SUBMISSION TO THE REFUGEES AMENDMENT BILL

Sergio Carciotto

SCALABRINI INSTITUTE FOR HUMAN MOBILITY IN AFRICA (021-079 NPO) (PBO 930047854)
Governed by a Trust (IT020157/2014)

Scalabrini Institute
for Human Mobility
in Africa

Attention of:

Ms Marcelle Williams email: mawilliams@parliament.gov.za

Re: Commentary on the Refugees Amendment Bill [B12B - 2016]

Cape Town, 14 June 2017

1. INTRODUCTION

1.1 The Scalabrini Institute for Human Mobility in Africa (SIHMA) is a research institute within an existing network of six established research centres around the globe, located in Manila, Buenos Aires, Sao Paulo, Paris, Rome and New York. These centres are part of the network of the Scalabrinian Centres for Migration Studies and are supported by the Missionaries of St. Charles - Scalabrinians, a Congregation of the Catholic Church devoted to the care of migrants, refugees and seafarers.

1.2 The call by the Committee on Social Services for public comments on the Refugees Amendment Bill, 2016 is welcome. In making our comments we will specifically focus on Clause 2, 3, 6, 15, 18, and 23 of the Bill.

1.3 We note that despite the comments made by 19 different organizations and over 200 pages of submissions, the Bill in its current form has failed to implement many of the most important suggestions made by civil society organizations.

2. COMMENTS ON THE BILL

Clause 2 - Substitution of section 4: Exclusion from Refugee Status

2.1 The proposed addiction of Section 4 *(e)* should not be applicable to an asylum seeker who has been convicted of a 'serious'[1] crime and has served a sentence in South Africa as he or she should not forever be barred from refugee status. In this regard, there should not be a further prejudice on the account of the offence committed.

2.2 Addition of Section 4(1) *(f)* raises some concerns as the exclusion from refugee status for criminal activities in a country of refuge should be limited only to 'serious' and 'non-political' acts posing a security threat to the country of refuge.

2.3 The proposed addition of Section 4(1) *(g)* may be of difficult application as the mere fact that an individual is considered to be a 'fugitive from justice' should not lead *ipso facto* to the exclusion from refugee status. A government with persecutory intent could, in fact, 'use the criminal law to persecute its opponents; in such circumstances, 'it makes no sense to treat those at risk of politically inspired abuse of the criminal law as fugitive from justice.'[2]

It is, therefore, important to strike a balance between the offence committed and the well-founded fear of persecution. In a 2012 case[3] involving two Botswana citizens sought in their home country on murder charges, the Court held that the extradition of an accused person to a country that imposes the death penalty without obtaining an assurance that the person would not be executed was a violation of the South African Constitution.

In considering points 4(1) *(g)* Refugee Status Determination Officers and any other relevant authority shall have regard whether the risks 'associated with the exclusion from refugee status outweigh the harm that would be done by returning the claimant to face prosecution or punishment.'[4]

It is suggested that at the least this Section is changed to read: <u>is a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary and does not qualify for refugee status as defined in Section 3 of the principal Act.</u>

2.4 The proposed addition of Section 4(1) *(h)* is problematic; being a refugee implies a 'special vulnerability' and Home Affairs officials have the duty to ensure that applicants for refugee status are 'given every reasonable opportunity to file an application with the relevant refugee reception office.' Knowing that the majority of persons who apply for refugee status do not enter South Africa lawfully through a port of entry, the addition of Section 4(1) *(h)* might lead to an *a priori* exclusion from international protection and to a possible breach of the *non-refoulement* principle.

---

[1] *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, pp.30 defines a 'serious' non-political crime as: *[A] capital crime or a very grave punishable act*.

[2] Ibid. pp.170-171.

[3] Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others (CCT 110/11, CCT 126/11) [2012] ZACC 16 (July 27, 2012), SAFLII

[4] James C. Hathaway, The Law of Refugee Status, Lexis Law Pub, 1991, pp.224.

2.5 The proposed addition of Section 4(1) *(i)* is also problematic and, although it is reasonable to expect an individual to lodge an application for asylum as soon as he or she arrives in the country of refuge, a general rule for migrants to present themselves within 5 days from their arrival in South Africa cannot lead *ipso facto* to their exclusion from refugee status. Moreover, this provision fails to take into consideration the case of Refugees *sur place*. The *1951 Convention Relating to the Status of Refugees and the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa* 'do not distinguish between persons who flee their country in order to avoid the prospect of persecution and those, who while already abroad determine that they cannot or will not return by reason of the risk of persecution in their state of nationality or origin.'[5]

It seems, therefore, necessary to allow individuals already present in South Africa to benefit from international protection without the restriction of a formal timeframe to lodge an asylum request. It is suggested to add the following provision: Section 4(1) *(i)* does not apply to an asylum seeker whose well-founded fear of being persecuted may be based on events which have taken place since he or she left the country of origin.

Clause 3 - Substitution of section 5: Cessation of Refugee Status

2.6 The proposed Section 5(1) *(d)* states that:

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

The addition of Section 5(1) *(d)* raises some concerns as it fails to consider that the 'voluntary re-establishment' is to be understood as return to the country of nationality or formal habitual residence with the view to *permanently* reside there. Therefore, a temporary return to a former country does not constitute 're-establishment' and cannot lead *ipso facto* to the cessation of refugee status.[6] This is, for instance, the case of a temporary return to visit a sick relative/friend or to check a property. Re-establishment has to be considered more than a mere physical presence and occasional visits are not in contrast with the need of protection.[7]

It is suggested that at the least, this section is changed to read: he or she voluntarily re-establishes himself or herself in the country which he or she left or returns to visit such country with a view to permanently reside there.

2.7 The insertion of Section 5(1) *(e*) provides for the cessation of a person's refugee status where *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.* In considering point *(e)* a Refugee Status Determination Officer and any other relevant authority, shall consider that a 'change in

[5] Ibid, pp

[6] *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.refworld.org/docid/4f33c8d92.html [accessed 26 August 2015].

[7] James C. Hathaway op cit note 4 at 198.

circumstances' should correspond to a substantial and durable political change and not to a mere state of relatively calm in the country of origin.'[8]

It is suggested that at the least, this section is amended to read: in considering point *(e)* of Section 1, responsible authorities shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

2.8 The insertion of Section 5(1) *(h)* should not lead to a frequent review of refugees' continued eligibility; with regard to this provision, the UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* highlights that 'the strict approach to the determination of refugee status results from the need to provide refugees with the assurance that their status will not be subject to constant review in the light of temporary changes – not of a fundamental character – in the situation prevailing in the country of origin'.[9]

Moreover, Section 5(1) *(h)* does not explicitly refer to Article 1C of the the *1951 Convention Relating to the Status of Refugees and Article I.4 of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa* which defines when refugee protection is no longer needed and can be ceased. It is noteworthy that the cessation of an individual refugee or category of refugees should not be used to 'trigger automatic repatriation and that a refugee may obtain another lawful status in the state of refuge.'[10]

Clause 6 – Amendment of section 8: Refugee Reception Offices and Refugee Status Determination Officers

2.9 The proposed amendment of Section 8(1) suggests an intention to introduce greater control by the Department over policy matters without including a process of consultation with an independent body or with persons affected by the decisions. It is noteworthy that 'the decision to establish or disestablish an RRO is an administrative action and may not be arbitrary but must fulfil the requirement of the promotion of Administration Justice Act (PAJA).[11]'

Clause 15 – Amendment of section 21: Rejection of Applications

2.10 Section 21 *(a):* See commentary in relation to the insertion of Section 4(1) (i).

Clause 18 to replace section 22: Asylum Seeker Visa

2.11 Section 22 (4): the renewal of the asylum seeker visa cannot be discretionary. Moreover, the proposed addition of Section 22 (6) requires further clarification to determine who is going to be responsible to conduct a 'financial assessment' and what will be the main criteria applied to establish whether an asylum seekers is able to

[8] Ibid at 200.
[9] *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.refworld.org/docid/4f33c8d92.html [accessed 26 August 2015] pp.23.
[10] UN High Commissioner for Refugees (UNHCR), *Current Issues in Cessation of Protection Under Article 1C of the 1951 Refugee Convention and Article I.4 of the 1969 OAU Convention [Global Consultations on International Protection/Second Track]*, May 2001, pp. 3. Available at: http://www.refworld.org/docid/3bf925ef4.html [accessed 28 August 2015].
[11] Polzer, T (2013) 'Policy Shifts in the South African Asylum System: Evidence and Implications', Lawyers for Human Rights and African Centre for Migration & Society Report, pp.40.

support himself/herself or his/her family. It is acknowledged that, in the past, asylum seekers were asked to fill sort of 'pre-screening' forms on arrival at the Refugee Reception Office.[12] These forms were often completed outside the office, without the support of interpreters, while asylum seekers were queueing. Therefore, there is a necessity to clarify in detail the modalities in which a 'financial assessment' will be conducted in full respect of individual's privacy. Furthermore, considering that the Department of Home Affairs lacks adequate personnel and financial resources, as proved by the fact that there were no resources available to operationalise the 2011 refugee amendment, this provision seems to be problematic and difficult to implement.

2.12 On the same vein, the proposed addition of Section 22(7) sounds unrealistic, difficult to implement and will require considerable additional resources. The vast majority of asylum seekers, in fact, do not have financial resources to maintain themselves and therefore it is plausible that they would require shelter and basic necessities provided by the UNHCR. However, the position of UNHCR with regard to the relocation of RROs near the borders has never been clear nor supportive of government's plan to relocate RROs, as stated by the former UNHCR Senior Operations Manager in South Africa on 29 August 2016: 'UNHCR is concerned about the impact the planned relocation of the RROs to the borders would have on the rights of refugees and asylum-seekers'. Moreover, the UNHCR Southern Africa office is likely to lack the necessary fund to offer adequate assistance to all individuals in need. The overall number of asylum seekers in the country is also a matter of great concern. In 2015, the Department of Home Affairs received nearly 70 000 new applications but the overall number of individuals who are registered as asylum seekers is over 1 million. The Bill does not clarify whether Clauses 22(6) (7) (8) apply to new asylum seekers or to those who are already registered.

Right to work

Section 22 deals with the right to study and work for asylum seekers. In principle, we do not believe that the right to work should be extended necessarily to all asylum seekers and we accept that such right may be subject to certain limitations as ruled by the court in the *Watchenuka case:*[13]

'[t]he protection of human dignity is not absolute and s 36 of the Bill of Rights recognises that it may be limited in appropriate circumstances… if the protection of human dignity were to be given its full effect in the present context – permitting any person at all time to undertake employment – it would imply that any person might freely enter and remain in this country so as to exercise that right.'

However, the court went on to say that protection of human dignity

'[m]ay be limited where the limitation is of general application and is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors'. It further stated that 'when employment is the only reasonable means for the person's support other consideration arise.'

[12] *Tafira and Others v. Ngozwane and Others*, Case No. 12960/06, South Africa: High Court, 12 December 2006, available at: http://www.refworld.org/docid/502393072.html [accessed 28 August 2015].
[13] *Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003)

Considering the many administrative challenges the Department of Home Affairs is facing, the rampant corruption and the lack of funding, we believe that a provision to restrict the right to work for asylum seekers based on a 'financial assessment' is not enforceable in a way that is respectful of human dignity and does not 'take into account all relevant factors'. We would like to point that as commented by some of the Portfolio Committee members 'such measure is too harsh as it would infringe on the right to employment which is seen as component of the right to human dignity which the Constitution strives to protect and promote'. Dignity is one of the foundational values of the Bill of Rights and s 10 of the Constitution states that '[e]veryone has inherent dignity and the right to have their dignity respected and protected'. In the *Watchenuka* judgment, the court clearly stated that '[h]uman dignity has no nationality it is inherent in all people – citizens and non-citizens alike – simply because they are human.'

We take this opportunity to comment on a statement made by the Deputy Minister of Home Affairs, Fatima Chohan, during a Portfolio Committee Meeting on 11 October 2016. The Deputy Minister stated that '[t]he country could not allow undocumented or *bogus asylum-seekers* to have rights. For them to claim rights, asylum-seekers ought to possess, at least, immigration visa. And immigration visa could not be applied for while staying in the country'. We, herby, remind all members of the Portfolio Committee that '[i]rregular migrants and bogus-asylum seekers by virtue of being within the jurisdiction of the state, possess the same basic human rights possessed by citizens and legal residents, tourists and temporary visitors. These include, amongst others, legal rights (fair trial and right to security) and the right to receive emergency medical care[14].

Moreover, we emphasize that the only effective way to separate asylum-seekers and economic migrants in a dignified manner is through a fair adjudication of the refugee claim, as provided by the Procedural Standards for Refugee Status Determination, compiled by the UNHCR and not through denying access to the asylum system nor limiting fundamental human basic rights.

2.13 The insertion of Section 22 (9) does not refer to asylum seekers who are self-employed or run their own business to earn a living. It is, in fact, true that for asylum seekers who are unable to find employment in South Africa, self-employment activities represent the only means of financial support. Research conducted by MiWORCs[15] shows that 32.65% of international migrants, including asylum seekers and refugees, are employed in the informal sector. In this case, the provision does not specify what sort of documentation is needed in order to receive an endorsement on the asylum visa. The Bill must cater also for self-employed people.

2.14 The proposed addition of Section 22 (12) does not include a provision to inform each affected person of the intention to consider an application 'abandoned'. Asylum seekers should be able, within a prescribed period, to make a written submission with regard thereto.

2.15 The proposed addition of Section 22(13) appears particularly harsh and might contravene fundamental international obligations. An individual should be given the

[14] Carens, J.H. (2008) 'The rights of Irregular Migrants', *Ethics and International Affairs*, 22(2), pp.165.
[15] http://www.miworc.org.za/

opportunity to re-apply for asylum at least in the case that new elements or findings have arisen or have been presented by the applicant to support a request for asylum. Moreover, in case the determining authority considers that a return decision will lead to direct or indirect *refoulement* in violation of the State's international obligations a person should be granted the right to stay.

Clause 23 to amend Section 27: Continuous Residence

2.16 Section 27(c) allows those who are deemed to be refugees for an 'indefinite period of time', to apply for permanent residence [or for a long term visa, as defined in the 2017 White Paper]. We believe that government should maintain the status quo and continue granting permanent residency to eligible refugees[16] who have been legally residing in South Africa for at least five consecutive years, as opposed to the years. This is, in fact, morally acceptable and compatible with democratic principles of justice. Moreover, every immigrant who is lawfully present, is employed or self-employed and have no criminal record, is an economic contributor to the local economy and do not pose a security threat to the country.

3. COMMENTS ON THE BILL

3.1 The proposed amendments to the Refugee Act, 1998 seek to reform the asylum system in South Africa in line with governmental and departmental policies but before the completion of a comprehensive overhaul of the current policy on international migration.

3.2 Clause 2 and 3 of the Bill seek to introduce further administrative barriers which can prevent genuine asylum seekers from accessing the asylum system. In particular, certain criteria for exclusion from refugee status are inconsistent with those set out in the 1951 Genève Convention relating to the Status of Refugees.

3.3 The proposed amendments seek also to restrict the possibility for asylum seekers to work and study in South Africa. This fact raises several concerns on its actual implementation and it is our opinion that the deprivation of the freedom to work may threaten to degrade asylum seekers in South Africa. Given the backlog, the overburdened system and the limited resources available, it is foreseeable that the Department of Home Affairs will not be able to process applications for asylum within a reasonable period of time and without severe delays. In this regard, we point out that research shows that, on average, asylum seekers in South Africa have spent 2.8 years in the asylum system.[17] It is vital that the challenges around implementation are taken into account in the process of considering amendments to the Refugees Act.

3.4 It is difficult to believe that the United Nations will be able to provide adequate shelter and basic services for thousands of asylum seekers across the country. This will have, in fact, enormous financial and capacity implications and it is unlikely that UNHCR or NGOs in South Africa would be able to foot this bill.

[16] Section 27(d) Immigration Act, 13 of 2002

[17] Amit, R. (2015) 'Queue here for corruption: measuring irregularities in South Africa's asylum system', published by Lawyers for Human Rights and the African Centre for Migration and Society, pg.24.

3.5 The limitation of the right to work might deprive asylum seekers of the only means to support themselves while in South Africa and represents not only a violation of the constitutional right to dignity, but also 'a restriction upon the ability of live without positive humiliation and degradation.'[18]

3.6 The proposed amendments do not make any *ad hoc* provision for vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence. In particular the Bill does not address the need of refugee children neither does refer to the concept of 'best interests of the child' which includes the principle of family unity, the minor's well-being and social development, as well as safety and security considerations.

3.7 To conclude, some of the proposed amendments risk to drastically restrict the possibility for individuals of accessing a fair and efficient asylum procedure. The inability to lodge applications due to time restrictions, a reduced number of available Refugee Reception Offices, new stringent criteria to exclude individuals from refugee status and to cease refugee status, might leave asylum seekers and recognised refugees undocumented without alternatives to legalise their status in the country. As expressed by some members of the Portfolio Committee on 11 October 2016 '[t]hese new measures are too harsh as they would infringe on the right to seek asylum as well as on the right to education and employment which were seen as component of the right to human dignity which the Constitution strives to protect and promote. [19] We call on members of the Committee to reconsider these provisions.

For information, please contact:

Sergio Carciotto (Director of SIHMA)

Sergio Carciotto

director@sihma.org.za

Tel. 021 461 4741

[18] *Somali Association of South Africa v. Limpopo Department of Economic Development, Environment and Tourism*, 48/2014 ZASCA 143, South Africa: Supreme Court of Appeal, 26 September 2014, available at: http://www.refworld.org/docid/55e06f5c4.html [accessed 31 August 2015].

[19] Government Printing Works & IEC audit outcomes: AGSA briefing; Refugees Amendment Bill: Deputy Minister & Department briefing, 11 October 2016. Available at: https://pmg.org.za/committee-meeting/23355/