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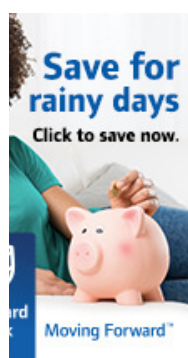
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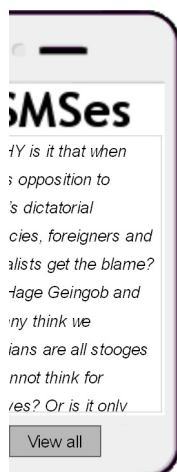
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The Namibian
19 Aug 2014



OPINIONS - COLUMNS | 2014-08-12



Asylum Based on Sexual Orientation



Laura Halonen and Felix Lüth

• *Laura Halonen and Felix Lüth*

A UGANDAN man obtained an urgent injunction from the High Court on 7 August 2014 to stop Namibia from deporting him while his application for asylum is considered.

According to press reports, he stated that persecution in his home country on the grounds of sexuality would entitle him to refugee status under both Namibian law and international law ("Home Affairs loses bid to deport Ugandan gay", The Namibian, 8 August 2014). As a matter of law, the Ugandan asylum seeker is correct: people at risk of persecution for their homosexuality must be protected.

Namibia has not had to deal with a large variety of refugees in the past. The vast majority of those who have sought refuge in this country have been running from civil war in countries like Angola and the Democratic Republic of the Congo. Their numbers have been dwindling since peace has gained a foothold in countries surrounding Namibia, with the population of the Osire refugee camp dropping to less than 3,000 people.

But war is not the only reason why someone might be forced to leave their country of origin, and seek asylum across the border.



Homosexuals arriving in Namibia from countries where they are in danger have so far been told that they are not welcome here, but should return to where they came from, regardless of what might happen to them if they do. Earlier this year the Commissioner for Refugees in Namibia, Nkrumah Mushelenga, stated in the press that “[o]ur domestic refugee law does not have a provision granting refugee status for being gay” (Namibian Sun, 14 April 2014).

With respect, Mushelenga is wrong.

The law is very clear: in terms of the Namibian Refugees (Recognition and Control) Act 2 of 1999, homosexuals are members of a “particular social group”, entitled to asylum if they are persecuted for being gay. The criteria in the domestic law (“a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”) come, word for word, from the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

These are the main international treaties dealing with refugees, adopted under the auspices of the United Nations. Namibia has been a party to both of these treaties since 1995, and has also expressly adopted them into its domestic law as part of the 1999 Refugees Act. So there can be no doubt about the intention of the lawmakers: it was to comply with Namibia’s international obligations to protect the same people the rest of the world protects. This includes homosexuals.

Both the United Nations Refugee Agency (UNHCR) and numerous courts around the world have found that homosexuals are entitled to asylum if they are persecuted for being gay, as they are part of a particular social group entitled to protection under domestic refugee laws and the 1951 Refugee Convention. According to the UNHCR, homosexuals are members of a particular social group because they share a common characteristic which is innate, unchangeable or fundamental to their identity, and because they are perceived as a group by society. Courts have applied this approach in practice. For example, in a recent case concerning three asylum applicants in the Netherlands from Sierra Leone, Uganda and Senegal, the European Court of Justice (whose judgments bind all member states of the European Union) held that homosexuals “must be regarded as forming a particular social group”. We see no reason why the situation would be any different in Namibia.

The Namibian Constitution provides that the Refugees Committee, the administrative body that determines refugee status, has to comply with any relevant legislation when determining whether a claim to refugee status will be granted. “Relevant legislation” here includes not only Namibia’s Refugees Act, but also the 1951 Refugee Convention, incorporated into our law by the Refugees Act as well as being directly applicable under Article 144 of the Namibian Constitution.

So, contrary to Mushelenga’s statement, our domestic laws do provide for asylum for persecuted homosexuals.

There is a well-known and lengthy chapter in Namibia’s pre-Independence history when her leaders and freedom fighters had to seek asylum in other countries due to the repressive regime at home. They were duly granted such asylum and assistance by countries near and far.

A country with such a past is naturally more attuned to injustice and suffering than most and will no doubt welcome individuals who are at present being persecuted by repressive regimes in their home countries. This is not only a humanitarian duty, but a legal one as well.

• Laura Halonen and Felix Lüth are lawyers specialising in international law and currently working at the Legal Assistance Centre. Mr Lüth previously worked for the UNHCR in Switzerland. Neither of them is involved in the pending case mentioned in this article.

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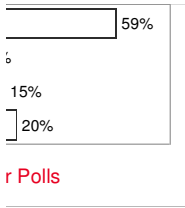
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