LAWYERS FOR HUMAN RIGHTS SUBMISSION

ON THE REFUGEES AMENDMENT BILL, 2016

28 October 2016

For attention: Mr Eddy Mathonsi
Secretary: Portfolio Committee for Home Affairs
National Assembly

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1. Introduction

Lawyers for Human Rights ("LHR") is an independent human rights organisation with a 37-year track record of human rights activism and public interest litigation in South Africa. LHR uses the law as a positive instrument for change and to deepen the democratisation of South African society. LHR's Refugee and Migrant Rights Programme sees between 10 000 to 15 000 asylum seeker and refugee clients per year in its four law clinics (in Pretoria, Johannesburg, Durban and Musina). LHR welcomes this opportunity to make submissions to the Portfolio Committee for Home Affairs on the Refugees Amendment Bill, 2016.

LHR has a number of concerns regarding the amendments to the principal Act introduced in this Bill. These changes represent a wholesale change to refugee protection and adjudications in South Africa and present a massive deviation from the urban refugee policy. The urban refugee policy has been the cornerstone of refugee protection in South Africa since the inception of refugee protection in South Africa through the Basic Agreement with the UNHCR in 1993. The development of this policy and the Refugees Act of 1998 was the result of widespread public consultations with stakeholders, government departments and civil society during the Green and White paper process of the mid-1990's.

Green Paper on International Migration

However, we note that the Minister of Home Affairs, the Hon. Minister Malusi Gigaba, issued the Green Paper on International Migration in June 2016, which was opened for public comment and consultation until 30 September 2016. LHR participated in this consultation process and submitted substantive written submissions to the Green Paper.

Asylum management is one of the areas which is dealt with in the Green Paper and is the subject of the White Paper process which will be presented to Cabinet. Normally, it is on the basis of such a policy document that legislation would be introduced in line with a fully developed policy, based on dialogue and public participation.

In this case, however, it seems that the opposite has happened and that legislation is being introduced before Cabinet has made a final decision regarding migration policy. Indeed, the

Refugees Amendment Bill, 2016 was introduced to Parliament even before public submissions were due.

Considering the changes which are being considered in the above process, we submit that such drastic changes to asylum and refugee policy should be considered within the context of an eventual White Paper and introducing such changes at this point is premature.

It is important to note, however, that the asylum system in South Africa is in crisis and has all but collapsed. At present, the Refugee Appeal Board is non-functional, the Standing Committee for Refugee Affairs is desperately under-staffed and under-resourced, Refugee Reception Offices have been closed (even in violation of court orders) and corruption remains a principal barrier to South Africa fulfilling its obligations under international law.

We submit that the provisions of the Bill which deal with immediate capacity problems, particularly the massive backlog of approximately 200 000 appeals before the Refugee Appeal Board,[1] can be severed from the wholescale changes in the system and dealt with immediately. This would include the changes contemplated in section 8C(2) of the principal Act permitting appeals to be heard by one member as determined by the Chairperson of the Board. We submit that this change can be effected while the overall changes as contemplated in the Green Paper on International Migration are being considered in a final White Paper.

The "Genuine" Refugee

Much has been made during the Green Paper process of preserving the asylum system for the "genuine" refugee while relying on a 96% rejection rate of asylum applications by the Department of Home Affairs.

Firstly, we also note paragraph 28 of the 2011 UNHCR Handbook on Refugee Protection which states:

> *28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.*[2]

Therefore, many asylum seekers are already refugees while their status is being official determined. Refugee status is a declaratory status from the moment one crosses an international boundary due to persecution under the definitions in section 3 of the Refugees Act. Strict differentiation of treatment between asylum seekers and refugees may therefore be inappropriate and where rights reserved for "refugees" may be removed from asylum seekers, this may be a violation of South

[1] This number was given by the Deputy Minister of Home Affairs, the Hon. Deputy Minister Fatima Chohan, during a presentation at the Conference of the African Chapter of the International Association of Refugee Law Judges which took place at the University of Pretoria on 27 October 2016.

[2] UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (2011), p. 9

Africa's obligation toward the 1951 UN Convention Relating to the Rights of Refugees and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa.

It should be noted that the accuracy of the 96% rejection rate has been called into question by leading research institutions in South Africa, including research done by the African Centre for Migration and Society (ACMS) at the University of the Witwatersrand. In a 2012 Report,[3] ACMS found that the poor quality of refugee status determination ("RSD") proceedings was a violation of the constitutional right to just administrative action. In another report[4] from ACMS in the same year, hundreds of RSD decisions were analysed and specific problems relating to the determination procedure were found to violate both domestic constitutional law regarding just administrative action and good decision-making as well as international standards relating to RSD. LHR will be happy to provide copies of this reports at the Committee's request.

These findings closely mirror LHR's experience in this area. We respectfully submit that any legislation based on the so-called 96% rejection rate to legitimate excessively restrictive procedures must be regarded critically. For example, the Musina Refugee Reception Office had a 0% approval rate in 2015. This is indicative in and of itself of a flawed RSD model in South Africa. It is also indicative of the difficulty in determining who is a "genuine" refugee thereby negating justification for excessively restrictive policies.

2. Submissions on the Bill

Many of the submission made below were addressed to the Department of Home Affairs in our written submissions dated 7 September 2016. We repeat many of our views from that 2015 version of the Amendment Bill with changes where appropriate in the 2016 Bill.

LHR requests the opportunity to make oral submissions to the Portfolio Committee where we can discuss these and other submissions with members of the Committee.

DEFINITION OF "DEPENDANT"

1. This section limits the definition of "dependent" to include only unmarried minor children (younger than 18 years old).

   1.1. We welcome the change from the 2015 Bill which made a distinction between children born to their natural parents and children who are adopted by an asylum seeker or refugee.

2. The definition of *'dependant',* however, should encompass separated children who accompany their related caregivers into the Republic, including children who have not been formally adopted.

[3] Amit, Roni. "No Way In: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices." *African Centre for Migration & Society.* September 2012. p.9

[4] Amit, Roni. "All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination." *African Centre for Migration & Society.* June 2012: http://www.lhr.org.za/sites/lhr.org.za/files/all_roads_lead_to_rejection_research_report.pdf.

3. There are many minors who live with and are cared for by close relatives, but have not been formally adopted. In war torn countries where a minor's biological parents are killed and a relative takes the role of being the parent of the child there is usually no time for the relative to avail himself/herself to the relevant authorities for formal adoption procedures because their continued presence in the country is too dangerous and they have no option but to immediately flee from their country. These children are often considered separated children. There are no provisions for dealing with this group of children as opposed to unaccompanied children who have no caregiver.

4. It should further be noted that many countries, particularly which have suffered war or other events seriously disrupting public order, may not have formal adoption processes. It would not be in the best interests of such children to exclude them from their "parents'" or another caregiver's care.

Relevant International Law Pertaining to the Rights of the Child

5. The United Nations Convention on the Rights of the Child[5] (hereafter "the CRC") provides for the protection of children who seek refugee status. Article 22(1) states that:

   5.1. *State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by another person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.* (*Our emphasis).*

   5.2. The United Nations Committee on the Rights of the Child's General Comment on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6 ("the General Comment"), at para 8, provides, the definition of "Separated Children", who are children who have been separated from both parents, or from their previous legal or customary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.

   5.3. Para 66 of the General Comment states that asylum-seeking children, including those who are unaccompanied or separated shall enjoy access to asylum procedures and other complementary mechanisms providing international protection, irrespective of their age.

   5.4. Para 68 of the General Comment requires that an asylum-seeking child should be represented by an adult who is familiar with the child's background and who is competent and able to represent his or her best interests. (*Emphasis added)*

[5] Ratified by South Africa on 15 June 1995.

5.5. Para 70 of the General Comment requires status applications filed by unaccompanied and separated children to be given priority and every effort should be made to render a decision promptly and fairly.

6. The African Charter on the Rights and Welfare of the Child[6] (hereafter "the ACRWC"), at Article 23 of the ACRWC provides for the protection of refugee children. Article 23(1) provides that:

   6.1. *State Parties shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.*

7. The Inter-agency Guiding Principles on Unaccompanied and Separated Children of 2004 ("the Guiding Principles"),"[7] In terms of these principles, family unity is highlighted, and unaccompanied and separated children must be provided with services aimed at reuniting them with their parents or primary legal or customary caregiver as quickly as possible. In the context of the Guiding Principles, family is accorded a broader meaning and therefore includes care by persons other than biological parents of children. (*Emphasis added*)

EXCLUSION FROM REFUGEE STATUS

Ad section 4 of the Principal Act

8. The amendments to the Act seek to introduce provisions which would exclude asylum seekers from the protection of the Act as well as introduce new grounds for cessation of refugee status. These new grounds for exclusion and cessation are problematic as they are not provided for in the relevant international conventions and may not meet the "seriousness" test under international law, particularly under the 1951 UN Convention Relating to the Status of Refugees.

9. To exclude an asylum seeker from refugee status is a serious decision which presents risks to the asylum seeker's life and liberty. It is for this reason that international law and the South African Constitution require that such exclusions be limited, taken on an individualised case-by-case basis and be based on a test of seriousness before it is imposed.

Offences under Schedule 2 of the Criminal Law Amendment Act, 1997

10. The amendments introduce a provision which states that those who have committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997) are excluded from refugee protection.

[6] Ratified by South Africa on 7 January 2000.

[7] The Guiding Principles were developed and endorsed by the International Committee of the Red Cross, the International Rescue Committee, Save the Children, UNICEF, UNHCR and World Vision International in order to guide future action concerning unaccompanied and separated children.

11. The 1951 UN Convention permits exclusion from refugee status of any person for whom there is serious reasons for considering that they have committed a "serious" non-political crime in any country prior to their admission to the country of refuge. The offences enumerated under Schedule 2 of the above Act are no doubt serious and may be effectively used to exclude applicants from refugee status.

12. The wording of the amendment, however, does not clearly define the burden or standard of proof for assessing whether someone has committed a crime contemplated in this section or whether a particular offence requires a conviction from a South African court of law in order to effect an exclusion.

13. The effect of excluding individuals for crimes committed in South Africa would be to expose individuals with genuine persecution concerns regarding potential *refoulement.* Depending on the severity of the crime, this may be inconsistent with the constitutional right to life, section 2 of the Refugees Act and the country's international obligations. Each case would have to be dealt with on an individual basis.

14. It should also be noted that individuals who may face the death penalty in their country of origin, or any other country, where they may be suspected of or have committed a capital crime cannot be returned to their country of origin.[8] It should be noted that neither the Refugees Act nor the Immigration Act make provision for permitting such individuals who may not return to their country of origin without the requisite assurances that the death penalty will not be imposed.

Offences relating to fraudulent possession, acquisition or presentation of identity / travel documents

15. The inclusion of these "types" of offences is broad and may case the net too wide when it comes to excluding refugees from international protection.

16. The nature of these offences is administrative in nature and would not, in many cases, meet the "seriousness" test under Article 1F of the 1951 UN Convention.

17. This provision fails to take into account the often irregular migration of individuals who are fleeing persecution. Many refugees are often forced to use irregular migration methods to secure their safety and privacy. Such methods have been recognised under the 1951 UN Convention[9] and principal Refugees Act.[10] Such acts would often fall within acts that are considered offences in the Immigration Act, the Identification Act, 1997 (Act No. 68 of 1997) or the South African Passports and Travel Documents Act, 1994 (Act No. 4 of 1994). The net effect of excluding people who commit offences under these Acts would be to exclude a good number of genuine refugees from refugee protection for the nature of their flight from persecution.

[8] Minister of Home Affairs and others v Tsebe and others 2012 (5) SA 467 (CC)
[9] Article 31(1) of the 1951 UN Convention on the Status of Refugees
[10] Section 21(4) of the Refugees Act 130 of 1998

18. The wording of the amendment is overly broad and encompasses every offence in these three Acts, some of which only merit a fine and no imprisonment and cannot be a justifiable reason for making someone undeserving of refugee status. Such an inclusion would be incompatible with section 2 of the Refugees Act. The severity of the effect of exclusion requires greater care in the drafting of any exclusionary clauses to ensure they might constitutional scrutiny.

Fugitives from Justice with a "Recognised Judiciary"

19. The amendments introduce a provision which states that fugitives from justice in another country where the rule of law is upheld by a recognised judiciary are excluded from refugee protection.

20. Applications for refugee status are frequently made by persons who have fallen foul of their ruling governments. The basis for an applicant's asylum application (political activities, religion, and membership of a particular social group) can also be the same basis for a criminal charge being levelled against an individual. The proposed amendment fails to cater for the abusive nature of a criminal charge against an applicant or the nature of the criminal charge which should not necessarily have the effect of declaring an applicant undeserving of refugee status. In fact, it may be the very reason for seeking refugee protection.

21. The standard set by the wording of the amendment does not adequately factor in the independence and impartiality of the judiciary from which the applicant might be a fugitive from and does not factor in the seriousness and/or nature of the crime. For example, a judicial system may be quite independent and uphold the rule of law in uncontroversial areas relating to economic transactions or banking law, but may be subjected to manipulation in politically sensitive "criminal" cases.

22. Further it sets the burden on the asylum seeker to prove that his or her judiciary does not uphold the rule of law. In light of the above qualifications relating to uncontroversial areas of the law, this may be an impossible task to prove and would result in refugee status being unlawfully withheld from a refugee deserving of international protection.

Exclusion based on Entry other than through a Port of Entry

23. The amendments introduce a provision which states that an applicant who that entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, and fails to satisfy the Refugee Status Determination Officer that there are compelling reasons for such entry is excluded from refugee protection.

24. The amendment provides the Refugee Status Determination Officer a wide discretion for determining what qualifies as a compelling reasoning. Such unfettered discretion for such an unnecessary exclusion provides opportunity of exploitation and corruption.

25. This is inconsistent with Article 31(1) of the 1951 UN Convention which provides for non-penalisation for unlawful entry or presence within the territory of the host country. One

interpretation of this Article is that only refugees who come "directly" from their country of origin benefit from this provision, however, this interpretation would be controversial as international law recognises that an asylum seeker does not need to make his or her application in the "first safe country" in which he or she finds themselves. This has been the opinion of the UNHCR in several opinions relating to First Safe Country agreements.

Exclusion for not Applying Within 5 Days of Entry

26. This provision is particularly harsh considering that most refugee reception offices only allow certain nationalities to apply for asylum one day of the week. This essentially means that asylum seekers have effectively one day in order to apply for asylum otherwise, they will be *excluded* from refugee status.

27. It also runs afoul the findings in *Ersumo*[11] which found that the 14 days, as prescribed under Regulation 2(2) of the Refugee Regulations, 2000 was a starting point and not determinative of who may apply for asylum.

28. This is coupled with the asylum seeker's lack of knowledge of where refugee services are provided as well as travel time to centres such as Pretoria, Durban, Port Elizabeth (when it is re-opened by order of the Supreme Court of Appeal) or Musina where the support structures, such as family or friends, may be located in order to maintain one's file at those offices and not incur the additional expense of frequent travel to RRO's based at border points during the asylum process.

29. This is particularly serious in light of the changes to section 22(6) and (7) of the principal Act which will require an assessment of an asylum seeker's ability to sustain him or herself "with the assistance of family and friends". This provision essentially makes it impossible to make such an assessment if they are effectively excluded from status.

30. The "compelling reasons" provision does not limit the unfair prejudice of this provision. Compelling reasons are limited to hospitalisation or institutionalisation of some kind. This is an unreasonable amount of time and will likely not pass the reasonableness test under the Constitution.

Conclusions regarding Exclusion

31. The rationale for the exclusion clauses in Article 1F of the 1951 Convention relating to the Status of Refugees and Article I(5) of the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa is that certain acts are so grave as to render the perpetrators underserving of international protection as refugees. The proposed amendments relating to exclusion from refugee status assign exclusionary status to a variety of acts that inherently attach to many genuine refugees by virtue of the difficulty of their flight and their status in their country of origin.

[11] Ersumo v Minister of Home Affairs and others 2012 (4) SA 581 (SCA)

32. These measures also do not take into account the real and documented problems relating to access to the refugee system through the country's refugee reception offices.

33. The amendments create a broad vague list which would have the effect of eroding the integrity of the institution of asylum and unfairly excluding a great potion of asylum seekers from refugee protection in the name of administrative convenience. Given the severity of the consequences of exclusion to applicants, the rationale behind amendments of the exclusion clauses must be consistent with the objects of the Refugees Act and the Constitution. The rationale for these amendments which do not serve to protect the institution of asylum from abuse but rather exclude applicants from the refugee protection for acts naturally inherent in refugee flight and minor administrative transgression cannot be seen as consistent with the objectives of the Refugees Act, the Constitution or the international refugee conventions to which South Africa is signatory.

CESSATION OF REFUGEE STATUS

Ad section 5 of the Principal Act

34. LHR is concerned by some of the additions in the grounds for cessation of refugee status which are not foreseen by the 1951 or 1969 Refugee conventions.

35. We submit that it is unnecessary to include the term *"in any way"* in section 5(1)(a) of the principal Act. This will inevitably create situations where a refugee may innocently interact with his or her embassy (for example to obtain a birth certificate) with no intention of re-availing themselves to the protection of that State, yet may fall foul of this provision. If additional grounds are necessary regarding re-availment, they should be specific in the law so that refugees know what they may or may not do and meet the "seriousness" criteria for removing refugee status.

36. This is particularly the case in section 3(b) claims where the agent of persecution may not be the state itself, but the state is <u>unable</u> to protect the individual. Interacting with one's embassy in those circumstances cannot amount to re-availment. There is no public policy reason for permitting this type of exclusion.

37. It is further unnecessary to include "visits" to a country of origin as a grounds for cessation. Regular visits may be indicative of changed country of origin conditions meriting the cessation of status, but one visit may be out of necessity to bury a family member who has passed away or to deal with other family emergencies. It may also be a precursor to determining whether it is safe for a refugee to return to his or her country. Rather than punishing such trips, they should be encouraged where it is safe to do so. These trips have been cited in various international texts as "look-see" trips and provide a safe way for refugees to determine when it is safe to return.

38. We submit that whether a "visit" amounts to re-establishing oneself should be taken on a case-by-case basis, but should not result in automatic cessation of refugee status. It may be

appropriate to permit a "compelling reasons" defence in this case to permit the refugee to explain the nature of his or her visit.

39. We further submit that to cease status based on a conviction for the use of a fraudulent document is out of proportion and irrational. Returning someone to face death or a serious deprivation of their liberty due to such relatively minor administrative offences is disproportional to any objective and would therefore not meet the limitations test under section 36 of the Constitution. Criminal sanctions exist in these circumstances to punish unlawful behaviour without breaching the proportionality requirements of natural justice.

ESTABLISHING AND DISESTABLISHING REFUGEE RECEPTION OFFICES

Ad section 8(1) of the Principal Act

40. We note with concern the attempt by the amended provision to exclude the constitutional requirements of the Promotion of Administrative Justice Act ("PAJA") 3 of 2000 from the Director-General's authority to establish and disestablish refugee reception offices.

41. The term "(n)otwithstanding the provisions of any other law" cannot be used to exclude the application of PAJA from administrative decision-making, particularly where such decisions have such a prejudicial and adverse effect on a large segment of the population, including refugees and asylum seekers. It should be noted that PAJA is the implementing legislation as contemplated by section 33(3) of the Constitution of the Republic of South Africa, 1996 and therefore has a quasi-constitutional stature. The right to just administrative action, including the right to public consultations, procedurally fair decisions and administrative action that comply with the principle of legality, cannot be excluded by the inserted provision and the requirements set out by the courts, most notably the Supreme Court of Appeal in *Minister of Home Affairs and others v SASA (EC) 2015 (3) SA 545 (SCA)*, must be complied with.

APPLYING FOR REFUGEE STATUS

Ad section 21 of the Principal Act

42. The proposed Refugee Amendment Act that relates to the undertaking by the Department of Home Affairs to issue asylum seekers with asylum transit visa at the port of entry however, but must be implemented in a manner that is fair and non-discriminatory. Unfortunately, from LHR's observations at various ports of entry, this is often not the case.

43. Section 23 (1) of the Immigration Act of 2002 provides for the issuing of an asylum transit visa that is valid for five days. However, from our observations of the general practice, such visas are inconsistently issued at the port of entry, especially at Beitbridge Border Post. The underlying problem that is associated with transit visas appears to be that officials deliberately do not provide these visas to asylum seekers at the port of entry. Although an excuse that is often stated that those individuals who enter the country do not use the official port of entry. But the reality is that if the individual concerned approaches the officials and presents such a request, it

risks being summarily refused in the absence of valid passport / visa. Such *non-entrée* practices are clearly unlawful.

The Impact of the Unavailability of Asylum Transit Visas

44. The deliberate refusal by Department of Home Affairs officials to issue transit permits at the port of entry to asylum seekers has had extreme severe consequences which will be exacerbated by the provisions of the Amendment Act.

Limited Access to Refugee Reception offices

45. Asylum seekers who are not in possession of transit visas have a limited choice when it comes to access to the refugee reception offices. For example, an individual who entered into the country through Beitbridge border may be forced to lodge his application in Musina, despite having intention to apply in places such Pretoria, Port Elizabeth and Durban because if he or she attempts proceeding inland without any form of identification he might be arrested and face deportation.

46. The "humanitarian reasons" for establishing RRO's at ports of entry become extremely prejudicial when file transfers are consistently refused to be permitted by the Asylum Seeker Management directorate. Requiring asylum seekers to repeatedly travel long distances has a major cost implication, presents dangers to vulnerable groups such as children who must also travel and present themselves and who risk not being seen on their "country day" and must wait another week until they can be seen.

47. This serves to further exclude people from renewing their permits through the increased barriers put in place to make the system nearly impossible to access. New practices of requiring travel documents and / or affidavits to submit an application for asylum are also unlawful and not provided for in the Refugees Act, the amendments or the international conventions.

DIRECTING CATEGORIES OF ASYLUM SEEKERS TO PARTICULAR OFFICES

Ad section 21 of the Principal Act

48. LHR notes with particular concern the authorisation which is given to the Director-General to require "any category" of asylum seeker to report to a specific Refugee Reception Office "or other place specially designated as such" to lodge an application for asylum. Such categories may be based on the applicant's country of origin, or the specific ground of persecution including gender, religion, nationality, political opinion or social group.

49. This provision is troubling in a number of respects:

49.1. Firstly, it appears to allow the Director-General the authority to create addition burdens on individuals by requiring them to report to a certain office, despite the fact that the Constitution provides for freedom of movement throughout South Africa and the right of asylum seekers to reside in any part of the country. Such a power is making it impossible to comply with the provisions of the Refugees Act and the desire of the Department to have asylum seekers depend on "friends and family" by creating increased obstacles to applying for asylum. If there are no means to support oneself and everyone is obliged to use the services of the UNHCR and its implementing partners, South Africa is effectively creating a *de facto* encampment policy in direct violation to its stated intentions and without the protection of minimum standards of conditions for such encampment.

49.2. Secondly, it allows the Director-General to discriminate based on the very grounds of persecution from which individuals are fleeing.

49.3. Thirdly, there is no indication for the rationality of such an authorisation "necessary for the proper administration of the Act". This is something that should have been considered with refugee communities, civil society and other stakeholders to determine whether services are available in those parts of the country.

49.4. Lastly, and perhaps most seriously, this power allows the Director-General to require these categories to report to a refugee reception office "or other place specially designated as such". This clearly opens to door for the Director-General to allow for certain categories to be detained in places of detention. Such a power clearly has serious constitutional ramifications and should have been considered after proper consultations with service providers to the refugee community.

50. We submit that sections 12(1) and 21(1) of the Constitution will not permit arbitrary and irrational deprivation of liberty of an entire class of persons, particularly based on the very grounds of persecution from which they are fleeing. In addition, South Africa has not registered any reservations to the 1951 UN Convention which provide for non-discrimination[12] and the free movement of refugees within the territory of the Republic[13].

51. The Committee should take note of the decision of the High Court in *Lawyers for Human Rights v Minister of Home Affairs*[14] in which the court found that detention without judicial oversight was unconstitutional and referred the matter to the Constitutional Court for confirmation. Confirmation proceedings will take place on 8 November 2016. Similar detention previsions under the Refugees Act will also likely not pass constitutional muster.

FINANCIAL ASSESSMENT OF ASYLUM SEEKERS AND THE RIGHT TO WORK

Ad section 22(6) and (7) of the Principal Act

The right to work and the dignity of asylum seekers

[12] Article 3 of the 1951 UN Convention Relating to the Status of Refugees
[13] Article 26 of the 1951 UN Convention Relating to the Status of Refugees
[14] Lawyers for Human Rights v Minister of Home Affairs 2016 (4) SA 207

52. The original intention of the Refugees Act and its regulations was not to allow asylum seekers to work or study, except under conditions imposed by the Standing Committee for Refugee Affairs (SCRA). This provision became problematic due to the inability of the Department of Home Affairs to adjudicate claims within a reasonable time, leaving asylum seekers in the asylum system for years without the ability to sustain themselves and their families and preventing them from integrating and contributing to the society in which they were living. The current situation is the very same as when *Watchenuka* (below) was decided.

53. The amendments envisage three groups of asylum seekers: those who can provide for themselves, those who cannot and are dependent on the UNHCR and its partners for four months and those who have received UNHCR assistance but are still awaiting adjudication after four months. Despite the fact that the amendments appear to place each group in a position in which they can live with comfortably and with dignity, on closer inspection, this is not the case.

54. The **first group** of asylum seekers is totally denied the right to work (for at least the first four months of their stay in South Africa) and must rely on the support of friends and family. The amendments do not clarify what being "sustained" by family and friends looks like and without a minimum threshold having been set, asylum seekers may find themselves living below the breadline - a situation which undoubtedly **impairs the dignity of asylum seekers** and restricts their ability to live without positive humiliation and degradation. To the extent that there are asylum seekers who will live well or comfortably on the support of their friends and relatives, those individuals must be seen as a small and exclusive minority of the asylum seeking population. That there are some people who may live comfortably in this way cannot be a reason to impose the overly broad restrictions on the majority of the asylum seeking population.

55. The **second group** of asylum seekers are also totally denied authorisation to work as they have presumably have obtained social assistance from UNHCR and its partners. Again, the amendments contain no definition of what "assistance from UNHCR or its partners". Therefore, it is not defined what "social assistance" would constitute that could justify the denial of the right to work. The amendments appear to indicate that being offered shelter and basic necessities by UNHCR and its partners would justify a denial of authorisation to work. These rudimentary means cannot be considered a reasonable amount and a blanket prohibition against employment under these circumstances is again **an invasion of human dignity that cannot be justified and is therefore unconstitutional**.

56. Lastly, the **third group** of asylum seekers, while not outright denied authorisation to work, in reality, face trying obstacles to ultimately become the holder of the said right. As mentioned in detail above, to become a holder of the right, one must first show that they cannot rely on their families or friends to support them, then that they cannot obtain assistance from UNHCR and its partners (under circumstances where they are new in the country and have no financial support from their families or friends) and lastly, they must actually find work to be granted the right for a period of more than six months (under circumstances in which the

work must be the type of work in which an employer can provide a letter confirming employment and which therefore implicitly has the effect of unlawfully restricting asylum seekers from self-employment and piece work).

57. The obstacles and restrictions imposed on newly arrived asylum seekers in this regard must be seen as insurmountable for a majority of asylum seekers. When taking into consideration:

57.1. the hurdles the asylum seeker must overcome to be granted the right to work (including actually *finding* work and the implied unlawful restrictions on the type of work that can be entered into); and

57.2. the delays in the adjudication of asylum seeker claims (and therefore the length of time an asylum seeker can expect to live under these conditions) as well as the restrictions on the type of work an asylum seeker is entitled to engage in it is not difficult to conclude that the manner in which the legislative scheme bestows (or realistically, *prohibits*) the right to work is an unjustifiable invasion of human dignity.

58. The relationship between asylum seekers' right to work and dignity has already been highlighted in several seminal cases, *Minister of Home Affairs and Others v Watchenuka and Others* ("Watchenuka")[15], *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* ("Union of Refugee Women")[16] and *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* ("Somali Association")[17]. In Watchenuka the Supreme Court of Appeal had to decide whether a prohibition imposed by the SCRA on the right of asylum seekers to work constituted an unjustifiable infringement to asylum seekers' human dignity.

59. The court made two important findings in Watchenuka. First, it found that "*where employment is the only reasonable means for the person's support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation*".

60. Second, it found that because the prohibition was a blanket prohibition (I.e. excluding all asylum seekers from working) that it "*[would] inevitably include amongst those 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*** [of the Constitution]*."*

61. *Watchenuka* was confirmed in the *Somali Association* case.

[15] [2004] 1 All SA 21 (SCA) (28 November 2003).
[16] 2007 (4) BCLR 339 (CC).
[17] [2014] 4 All SA 600 (SCA) (26 September 2014).

62. The findings in *Watchenuka* are of application to the legislative scheme envisaged by the amendments. The thrust of *Watchenuka* is to declare that restrictions on one's ability to live without positive humiliation and degradation are unjustifiable invasions into human dignity. As the asylum seekers in groups one and two are generally prohibited from working under circumstances where there is no guarantee that they will live above the breadline (even with reliance from UNHCR partners and their friends and family), the amendments are thus a far way away from sidestepping the findings in *Watchenuka* and cannot guarantee that asylum seekers will live with dignity. Accordingly, the amendments would not withstand constitutional scrutiny and are unlawful.

63. *Watchenuka, Union of Refugee Women* and *Somali Association* also finds application within the legislative scheme surrounding the asylum seekers in group three (those that can work). These cases made findings in relation to dignity and the special vulnerability of refugees.

64. In *Union of Refugee Women* O'Regan J in paragraph 117 stated that "*Discrimination on the ground of refugee status thus may well violate the dignity of refugees or impair their rights in a serious manner. Excluding them from work opportunities as private security service providers is a form of discrimination that may exacerbate the situation in which refugees find themselves and be harmful to them as a group"*. This statement rings true in the context of depriving asylum seekers from opportunities to work too – and would in many respects be more harmful to the group (of asylum seekers) than the deprivations spoken of in *Union of Refugee Women*.

65. Importantly, paragraphs 28 and 29 of the case mentions the special vulnerability of refugees, saying particularly that:

> "[28] *Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. As pointed out by the applicants, the fact that persons such as the applicants are refugees is normally due to events over which they have no control. They have been forced to flee their homes as a result of persecution, human rights violations and conflict. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country.*
>
> [29] *The condition of being a refugee has thus been described as implying "a special vulnerability, since refugees are by definition persons in flight from the threat of serious human rights abuse….*"

66. As mentioned above, the hurdles that a new asylum seeker must overcome to be granted the right to work is unworkable and irrational in light of their practical circumstances (no support from family, friends or UNHCR partners, newly arrived in a foreign country and likely having escaped traumatic experiences) and the vulnerability expressed in *Union of Refugee Women*.

67. Similarly, *Watchenuka* and *Somali Association* finds application to the third group too – because despite the fact that the third group is able to find work, the obstacles they must

overcome to work necessarily entails their humiliation and degradation. LHR cannot foresee circumstances under which an asylum seeker – who is very likely traumatised and without the ability to speak a South African language – will not feel humiliated and degraded in attempting to

i. find help from family and friends and UNHCR partners,
ii. fail to obtain this assistance;
iii. find wage-earning employment

to be given the right to work.

68. To the extent that this can be done without a sense of desperation and degradation, we submit it is possible only for a minority of asylum seekers and again cannot be a reason to impose the overly broad restrictions on the majority of the asylum seeking population.

69. Very lastly, the implied restrictions on trading and piece work are overly broad and has already been dealt with in *Somali Association* which stated that:

> *"In any event, paragraph 32 of Watchenuka…makes it clear that in circumstances such as this, where persons have no other means to support themselves and will as a result be left destitute, the constitutional right to dignity is implicated. I can see no impediment to extending the principle there stated in relation to wage-earning employment to* ***self-employment*** *(our emphasis). Put differently, if, because of circumstances, a refugee or asylum seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade as aforesaid. In fact in those circumstances it would be the very antithesis of the very enlightened rights culture proclaimed by our Constitution for us by resorting to s 22 of that very Constitution (as contended by the respondents and appears to have found favour with the high court) to condemn the appellants to a life of humiliation and degradation. That I do not believe our Constitution ought to countenance."*

70. If the amendments were to be promulgated, we would in no time find ourselves within the realm of what is described above – that asylum seekers would likely find themselves unable to obtain wage-earning employment, which would bring with it humiliation and degradation, and that they would attempt to apply for business licences but find themselves blocked from so doing – and as stated in *Somali Association*, they would be able to rely on the constitutional right to dignity to advance a case for the granting of that business licence. It is an inevitable situation which the amendments cannot circumvent.

71. The Department would do far better in attempts to equip its officials with tools to properly consider applications for asylum in a timely manner than restricting the right of asylum seekers to work in the awkward fashion suggested in the amendments. Unfortunately, the

Department's efforts have not made any headway in reducing the backlog of RSD decisions and appeal matters to be determined.

Vague nature of the assessment process

72. No information is provided on the nature of the assessment to be conducted into an applicant's ability to sustain him/herself and his/her dependants. There is a vague reference to support which an applicant may receive from "family and friends" – but no provision is made for how the ability of such family/friends to support the applicant will be assessed, nor are any other criteria listed as admissible in the assessment.

Fear of Criminal Sanctions for Employers and Learning Institutions

73. LHR is concerned about the criminal sanctions imposed upon employers and learning institutions for employer or enrolling asylum seekers. This is not provided for under any legislation or other category of non-nationals and appears to be discriminatory against asylum seekers due to the delays *by the Department* in adjudicating claims.

74. Such a provision, and the rather harsh penalties attached to it, will no doubt have a chilling effect on the willingness of employers to hire asylum seekers, thereby effectively removing the ability of asylum seekers to provide for themselves and ensuring their human dignity as required by the case law cited above.

75. We propose that similar provisions as those under sections 38 and 39 of the Immigration Act, 2002 which require adequate recordkeeping by employers and learning institutions rather than reporting provisions with the threat of criminal sanction.

The Lack of Transitional Provisions

76. One key area of concern for the refugee community is the lack of transitional provisions for existing asylum seekers, particularly those who have been in the system for extended periods and who may still face years in South Africa due to the backlogs in appeals. These provisions should be immediately addressed in order to provide clarity in the law.

ABANDONMENT OF CLAIMS

Ad sections 22(13) of the Principal Act

77. LHR recognises the need for a process regarding abandoned applications for asylum. Such abandoned claims tend to skew the statistics and risk presenting an unrealistic view of South Africa's burdens regarding asylum seekers and refugees.

78. However, it should be noted that the amended provisions are far too narrow to be justified and reasonable, especially considering the multitude of reasons why a permit may not be renewed on time.

79. A one-month period is clearly unreasonable, even when an individual has not be hospitalised or other institutionalised. Failure to renew may have resulted from difficulties in accessing a refugee reception office due to corruption or difficulties in accessing refugee reception offices as they close.

80. We submit that a longer length of time to prove an actual *abandoned* claim would be more reasonable in the current circumstances. We would submit that one year would be a more appropriate approximation of an abandoned claim.

81. Shorter time periods where an asylum seeker or a refugee permit expires (i.e. less than a year) is in fact governed by section 37 of the Refugees Act and is a criminal offence. At the Marabastad and TIRRO Refugee Reception Offices, such offences are governed by the Admission of Guilt Fines Schedule issued by the Chief Magistrate for Pretoria in November 2012. However, immigration officials at those offices as well as the SAPS officials at Pretoria Central Police Station are not issuing fines properly. They are only issuing fines to people willing to pay the fine immediately and not to those who wish to contest the fine in court, as they are permitted to do under section 57 of the Criminal Procedures Act. This is clearly unlawful and until such time as the fines procedures are clarified, presuming that such applications have been abandoned after one month is clearly irrational, unreasonable and procedurally unfair.

WITHDRAWAL OF REFUGEE STATUS

Ad section 36 of the Principal Act

82. LHR is further concerned with the ability of a RSDO to re-open the decision making process on account of an error, omission or oversight.

83. Under South African administrative law, decision-makers are *functus officio* once they have made an administrative decision and may only reconsider their decision in very specific circumstances. This is to create some stability in the decision-making process.

84. In addition, where information of this sort comes to light, the burden must be on the official to prove that the error, omission or oversight was the fault of the applicant and not the decision-maker. To keep a refugee in limbo by constantly question his or her status through no fault of their own would be unfair, prejudicial and a violation of the constitutional right to just administrative action.

DEALING WITH CORRUPTION

85. LHR welcomes initiatives by the Department of Home Affairs to deal with corruption. Corruption needs to be dealt with as a matter of urgency in policy as well as legislation, which is currently not the case.

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