Introduction

The Refugee Legal and Advocacy Centre welcomes this opportunity to comment on the revised Refugees Amendment Bill. The interests of asylum seekers, the provisions of international law, the Bill of Rights of the Constitution of the Republic, the current Refugees Act 130 of 1998, and case law of several court decisions of the Republic have all been taken into account in preparing these submissions. We have also attempted our very best to balance the interests of the lawmakers versus the above factors. Given that the Bill is a revised version of the former Bill, we have used the bulk of our submissions for the previous Bill, and have made the necessary amendments where necessary. We trust therefore that we will be forgiven for submitting an almost identical submission to our previous one. We have also consulted and referred to the comments from the Department of Home Affairs on the previous submissions delivered to the Portfolio Committee of Home Affairs on the 17th of February 2017.

Purpose of the Bill

We have noted the contents of the preamble and are still concerned with the purposes of the Bill, which are *"to include further provisions relating to the disqualification from refugee status…to clarify the procedure relating to conditions attached to asylum seeker visas and abandonment of applications… to provide for the withdrawal of refugee status in respect of categories of refugees … to provide for additional offences and penalties…*and the *"withdrawal of refugee status,"*. We also note the comments from the Department with regards to our previous submission, in which the Department states that *"there is nothing in the Bill that seeks to withdraw the already granted protection".* It is our hope therefore that the Bill will not withdraw protection already granted save for those erroneously granted.

Section 1- Definitions

As previously commented, we are pleased with the substitution of the word *"permit"* with *"visa"*. We applaud the department for its intentions to change the name it uses to refer to these documents. We recommend that along with the change, the Department conducts awareness workshops with employers to sensitize them to the rights that are granted by the above documents. Our office is more than open to partnering with the Department in this regard.

We are also pleased with the extended definition of dependant. The amendment proposes that the words *"unmarried minor, any destitute, aged parent of asylum seeker, and who is included by the asylum seeker in the application for asylum"* be inserted to define a qualified dependant. We agree it is both logical and acceptable that this definition excludes a minor who is married.

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We, however, hold mixed feelings with regards to the phrase, *"... or any destitute, aged or infirm parent"* as opposed to the more liberal *"family member".* The Regulations to the Refugees Act, NO R 366 define dependant and family as follows:

> *"dependant means an applicant's spouse, unmarried or dependent child under the age of 18 years or any destitute, aged or infirm member of the principal applicant's family."*
>
> *"family means the father and mother and any children who, by reason of age or disability, are, in the opinion of the Refugee Status Determination Officer, mainly dependent on the father or mother for support. Family also means an aged or infirm member of the principal applicant's family"*

We are also concerned that this revised version restricts dependant eligibility to parents, thereby excluding, for example, grandparents who depend on the principal applicant for support. We have noted that the definition of dependant in the Compensation for Occupational Injuries and Diseases Act 130 of 1993 includes … *"a widow, widower, or any person with whom the deceased was living with at the time, a child over the age of 18 years of the employee, or his or her spouse… or a grandparent, or a grandchild of the employee…or any person who in the opinion of the commissioner was acting in the place of the parent*". We are therefore perplexed that the Department seeks to limit the definition in as far as refugees and asylum seekers are concerned, yet the lawmakers provide such a liberal and all-encompassing definition under COIDA.

We also submit that a restrictive definition of the term dependant is a violation of the principle of unity of the family, which is one of the binding principles in terms of the UNHCR Convention. Therefore we recommend that for the sake of uniformity and the indigent family members and dependants of the main applicant the section read as follows:

> *"dependant in relation to an asylum seeker or a refugee, means any unmarried minor dependent child, including an adopted child if such child was legally adopted by the asylum seeker or refugee, a spouse legally married to the asylum seeker or refugee or any destitute, aged or infirm parent of such asylum seeker or refugee who is dependent on him or her ,* ***or any other family member who is dependent on the principal applicant for support, and who can prove such dependency, and provided that such family member was included by the asylum seeker in the application for asylum or good cause is shown why such dependant was not included in the application****"*

<u>Section 2 – Exclusion from Refugee Status</u>

We have taken note of the proposed changes to section 4 of the Act. It is our submission that the amendments violate both the principle of non-refoulement and the right to life entrenched in the Constitution of the Republic. Most worrisome are clauses (e) through to (h), which are individually addressed below.

The amendments seek to disqualify a person from refugee status if the person has *(e) committed a crime in the Republic which is listed in Schedule 2 of the Criminal Law Amendment Act ,(e) has committed an offence which is punishable by imprisonment without the option of a fine, (f) has committed an offence in relation to the Immigration Act, the Identification Act, or the South African passports and Travel Documents Act, (g) is a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary, (h) having entered the Republic through other means than a port of entry, fails to satisfy the RSDO that there are compelling reasons for such entry and has failed to make an application for asylum within five days of entry into the Republic as contemplated in section 21.*

Clause (e) – Criminal Offences

This clause seeks to disqualify a person from refugee status if the person has committed a crime in the Republic that is listed in Schedule 2 of the Criminal Law Amendment Act, or that is punishable by imprisonment without the option of a fine. While disqualification based on criminal activity, particularly those concerning terrorist activities or against the security of the government rendering protection, is acceptable and in line with the objectives of the Convention, we are of the bona fide opinion that the right to non-refoulement and, in conjunction, the right to life, supersedes other concerns and must be given heavy consideration. The right to non-refoulement is premised on the notion that an asylum seeker and/or a refugee will face either persecution and/or death if returned against their will to a country of origin or of nationality. Therefore, refusing protection to an asylum seeker based on their commission of an offence that does not amount to treason is a breach of international law and the Constitution. Section 7 of the Constitution of the Republic reads:

> *"This Bill of Rights is a cornerstone of democracy in South Africa.* ***It enshrines the rights of all people in our country*** *and affirms the democratic values of human dignity, equality and freedom."*

The Bill of Rights also extends to refugees and asylum seekers in the Republic. Furthermore, the Constitutional Court held in the landmark case *S v Makwanyane (CCT3/94 [1995] ZACC 3)* that the right to life is an absolute right that cannot be limited in any way.

Clause (g) – Fugitives from Justice

In *Mohammed and another v President of the Republic of South Africa and others (Society for the Abolition of the Death Penalty in South Africa and another intervening) 2001 (3) SA*

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893 (CC), the court held that this country is underpinned by the concept of and respect for human rights including the right to life and dignity, and that *"this must be demonstrated by the state in everything it does."* We accordingly submit that in handling matters concerning fugitives of justice, due regard be given to the above rights, regardless of the seriousness and severity of the offence.

"

Clause (i) – Five-day Application Period

While we are in general agreement with this provision, we recommend that subsection (i) is revised to read as follows:

> *"has failed to make an application for asylum within five days of entry into the Republic as contemplated in section 21, and having failed to do so has been given an opportunity to reasonably explain such failure, and has failed to reasonably convince the Refugee Status Determination Officer, which reason has been communicated to the applicant in writing; provided that despite failure to reasonably explain such a failure, no applicant will be denied the right to lodge a claim for asylum and have that claim adjudicated before being disqualified."*

In other words, we recommend that the issue of failure to lodge an application within the five-day period only be raised once adjudication on the merits of the application has taken place.

We have also taken note of the comments of the Department with regards to our previous submission, and whilst we agree that they seek to enforce the respect of the laws by every person in the country, and have to be wary of those enjoying refugee protection given the likelihood that they may end up being citizens of the Republic, we do encourage the Department to nonetheless be guided by the provisions of the Constitution, and the case laws cited, which are considered/ meant to be binding.

Section 3 – Disqualifications

Clause (a) – Re-availing

We have also noted the provisions of section 3, the intention to amend section 5 of the principal Act. We welcome the inclusion of the phrase:

> *"he or she voluntarily re-avails himself or herself in the prescribed circumstance to the protection of the country of his or her nationality…"*

It is a much more concise clause as opposed to the previously vague *"in any way"*.

Clause (d) – Re-establishing self

We also welcome the inclusion of this clause. We agree with the Department that once a person enjoying protection from the Republic re-establishes self, or returns to visit such a country, then protection has to be withdrawn. One cannot allege protection from a country and yet have the luxury of visiting the very same country. This is abuse of the system, and our office is strongly against such**.**

Clause (h) – Order by Minister

We have taken note of the provisions of this section. However, we are concerned that the section is vague, and does not set out:

i. The circumstances under which the Minister may issue such an order;
ii. The manner in which such an order may be issued;
iii. The remedies available to those adversely affected by such an order.

Section 6- Amendment Section 8

We have acquainted ourselves with the provisions of this section. We recommend that subsection (1), outlined in clause (b) of this section, read as follows:

> *"notwithstanding the provisions of any other law, the Director-General may, by notice in the Gazette , establish as many Refugee Reception Offices in the Republic as he or she deems fit and necessary for the purposes of this Act, and may disestablish any such office, by notice in the Gazette, if deemed necessary for the proper administration of this Act, provided that proper administrative measures are taken prior to the disestablishment of such office (s) and provided that at all times, the actions of the Director-General are taken having due regard to the circumstances of the refugees and asylum seekers and striking such a balance between such interests and the objectives of the Act."*

Section 15- Amending Section 21

Insertion of subsections 1A –D

We have taken note of the provisions of this section, and do agree with the Department that

i. Every applicant ought to submit their biometrics at a port of entry.

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ii. In the event that an applicant does not have a transit permit, he/she should be interviewed by an immigration officer. (Our office is extremely pleased with this provision as it is an indication that the Department will endeavor to give every desirous applicant an opportunity to submit an application).

iii. We do not have any issues with the provision empowering the Director-General to issue a notice calling on any category of asylum seekers to report to a designated office. We will merely request that the asylum seekers be given reasonable time to report to "the" designated place.

Subsection 2A and subsection 6 and 7

We further welcome the provisions of this subsection. We do agree that every applicant must declare all his dependants. We also request that the Refugee Reception Officers duly inform applicants of this obligation.

We also agree that any application found to contain false information be rejected. We further agree with the provision relating to the indication of a language or preference. We would however encourage the Department to exercise caution in dealing with some applications containing false information by inter alia, ascertaining whether language may have been a barrier (in instances where no language preference was indicated).

Section 17 –Amendment of section 21 B

Our office is further impressed with the changes to this section. It is a further indication that the Department gave due regard to the previous submissions. We agree with the Department that:

i. Dependants ought to have the same visa as the principal applicant

ii. When dependency ceases, the person may apply in the prescribed manner to be permitted to continue to remain in the Republic.

Section 18- Substitution of section 22- Asylum Seeker Visas

We are, however, concerned with the provisions of subsection 5, the withdrawal of the asylum seeker visa by the Director General. This provision endangers the protection of bona fide asylum seekers in that an application may be erroneously rejected by the RSDOs, and before such a person may exercise the recourses available, the Director General may decide to withdraw the visa. We therefore strongly recommend that another paragraph, paragraph (e), be introduced to read as follows:

> *"Provided that the asylum seeker has been afforded an opportunity to exercise the right to either appeal or review the rejection as applicable, within the*

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> *prescribed timeframe, and that having been afforded such an opportunity the asylum seeker has either failed to exercise the right, or having exercised the right, the Director General is convinced that there are no grounds for rendering protection (or the applicant does not meet the criteria).”*

We are further concerned with the provisions of subsection 6. We are of the opinion that it will be cumbersome to require RSDOs to consider the ability of an applicant to sustain themself while the application is adjudicated. From the onset, the application is meant to focus on the merits of the asylum claim itself, in line with international law. Social standing and prowess do not alter the validity of an asylum claim. This will only add to the already lengthy adjudication process. We recommend therefore that this section be omitted altogether. Instead of these assessments, we recommend that upon completion of the interview, the RSDOs refer applicants to the UNHCR offices and/or its partners for possible consideration for social assistance. We are against the idea of having RSDOs bear the additional burden of conducting sustainability interviews.

For this reason, we are against the provisions of subsection 8. In the case of *Watchenuka*, the court held that:

> *“the freedom to engage in productive work - even where that is not required in order to survive - is indeed an important component of human dignity…for mankind is eminently a social species with the instinct for meaningful association”.*

We thus strongly recommend that the right to work be an inherent right at the time that the visa is issued pending the finalization of the application, on condition that the provisions of subsection 9 are applied. We also submit that the time frame be increased from 14 days to 6 months. This would mean that within the first 6 months, an asylum seeker would have to prove that he/she is gainfully employed, failing which the right be revoked. We, however, agree with the rest of the provisions of this section.

Section 19 –Amendment of Section 23.

We have noted the provisions of this section and are both puzzled and amazed by it. A reading of this section creates nothing but confusion in the mind of the reader and clarity is therefore sought. It reads as follows:

> *“If the Director-General has withdrawn an asylum seeker visa … he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalization of the application for asylum…”.*

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The section provides that the Director-General may withdraw an asylum seeker visa, yet it further provides that he or she may cause the holder to be arrested and detained pending finalization of the very application purported to be withdrawn. Our office is seeking clarity on how an application can be finalized if it has already been withdrawn? We also submit that in carrying out these detentions, the Director-General and the officials comply with the provisions relating to detentions which have been reiterated time and time again by courts. We pray that the provisions of this section be applied mutatis mutandis for section 24.

Section 23 - Amendment of section 27 of Principal Act.

We are saddened by the provisions of this section. The Department is seeking to extend the number of years in which a refugee may be considered for permanent residence. No logical explanation exists for this section. By applying for and acquiring permanent residence, refugees become a step closer to calling the country a second home. It is saddening to further note that a similar approach was adopted in terms of the Immigration Act 13 of 2002.

In the case of Moustapha Dabone, an application was lodged by the aforementioned to declare certain provisions of the latter Act requiring applicants for permanent residence to be passport holders, and to abandon their refugee and asylum claims. Despite an order being granted by agreement between the parties (the Dabone order), the Director- General issued a new directive , Directive 21, on the 3rd of February 2016, announcing that the order will no longer be complied with. It is no mere coincidence that this provision is introduced at a time that circular has also been passed. It is so deplorable that the department which is meant to uphold the rights of victims of human rights violations seeks to deprive them of the right to be considered for permanent residence, and we move that this section be struck.

We have taken note of the comments of the Department with regards to this provision, in which the Department states that applying for permanent residence does not grant any new rights that the person on refugee status does not enjoy. This is however untrue. For example, in terms of the PSIRA, one cannot be registered as a security officer unless he or she is a holder of a permanent residence permit. This is just one of many examples, with medicine being another, of how extending the period in which a person can apply for permanent residence impacts on the rights of the persons concerned, although this does vary with the circumstances of each applicant.

Section 27- Amendment of Section 36-withdrawal of refugee status

We have also noted the provisions of this section. We are perplexed to note that the provisions of this section depart from those contained in Regulation 17 of the Regulations, which provide amongst others that notice must be given to the refugee:

(a) Explaining that the Standing Committee intends to withdraw the status
(b) Identifying the reasons for the intended withdrawal
(c) Giving the refugee notice that he or she has the right to make a written submission to respond to the Standing Committee and that the burden of proof is on the Standing Committee to establish that a refugee is subject to one or more grounds for withdrawal.

What both these provisions lack is a reference to the Promotion of Administrative Justice Act notifying the refugee of his or her right to challenge this decision which undoubtedly will adversely affect the rights of the latter. We therefore pray that the notice makes reference to the latter Act. We have noted the comments of the Department in which it states that the PAJA is an integral element of the process, and submit that the process laid out by PAJA and Regulation 17 be therefore employed in implementing the provisions of this section.

Conclusion.

We are very impressed to note that the submissions of all interested stakeholders were strongly considered by the Department in revising the Bill. We appreciate that any piece of law can never meet the standard of every interested party, and we encourage the Department to continue promoting and upholding the rights of refugees and asylum seekers, and to be guided and driven by the values imposed by the Constitution of the Republic.

By

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