents.

KM: When the case went to court, you received a judgment delivered by Judges Davis and Fortuin. Can you tell us a bit about that process?

PM: Initially the judgment was delivered *ex tempore*, which means that it was delivered from the bench in court. As part of this order we negotiated an agreement with the Department of Home Affairs that created a somewhat of a supervisory order where the Department agreed to go away and formulate a standard operating procedure for these cases. One of the biggest issues was that there was (across the country) no clear, detailed written policy that outlined how these cases should be handled. In other words, something that sets out for people who are coming in to join as a dependent that this is what you need in order to qualify, and these are the documents that you are required to bring in as part of your application. The policy also didn't specify under which conditions cases could, and could not, be joined. So, it all depended on the whims of the official who you met on the day

– one official would ask for a DNA test, another would ask for a birth certificate, and another would ask for an affidavit. Sometimes the official would simply not help you and would also not provide reasons for why they were declining to join the files. Part of the original supervisory order issued by Judge Davis and Judge Fortuin was to ensure that Home Affairs drafted the standard operating procedures so there would be clarity and certainty across the country on the manner in which family joining is meant to be done.

SG: I think it's also important to note that although this was a supervisory interdict it operated more like a structural interdict, which is an order through which a court ensures compliance with its order by monitoring its implementation. This framing was very important for the case.

KM: So, what happened after the agreement of 2017 to necessitate going back to court?

PM: They didn't comply, and didn't comply for quite some time.

SG: When they did comply, they did so with a sub-par set of standard operating procedures. So, there was more back and forth between us and the Department, after which we went back to court in February this year because the standard operating procedures were still not what we believed they should have been in order to give effect to section 3(c). In March, Judge Bozalek indicated that we should try to reach agreement with the Department. At that stage we pushed for the involvement of the United Nations Refugee Agency (UNCHR) because they have produced a guiding note on DNA and family unification, which we thought should really be incorporated into the standard operating procedures. We met with the Department and UNHCR, which resulted in an agreement that UNHCR would fund DNA tests on a case-by-case basis (based on a means test). This removed a significant barrier in that Home Affairs was not willing to fund the DNA tests, and we were adamant that asylum seekers should not be expected to undergo these tests routinely, but that they should only be an option of last resort. We were concerned that if the requirement was written into the standard operating procedures – even as an option of last resort – officials would implement it as routine, or a first port of call. And DNA tests are not uncomplicated in and of themselves – some of the pathology centres will not allow people to undergo tests if they are not documented, and we have cases where Home Affairs officials have refused to accept the results of the tests too. There are barriers with DNA testing too.

PM: The matter has, in the end, had a good outcome. But our initial frustration when the case came back to court was that the standard operating procedures that Home Affairs had submitted to the court did not, in our opinion, comply with the initial order that had been set by Judges Davis and Fortuin. Judge Bozalek's position throughout the matter had been that he was unwilling to make a finding as to whether the policy meets the law or not, and instead encouraged the parties, that are experts in the field, to work together to agree on what would be the best standard operating procedures. The frustration for us was that, because the process took so long, and so many clients remained undocumented for many years, given that the case had been running since 2016. And it was difficult for those clients to understand how there was no final outcome in the matter. Ultimately though, in retrospect, I don't think that a court would have been able to fashion a standard operating procedure that is as broad and liberal and comprehensive as the one that we were ultimately able to craft. The time that the negotiation process took also allowed us to bring in other allies, like UNHCR, who has more clout in making suggestions to the Department. Their involvement wasn't

only limited to the issue of DNA, but they were also able to comment on other areas of the SOP that they felt were problematic, and that we were not able to raise because we were limited to what the initial order had set out. Thinking about it now, it was a good approach by Judge Bozalek to say 'I am going to give you time to go and design, negotiate and finalise an SOP as the experts, but if you are not able to do so, I will make a final decision.' Perhaps this is an indication that judges are taking the position that they don't want to meddle readily in the administration of Home Affairs and other government departments, and if parties are able to reach agreement on their own, then the court will adopt that proposal.

SG: I think that it is useful to recognise that the Department isn't always good at complying with court orders – we have seen this with one of Scalabrini's other cases, which is about the reopening of the Cape Town refugee reception centre's offices. Of course, you can hold them in contempt of court, but where does that really leave you? We are not the only litigant where Home Affairs has failed to listen to a court order. If you sit in the Parliamentary Portfolio Committee meetings these issues are discussed, and Parliament has tried to exercise its oversight function. An order by agreement is a much better outcome.

KM: Now that you have the judgment in hand, what are the barriers to implementation of the agreement by Home Affairs.

PM: Sally touches on an important point around compliance. Home Affairs is notorious for not complying with court orders, for example, the Port Elizabeth refugee reception office was closed but was ordered by the Supreme Court of Appeal to reopen by 2015. It didn't open in 2015 or even 2016. It only opened in October 2018 – it took them almost three years to comply with the court order. Other orders that we have also got, we have had to follow through with contempt of court applications to force them to comply. So, compliance is going to be a question. We even recognised that when we got the order in our original case, that the real work was going to be to get Home Affairs to comply. I think that the other biggest hurdle, especially for the Cape Town refugee reception office, is going to be capacity. They have not implemented family joining for many, many years, and so there are going to be large numbers of people who will now be approaching them to join their family members. That is going to pose another problem in that the office probably doesn't have the capacity to document everyone timeously, and in the manner in which they are supposed to be documented in terms of the standard operating procedures.

SG: We have already had good reports from colleagues in Durban and Port Elizabeth about family joining applications, despite limited capacity in those offices. Scalabrini have met as a team and have decided that, in terms of implementation, we will initially notify our clients but intentionally not set the bar too high in terms of what we expect from Home Affairs. For example, we are able to draft affidavits for clients in terms of what is required for family joining or to supply them with the letters that would make the process easier. But that means that for people who haven't accessed our services, who don't have those documents and who haven't received that advice, we may well be creating a barrier by making things easier for our clients. Our approach is therefore to start with the lowest possible bar – which is not to provide anyone with letters or affidavits unless absolutely required, but rather just with advice on what the process is, what their rights are, and what the court order says. We have heard from our clients that there doesn't yet seem to be a standard approach by the Cape Town refugee reception office on how they

are handling these cases, but we just don't have enough evidence to show trends yet. It is something that we are watching closely, and we have identified a step-by-step approach in terms of how we will intervene. We will first give advice, then the next step will be to write letters and engage on an individual level with the officials at the Cape Town refugee reception office and track cases so that we can give UCT's Refugee Rights Clinic a call and step in where needed.

PM: I take a slightly more jaded approach where Home Affairs is concerned because my experience is that where the Department can use an outside organisation as a cog in their wheel, they will do so. If you look at how we assist many of our clients to fill in Notices for Appeal, which are used where someone has been interviewed by a Refugee Status Determination Officer and their application is rejected, they have the right to appeal that decision if it is unfounded. The rules say that the applicant has the right to be assisted by an official at Home Affairs to complete that form. But the officials at Home Affairs never do. It's organisations like us, like the Scalabrini Centre, like Lawyers for Human Rights, like the Legal Resources Centre that assist hundreds of people per month to complete those forms. Taking from that experience, I am sure that officials at Home Affairs are not going to take the time to sit with clients and fill out affidavits to document what happened to show why they don't have birth certificates, in order to ascertain whether this person is actually a dependent or not. What they are going to do is to say 'go to UCT, go to Scalabrini'. They often do that …

SG: They actually have our addresses printed out on little slips of paper to hand to people!

PM: So as much as we want to assist our clients, and make the system better, Home Affairs is to a large extent (and especially the refugee section) dysfunctional. It requires us to perform administrative tasks that we wouldn't ordinarily want to do, but if we don't do them our clients are not going to be assisted. So, my suspicion is that they are just going to refer everyone to us, or to Scalabrini, or to one of the other civil society organisations providing services. And for the first couple of months, in order to implement this order properly, we are going to have to work with them in this way.

KM: And of course, this is what we see across the system. These de facto public/private partnerships between government and non-governmental organisations that are propping up the criminal justice and other systems, like counselling, rehabilitation and other services, that see little bit of responsibility being carved off and handed over to organisations that are donor funded and who have to make it work for the sake of clients.

SG: I don't think it's even just the criminal justice sector. If you look at the early childhood development sector there is a privatisation of services that should be offered by government, but where government doesn't have the capacity to do so. Those private entities may get funding from the Department of Social Development and private philanthropists, and it ends up being a hollowing out of the state.

PM: It makes the sector very vulnerable. Organisations like ours don't necessarily know whether we will receive our funding or not, and if you look at especially where the UNHCR are concerned, they are cutting and rolling back budgets across the world. They are halving their entire budget because their biggest donor, which is the United States, has cut funding to them quite significantly. If we rely heavily on civil society to do the work that Home Affairs should be doing, it leaves the system vulnerable because when we can no longer operate, people are simply not going to be assisted.

SG: There is also shift in funding with the International Organisation for Migration (IOM) in terms of the Global Compact on Migration. They are putting together a fund, and they will approach donors, both private and state, to contribute to this fund. It is concerning that even a UN body like the IOM has put together a working group to think about funding this work in that way. There is a question about whether those donors, should they choose to fund the IOM initiative, will continue funding research institutions and other civil society organisations as well.

KM: To end off, I want to ask you how refugees who are not the beneficiaries of Scalabrini or UCT Refugee Rights Clinic will know about these changes, and what they can expect when they seek services?

SG: They already know. We got so many phone calls after the press releases went out after the judgment.

PM: It was definitely a huge error to put our personal cell phone numbers on there!

SG: The informal communication networks within different refugee groups have a lot to teach us about spreading the word. The press release from Scalabrini, which we put together after getting this order, was immediately converted into a WhatsApp message, which then went viral in these networks. There was a lot of media interest, and we also got a number of queries and calls from other lawyers and advocates in practice across the country. The information is certainly out there.

KM: Thank you both.

Notes

1 The Refugees Act (Act 30 of 1998).

2 In the case of *Minister of Home Affairs & Others v Scalabrini Centre, Cape Town & Others* [2013] ZASCA 134 (27 September 2013). The Supreme Court of Appeal ruled that the decision to close the refugee reception office was unlawful and should be set aside because proper consultation with stakeholders had not taken place. Thus, effectively what the court ordered was for such consultation with stakeholders to take place, and for a further decision to be made. After the judgment was handed down the DHA purported to consult stakeholders, and then on 31 January 2014 it reached the same decision it had initially taken: to close the Cape Town refugee reception office, and that the office should not assist persons who did not apply there prior to 30 June 2012.

3 Births and Deaths Registration Act (Act 51 of 1992).

4 *Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003).

5 Immigration Act (Act 13 of 2002).

6 Technically, an asylum seeker should include an individual who has not had the chance to have their claim adjudicated. So as soon as they express the intention to apply for asylum, they cannot be deported and must be released. However, in practice this doesn't happen.

7 For a discussion of the problems with this centre see, for example, A Kaziboni, The Lindela Repatriation Centre 1996–2014, *South African Crime Quarterly*, 66, 2018.