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Submission on the Refugees Amendment Draft Bill, 2015

by the M&G Centre for Investigative Journalism (amaBhungane)

"Not only must justice be done; it must also be seen to be done."

Attention: **Mr E Mathonsi, Portfolio Committee on Home Affairs**

Email: **emathonsi@parliament.gov.za**

Friday, 17 July 20

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Introduction

1. The M&G Centre for Investigative Journalism ("amaBhungane") welcomes the opportunity to comment on the Draft Refugees Amendment Bill ("the Bill") which seeks to amend the Refugees Act 130 of 1998.
2. amaBhungane is a non profit company founded with the objective of promoting open, accountable and just democracy by developing public interest investigative journalism through its best practice, skills transfers and helping to secure the information rights investigative journalists need to do their work. Our staff are known as amaBhungane, *isiZulu* for the dung beetles. amaBhungane is dedicated to uncovering information that is of public interest and reporting that information to the public.
3. We make this submission in the interest of ensuring the final legislation, which grants the Refugee Appeal Board discretionary authority to allow media access, *strikes an appropriate and well defined balance* between the asylum seeker and the public interest as envisioned by the Constitutional Court ("the Court") Judgment that gave rise to this amendment.
4. The public interest is demonstrated inter alia by the wide media interest from the Mail & Guardian, Independent Newspapers and Media24, who intervened as co-applicants when the media and public were denied access by the Refugee Appeal Board to its hearing of Radovan Krejcir's appeal, against the refusal of his application for asylum in South Africa. Further, the interests of open justice in the matter were demonstrated when the South African Litigation Centre made submissions as an amicus curae in the Court application.
5. We thank the Portfolio Committee on Home Affairs for initiating the Bill to ensure the interim provisions do not lapse on the 26 September 2015. We look forward to your consideration of our comments on this important matter, which enable us to contribute to an open, accountable and just democracy.
6. amaBhungane can be contacted via: Karabo Rajuili, advocacy coordinator, at 021 426 0802; 082 2656552; rajuili.karabo@gmail.com
7. Our submission adopts the following overall positions and recommendations:
   7.1 We thank the Portfolio Committee on Home Affairs for initiating the necessary legislative amendments to ensure there isn't a legislative gap.
   7.2 We welcome the call for public comment before the statuatory wording is finalised and adopted as law.

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7.3 We believe that the current wording of the gazzetted *Draft Amendment Bill on Refugees*[1] represents only a temporary and context specific provision (having been adopted directly from the wording contained in the Court's judgment) and does not sufficiently address the principles of open justice and media freedom which underly the Court's intention.

7.4 In line with the doctrine of the separation of powers, Parliament is entitled to adopt its own wording, better to give effect to the intent underlying the judgment

7.5 We propose a number of changes guided by the principles of *openess, accountability and transparency,* that we believe would be in line with this intent and Parliament's own prerogative.

7.6 We believe that the wording suggested below will increase the *legislative certainty* of the proposed amendment.

7.7 We conclude by submitting proposed wording of the Bill.

8. Should the Portfolio Committee on Home Affairs elect to hold public hearings, amaBhungane requests the opportunity to make oral submissions.

The Context of Constitutional Court "Read-In" order provisions in Draft Refugee Amendment Bill

9. The 27 Sept 2013 judgment of the Court declared section 21(5) of the Refugees Act, 1998 (Act No. 130 of 1998) ("the Act") inconsistent with the freedom of expression rights entrenched in section 16 of the Constitution (particularly s 16(1)(a) – freedom of the press and other media and 16(1)(b) – freedom to receive or impart information or ideas).

10. However, the declaration of invalidity was suspended for a period of two years from the date of the order to enable Parliament to correct the constitutional defect in s21(5).

11. Section 172(2)(b) of the Constitution empowers a court making an order of constitutional invalidity to grant a temporary relief to a party. Accordingly, the Constitutional Court exercised its powers to grant temporary relief by providing specific wording for a reading-in.

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[1] Government Gazette, Notice 591 Of 2015, Invitation to comment on draft refuges amendment bil, 9 June 2015

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12. The use of interim relief by way of reading-in was unique to the pressing circumstances as explained in *para 103* of the judgment. Had no interim relief been granted, the Appeal Board could have continued with Mr Krejcir's appeal without the applicants being able to attend the proceedings of the Appeal Board, despite the judgment in their favour. It was determined as '*seriously prejudicial and untenable for Mr Krejcir's appeal to be deferred [until] after Parliament has cured the defect because the appeal has been pending for a long time'.* [para 10]

13. In considering interim relief, the Court was guided by the wording submitted by the applicants, but with amendments and changes from the Court, to be read into section 21(5). In discussing the Court's reasoning for the use of the read-in provisions, Zondo J explained:

I have taken the view above that it would not be appropriate to resort to the remedy of reading-in as a permanent remedy in this matter. However, it seems to me that, for purposes of a temporary remedy, the remedy of reading-in would be appropriate.

14. On12 May 2015, in a presentation given to the Portfolio Committee on Home Affairs, the presentation correctly noted that the Constitutional Court interim order on this matter (refer to Annexure A):

Provided a "temporary read-in provision": Pending the correction of the defect, or the expiry of the two year period, whichever occurs first…

15. We can therefore conclude that the read-in provision, which the Committee has used as a basis for the current draft Bill, was merely meant as interim measure until Parliament had an opportunity to consider numerous complex questions. The Constitutional Court made this clear:

"*All of these are issues on which choices must be made in formulating the test that must be used by the Appeal Board in exercising the discretion. Must this Court make those choices? I think not. It would be more appropriate for Parliament to make such choices. This accords with the doctrine of separation of powers.*"[para 100]

16. In the Committee deliberations on 9 June, we note that while some Committee members felt that the interim read-in wording should be amended, the Committee made a choice to '*stick to the wording of the judge, because the principal Act was about to be holistically amended.*' However, comments from the public would then

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be soliticed for consideration on any amendments.[2]

17. We feel that the adoption of the interim read-in as the final text will result in weak legislation. It would also be a misapplication of the Constitutional Court order, not fulfil the obligations on Parliament in this matter, and not be in the interests of justice.

Recommendation 1: Parliament should fulfill its obligations in considering 'all relevant factors' as described by the Court

18. The Court's judgment makes it plain that "*all relevant factors*" must be considered by Parliament in developing legislation:
....including, whether or not prohibiting the publication of information that does not tend to reveal the identity of the asylum applicant or his or her family and friends would not be a sufficient protection. A very important factor in that inquiry would be whether granting access would be in the public interest. [para 102]

19. The Court further discussed the importance of careful consideration as to the tests which should be used to determine discretion in requests for access:
"*.....Must the test be exceptional circumstances? Must the test be if, in the opinion of the Appeal Board, the disclosure is unlikely to pose a threat to the lives and safety of the applicant for asylum and his or her family and friends in his country of origin? Yet another question is whether any one should bear the onus of showing the existence of exceptional circumstances if that is to be the test. All of these are issues on which choices must be made in formulating the test that must be used by the Appeal Board in exercising the discretion.*"

20. These significant choices in determining the tests, the Court deferred to Parliament to make, citing the doctrine of separate of powers. Later in this submission we will explain the importance of these tests and exercise of discretion not being left loosely to the interpretation of the Refugee Appeal Board. The latter should be given firm legal guidance.

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[2] PMG Minutes, *Refugees Amendment Bill, 2015 (proposed Committee Bill): briefing by Parliamentary Legal Adviser; New immigration regulations: Consideration of problems* Available At: <https://pmg.org.za/committee-meeting/21037/>

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Recommendation 2: The Constitutional principals of openness, transparency and accountability should underpin the provisions of the amended legislation

21. Another matter for consideration, which the Court left to Parliament to determine, is whether the hearings are to be default open but give the Appeal Board a power to close them in certain cases, or to keep the hearings closed to the public but give the Appeal Board the power to open them to the public in appropriate cases. [*para 99]*

22. The Court further added that the basis would need to be clarified upon which the Appeal Board would be able to open its hearings to the public in a particular case if, as a general rule, they are closed to the public or the basis upon which the Appeal Board would close its hearings to the public in a particular case if its hearings are normally open to the public. [*para 99*]

23. The Court took a conservative approach in the interim order provisions proceeding from the premise that confidentiality should be the norm and access the exception. For instance, Zondo J expressly stated at para 71 of the judgment that: "*[a]lthough it is probably true that there will be fewer cases in which confidentiality cannot be justified than those in which it can be justified, I do not think that they will be so few that absolute confidentiality as required by section 21(5) can be said to be a justifiable limitation of the right to freedom of expression.*"

24. However, this conservative approach should be read in light of the Court's recommendations to Parliament to actively make choices in the interests of the asylum seekers and in the public interest. Indeed, we note that the Committee Chairperson made remarks that the "*purpose of the Bill was to give power to the RAA to open its door to the public or to close it under certain circumstances.*"[3] This would suggest a commitment to the principal of open justice and transparency, and certainly default openness.

25. Moseneke J in recent comments noted the transparency of the judicial process is fundamental to developing public trust in the judiciary[4]. The applicants made similar assertions during the court hearing, particularly in cases involving important public figures such as Radovan Krejcir. In sentiments expressed at the time which drove

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[3] PMG Minutes: *Refugees Amendment Bill, 2015: Adoption of Memorandum for Committee to introduce this Bill* Available At <https://pmg.org.za/committee-meeting/20887/>

[4] Dario Milo and Stuart Scott, 2015 ' Access to court papers is part of open justice' in Mail and Guardian: Available At < http://mg.co.za/article/2015-06-18-access-to-court-papers-is-part-of-open-justice>

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the appeal for access to the hearing, it was noted that ' *it is critical that justice is not only done in the matter of his refugee status, but that it is seen to be done. Public confidence in the RAB can only be ensured by opening these hearings to the scrutiny of the media."*[5]

26. Other jurisdictions have also recognised the significance of open justice, not only in the public interest, but to ensure the rights of asylum seekers are upheld through the correct application of the law. In a critique of the Irish Appeal Board, it was said that "*The strict enforcement of the privacy rule in refugee appeal cases means that legal practitioners, judges and NGOs have very limited access to see how the law is being applied and where it is being applied inconsistently by individual tribunal members*"[6]

Recommendation 3: The amended legislation should provide certainty to enable the correct and timeous application by the Refugee Appeal Board of its discretionary powers

27. The introduction of discretionary powers must balanced with the Court's call for providing certainty to asylum seekers. The Court, discussing the implications of the discretionary powers noted that "*[i]t is true that section 21(5) gives asylum applicants certainty, and that, if the Appeal Board has a discretion to allow access in appropriate cases, that will not give them certainty. This is so because in exercising its discretion the Appeal Board would allow access in some cases and not allow it in others"*

28. Legislative certainty is therefore important. The very reason that the Court provided the administrative decision-maker with express factors to balance is to create better certainty. The risk that by not providing important factors expressly (such as the public interest in the full disclosure of evidence) that these could be given less weight by the administrator, leading to incorrect or unduly delayed decisions.

29. To achieve better certainty the passages setting out the factors we posit should be expressly included in the text of the Bill itself, and then the administrator will be best placed to weigh each factor in a particular case. This is particulary relevant and

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[5] Niren Tolsi, 2013 'ConCourt reserves judgment on media's access to Krejcir hearing ' in Mail and Guardian, Available at <http://mg.co.za/article/2013-05-14-concourt-reserves-judgement-on-medias-access-to-krejcir-hearing>

[6] Refugee group calls on Govt to bring transparency to appeals tribunal http://metroeireann.com/article/refugee-group-calls-on-govt-to,3710

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urgent as the Refugee Appeal Board has struggled to apply the test set down by the Constitutional Court in practice.

30. This is plainly borne out by examples of refugee appeals before the Refugee Appeal Board. In the appeal the decision regarding media access to the Radovan Krejcir hearing, a decision took nearly two years.

31. In *Harerimana v Chairperson of the Refugee Appeal Board and Others (10972/2013) [2013]* Davis J, presents damning findings on the Appeal Board. A particular feature of concern in this case was the lengthy delay in reaching a decision which unduly prejudiced the applicant whose request for refugee status was determined unsuccessful after almost four years after the initial interview and five years after applicant had first applied for refugee status and asylum.

32. In a more recent case, the High Court had harsh words for the Department of Home Affairs because it took seven years to finalise an asylum application by a Congolese national who fled persecution in his homeland.

33. Research on South Africa's refugee system indicates that these cases may not be exceptional.[7] In a review of 324 negative status determination decisions made by Refugee Status Determination Officers, it was found that these decisions were characterised by errors of law and absence of reasons, a lack of individualised decision making, a general failure by the decision maker to apply his or her mind or to use sound reasoning. Research has further found that "RSDO's routinely misapplied the core concepts of international refugee law. However, they also erroneously applied elements of domestic refugee law".[8]

34. These delays strongly urge the neccessity of providing the administrators with more factors, rather than less, in order to assist them in coming to a decision more easily and speedily. It also further affirms the importance of transparency and accountability in how the hearings are undertaken.

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[7] The judgment on Harerimana v Chairperson of the Refugee Appeal Board and Others (10972/2013) [2013] cites research from Roni Amit 2011 (23) International Journal of Refugee Law 458. Available at <http://www.saflii.org/za/cases/ZAWCHC/2013/209.html>

[8] Section 3 (b) of South Africa's Refugees Act incorporates a provision from the OAU refugee convention that grants refugee status to individuals who have been compelled to leave their place of habitual residence 'owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part of the whole of this or her country of origin or nationality'. <http://www.saflii.org/za/cases/ZAWCHC/2013/209.html>

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Conclusion

35. Our comments have served to not only point out the inapproriateness of adopting the interim wording in its current form, but also the limitations. Parliament was tasked with the responsbility to determine the manner in which the Appeal Board should exercise it's discretionary powers. Our factors are set out at para 97 of Zondo J's judgment (the passages in green were not included in the Court's formulation; and the Court also added one or two factors).

36. In particular the Court's interim test from which the temporary read-in provision is based, failed adequately to include the factor "the public interest in full disclosure of the evidence led at the hearing". It is of critical importance that it is included (in our view) in order to strike an appropriate balance between the asylum seeker and the public interest.

37. The proposed draft below sets out to address this gap:

"The confidentiality of asylum applications and information contained therein must be ensured at all times, save that in proceedings before the Refugee Appeal Board, the Refugee Appeal Board may on application or of its own accord allow any person or persons to attend a hearing, subject to conditions determined by it.

a) In determining whether any person or persons are to be allowed to attend a hearing of the Appeal Board, the Appeal Board shall have regard to the following considerations:

(i) the attitude of the appellant, who shall be given the option of waiving confidentiality;

(ii) *the need to balance* ***the interests of the appellant in retaining confidentiality with the public interest in full disclosure of the evidence led at the hearing;***

(iii) ***the need to protect the integrity of the appeal proceedings;***

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(iv) ***the identity of the appellant and the extent to which he or she may be considered a public figure;*** *(The Courts version is quite different: "the need to protect the identity and dignity of the asylum seeker")*

(v) *the grounds advanced for claiming disclosure or for refusing it;*

(vi) ***whether the information is already in the public domain and if so, in what circumstances it reached the public domain (including the role, if any, played by the appellant in placing the information in the public domain) and for how long and to what extent it has been in the public domain; and***

(vii) ***the impact of the disclosure or non-disclosure on the fairness of the proceedings and the rights of the appellant.***"

Name: Karabo Rajuili

Signed:

Date: 7/07/2015