



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: GP/2012/0399

Shown Mupani

Complainant

and

National Department of Science and Technology

Respondent

INVESTIGATIVE REPORT

1. Introduction

- 1.1. The South African Human Rights Commission (hereinafter referred to as "the Commission") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the Constitution").

- 1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy".
- 1.3. In terms of section 184 (1) of the Constitution, the Commission is specifically mandated to:
 - 1.3.1. Promote respect for human rights and a culture of human rights;
 - 1.3.2. Promote the protection, development and attainment of human rights; and
 - 1.3.3. Monitor and assess the observance of human rights in the Republic.
- 1.4. Furthermore, section 184(2) affords the Commission authority to undertake research and education activities together with the duty to investigate and report on the observance of human rights. These duties contribute and enhance the exercise of its authority in terms of section 184(2)(b) to take appropriate steps to secure redress where human rights have been violated.
- 1.5. The Human Rights Commission Act, 54 of 1994 (hereinafter referred to as "the HRC Act"), further supplements the powers of the Commission to fulfil its constitutional mandate.

2. Nature of Complaint

- 2.1. On the 25th of September 2012 the Commission received a complaint from Mr Shown Mupani (hereafter referred to as the Complainant), alleging the following:
 - 2.1.1. That he is a refugee in South Africa;
 - 2.1.2. That on or around the 10th of September 2012 he applied for an internship programme (the DST-NRF Internship Programme), advertised by the National Department of Science and Technology (hereafter referred to as the Respondent),

- 2.1.3. That he was informed he did not qualify for said internship as the internship was limited to South African citizens only, and that;
- 2.1.4. The disqualification amounted to unfair discrimination and further violated his dignity.

3. The Parties

- 3.1. The Complainant is a major Zimbabwean male, with recognised refugee status in the Republic of South Africa, residing at 8 Joseph Addison Street, Vanderbijl Park, 1901, at the time of the alleged incident.¹
- 3.2. The Respondent is the National Department of Science and Technology, a public body which is accountable to the National Parliament of South Africa and is mandated to develop, coordinate and manage a national system of technological and scientific innovation, with its head office in the DST Building, Meiring Naude Road, Pretoria, Gauteng.

4. Preliminary Assessment

- 4.1. A preliminary assessment on receipt of the complaint was informed by a consideration of the legal framework detailed below. A consideration of the rights which are alleged to have been violated in terms of the framework governed largely by the Constitution, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereinafter referred to as "the PEPUDA"), indicated a *prima facie* violation of the right to dignity and equality.
- 4.2. Section 9 of the Constitution, which entrenches the right to equality, provides that:

¹ The complainant has also obtained both his Bachelors and Honours degrees at a South African university.

- "(3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, **ethnic or social origin**, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) *No person [our emphasis], may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).*
- (5) *National legislation must be enacted to prevent or prohibit unfair discrimination."*

4.3. PEPUDA provides the framework for the protection of the right to equality as entrenched in the Constitution. PEPUDA defines "prohibited grounds" and includes the following:

"Prohibited grounds are—

*(a) race, gender, sex, pregnancy, marital status, **ethnic or social origin**, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;"*

- 4.4. As a result of the aforesaid, the Commission accepted the complaint as constituting a *prima facie* violation of the right to equality, which required closer investigation.
- 4.5. The Commission's decision to investigate the matter is informed by its Complaints Handling Procedures (CHP), as gazetted.²

² Gazetted January 2012

5. Steps taken by the Commission

- 5.1. An assessment of the relevant frameworks was undertaken based on desktop research. This assessment informed the allegations arising from the alleged conduct of the Respondent giving rise to the complaint described more fully below.
- 5.2. As a result of engagement with the Complainant, the Commission was advised that an outcome in relation to his specific complaint was no longer applicable to him, however, that **he wished for the Commission to proceed with its investigation as Respondent's conduct as alleged had a "negative impact on non-nationals in South Africa in general."**
- 5.3. After considering the furnished information, and conducting a full assessment on the facts before it, the Commission issued the Respondent with an allegations letter on the 4th of July 2013, requesting responses to the allegations made by the Complainant.
- 5.4. On the 22nd of July 2013 a response was received from the National Research Foundation (NRF) in respect of the complaint. The NRF is an independent statutory body encompassing a number of research funding agencies, undertaking and providing services to the research community. The NRF indicated that the DST-NRF programme is funded by the Respondent, and managed by the NRF.
- 5.5. The response also indicated that in managing internships, the NRF was guided by the Department of Public Service and Administration's (DPSA) 2006 Guide,³ on internships.

³ Hereafter referred to as the DPSA Guide.

- 5.6. The response further referred to the fact that the DPSA Guide stipulated internship beneficiaries should be unemployed South African graduates, and that internships by design were intended to address unemployment amongst South African graduates.

6. Legal Analysis

6.1. International Law

6.1.1. *The Charter of the United Nations 1945*

The Charter of the United Nations addresses political and civil rights; and calls for international economic and social cooperation by states with its precepts. Article 55 declares that all human beings are entitled to enjoy human rights without discrimination.

6.1.2. *The Universal Declaration for Human Rights 1948*

The Universal Declaration of Human Rights added race, political or other opinions, **national or social origin**, property, birth or other status to the list of **unacceptable distinctions** in the enjoyment of rights. It also emphasises the equality of all persons before the law and their entitlement to full protection of the law without discrimination

6.1.3. *International Covenant on Civil and Political Rights 1966*

This Covenant obliges South Africa as a signatory to provide an effective legal remedy to any violation of the rights it recognises, which include the right to physical integrity, liberty and security of person, procedural fairness, individual liberties, and non-discrimination (**including on the basis of race or national origin**).

6.1.4. *Convention on the Elimination of All Forms of Racial Discrimination [ICERD] 1965*

South Africa is obliged under the ICERD to take all appropriate measures to eliminate discrimination on the basis of race, colour, descent, or **national or ethnic origin** within its borders. The monitoring body for adherence with ICERD is the Committee on the Elimination of Racial Discrimination (CERD) – expressed concern at its 69th session in 2006 about “the frequency of hate crimes and hate speech in [South Africa] and the inefficiency of the measures to prevent such acts (article 4).” In light of its General Recommendation 15 (1993) **on organised violence based on ethnic origin**, the Committee recommended that South Africa ensure the full and adequate implementation of article 4 of the ICERD, and that it adopt “legislation and other effective measures in order to prevent, combat and punish hate crimes and speech,” signalling the Committee’s intent to encourage wider domestic protections of the rights of non-nationals.

6.1.5. ***Convention Relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1966***

The two agreements referred to above and acceded to by the Republic, affirm the rights of **refugees to status, property, association, access to the courts, employment, and education (among other freedoms)**. The Convention also protects against refoulement, or the return of asylum seekers or refugees to a country where they would face a threat to their lives or freedoms. South Africa’s pledges under these instruments are particularly relevant given the substantial number of refugees resident in the country.

6.1.6. ***Declaration of the UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance [WCAR], 2001***

The WCAR Declaration, of 2001, commits South Africa to developing both policies and an overarching National Action Plan **to combat intolerance based on race and national origin**. It furthermore urges party nations to uphold the rule of law

and to adopt effective measures to ensure that crimes stemming from such intolerance do not go unpunished.

7. **The Constitution and Domestic Legislation**

The Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. Section seven (7), extends the protection and application of the bill of rights to "all people in our country."⁴

The South African Constitution protects the right to life, freedom and security of person, and freedom of movement for all. The Bill of Rights also **specifically prohibits discrimination on specific grounds including social origin and birth.**

7.1. ***Refugees Act 1998***

The Refugees Act 1998⁵ establishes that non-nationals may reside legally within South Africa as asylum seekers or **recognised refugees**. The Act outlines the rights and responsibilities of refugees and asylum seekers, and stipulates the administrative regime that governs their status.

7.2. ***PEPUDA***

Section 1 of PEPUDA defines "discrimination" as:

"any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—

*(a) **imposes burdens, obligations or disadvantage on;** or*

(b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds".

⁴ Section 7 of the Constitution, 1996.

⁵ Hereafter referred to as the Refugees Act.

Section 6 of PEPUDA reiterates the Constitutional prohibition of unfair discrimination by both the State and private parties on listed grounds, **including social origin**. The prohibited grounds provided in the definitions section are "race, gender, sex, pregnancy, marital status, **ethnic or social origin**, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

PEPUDA also provides guidance for the determination of unfairness. Section 14 of the Act provides that –

"(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

(2) In determining whether the Respondent has proved that the discrimination is fair, the following must be taken into account:

- (a) The context;*
- (b) the factors referred to in subsection (3);*
- (c) **whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.***

(3) The factors referred to in subsection (2)(b) include the following:

(a) Whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the Complainant;

(c) the position of the Complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the Respondent has taken such steps as being reasonable in the circumstances to –

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity.”

8. **Case Law**

In considering this matter the Commission is further guided by relevant jurisprudence in determining the nature and scope of a human right:

8.1. In ***Larbi-Odam and others v MEC for Education (North-West Province) and another***⁶ the Constitutional Court held that **unless a post requires that its incumbent should be a citizen**, for example because of the particular political sensitivity of the job, **employment opportunities should be available to permanent residents and South African citizens on an equal basis**. The government’s aim should be to reduce unemployment among South African citizens and permanent residents. The Court rejected an argument that **non-citizens had a reduced commitment** to South Africa because there was another country to which they could go. The Court noted that this argument applied with equal force to South African citizens who hold dual nationality. **In respect of refugees, it is important to note that the reason for their stay within a country other than their country of origin, is due to the fact that they may be unable, at that particular stage, to return to said country due to political unrest, etc.**

⁶Larbi-Odam and others v MEC for Education (North-West Province) and another CCT 2/97 (hereafter referred to as Larbi-Odam).

8.2. In the *Minister of Home Affairs And Others v Watchenuka And Another*⁷ the learned Nugent JA stated the following:

*"The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the Respondents' counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful."*⁸

8.3. The Court also stated that in respect of a general prohibition of asylum seeker-applicants from working in South Africa:

"That it affects applicants for asylum who have no reasonable means of support other than through employment. A prohibition against employment in those circumstances is a material invasion of human dignity that is not justifiable in terms of s 36."

8.4. In respect to the right to dignity, the Constitutional Court has held in *NM v Smith, (Freedom of Expression Institute as Amicus Curiae)*⁹ that:

"If human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. As this Court held in Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v

⁷ Minister of Home Affairs And Others v Watchenuka and Another 2004 (4) SA 326 (SCA).

⁸ Ibid 7 at para 339

⁹ 2007 (5) SA 250 (CC) at paras [49]-[51]

*Minister of Home Affairs and Others: 'The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore **informs constitutional adjudication and interpretation at a range of levels.** It is a value that informs the interpretation of many, possibly all, other rights.'*

8.5. Similarly in ***Affordable Medicines Trust And Others v Minister of Health of RSA and Another***¹⁰ the Court stated that:

*"What is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. It is a relationship that shapes and completes the individual over a lifetime of devoted activity: **it is the foundation of a person's existence.**"*

8.6. In ***Rutimba and Others v Director Private Security Industry Regulatory Authority and Others***¹¹ the Court stated the following:

*"Though economic necessity or cultural barriers may unfortunately limit the capacity of individuals to exercise such choice, **legal impediments are not to be countenanced unless clearly***

¹⁰Affordable Medicines Trust And Others v Minister of Health of RSA and Another [2005] ZACC 3; 2005 (6) BCLR 529 (CC) at p 549 para [59] – [61]

¹¹Rutimba and Others v Director Private Security Industry Regulatory Authority and Others (35986/03)[2006] ZAGPHC 55 (26 May 2006). Hereafter referred to as Rutimba.

*justified in terms of the broad public interest. Limitations on the right to freely choose a profession are not to be lightly tolerated. But we live in a modern and industrial world of human interdependence and mutual responsibility. Indeed we are caught in an inescapable network of mutuality. **Provided it is in the public interest and not arbitrary or capricious, regulation of vocational activity for the protection both of the persons involved in it and of the community at large affected by it, is to be both expected and welcomed.***"

9. **Application**

9.1. **The right to seek employment**

9.1.1. According to the United Nations High Commissioner for Refugees, at the end of 2012, some 6.5 million refugees under UNHCR's mandate had been in exile for five years or more. **With many of them incapable of finding employment or becoming self-reliant in any other way, the waste of human potential was seen to be vast, and the impact of relentless poverty intolerable for those concerned.**¹²

9.1.2. The three traditional approaches to **solving refugee situations** as outlined by the UNHCR are encompassed in the term '**durable solution/s**'. They involve voluntary repatriation, resettlement in a third country, and **local integration into the country of asylum**.

9.1.3. Local integration is defined as '**a situation in which host and refugee communities are able to coexist, sharing the same resources – both economic and social** – with no greater mutual conflict than that which exists within'.

¹² See <http://www.unhcr.org/528a0a13b.pdf>

9.1.4. Since 2000 the UNHRC, the international community, and non-governmental and donor agencies have **recognized the integration of refugees into host communities in Africa as a preferred option** to manage protracted situations, moving away from the 'warehousing' of refugees in camps.¹³

9.1.5. According to Snodgrass, **South Africa is the choice destination for migrants** in the Southern African Development Community (SADC) and has been the recipient of the highest number of asylum applications worldwide in recent years.¹⁴ The National Department of Home Affairs reported that 81,708 applications for asylum were received during the 2011/12 period.

9.1.6. Migration to South Africa from all over Africa is driven largely by economic and protection-related needs. **Migration is therefore an inevitable and real phenomenon**, which requires high level intervention in order to repatriate, resettle or **integrate refugees in South Africa**. However, it is important to distinguish between refugees such as the Complainant, and economic migrants: An economic migrant normally leaves a country voluntarily to seek a better life. Should he or she decide to return home, the country to which such a migrant returns would continue to provide protection to the person. Refugees on the other hand may flee because of the threat of persecution and cannot return safely to their country of origin – **they are subject to the protections offered by the host country**.

9.1.7. The rights and obligations of **those who seek asylum** are governed by the Refugees Act, which was enacted to give effect to South Africa's international obligations to receive refugees in accordance with standards and principles

¹³UN Refugee Agency (UNHCR) Global Report, 2010. Africa. Available at <http://www.unhcr.org/gr10/index.html#/africa>

¹⁴ Snodgrass et al (2012)

established in international law. The effect of section two (2) of the Refugees Act is to permit **any person to enter and to remain in this country for the purpose of seeking asylum** from persecution on account of race, religion, nationality, political opinion or membership of a particular social group, or from a threat to his or her life or physical safety or freedom on account of external aggression, occupation, foreign domination or disruption of public order.

9.1.8. A person who wishes to be given asylum must **apply to be recognized as a refugee**. If that recognition is granted, the refugee – and his or her dependents – may claim the benefit **of the various rights specified in section 27 of the Refugees Act which include the right in certain circumstances to apply for permanent residence**, the right to a South African travel document, **the right to seek employment, and the right to receive basic health services and primary education**.

9.1.9. **Refugees' rights are institutionalized on the basis of an established international refugee framework that protects their rights and obliges individual countries to assist them**¹⁵ At the domestic level, the Refugees Act entrenches the general rights of refugees as follows. A refugee:

- (b) Enjoys **full legal protection, which includes the rights set out in chapter 2 of the Constitution and the right to remain in the Republic of South Africa in accordance with the provisions of this Act;***
- (c) Is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years continuous residence in the Republic from the date on which he or she was granted asylum, if the*

¹⁵Redelinghuys, 2000.

Standing Committee certifies that he or she will remain a refugee indefinitely;

...

(f) Is entitled to seek employment;

(e) Is entitled to the same basic health services and basic primary education that the inhabitants of the Republic receive from time to time.

- 9.2. In terms of the Refugees Act, the Complainant is therefore clearly entitled to **seek employment in South Africa. The right to seek employment supports the objective of integrating refugees and asylum seekers into local society.** For refugees and asylum seekers the status/permit is proof of right to work. In other words it serves as a valid work permit. Moreover, the Standing Committee for Refugee Affairs (the Committee), is tasked with regulating work for asylum seekers and refugees. The latter **Committee has not undertaken to limit the right to work for refugees.**
- 9.3. Further to this, in respect of the Immigration Act of 2002 (the Act), the Act states that a study permit may be issued to a non-national intending to study in the Republic for a period longer than 3 months if certain criteria are met. The Act also states that the Department of Home Affairs may, in appropriate cases, authorise the holder of a study permit to **conduct work as practical training in a field related to that of his or her studies. Foreign nationals may therefore also participate in vocational training through this Act.**

9.4. The Complainant's section 24 permit, which grants him refugee status, therefore also allows him to work and study in South Africa¹⁶. **Persons of foreign origin are therefore not generally disbarred from seeking to study and work in South Africa, according to certain South African statutes.**

10. **Internships**

10.1. The International Labour Office's (ILO) Skills and Employability department defines an internship **as workplace based training.**¹⁷

10.2. In terms of the DPSA Guide, an internship is **a public service graduate work experience programme targeting unemployed graduates.** DPSA also contends that an internship gives students workplace experience or an opportunity to practice the work skills that they have studied and will practice in future. Internship in the public service is a planned, structured, and a managed programme that provides work experience for a specific period varying from three (3) to twelve (12) months. In this regard, an internship is intended to develop and enhance practical skills to assist with the continuous development of people for future appointment in the labour market. **It is directed at young people who are completing their studies or who have completed their studies and are unemployed.**

10.3. The DPSA Guide is based on the **Human Resource Development Strategy for South Africa 2001/2002 (HRDS 2001)**. The HRDS 2001, was however **reviewed** and updated by Cabinet in 2009, and replaced with

¹⁶ Additionally, any non-national complying with the conditions set out in the Immigration Act may also study and work in South Africa, provided certain criteria are met.

¹⁷ ILO "Upgrading informal apprenticeship: a Resource Guide for Africa." 8.

the Human Resources Development Strategy for South Africa: 2010-2030 (HRDS).

10.4. Strategic objective three (3) of the HRDS 2001 states the following:

"The learning will be achieved through the establishment of an internship programme for

South African students [our emphasis] that will –

- *contribute towards developing a new cadre of competent and committed public servants for a people-orientated Public Service;*
- *develop the employability skills of interns and improve their ability to find employment within the Public Service after graduation;*
- *offer insights into future employment opportunities within the Public Service; and*
- *help them evaluate their career options within the Public Service."*

10.5. It is clear that the HRDS 2001 included specific categorization earmarked for development under the internship programme namely: **South African Students. However, in revising the HRDS, the phrase "South African Students" was omitted from the amended version of the document.**

10.6. Commitment four (4) of the HRDS now states the following:

*"We will urgently implement skills development programmes that are purposefully aimed at **equipping recipients/citizens with requisite skills** to overcome related scourges of poverty and unemployment."*

10.7. In this respect, it is clear that development programmes are aimed at citizens and/or "recipients." The deliberate choice of wording and omission of the earlier limitation to South African's therefore reinforces an interpretation that

the revised HRDS intended to be better aligned with the Constitution and no longer excluded non-nationals.

10.8. Further to this, Commitment five (5) of the HRDS states that:

*"We will ensure that **young people** have access to education and training that enhances opportunities and increases their chances of success in further vocational training and sustainable employment."*

10.9. Once again, reference is made to "young people" and **no differentiation is made between different categories of youth (ie. South Africans and non-nationals)**. Specifically, Strategic Priority 5.2 states that public and private sector programmes are to be leveraged to create employment opportunities and work experience **for new entrants** into the labour market. The strategic objective in relation to this priority is to expand the Public Sector Internship Programme to provide opportunities to young unemployed graduates.¹⁸

10.10. In following the priorities set out by the HRDS (albeit the 2001 version), the **DPSA Guide sets out the objectives** of the Public Service Internship Programme as follows:

1. *To resolve the general shortage of qualified and skilled people in the workforce by **encouraging graduates to equip themselves with the necessary practical experience.***
2. *To assist in meeting the strategic staffing needs of the public service by providing practical and accelerated work experience programmes that expose interns to specific occupations.*

¹⁸ Reference is only made to "young, unemployed graduates". No reference is made to the nationality of these graduates.

3. ***To provide unemployed graduates with valuable work experience and skills to enhance their employability.***
4. ***To address the problem of youth unemployment, especially tertiary (university and technikon) graduates by providing them with work experience opportunities in the public service.***
5. *To provide opportunities to gain some practical experience for students who are required to do this to earn credits towards a qualification.*
6. *To contribute to accelerated service delivery by government through the improved introduction of skilled personnel in the public service.*
7. To improve ***equitable access to public sector employment*** for rural and marginalised groups such as women and the disabled.
8. *To contribute to lifelong learning.*
9. *To increase awareness among students of job and career opportunities in the public service.*

10.11. The DPSA Guide also set out the specific intended beneficiaries of the internship programme as follows:

1. ***Unemployed South African graduates*** from higher education institutions who have completed their degrees or diplomas.
2. ***Unemployed graduates*** who have not been exposed to work experience related to the area of study that they have completed.¹⁹

10.12. The wording of the first paragraph, limits the benefit of the programme to South African graduates as the explicit beneficiaries of this programme.

¹⁹ From the above description, the Complainant would qualify in respect of this category.

However, the second category of beneficiaries does not include the caveat of the graduates' nationality. It may therefore be surmised that persons who are not South African citizens, such as refugees or permanent residents, may be included as beneficiaries of this programme.

11. **The Respondent's responses**

- 11.1. The Respondent indicated to the Commission that its reason for excluding non-national applicants from applying for the scholarship was that:
 - 11.1.1. It followed the broader guide on internships by the DPSA (DPSA Guide);
 - 11.1.2. The DPSA Guide specified that internship beneficiaries should be unemployed South African graduates; and
 - 11.1.3. That internships are by design intended to deal with unemployment among South Africans.
- 11.2. In respect of the third motivation for excluding non-South Africans from Public Service internships, the Respondent infers that **government aims to address unemployment amongst South Africans, and not unemployment generally *within* South Africa.**
- 11.3. Respondent therefore makes a clear **differentiation** between South African graduates, and other graduates living in South Africa in its justification. In this regard, the Constitution as well as PEPUDA needs to be engaged to ascertain whether such differentiation, would amount to unfair discrimination. The disadvantaged group in this case being non-nationals who are refugees, such as the Complainant. Because citizenship is an unspecified ground, the first leg of the discrimination enquiry envisaged in PEPUDA requires consideration regarding the differentiation on the basis of citizenship.

- 11.4. In *Harksen v Lane NO and Others*,²⁰ the Constitutional Court, in referring to *Prinsloo v Van der Linde and Another*²¹ stated that the pejorative meaning of discrimination related to the **unequal treatment of people based on attributes and characteristics attaching to them.**
- 11.5. In *Larbi-Odam* the Constitutional Court held that the Respondent discriminated unfairly against non- national teachers on the basis of their citizenship. The Court stated that **foreign citizens are a minority in all countries, and have little political muscle.** Secondly, the Court held that **citizenship is a personal attribute which is difficult to change.** The Court also stated that to determine whether the discrimination is unfair, regard must be had primarily to the impact of the discrimination on the relevant persons, which in turn requires **a consideration of the nature of the group affected, the nature of the power exercised, and the nature of the interests involved.**
- 11.6. Perhaps what is insightful in *Larbi-Odam* is the Constitutional Court's **recognition of societal and state objectives together with the rights of the employment seeker.** In considering these notions in tandem with residency, the Court recognized the **value to be gained by the state from a productively engaged workforce.** This approach fits closely with the UNHCR 2007 note on the Integration of Refugees in the European Union where it states that:

12. Vocational training also has an empowering effect. It enables asylum-seekers to meet the host population on equal terms rather than as recipients of services, and facilitates access to employment in case permission to remain is granted.

²⁰Harksen v Lane 1998 (1) SA 300 (CC).

²¹ 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

Vocational training may also be beneficial for reintegration upon return of rejected asylum-seekers, as it can open new employment opportunities in the home country.

- 11.7. Indeed a broader perspective would recognize our **increasingly porous borders and an equally increasing common objective of African states to work toward economically strong regions** on the continent as a whole. Realizing this common objective would be extremely difficult if empowerment of individuals toward that objective was limited by geopolitical divides.
- 11.8. In this respect, the Court in ***Larbi-Odam*** also confirmed that non-citizens are a vulnerable group. Although citizenship is not a prohibited grounds for discrimination listed in the equality clause of South Africa's Constitution, the **Court found unanimously that in this case discrimination against non-citizens was unfair.**
- 11.9. Relating to ***Larbi-Odam***, the Court argued that **to permit foreigners to enter and remain in the country permanently, but then to exclude them from permanent employment constitutes unfair discrimination which cannot be justified in terms of section 36 of the Constitution.**
- 11.10. **In this regard, and given the aim and objectives of providing graduates with internship opportunities, granting refugee status and then excluding refugees from the internships significantly limits their ability to compete with South African graduates for potential employment during a potentially indefinite stay in the country.**

- 11.11. The *Larbi-Odam* analysis serves as an important point of reference in consideration of this matter. In this respect, the issue of the employment status of non-citizens who **are bound by a finite period of time in South Africa as a result of the status of their permits, requires consideration.**
- 11.12. At this juncture, it is important to note that from the wording of the advertisement inviting applicants to apply for the relevant internship, that **all categories of non-nationals, including permanent residents are excluded.**
- 11.13. The status of a refugee, recognized and protected in international law is substantially different to other categories of non-nationals in host countries. In this respect, refugees have neither a permanent nor a temporary right of stay. The latter is affected when a refugee has not met the conditions of their stay, or if the reason for asylum no longer prevails. **The permanency of residency can therefore not be predicted with any degree of certainty.**
- 11.14. The Complainant however, renews his refugee permit on a two-yearly basis. He is nevertheless not yet a permanent resident and **his precarious position** in terms of permanency may have an effect on the potential stability of his employment offers. The Complainant may elect to renew his status and apply for a **Permanent Residence Permit** after he has been in the country for a period of **more than five years**, has been declared an **indefinite refugee**, and is awarded a **Refugee Certificate** in terms of Section 27 (c) of the Refugee Act. The holder of a Permanent Residence Permit in turn has almost **all the rights, privileges, duties and obligations of a citizen in so far as employment is concerned.**

- 11.15. A justification for exclusion based on the temporary nature of refugee status is therefore difficult to sustain. The issue of time spent by the refugee in South Africa in relation to the duration of an internship is also **practically of limited relevance** as the Complainant has an opportunity to renew his status for two (2) year periods, as against the 1 year duration of the internship.
- 11.16. As is illustrated in *Larbi-Odam*, a **blanket denial of employment to all non nationals regardless of status will not pass the test of reasonableness in terms of section 36 of the Constitution.**
- 11.17. The **only restriction courts have recognised on the basis of nationality in respect of employment relates to reasons of national security. In the *Rutimba* matter**, the Court scrutinised the hiring of asylum seekers and refugees as security guards. The Court asserted that: "It is understandable, in my view, that due to the high level of trust required by the above-stated offices, including that of private security officers, there must be some strict criteria as to who can qualify for such positions so as to exclude undesirable persons"
- 11.18. **No such specific need as expressed in the *Rutimba* matter is indicated or could potentially be attributed to the programme of internship in question.** In respect of the advertised opportunity for the attainment of the DST-NRF Internship Programme, the Complainant met all qualification criteria for the internship but for his status as a non-national. Having also considered *Rutimba*, non-nationals cannot be deemed to fall into the category of "undesirable persons" as set out by the court in that decision.

12. **Findings**

- 12.1. In summary the Commission has taken a number of factors into consideration in this matter. Key amongst them is the jurisprudence of courts in so far employment of non-nationals is concerned, **the need for integration** and a **fully engaged productive work force** in South Africa, South Africa's HRDS, and most significantly the Constitution and PEPUDA which recognize the basic human rights of all in our country. Against this backdrop, is the temporary nature of Complainant's residency in the country, the specific one (1) year duration of the internship, **the blanket exclusion of all non nationals**, as well as the rights of refugees expressly to seek employment in South Africa.
- 12.2. Post 1994, South Africa became an attractive destination for migration. The fall of Apartheid resulted in a **large influx of refugees and immigrants into South Africa**, particularly from other African countries. Two years later, South Africa became a signatory to all three major international instruments pertaining to international migration. In respect of the management of the influx and impact of migrants and refugees to South Africa, the traditional approaches of repatriation, re-settlement and **integration therefore need to be considered.**
- 12.3. Flowing from the international obligations referred to above, the extreme vulnerability of non-nationals, and the **increasing need to protect the rights of growing numbers of non-nationals, the matter of integration remains key.** Media reports and the Commission's own monitoring heighten the need for a focus on meaningful integration,

particularly, in light of the vulnerability to which this sector of our society is exposed.

- 12.4. The UNHCR indicates that the integration of refugees is a dynamic and multifaceted two-way process which **requires efforts by all parties concerned**, including a preparedness on the part of refugees to adapt to the host society without having to forego their own cultural identity, **and a corresponding readiness on the part of host communities and public institutions to welcome refugees and meet the needs of a diverse population**. The process of **integration is complex and gradual, comprising distinct but inter-related legal, economic, social and cultural dimensions, all of which are important for refugees' ability to integrate successfully as productive members of society**.
- 12.5. Many integration challenges are experienced by refugees. **Discrimination and xenophobic attitudes affect refugees** and other migrants alike, as does the need to bridge language and cultural barriers, including those relating to different gender roles. Preferences given to nationals by employers are an example of the kinds of obstacles that both refugees and other migrants may face.
- 12.6. Vocational training such as internships are deemed internationally as a **viable option in order to empower refugees within the employment sector in which they find themselves**. Providing access to the labour market can **reduce reception costs, discourage informal employment and facilitate reintegration into the country of origin by allowing asylum-seekers who return home to do so with a degree of financial independence** or acquired work skills.

- 12.7. The DPSA Guide appears to be based on the noticeably outdated 2001 document, **which still refers to beneficiaries as "South African students."** As indicated, the HRDS currently makes no such differentiation and therefore the basis of the DPSA Guide appear to be inconsistent with the HRDS to that extent.
- 12.8. Nevertheless, the DPSA Guide does include two separate categories of beneficiaries in its intended programmes: South African graduates, and **unemployed graduates** who have not been exposed to work experience related to the area of study that they have completed. **"Foreign nationals" are therefore not expressly excluded from internship programmes in respect of a textual interpretation of the DPSA Guide.** Yet, a level of ambiguity prevails in the description of the abovementioned beneficiaries.
- 12.9. The current regulatory framework with reference to refugees in **South Africa clearly provides that refugees have the right to seek employment.** This right to seek employment is fundamentally linked to one's ability to strengthen prospects of employment through internship programmes and additional training. Given this relationship there is therefore a right to be considered for access to programmes designed to assist them gain workplace skills. **It is noted that while an internship does not guarantee employment, it does provide an additional advantage in the eyes of potential employers, which advantage is unfairly withheld from refugees who also compete for employment.**
- 12.10. It is noted further that issues of access to internships by refugees have not been addressed or limited by the Committee. With no information to the contrary, Complainant cannot be said to have acted outside a general limitation or condition determined by that Committee in expecting to be considered for the internship programme.

- 12.11. The argument presented by the Respondent that the purpose of internship programme is to alleviate unemployment amongst South African students, must also be interrogated, as the evidence for the particular exclusion of non-nationals cannot expressly be found in the HRDS nor the DPSA Guide. **Blanket restrictions on all non nationals are therefore without basis.** A more beneficial approach would be to consider **unemployment and its impact within South Africa more broadly, as opposed to addressing unemployment amongst South Africans specifically.**

On the basis of the analysis in the preceding section, as well as the interactions with the Complainant and Respondent in this regard, the Commission makes the following findings:

- 12.12. By excluding the Complainant and similarly placed persons who are recognised refugees in South Africa from applying for the DST-NRF Internship, the Respondent created **an unreasonable limitation, and discriminated against the complainant on the basis of his non-national status,** as well as his **right to dignity;**
- 12.13. The response from the Respondent that the DPSA Guide dictates that only South African graduates are eligible for internships should be reviewed in light of the **textual interpretation** to which it currently lends itself, **possible ambiguity, as well as legislation and jurisprudence on the matter;**
- 12.14. The limitation justified by the Respondent on the basis of widespread unemployment in South Africa, disregards the vulnerability of refugees and permanent residents. **The absence of measures to promote their financial independence from the State,** in turn impacts on the countries

resources, **impact on the region**, and need to grow skills and competition. On the facts of the complaint, the Commission was also unable to find any justifiable exclusion based on grounds that would cause the Complainant to be excluded from the internship offered as any related field of potential employment flowing from the internship was not connected with an area of employment from which a permanent resident could have reasonably been excluded by law.

- 12.15. The Commission's findings also acknowledges that the specific internship on which this complaint is founded would **no longer be open to the Complainant** as its term would have been complete and further based on Complainant's own instructions, he no longer wishes to pursue the internship. The Commission therefore makes no specific findings or recommendations in this regard.

13. Recommendations

- 13.1. In terms of the Human Rights Commission Act, the Commission is entitled to:

"...make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution."

- 13.2. The Commission recommends accordingly that:

- 13.2.1. The Respondent **consult, review and amend the criteria for admission to its DST-NRF Internship Programme and any such similar programme** within a **period of three (3) months** from date of this finding.

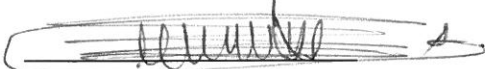
- 13.2.2. The Respondent render amendments to its admission criteria for the DST-NRF Internship Programme with due regard to current **jurisprudence and legislation and need to avoid blanket restrictions on status of applicants.**
- 13.2.3. The DPSA **conduct an audit and review of its 2006 Guide** on Public Services internship programmes **within twelve (12) months** from date of this finding, with a view to amending same in accordance with the Constitution and international obligations of the State and international best practise.

14. Appeal

You have the right to lodge an appeal **against this decision. Should you wish to lodge such** an appeal, you are hereby advised that **you must do so in writing** within 45 days of the date of receipt of this finding, by writing to:

**The Chairperson, Adv M.L. Mushwana
South African Human Rights Commission
Private Bag X2700
Houghton, 2041**

Signed at Bloomfontein on the 23rd day of February ~~2014~~ 2015



**Adv M.L. Mushwana
Chairperson: South African Human Rights Commission**

Report approved by: C Kisoona (Gauteng Provincial Manager)