

**Rwandan Refugee Community Association's
["RRCA"]
Written Submissions
To the
SECRETARY TO PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA
["THE SECRETARY"]
IN RESPECT OF
THE REFUGEES AMENDMENT BILL
[B12-2016]
PUBLISHED IN
GOVERNMENT GAZETTE NOTICE 39284 OF 12
OCTOBER 2016
["THE BILL"]**

PREAMBLE TO THE RRCA's SUBMISSIONS

The amendments of the Act should not distance itself from any of the practical guidance contained in the **HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES HCR/IP/4/ENG/REV.1 REEDITED, GENEVA, JANUARY 1992, UNHCR 1979** ["Handbook"].

The explanations in the Handbook

"... are based on the knowledge accumulated by the High Commissioner's Office over some 25 years, since the entry into force of the 1951 Convention on 21 April 1954. The practice of States is taken into account as are exchanges of views between the Office and the competent authorities of Contracting States, and the literature devoted to the subject over the last quarter of a century. As the Handbook has been conceived as a practical guide and not as a treatise on refugee law, references to literature etc. have purposely been omitted." [Handbook: Foreword V].

Furthermore "The Handbook is meant for the guidance of government officials concerned with the determination of refugee status in the various Contracting States. It is hoped that it will also be of interest and useful to all those concerned with refugee problems." [Handbook Foreword VI]

It is submitted that the Legislature of South Africa should not lightly disregard or not follow these guidelines published in the Handbook. If the DHA wants to deviate from the Handbook, it should do so very cautiously and with very good reason.

The RRCA submits:

AD Clause 1 of the Bill [definitions]:

ASYLUM SEEKER VISA

- The use of word “visa” without its qualifying word “asylum ...” is ambiguous and needs re-drafting to clarify how it practically applies to asylum seekers and/or refugees.
- The case for Refugees in general calls for a clear cut distinction between refugee purposes [catered for in the Refugees Act 130 of 1998] & normal immigration purposes as are made provision for in the Immigration Act 13 of 2002 as amended ("the Immigration Act").
- It is suggested that the term should be used consistently as follows: "asylum seeker visa".
- It is acknowledged that this amendment is to bring it more in line with the Immigration Act, but the case for Refugees in general clearly calls for a definite distinction and should be used consistently.

MARRIAGE

- The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 [Act No. 41 of 2003] since it does not contain provisions pertaining to customary law or customs of traditional communities.
- It is submitted that it is necessary to refer this Bill to the National House of Traditional Leaders because it seeks to re-introduce the concept of marriage into the Bill and it strikes at the heart of customary law or even customs of traditional communities.

Ad clause 2 of the Bill [exclusion from refugee status]:

- The amendment now requires a refugee to apply for asylum within five days upon entry in the Republic.
- It is submitted that 5 days are totally unreasonable especially if he/she enters the country during a weekend or on a holiday in a traumatic situation in a foreign land without any information.
- The suggested amendment is vague and ambiguous as it does not specify what would happen to asylum seekers who arrive in the Republic over a weekend or on public holidays or fail to gather as

much information as possible to enable them to locate the Refugee Status Determination Office in a huge, diverse and complex territory such as South Africa.

- Even if that clarification was attended to, the provision would still be unreasonable as five days are too short a period regard being had to the particular circumstances of the asylum seeker.
- It is suggested that the duration should exclude weekends and public holidays and be extended to a minimum of 21 [twenty-one] working days.

Ad clause 3 of the Bill [when a person ceases to qualify for refugee status]:

- There are 8 sub-subsections listed when a person ceases to qualify for refugee status for the purposes of this Act.
- In terms of subsections [f] & [g] a person ceases to qualify when he or she has committed a crime in the Republic, which is listed in Schedule 2 to the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), or which is punishable by imprisonment without the option of a fine; or (g) he or she has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit.
- It is submitted that it goes without saying that criminal acts are adjudicated in a court of law and after credible evidence were produced, such a person is found guilty of the crimes referred to the statutes mentioned in these subsections.
- It is clear to my mind that these crimes will have to be adjudicated by a court of law and not an official sitting in an office acting as for instance a RSDO.
- Subsection (a): A person ceases to qualify for refugee status for the purposes of this Act if he or she voluntarily re-avails himself or herself in any way of the protection of the country of his or her nationality.
- Subsection (d): A person ceases to qualify for refugee status for the purposes of this Act if he or she voluntarily re-establishes himself or herself in the country which he or she left or outside of which he or she remained owing to fear of persecution, or returns to visit such country;
- Subsection (e): A person ceases to qualify for refugee status for the purposes of this Act if he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist and no

other circumstances have arisen which justify his or her continued recognition as a refugee.

- My client asks specific questions in respect of the following sub-sections: (a), (d) & (e):
- What are the criteria to ascertain when and if a person has re-availed, re-established, or such a person can no longer continue to refuse to avail him/herself of the protection afforded by the host country?
- Who is going to adjudicate/determine that a person has re-availed, re-established himself?
- What does it mean to “re-avail yourself”?
- What does it mean to “re-establish yourself”?
- Who is going to adjudicate/determine that such a person can no longer continue to refuse to avail him/herself of the protection afforded by the host country?
- The RRCA views these proposed amendments as if the DHA introduces “... more punishments ...” to their already traumatised state in life. They are of the view that they have suffered enough trauma in their lives by fleeing from their country of birth, the trauma of travelling through other hostile environments to reach a safe haven in the Republic of South Africa – it is submitted that having regard to the protocols found in the Handbook it should be adhered to and not introduce more stumbling blocks by excluding them from obtaining refugee status.
- The RRCA submits that the “punishment measures” deprive them their humanitarian character as are enshrined in the Handbook.
- All these conventions and laws require refugees to abide by the law of the hosting country including punishment when a refugee fails to comply with any laws or has committed a crime regardless of the scheduled offenses in terms of the Immigration Act, Identification Act, Passport and Travel Document Act.
- Maintaining the suggested amendment is discriminatory in nature, and may be contrary to other laws of the Republic including the Constitution of South Africa.
- The RRCA further submits that the intended amendment should, at a minimum, preserve the humanitarian character of refugeehood and not be framed in an exclusionary immigration framework.
- This proposed amendment assumes that an asylum seeker is a regular traveller who must prepare himself before leaving his country of origin to pass through the regular border entries to come to South Africa.
- If he does not pass through the ports of entry as designated by the Minister, he is at high risk of being excluded during his interview if he fails to satisfy the Refugee Status Determination Officer.

- Refugees fleeing from political or social conflicts, persecution or other kinds of upheavals do not necessarily have passports and time to prepare their uncertain journeys.
- They flee for their lives and is desirous of safety for themselves and their loved ones and therefore do not have time to go through the normal Passport process application.
- An example will perhaps suffice:
 - A Commissioner in an appeal before the Refugee Appeal Board asked the Appellant for his passport [my client].
 - Of course the Appellant could not produce a passport at all.
 - The Appellant's answer was: "Sir, this is the reason why I sit in front of you in this appeal. When I fled my country of my birth, I left with the clothes on my body. I did not take any food, any water, no money or any other provision at all to keep me alive. I fled for my life as my parents and siblings were killed before my very eyes! I was nine years old."
- The RRCA asks that these provisions be repealed and not put into force or alternatively that it should be redrafted to clarify it.
- These proposed amendments are contrary to the letter and spirit of the refugee legal regime and was not intended as such when South Africa ratified the conventions of 1951 and the protocol of 1967.
- The unity of the family is of paramount importance and it should be taken into account when refugee status ceases.
- The Principle of Family Unity [Chapter VI in The Handbook]
Beginning with the Universal Declaration of Human Rights, which states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State", most international instruments dealing with human rights contain similar provisions for the protection of the unit of a family.

182. The Final Act of the Conference that adopted the 1951 Convention:

"Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

(1) insuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.

(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

183 ...

184. If the head of a family meets the criteria of the definition, his dependants are normally granted refugee status according to the

principle of family unity. It is obvious, however, that formal refugee status should not be granted to a dependant if this is incompatible with his personal legal status. Thus, a dependant member of a refugee family may be a national of the country of asylum or of another country, and may enjoy that country's protection. To grant him refugee status in such circumstances would not be called for.

185. As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household. On the other hand, if the head of the family is not a refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention or the 1967 Protocol. In other words, the principle of family unity operates in favour of dependants, and not against them.

186. The principle of the unity of the family does not only operate where all family members become refugees at the same time. It applies equally to cases where a family unit has been temporarily disrupted through the flight of one or more of its members.

187. Where the unity of a refugee's family is destroyed by divorce, separation or death, dependants who have been granted refugee status on the basis of family unity will retain such refugee status unless they fall within the terms of a cessation clause; or if they do not have reasons other than those of personal convenience for wishing to retain refugee status; or if they themselves no longer wish to be considered as refugees.

188. If the dependant of a refugee falls within the terms of one of the exclusion clauses, refugee status should be denied to him. Other criteria contained in the suggested amendment are more discriminatory than the benchmarks set out in international and domestic legal instruments.

- The Principle of the Family is set above and should be strictly adhered to.
- The RRCA submits that the principle of “family unity” and the “individual character of the applicant” when granted refugee status & “the personal circumstances” should continue to be the minimum criteria to determine the refugee status of an asylum seeker or to consider when applying the cessation of refugee status.
- The framers of the intended amendment should be mindful of the political meddling from countries of origin, particularly as far as Rwandan refugees are concerned.
- It should not be paid lip service whilst the proposed amendments try to circumvent these principles which are also enshrined in the Constitution of the Republic of South Africa.

- We as South African citizens rely on the protection of the State to keep our family unity intact.
- It is suggested that Refugees in general should be afforded the same protection and that they should expect the same protection from the State.

AD Clauses 7 – 12 of the Bill [measures to improve the workflow of the RAA, SCRA and RSDO's]:

- The DHA and government should be congratulated for this very positive step forward and to make it abundantly clear that a single member of the RAA may consider appeals.
- It is a positive step forward in respect of the term of office of these independent commissioners may vary and that the effective working may not to be stymied by a fixed term of office.

Ad clause 14 of the Bill [crime prevention and integrity measures]:

- Once again the DHA and government should be congratulated with these very positive steps being taken to try and prevent corruption and to install integrity measures.
- Having said, it should also be stated clearly that there are refugees/asylum seekers who are no angels.

Ad clause 15 of the Bill:

Section 21(c) by the insertion of section 2A:

- It is stated that “When making an application for asylum, every applicant must declare all his or her spouses and dependants, whether in the Republic or elsewhere, in the application for asylum.”
- It is submitted that it does not make provision for *inter alia* the following everyday scenarios:
 - An applicant whose application was not finalised can get married in the Republic after he has submitted his application.
 - An applicant whose application was not finalised may adopt children from his home country while in the Republic.
 - An applicant whose application was not finalised may sire or give birth to children while in the Republic.
- It is submitted that adequate provision should be made for these eventualities.

Section 21 (e) [An application for asylum, which is found to contain false, dishonest or misleading information, whether by a Refugee Status Determination Officer, when considering the application, the Standing

Committee, when reviewing, monitoring or supervising a decision or the Refugee Appeals Authority, when adjudicating an appeal, must be rejected]:

- The insertion of this clause that a Refugee Status Determination Officer, the Standing Committee for Refugees Affairs or the Refugee Appeals Authority may reject an application for asylum or any other subsequent process gives uncontrolled and unfettered powers/discretion to determine falsity, dishonesty or misleading information.
- It is suggested that such discretion should at the minimum be exercised judicially and these entities should provide written reasons for any decision handed down fully supported by facts & authorities relied on.
- This would enable an aggrieved party to be fully versant with the matter and the basis for that decision.

Ad clause 16 of the Bill:

- It is stated that: “Any person reasonably suspected to have a mental disability who is found under circumstances that clearly indicate that he or she is an asylum seeker, must ...”
- Who is going to ascertain whether?
 - A person is reasonably suspected to have a mental disability?
 - Specific circumstances are present that clearly indicate that the person is an asylum seeker?
- It is submitted that the term “mental health status” as is defined by the Mental Health Care Act 17 of 2002 be used and that a person should be taken care of in terms of the Mental Health Care Act.
- It is submitted that the DHA and its officials inclusive of the RSDO’s, Independent Commissioners who serve on the RAA of SCRA are ill equipped to solely take care of such a situation.

Ad clause 18 of the Bill [it relates to the onerous duties cast on the asylum seeker’s family or even his friends!]

- Government is reminded of the guidelines given by the HANDBOOK Chapter III – Gainful Employment Articles 17, 18 & 19
- Article 17: Wage-earning employment. Article 17
 “1. The Contracting State shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting States concerned, or who fulfils one of the following conditions:

- (a) He has completed three years' residence in the country;
- (b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his spouse;
- (c) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes."

- Article 18 - Self-employment:
"The Contracting States shall accord to a refugee lawfully in their territory treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies."
 - Article 19 - Liberal professions
"1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances.
2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible."
- It is submitted that this specific proposed amendment to cast a duty on the asylum seeker's family or friends to support him/her is extremely onerous and unjustified.
 - Why involve his family? Does that include a child of 2 years old?
 - It should be kept in mind that the asylum seeker fled for his life and his family members were in all probabilities murdered in front of his eyes.

- Why put a legal statutory duty on his friends who are in all probabilities in the same predicament?
- In many instances the applicant arrives in SA without his family who were exterminated by forces he/she had no control over, such a person had the trauma of travelling down various other countries to SA under extreme circumstances just to arrive in SA and to be confronted with this uncalled for and unexpected impediment to which he/she have no answer or powers to satisfy.
- It is suggested that this be scrapped.
- If such an applicant is not in a position to comply with these requirements, he/she faces the grim prospect of a living in a refugee camp.
- With the status quo at present where the temporary asylum seeker permit is endorsed that such a person may work and/or study such a person is not a burden on the state.
- If a person is prohibited to work or to study the State will have to provide shelter in a refugee camp at great expense to the South African Taxpayer.
- There is a duty cast upon the UNHCR – can government give the unequivocal assurance that the UNHCR is in on this deal?
- The term “work” is difficult to define: does that include to be self-employed?
- Or if an asylum seeker is employed in the informal sector by another asylum seeker?
- The practicalities in respect of educational institutions are that they give asylum seekers and even refugees a raw deal and don’t accommodate these people easily.
- Regard should be had to the criteria created in the Handbook.
- A refugee is not an employment seeker, neither is he a student. He/she came to South Africa primarily to survive.
- The rights to work and study attached to asylum seeking or refugee status in international and existing domestic legal instruments should not be prejudicial to the humanitarian interests of any asylum seeker and in any manner whatsoever.
- It is strongly urged that this part of the intended amendment be repealed and not enacted as it is contrary to the fundamental human rights aimed at having minimum living conditions.

Ad clause 22 of the Bill [new information comes to light during the appeal]:

- The Refugee Appeals Authority must refer the matter back to the Refugee Status Determination Officer to deal with such asylum seeker

in terms of this Act if new information, which is material to the application, is presented during the appeal.”

- It is submitted that the RAA is in a better position to deal there and then with the new material because it is ceased with the matter – strike while the iron is hot.
- It is further submitted that it would be costly and time consuming to refer the matter back to the RSDO.
- What is the situation if the specific RSDO has resigned and is no longer in the employ of the DHA?
- The applicant is entitled to speedy resolution to his matter – see our Constitution in respect of criminal matters.
- The matter will be unduly delayed by a reference back to the RSDO.

General:

- The intended amendment should only apply to new applicants and it should be clearly stated in so many words. It should not be left to courts of law to interpret this aspect.
- As the intended amended act will be the only act applicable to refugees and asylum seekers, it should not be enforced retroactively to strike at existing cases; be they asylum applications not yet finalized, any appeal thereof or refugee status, rejection, application for certification or any other application or appeal that was lodged under Act 130 of 1998 as amended to date of commencement taking into consideration the point stated immediately above.
- It is requested that the RRCA be afforded the opportunity to make oral representations to the Portfolio Committee of Parliament to *inter alia*:
 - Amend and/or expand on its submissions above &
 - To point out the relevancies of the Handbook and how, in their view it should be taken into consideration with these proposed amendments.

**SUBMITTED BY C.J. COERTSE ATTORNEY & NOTARY WITH RESPECT
FOR AND ON BEHALF OF THE RWANDAN COMMUNITY ASSOCIATION
JOHANNESBURG
28 OCTOBER 2016**